CONVENTION PROVIDING A UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL: PROBLEMS WITH STATE PROBATE LAW*

In October 1973, in Washington, D.C., the Diplomatic Conference on Wills prepared the *Convention Providing a Uniform Law on the Form of an International Will.*[1] This Convention is now open for signature and ratification.[2]

The Convention requires parties to the Convention to enact a Uniform Law, annexed to the Convention, as part of their local law.[3] This Uniform Law prescribes the form for the execution of an international will, a will which may or may not relate to assets in more than one country.[4] The execution of a so-called international will under the Uniform Law requires the participation of a state official. This person is authorized to complete a certificate, the form of which is set out in the Uniform Law, which states that the obligations of the Uniform Law have been complied with.[5] The Uniform Law and the Convention enable the formal validity of the will to be established by the certificate whenever proof of due execution becomes necessary.[6]

The United States may ratify the Convention and enact the Uniform Law as part of federal law. As this Uniform Law, enacted under the treaty power, will override any contradicting state law[7] and the law governing the form of

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*The author is grateful to Mr. R. V. Wellman, Robert Cotton Alston Professor of Law, University of Georgia School of Law, United States delegate to the Convention.

[1] 12 INT'L LEGAL MAT'LS 1298 (1973). The Convention providing a Uniform Law on the Form of an International Will and Uniform Law on the Form of International Will are reprinted p. 434 *infra*. For the historical background which led to this Convention, *see* Wellman, *Recent Unidroit Drafts on the International Will*, 7 INT'L L. 205 (1973). *See also* The Rome Draft of 1966, 2 INT'L L. 255 (1968).

[2] *See* Convention Providing a Uniform Law on the Form of an International Will, art. IX, app. I [hereinafter cited as Convention]. According to the United States Department of State on March 28, 1974, there have been six signatures: Holy See, Iran, Laos, Republic of China, Sierra Leone, and United States of America. There have been no ratifications.

[3] *See* Convention art. I.

[4] *See* Uniform Law on the Form of International Will art. 1, annex [hereinafter cited as Uniform Law].

[5] *Id.* art. 10.

[6] *Id.* art. 12.

[7] The Congress may enact as federal law the Uniform Law of the Convention, thereby providing a form for the execution of an international will. The President, with the advice and consent of the Senate, has the power to make treaties regulating interchange with a foreign nation. Based upon a valid treaty, Congress may enact a statute as a necessary and proper means of executing the provisions of the treaty. Missouri v. Holland, 252 U.S. 416, 432 (1920); In re Ross, 140 U.S. 453, 463 (1890). A federal law implementing a treaty controls any contradicting state law. U.S. CONST. art. 6; *See* United States v. Darby, 312 U.S. 100, 124-25 (1940).

> To the extent that the United States can validly make treaties, the people and the states have delegated their power to the National Government and the tenth amendment is no barrier. Reid v. Covert, 354 U.S. 1, 18 (1956).

Therefore, if the Convention is valid under the Constitution, then the Uniform Law may be enacted as federal law as a necessary and proper implementation of the treaty.

A treaty, to be valid under the Constitution, must concern a proper subject of negotiation

between the United States and a foreign government. Hauenstein v. Lynham, 100 U.S. 483, 490 (1879); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 235-36 (1796). One test for determining whether a subject is proper for negotiation is whether a treaty deals with an international concern. Although the Supreme Court has never declared a treaty unconstitutional, it also has never had occasion to define what the concept of international concern encompassses. Power Authority of New York v. Federal Power Comm'n, 247 F.2d 538 (1957). However, some writers view the term international concern as no more than a requirement that treaties must relate to United States foreign relations whereas other writers view this term as a serious limitation on the treaty power, at least prohibiting treaties which deal with purely internal and domestic matters. *Compare* Henkin, *"International Concern" and the Treaty Power of the United States*, 63 A.J.I.L. 273, 278 (1969) *with* Curtis, *The Treaty Power and Family Law*, 7 GA. L. REV. 55, 80 (1972). The author finds the convention to encompass a subject matter within the limits previously established by the Supreme Court.

This Convention concerns the method by which a person may devise his property; i.e. the requirements for the execution of a will and the proof of a valid execution. This subject matter was indirectly held to be a proper subject for negotiation in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), where the Supreme Court denied application of a Virginia forfeiture statute and upheld a treaty allowing British subjects to grant, sell, and devise land owned in the United States. The Supreme Court later expressly found the manner of devising property to be a proper subject for negotiation.

