

## CHAPTER VI

### NOTE ON THE REGISTRATION OF WILLS CONVENTION

The Convention on the Establishment of a Scheme of Registration of Wills, drawn up by member States of the Council of Europe, was concluded on May 16, 1972. It was then signed by 8 States, including the United Kingdom, and has subsequently been ratified by 5 States, including Cyprus but not the United Kingdom. It came into force on March 20th, 1976. The Committee of Ministers of the Council may invite non-member States to accede. To date, however, all Contracting Parties are European: Belgium, Cyprus, France, Netherlands, Turkey. There are now six signatories, including the United Kingdom, which have not yet ratified.

The purpose of the Convention is to establish a scheme for the registration of wills made in Contracting States, with a view to facilitating the discovery of the existence and whereabouts of a will after the testator's death. The mechanism proposed involves the establishment by each state of national agencies to be responsible -

(a) for registering wills which are drawn up by a lawyer or deposited with an agency in the state or which have been registered in another Contracting State; and

(b) for providing information, nationally and abroad, after the testator's death, about the existence of his will and its place of deposit.

The aim, therefore, is principally to establish a system of registration which will "reduce the risk of the will remaining unknown or being found belatedly".

The scheme calls for the registration with the appropriate national agency normally to be carried out by the lawyer (or public agency) before whom a relevant will is drawn up or with whom it is deposited. (Article 5). In addition the testator may request registration in other Contracting States, through the intermediary of the appropriate national agency (Article 6.2).

The scheme does not, however, embrace all wills made in a Contracting State. In far from clear language it appears to apply to -

(a) "formal" wills (each system of law will determine what comprises a formal will but it appears to be intended that it will be one executed by a notary (in a civil law system), a public authority, such as a court, or by a person authorised by law, for example a lawyer in a common law system);

(b) wills formally deposited with a public agency or person authorised by law to accept such a deposit;

(c) holograph wills (i.e. wills made in civil law systems by the testator himself without witnesses or similar formalities) which have been deposited (formally or informally) with a notary, public authority or other authorised person (Article 4).

It follows, therefore, that a will made in accordance with provisions equivalent to the Wills Act 1837 (U.K.) but without the involvement of a lawyer, will not fall within the scheme, even though the will may be informally deposited with a lawyer. It is, however, open to any Contracting State to extend the scheme to any other form of will or any other deed affecting the devolution of an estate (Article 11).

The registration relates to the existence of the will and where it may be found and not to its contents (Article 7). Information about the existence and whereabouts of the will must remain secret until the testator's death when a request for the information to be divulged may be made to the appropriate national agency (Article 8). Such information may be provided to anyone applying who can present satisfactory proof of the death of the testator.

It appears, therefore, that for common law jurisdictions in the Commonwealth, this scheme would require the imposition of a duty upon legal practitioners to cause the existence of a testator's will to be recorded in a register, at least in cases where the lawyer has been concerned with the execution of the will. Yet if the scheme is to be effective for common law systems, it would seem necessary at least to

extend it under Article 11 to include those wills drawn up by the testator which are informally deposited with a lawyer. The scheme does not, however, easily accommodate the case of a testator who wishes himself to keep the will which he has himself drawn up. For the duty to register would then have to fall upon the testator who may well be ignorant of the requirement (cp. Article 5.2).

Omissions from the register obviously weaken the value of the scheme. For the absence of a registration can never be taken as conclusive indication that a will does not exist. Indeed, even the last entry in a register cannot be treated as conclusive since it may have been rendered ineffective by a subsequent will made, for example, in a form which need not be registered. Moreover, whilst there is a Convention obligation to register wills and modifications or revocations thereof if made in a registrable form (Article 4.1 & 4.2), the Convention is silent as to the effect of failure to do so. What is clear is that the registration requirements are not intended to affect the validity of any will or subsequent revocations ( Article 10).

The Convention does not impose any requirement either to create a formal system of deposit of wills or, where one exists, to make that compulsory. Provision exists in some Commonwealth states for deposit of wills of living persons with the Supreme Court or Probate Registry (cp. Supreme Court of Judicature (Consolidation) Act, 1925, section 172 and the Wills (Deposit for Safe Custody) Regulations 1978, SI 1978 No. 1724 of the United Kingdom). Although these are generally permissive arrangements, deposits thereunder appear to be caught by the Convention Scheme. It seems probable, however, that many Commonwealth states, for want of appropriate facilities, do not have such a scheme. Indeed, informal deposits with lawyers and banks are common practice in common law systems; the depository would be under no obligation under the Convention scheme to register the will merely by reason of being depository. Such an obligation which is consistent with the facultative provisions of Article 11 seems sensible, if the scheme is to be useful for a common law jurisdiction.

The only Commonwealth state to put the scheme into operation, Cyprus, has not enacted any additional statutory provisions, being merely content to pass legislation to ratify the Convention (The Convention on the Establishment of a Scheme of Registration of Wills (Ratification) Law, 1974) and administratively to designate the Principal Probate Registry of the Supreme Court as the body responsible for registration.

It is worthy of note that, at the Washington Conference at which the Convention on The International Will was concluded, the Conference called upon states to -

"establish an internal system, centralised or not, to facilitate the safe-keeping, search and discovery of an international will as well as the accompanying certificate, for example, along the lines of Convention on the Establishment of a Scheme of Registration of Wills...

"facilitate the international exchange of information on these matters and, to this effect, ... [to] designate in each state an authority or a service to handle such exchanges".