> . . . That the treaty power of the United States extends to all proper subjects of negotiation between our government and the government of other nations is clear. It is also clear that the protection which should be afforded to the citizens of one [country] owning property in another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiation and regulation by mutual stipulations between the two countries. Geofroy v. Riggs, 133 U.S. 258, 266 (1889).

This conclusion follows whether the property is personalty or realty. *See* Zschernig v. Miller, 389 U.S. 429 (1967).

If the Uniform Law merely provided a method for disposing of property that a United States citizen owned in a foreign country, then the constitutional obstacles would be easily overcome. However, a testator could also utilize the Uniform Law to devise domestic property and avoid the state law requirement for the execution and proof of a will. Would this result infringe on a purely domestic concern and thereby exceed the limits of the treaty power?

As the form of a will is an element of devising property, the Constitution does not prohibit a treaty governing the form of a will. In fact inheritance and devise have often been subjects of treaties with foreign countries. *See* Zschernig v. Miller, 389 U.S. 429, 451-57 (Harlan, J., concurring) (1967). Under the criteria recognized in *Geofroy v. Riggs*, the Convention does not impermissibly encroach upon domestic concerns:

> [T]he treaty power, as expressed in the Constitution, is unlimited except by those restraints which are found in that instrument against the actions of the government or its departments, and those arising from the natures of the government itself and of that of the states. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country. 133 U.S. 258, 267 (1889). (citations omitted).

Although the court in *Zschernig* was not faced with the issue of a treaty permitting testators to devise local property, it did recognize that the state regulations of descent and distribution must yield to the treaty law in certain instances. "The several states, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy." Zschernig v. Miller, 489 U.S. 429, 440 (1967). As indicated above, American foreign policy includes the treaties regulating the disposition of American and foreign property. Where a treaty infringes on state law and there is sufficient national interest in the subject matter, the state law must yield to the treaty. Missouri v. Holland, 252 U.S. 416, 434 (1920). It is in the national interest to permit a testator to dispose of both his

a will and its proof is traditionally state rather than federal law, the acceptability of the Convention and its Uniform Law in this country may depend on the kind and extent of changes that they may effect in state law. Because the Convention and the Uniform Law provide only a form for a will, they do not effect state law governing interpretation, revocation, legality of the will's provisions, or any other substantive rule regarding wills and succession.[8]

The first section of this paper identifies the differences between the formal requirements for the execution of the so-called international will and state law formal requirements for the execution of a will in the United States. The second section compares the certificate of proof of the Uniform Law to the existing means of complying with the probate proceedings of the various states. The third section discusses the role of the state official, herein called the "authorized person," and the problems and possibilities related to his designation in this country.

I

Articles two, three, four, and five of the Uniform Law set out the formal requirements for the execution of the international will.[9] Article two[10] prohibits the Uniform Law from applying to the form of a will made by two or more persons.

Article three of the Uniform Law requires that the will be in writing, not necessarily in the hand of the testator, and permits the writing to be in any language.[11] Except for provisions concerning nuncuptative wills, all states require that the will be in writing, including typewriting.[12] No state rejects a will

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domestic and foreign property with one will and to permit foreign residents to dispose of their property in the United States. In other words, there is a sufficient national interest in the subject matter to permit regulation by a treaty. To maximize the potential benefits of the Convention, it will be necessary to allow the Uniform Law to regulate the execution of wills which, in part, devise or distribute property located in the United States. Federal regulation over probate in this manner falls within the Congressional power to execute laws necessary and proper for the implementation of treaties.

Although this exercise of the treaty power may be constitutional, it may be politically advantageous to oppose this treaty as infringing on matters of purely domestic concern. This paper is, in part, directed at this potential political opposition.

[8]Uniform Law art. 1, 14. *See also* Wellman, *supra* note 1, at 212.

[9]Uniform Law art. 1.

[10]*Id.* art. 2.

[11]*Id.* art. 3.

[12]Rees, *American Will Statutes*: (pts. I-II), 46 VA. L. REV. 613, 614-15, (1960). The author assumes that where the formal requirements for the execution of a will have been changed, the requirements have been relaxed. *See generally*, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM PROBATE CODE (1969) [hereinafter cited as UNIFORM PROBATE CODE]. As of March 28, 1974 the Code has been enacted in eight states. ALASKA STAT. §13 (1972); ARIZONA REV. STAT. ANN. § 14 (1973); COLO. REV. STAT. ANN.§153, Senate Bill no. 28 (1973), (effective July 1, 1974); IDAHO CODE §15 (1973); Montana House Bill No. 557 (1974) (effective Jan. 1, 1975); Nebraska Legislative Bill 354 (1974) (effective July 1, 1977); North Dakota House Bill No. 1040 (1974) (effective July 1, 1975); South Dakota Senate Bill no. 28 (1974) (effective July 1, 1975).

in another language, but some require English translations.[13]

Article four[14] requires the testator to declare that the document is his will in the presence of two witnesses and a third person authorized to validate the execution of an international will. The testator need not make known the contents of the will. Those states which require publication, that is the declaration by the testator to the witnesses that the instrument is his will, do not require that the testator make known the contents.[15] Most states require two witnesses, but some require three.[16] In those state requiring three witnesses the authorized person should serve as the third witness.[17]

Article five, paragraph one[18] requires that the testator sign or acknowledge his signature in the presence of the witnesses and the authorized person. This appears to meet all state standards[19] except those in New Mexico, Utah, and Louisiana where the statutes expressly require that the testator sign in the presence of the witnesses, thereby excluding an acknowledgement.[20] However, each of these states has a choice of laws statute which accepts any will as legally effective if it is executed according to the local law of the place of execution.[21] Therefore these differing positions on acknowledgement will be in conflict only where the signature has been acknowledged within one of these three states.

Article five, paragraph two, of the Uniform Law[22] provides that, if permitted by the law where the authorized person is designated, the testator may state his reasons for not signing and direct another person to sign for him. Otherwise, the testator may be aided in making his mark or other signature. The witnesses must be present and must sign in the presence of the testator, even though the authorized person notes on the will the testator's reasons for not signing.[23] No state procedure for assisting signatures requires more than the Uniform Law.[24]

The Uniform Law does not effect American law insofar as it contemplates that a proxy may sign for the testator. However, Louisiana, Connecticut, Utah,

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[13]*See* 94 A.L.R. 26, 230 (1935); Peet v. Peet, 11 Am. & Eng. Ann. Cas. 492 (1909). Pennsylvania is one state with a statutory codification of this rule. PA. STAT. ANN. tit. 20 § 744 (1972).

[14]Uniform Law art. 4.

[15]Rees, *supra* note 12, at 621.

[16]Rees, *supra* note 12, at 624.

[17]Uniform Law art. 10. The authorized person certifies that the witnesses meet the conditions requisite to act as such according to the law under which he acts.

[18]*Id.* art. 5.

[19]Rees, *supra* note 12, at 619-20.

[20]N.M. STAT. ANN. § 30-1-6 (1953); UTAH CODE ANN. § 74-1-5 (1953); LA. CIV. CODE ANN. arts. 1578-79, 1582, 1584-85 (1952).

[21]LA. REV. STAT. tit. 9 § 2401 (1950); UTAH CODE ANN. § 74-1-14 (1953); N.M. STAT. ANN. § 30-1-10 (1953) (applies this rule to realty); N.M. STAT. ANN. § 30-1-4 (1953) (accepts all wills admitted to probate elsewhere). Otherwise the common law rule, that the testator's will is valid if executed according to the law of the testator's domicile at the time of his death, applies. *See* T. ATKINSON, WILLS § 94, at 487 (2d ed. 1947). However, there is no conflict on this point with any statute of New Mexico.

[22]Uniform Law art. 5.

[23]*Id.* arts. 2-5.

[24]Rees, *supra* note 12, at 616-19.

and New Jersey do not expressly permit someone else to sign for the testator.[25] Louisiana case law allows someone else to sign.[26] Utah and Connecticut have choice of laws statutes which recognize wills executed in accordance with the law of the place of execution, even though the will may fall below local requirements.[27] Therefore, the Uniform Law contradicts Connecticut and Utah state law only when the will, signed on behalf of the testator, is executed in one of these states.

In New Jersey, however, the problem is different. New Jersey prohibits someone else to sign for the testator[28] and follows the common law to determine the validity of the will.[29] At common law the validity of wills of realty is determined by the law of the situs of the property and that of personalty by the law of the testator's domicile at his death.[30] Therefore, a will signed by the testator's proxy devising realty located in New Jersey is ineffective to pass the realty, irrespective of whether it meets the rules of execution of the state where execution occurs. Ratification of this Convention would waive this requirement for those wills executed as international wills.