Such a development would be dependent upon the introduction of procedures for registration and, ideally, deposit of wills of living persons under the general law. For most Commonwealth states, this would be a divergence from the existing practice under which a testator is under no duty to record the existence or whereabouts of his will and would necessitate additional bureaucracy.

CONVENTION  
ON THE ESTABLISHMENT OF  
A SCHEME OF REGISTRATION OF WILLS

The member States of the Council of Europe, signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its Members ;

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,

Have agreed as follows :

*Article 1*

The Contracting States undertake to establish, in accordance with the provisions of this Convention, a scheme of registration of wills, with a view to facilitating, after the death of the testator, the discovery of the existence of the will.

*Article 2*

In order to implement the provisions of this Convention, each Contracting State shall establish or appoint one or more bodies responsible for the registration provided for by the Convention and for answering requests for information made in accordance with Article 8, paragraph 2.

*Article 3*

1. With a view to facilitating international co-operation, each Contracting State shall appoint a national body which shall, without any intermediary :

(a) arrange for registration in other Contracting States as provided for in Article 6 ;

(b) receive requests for information arriving from the national bodies of other Contracting States, and answer them under the conditions set out in Article 8.

2. Each Contracting State shall communicate to the Secretary General of the Council of Europe the name and address of the national body appointed in accordance with the preceding paragraph.

#### *Article 4*

1. The following shall be registered in a Contracting State :
  - (a) Formal wills declared to a notary, a public authority or any person authorised by the law of that State to record them, as well as other wills deposited with an authority or a person authorised by law to accept such deposit, with a formal act of deposit having been established ;
  - (b) Holographic wills which have been deposited with a notary, a public authority or any person authorised by the law of that State to accept them, without a formal act of deposit having been established, subject to that law permitting such deposit. The testator may oppose registration if the said law does not prohibit such opposition.
2. Withdrawals, revocations and other modifications of the wills registered according to this article shall also be registered if they are established in a form which would make registration compulsory according to the preceding paragraph.
3. Any Contracting State may exclude from the application of the present article wills deposited with authorities of the armed forces.

#### *Article 5*

1. Registration shall be made at the request of the notary, the public authority or the person referred to in Article 4, paragraph 1.
2. Any Contracting State may, however, in special cases determined and under the conditions specified by its national law, provide for the request for registration to be made by the testator.

#### *Article 6*

1. Registration shall not be subject to conditions of nationality or residence of the testator.
2. At the request of the testator, the notary, public authority or person referred to in Article 4, may request registration not only in the State where the will is made or deposited, but also, through the intermediary of the national bodies, in other Contracting States.

#### *Article 7*

1. 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.

2. This information must be contained in the register, in the form stipulated by each Contracting State.
3. The duration of registration may be determined by each Contracting State.

#### *Article 8*

1. Registration shall be secret during the lifetime of the testator.
2. On the death of the testator any person may obtain the information mentioned in Article 7 on presentation of an extract of the death certificate or of any other satisfactory proof of death.
3. If the will has been made jointly by two or more persons, the provisions of paragraph 2 of this article shall apply, notwithstanding the provisions of paragraph 1, on the death of any of the testators.

#### *Article 9*

Services between Contracting States pursuant to this Convention shall be rendered free of charge.

#### *Article 10*

This Convention shall not affect provisions which, in each Contracting State, relate to the validity of wills and other deeds referred to in this Convention.

#### *Article 11*

Each Contracting State shall have the option to extend, under the conditions to be established by that State, the registration system provided for by this Convention to any other will not referred to in Article 4 or any other deed affecting the devolution of an estate. In this case, in particular the provisions of Article 6, paragraph 2, shall apply.

#### *Article 12*

1. This Convention shall be open to signature by the member States of the Council of Europe. It shall be subject to ratification or acceptance. Instruments of ratification or acceptance shall be deposited with the Secretary General of the Council of Europe.
2. This Convention shall enter into force three months after the date of deposit of the third instrument of ratification or acceptance.

3. In respect of a signatory State ratifying or accepting subsequently, the Convention shall come into force three months after the date of the deposit of its instrument of ratification or acceptance.

#### *Article 13*

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may invite any non-member State to accede thereto.

2. Such accession shall be effected by depositing with the Secretary General of the Council of Europe an instrument of accession which shall take effect three months after the date of its deposit.

#### *Article 14*

1. Any Contracting State may, at the time of signature or when depositing its instrument of ratification, acceptance or accession, specify the territory or territories to which this Convention shall apply.

2. Any Contracting State may, when depositing its instrument of ratification, acceptance or accession or at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend this Convention to any other territory or territories specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings.

3. Any declaration made in pursuance of the preceding paragraph may, in respect of any territory mentioned in such declaration, be withdrawn according to the procedure laid down in Article 16 of this Convention.

#### *Article 15*

No reservation shall be made to the provisions of this Convention.

#### *Article 16*

1. This Convention shall remain in force indefinitely.

2. Any Contracting State may, in so far as it is concerned, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.

3. Such denunciation shall take effect six months after the date of receipt by the Secretary General of such notification.

### Article 17

The Secretary General of the Council of Europe shall notify the member States of the Council and any State which has acceded to this Convention of :

(a) any signature ;

(b) any deposit of an instrument of ratification, acceptance or accession ;

(c) any date of entry into force of this Convention in accordance with Article 12 thereof ;

(d) any communication received in pursuance of the provisions of paragraph 2 of Article 3 and of paragraphs 2 and 3 of Article 14 ;

(e) any notification received in pursuance of the provisions of Article 16 and the date on which denunciation takes effect.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Basle, this 16th day of May 1972, in English and French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each of the signatory and acceding States.