Article five offers one new element to probate law in the United States. Under this article, the testator may state his reasons for not signing and the will may be executed without his signature or that of a proxy. Every state requires that the will be signed by the testator even though compliance may require another person to guide the testator's pen, or that the will be signed by someone on his behalf.[31] However, under the Uniform Law the will is well protected from fraud, undue influence, lack of testamentary intent and similar dangers which underlie the requirement that a will be signed by the testator.[32] The testator must declare that the instrument is his will in the presence of the witnesses and the authorized person. The authorized person notes on the will the testator's reasons for not signing. This is done in the presence of the testator and the witnesses. The witnesses and the authorized person attest the will by signing in the presence of the testator.[33]

The Convention does not attempt to change local probate law. However, it provides an additional form,[34] a privilege for those U.S. or foreign citizens who wish to protect their multi-national interests, whether known or only potential. An unsigned will, permitted by the Uniform Law, complies with the foreign will provisions of the Uniform Probate Code.[35] Thirty-five states have choice

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[25]Rees, *supra* note 12, at 616.

[26]Stafford v. Stafford, 12 La. 439 (1838).

[27]UTAH CODE ANN. § 74-1-14 (1953); CONN. GEN. STAT. REV. § 45-161 (1958).

[28]*In re* McElwaine's Will, 18 N.J. Eq. 499 (1867).

[29]*In re* Winter's Estate, 47 A.2d 548, 24 N.J. Misc. 172 (1946).

[30]Rees, *supra* note 12, at 905.

[31]Rees, *supra* note 12, at 616.

[32]Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-01 (1941).

[33]Uniform Law arts. 2-5.

[34]Preamble to the Convention.

[35]UNIFORM PROBATE CODE §§ 2-506, 3-303(e), 3-409 (1969).

of laws statutes which accept a will legally executed in another jurisdiction.[36]

Therefore, there is potential conflict between the Uniform Law form and local law form in only fifteen states.[37] But those foreign countries which ratify the Convention will be extending the privilege of a new will form to those American citizens who utilize the opportunity. Therefore, for reasons of comity and convenience, our states should not invalidate a will that has been executed according to the Uniform Law of the Convention.

II

The Uniform Law requires an authorized person to be present at the execution of the will. This person must attach a certificate to the will establishing that the obligations for the execution of a will under the Uniform Law have been performed,[38] and that the witnesses are competent according to the law of the place in which the authorized person is acting.[39] If completed in the form recommended in the Uniform Law, the certificate is intended to be sufficient proof to establish the formal validity of the will in a probate proceeding. In other words, the will, by the certificate, is self-proving as to its compliance with the Uniform Law requirements for execution.[40]

The Convention states that the conditions under which a person may act as a witness to an international will are governed by the law under which the authorized person is designated.[41] The Uniform Law certificate must state that

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[36]ALASKA. STAT. § 13.16.180 (1972); ARK. STAT. ANN. § 60-405 (Supp. 1959); ARIZ. REV. STAT. ANN. §Spec. Pam.) § 14-3409 (1974); COLO. REV. STAT. ANN. § 152-5-43 (Supp. 1957); CONN. GEN. STAT. REV. § 45-161 (1958); HAWAII REV. LAWS § 322-7 (1955); IDAHO CODE § 15-3-409 (1948); ILL. ANN. STAT. ch. 3, § 240 (Smith-Hurd 1941); IND. ANN. STAT. § 6-505 (1953); IOWA CODE ANN. § 633.49 (1950); KAN. GEN. STAT. ANN. § 59-609 (1949); LA. REV. STAT. tit. 9, § 2401 (1950); ME. REV. STAT. ANN. ch. 154, § 14 (1954); MD. ANN. CODE art. 93 § 368 (1957); MASS. ANN. LAWS ch. 191, § 5 (Recomp. Vol. 1955); MICH. STAT. ANN. § 27.3178 (97) (Supp. 1959); MINN. STAT. ANN. § 525.183 (1947); MONT. REV. CODES ANN. § 91-115 (1947); NEB. REV. STAT. § 30-204(2) (Reissue Vol. 1956); NEV. REV. STAT. § 133.080 (1959); N.H. REV. STAT. ANN. § 551:5 (1955); N.M. STAT. ANN. § 30-1-10 (1953); N.Y. DECED. EST. LAW §§ 22-a, 23 (1967); N.D. REV. CODE § 56-0306 (1943); OKLA. STAT. tit. 84, § 71 (1951); ORE. REV. STAT. § 114.060 (Supp. 1957); PENN. STAT. ANN. tit. 20 § 4101 (1972); R.I. GEN. LAWS ANN. § 33-5-7 (1956); S.C. CODE § 19-207 (1952); S.D. CODE § 56.0212 (1939); TENN. CODE ANN. § 32-107 (1955); UTAH CODE ANN. § 74-1-14 (1953); VT. STAT. ANN. tit. 14, § 112 (1958); WASH. REV. CODE § 11.12.020 (1956); WIS. STAT. ANN. § 238.07 (1957). *See* Rees, *supra* note 12, at 905-07.

[37]Nine states follow the common law. CAL. PROBATE CODE § 26 (1956); DEL. CODE ANN. tit. 12 § 1308 (1953); FLA. STAT. ANN. § 731.07 (1964); GA. CODE ANN. § 113-702, 705 (1966); KY. REV. STAT. ANN. § 394.120 (1969); MO. ANN. STAT. § 473.670 (1956); N.J. STAT. ANN. § 3A:3-27-29 (1953); N.C. GEN. STAT. § 31-27 (1966); VA. CODE § 64.1-53 (1950). Six states admit a foreign will previously probated. ALA. CODE tit. 61 § 46 (1958); MISS. CODE ANN. § 91-7-33 (1972); OHIO REV. CODE § 2189.05 (1971); TEX. PROB. CODE ANN. § 96-99 (1956); W. VA. CODE ANN. § 41-5-13 (1966); WYO. STAT. ANN. § 2-70 (1957).

[38]Uniform Law art. 9.

[39]*Id.* art. 10.

[40]*Id.* art. 12.

[41] Convention, art. V.

these conditions have been met.[42] In the United States, every state requires that the witnesses be competent,[43] but only five states prohibit certain persons from acting as witnesses. New Mexico and Louisiana prohibit heirs and legatees. Louisiana further prohibits 1) children under sixteen years of age, 2) the insane, deaf, dumb, or blind, 3) criminals and 4) married women in respect to the wills of their husbands. Arizona and Texas require witnesses to be at least fourteen years old, and Arkansas requires witnesses to be eighteen years old.[44] However, each of these five states, except Texas, accepts foreign wills executed according to the law of the place of execution.[45] Texas accepts only foreign wills which meet the requirements for execution under Texas law.[46] However, a will executed according to the Uniform Law meets the requirements for execution under Texas law.[47]

As mentioned above, the certificate is intended to be conclusive of the formal validity of the instrument as a will under the Uniform Law without further proof of valid execution.[48] This result is contemplated by The Uniform Probate Code which, following English practice, allows a will, valid on its face, to be probated in non-judicial proceedings without further proof.[49] Seven states and the Uniform Probate Code achieve this self-proving result by providing for a will to be probated on the evidentiary authority of a certificate similar to that recommended by the Uniform Law.[50] Five other states have provisions which allow probate without calling witnesses.[51]

The majority of the states require at least one witness to the execution to be called in order to establish the validity of the execution of a will.[52] If all of the witnesses are unavailable, *e.g.*, out of the jurisdiction,[53] then the state law requires proof of the testator's signature,[54] or the testator's and the witnesses'

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[42]Uniform Law art. 10.

[43]Rees, *supra* note 12, at 625-26.

[44]*Id.* at 629.

[45]ARIZ. REV. STAT. ANN. Special Pamphlet, § 14-2506 (1974); ARK. STAT. ANN. § 60-405 (Supp. 1959); LA. REV. STAT. tit. 9, § 2401 (1950); N.M. STAT. ANN. § 30-1-10 (1953).

[46]TEX. PROB. CODE ANN. § 103 (1956).

[47]*Compare* Uniform Law arts. 2-5 *with* TEX. PROB. CODE ANN. § 159 (1956).

[48]Uniform Law art. 12.

[49]UNIFORM PROBATE CODE § 3-303(c) (1969). *See also* Fratcher, *Fiduciary Administration in England*, 40 N.Y.U.L. REV. 12 (1965). In England the executor presents to the probate court a death certificate and the will. He gives an oath that he believes the will to be the last will of the decedent, and that he will administer according to the law.

[50]ALASKA STAT. § 13.11.165 (1973); ARIZ. REV. STAT. ANN. § 14-2404 (1973); IDAHO CODE § 15-2-504 (1973); N.M. STAT. ANN. § 30-2-8.2 (1973); OKLA. STAT. ANN. tit. 84 § 55 (1970); TEX. PROB. CODE ANN. § 59 (1956); VA. CODE § 64.1-87.1 (1950); UNIFORM PROBATE CODE § 2-504 (1969).

[51]CONN. GEN. STAT. ANN. § 45-166 (1968); NEV. REV. STAT. § 133-050 (1967); ILL. ANN. STAT. ch. 3 § 69 (Smith-Hurd 1973); TENN. CODE ANN. § 32-211 (1973); W. VA. CODE § 41-5-15 (1966). These statutes permit witnesses to make affidavits at the request of the testator which shall be accepted by the court of probate as if they had been taken before such court.

[52]IV J. WIGMORE, EVIDENCE § 1304 (1972).

[53]*Id.*, § 1312 (1972).

[54]COLO. REV. STAT. ANN. § 153-5-32 (1963); KY. REV. STAT. ANN. § 394.235 (1969); MAINE

signature,[55] or the testator's or witnesses' signatures,[56] or something else.[57]

The idea that the international will's certificate of proof may be the sole evidentiary authority for probate purposes clearly contradicts those state laws which require a subscribing witness to be called. However, the Uniform law does not seek to alter or replace state law applicable to the existing forms of wills.[58] Rather it provides an additional form which relieves the state probate court of the tedious and time consuming business of locating and producing a subscribing witness to prove due execution.[59] If an adversary produced evidence to contradict the certificate of due execution, the probate judge would proceed under the local law governing a contested will.[60]

Wigmore states that "[a] main object in requiring attestation as an element of validity is to surround the act of execution with certain safeguards; the object of securing evidence for litigation is a secondary one."[61] The procedure for executing a will under the Uniform Law is as protective as any state procedure. The new element of the Uniform Law is that the certificate is to perform Wigmore's secondary objective of providing evidence of due execution. The certificate replaces the witness and is primary evidence as to the fact of valid execution.

But this replacement need not be abrupt. There is language in the convention that can be read to permit a probate judge to both accept the certificate as primary evidence and to call for the witness or his deposition.[62] As the probate

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REV. STAT. ANN. tit. 18 § 106 (1964); REV. STAT. NEB. § 30-219.01 (1964); NEV. REV. STAT. § 136.170 (1967).

[55]ALA. CODE tit. 61 § 39 (1958); CALIF. PROBATE CODE § 329 (1957); GA. CODE ANN. § 11-602 (1959); IOWA CODE ANN. § 633.298 (1964); KAN. STAT. ANN. § 59-2224 (1964); LA. CIVIL CODE art. 1654 (1952); MICH. COMP. LAWS ANN. § 702.23 (1968); MINN. STAT. ANN. § 525.242 (1969); ANN. MISS. STAT. § 91-7-7 (1972); REV. CODE OF MONT. § 91-904 (1947); N.Y. ANN. S.C.P.A. § 1405 (1967); OKLA. STAT. ANN. tit. 58 § 43 (1965); CODE OF LAWS OF S.C. § 19-262 (1962); S.D. COMP. LAWS § 30-6-20 (1967); REV. CODE OF WASH. ANN. § 11.20.040 (1967); WISC. STAT. ANN. § 856.15 (1971); WYO. STAT. ANN. § 2-80 (1957).

[56]Anthony v. College of the Ozarks, 207 Ark. 212 (1944); DEL. CODE ANN. tit. 12 § 1305 (1953); IND. STAT. ANN. § 7-109 (Burns 1953); N.D. CENT. CODE ANN. § 30-05-14 (1960); OREGON REV. STAT. § 113.055 (1953); TEX. PROB. CODE ANN. § 84 (1956).

[57]Goodwin v. Riordan, 333 Mass. 317 (1956) (proof of witness); Jones v. Arterburn, 30 Tenn. 97 (1850) (proof of witness); ALASKA STAT. § 13.16.165 (1962) (other evidence); ARIZ. REV. STAT. ANN. Special Pamphlet § 14-3406 (1974) (other evidence); IDAHO CODE § 15-3-405 (1948) (other evidence); N.H. REV. STAT. ANN. § 552.12 (1955) (other evidence); ILL. ANN. STAT. tit. 3 § 74 (Smith-Hurd 1961) (proof of witness); MO. STAT. ANN. § 473.053 (Vernon 1956) (proof of witness); OHIO REV. CODE § 2107.16 (1973) (other evidence). *See also* FLA. STAT. ANN. § 732.24 (1943) (omitted on oath of executor). The states of Connecticut, Hawaii, Maryland, North Carolina and New Jersey have no statutory or case law requirement.

[58]Uniform Law art. 1. "A will shall be valid as regards form . . . ." *Id.*

[59]Wellman, *supra* note 1, at 212.

[60]Uniform Law art. 12.

[61]IV J. WIGMORE, *supra* note 52, at § 1304.

[62]Uniform Law art. 12 and Preamble. Article twelve read with the preamble can be interpreted to allow a judge to supplement the evidence of the certificate with other evidence without acting outside of the Convention. However, this is certainly not the intended interpretation of the Convention.

judges become familiar with the certificate, it should develop to its full conclusiveness as intended by the Uniform Law.

III

The international will is to be executed in the presence of the "authorized person." He must authenticate the execution by signing as a third witness and by completing the certificate and attaching it to the will. Each party to the Convention is obligated to introduce into its law the Uniform Law of the Convention,[63] to designate those persons authorized to complete the certificate, and to notify the United States as depositary government[64] of the designations.[65] Two questions arise for the United States if it should become a party to the Convention. First who should be designated as authorized persons, and second how should our federal system implement the designations? Several classes of persons might serve as authorized persons. Most self-proving wills are executed before an officer authorized to administer oaths,[66] making notaries public obvious candidates. However, notaries frequently lack the legal training to draft a will; hence, a notary might be an additional person at an already crowded ceremony consisting of a testator, two witnesses, and most likely an attorney. Probate judges might be designated to attend the execution of international wills. Clearly they have the legal competence to answer questions about the will and to safeguard their execution. But, the introduction of a judge into the ceremony of execution of a will is contrary to the habits of lawyers and clients who are accustomed to executing wills as a private transaction in the lawyer's office.[67]

It is submitted that authorized persons in the United States should be members of the legal profession.[68] The writing of a will is a legal matter and the attorney is already present at the execution of a will. The attorney should have practiced for a few years, wish to be an authorized person, and have some

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[63]Convention art. I.

[64]*Id.* art. IX.

[65]*Id.* art. II.

[66]ALASKA STAT. § 13.11.165 (1973); ARIZ. REV. STAT. ANN. § 14-2404 (1973); IDAHO CODE § 15-2-504 (1973); N.M. STAT. ANN. § 30-2-8.2 (1973); OKLA. STAT. ANN. tit. 84 § 55 (1970); TEX. PROB. CODE ANN. § 59 (1956); VA. CODE § 64.1-87.1 (1950); UNIFORM PROBATE CODE § 2-504 (1969).

[67]Fratcher, *The Uniform Probate Code and the International Will*, 66 MICH. L. REV. 469, 495 (1968).

[68]Such a designation would not invidiously discriminate, thereby violating the Fourteenth Amendment equal protection clause of the Constitution because it does not discriminate against a disadvantaged group and it is founded on a rational basis. *See* Shapiro v. Thompson, 394 U.S. 618 (1969); Karst. *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula"*, 16 U.C.L.A. 716 (1969). Further, the designation would not violate the due process clause of the Fifth Amendment of the Constitution as it has a rational relation to a constitutionally permissible objective, *i.e.*, a proper exercise of the treaty power. Williamson v. Lee Optical Co., 348 U.S. 483 (1955). More recently the court has tended to defer to legislative judgments in this area rather than sit as a "superlegislature to weigh the wisdom of legislation." Ferguson v. Skrupa, 372 U.S. 726 (1963).

experience in estate planning.[69] Isolating such a class of attorneys would provide an authorized person whose prestige more or less parallels that of his foreign counterpart who also is an important member of his country's legal profession.[70] This in turn will make American certificates more readily acceptable in other jurisdictions.

However, the designation of certain attorneys should not monopolize a new business or exclude someone who is skilled in estate planning. Therefore, certain officers of trust companies or members of accounting firms or brokerage houses or others who may be active in an indirect sense in the business of planning estates and drafting wills should be included in any designation.

If the United States ratifies the Convention, the Congress will be obligated to enact legislation introducing the Uniform Law into domestic law.[71] This legislation will embody articles one through fifteen of the Uniform Law. Also the Congress must enact legislation which designates a class of persons as the authorized persons.[72]

However, there is no reason why the Congressional designation of the authorized person should not be optional to the states. The Congress could either designate a broad class such as postal clerks, or a narrower group such as the clerks of the federal district courts, but make the designation applicable to a particular state only if the state does not redesignate a class of authorized persons of its own choosing. Conceivably, by framing a set of well drawn standards by which the authorized persons are selected, the Congress could provide a model statute for the states, as well as a stand-by designation for use until a state acts. With this in mind this statute is proposed:

> I. [This section shall include articles one through fifteen of the law of the Convention].
>
> II. THE GOVERNMENT OF THE UNITED STATES OF AMERICA, in order to meet its obligations under the CONVENTION PROVIDING A UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL, hereby designates as a person authorized to act in connection with international wills as set forth in Section I any attorney who 1) has actively practiced law for five years 2) is currently practicing law 3) has written one will for each year of practice 4) is not subject to any law under Section IV and 5) has submitted his name to the government of the United States of America for deposit with the Depositary Government.
>
> III. Any other person who desires to be so designated may

[69]Wellman, *supra* note 1, at 213.

[70]*E.g.*, Rollins, *The Notary in Germany*, 117 SOL. J. 610 (1973); Brown, *The Office of the Notary in France*, 2 INT'L & COMP. L.Q. 60 (1953); Common, *The Role of the Notary in the Province of Quebec*, 36 CAN. B.J. 333, 338 (1958).

[71]Convention art. I.

[72]*Id.* art. II.

submit his name with his reasons to the Government of the United States of America for deposit with the Depositary Government.

IV. Sections II and III of this law shall cease to be in effect in any State of the Union, which, by its own law, designates those persons authorized to act in connection with international wills. Any state which enacts such a law shall submit the names of the authorized persons to the Government of the United States for deposit with the Depositary Government.

V. The United States Department of State shall appoint an official to receive those names submitted under Sections II, III, and IV, and to deposit them with the Depositary Government.

CONCLUSION

The present Convention is open for signature until December 31, 1974.[73] Six countries, including the United States have signed the Convention. None has ratified it.[74] If the United States ratifies the Convention, the Congress must pass the appropriate legislation to enact the Uniform Law into U.S. law. The Convention contains a federal clause whereby the United States may be a party to the Convention without extending its applicability to every state by declaring at the time of signature or ratification those specific areas of the nation in which the Convention is applicable.[75] In other words, the United States may declare that the Convention is applicable only in those areas under its direct rule, or in those states which adopt the Uniform Law and designate a class of authorized persons and choose to be included in the declaration. In varying degrees, each of these alternatives involves congressional recognition of the Convention as an important and necessary law for the development of the international law of estates and wills.

But why not declare that the convention is applicable in every state of the union and have the congressional enactment[76] of the Uniform Law extend to every state? This new federal law on wills would only provide an optional, additional validation device for wills.[77] A new federal law on wills would supplement, rather than supplant existing state law on the form of wills. A well drafted federal law could allow any state to designate its own authorized persons. If Congress legislates for those areas directly under its rule or for a selected list of states which choose to adopt the legislation, rather than for every state, persons, both in the United States and in other countries, will gain little by way of new assurance of validity for their wills.[78] Testators are permitted

[73] *Id.* art. IX.

[74] *See* note 2, *supra.*

[75] Convention art. XIV.

[76] *See* note 7, *supra.*

[77] Wellman, *Proposed International Convention Concerning Wills*, 8 REAL PROPERTY, PROBATE & TRUST J. 622, 626 (1973).

[78] Proposed Conventions on International Wills and Estate Administration, 8 REAL PROPERTY, PROBATE & TRUST J. 658, 660 (1973).

to own property both abroad and in any state. Within limits they may generally devise their property. They should have the opportunity to execute wills here or abroad without fear of the myriad variations among the execution standards that exist in every jurisdiction of the nation and the world.

Jack N. Sibley

APPENDIX

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.

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.

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*Reprinted from 12 INT'L LEGAL MAT'LS 1298 (1973).

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.

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.

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.

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.

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 witness

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
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 of 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.