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The Resurgence of the International Will: A Call for Federal Legislation

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RECENT DEVELOPMENT

The Resurgence of the International Will: A Call for Federal Legislation

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I. INTRODUCTION: THE PATH TO RATIFICATION

In August 1991, eighteen years after diplomats and scholars completed the Convention Providing a Uniform Law on the Form of an International Will (Washington Convention), the United States Senate consented to ratification.[1] Before the Washington Convention enters into force, however, the United States Congress must enact federal legislation that requires each of the fifty states to recognize the Convention and its prescribed form of an international will.[2]

The Washington Convention is the result of the Diplomatic Conference on Wills which convened in Washington, D.C., in October 1973. Its primary objective is to provide testators with a common means of meeting multiple international jurisdictions' will formality require-

1. 137 CONG. REC. S12,131 (daily ed. Aug. 2, 1991).

2. SENATE COMM. ON FOREIGN RELATIONS, CONVENTION PROVIDING A UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL, S. EXEC. REP. No. 9, 102d Cong., 1st Sess. 1 (1991) [hereinafter EXECUTIVE REPORT]. This report of the Committee on Foreign Relations officially recommended ratification of the Washington Convention.

ments.[3] To meet this objective, the Washington Convention established a document that certifies the International Will as a valid will that must be accorded full recognition and compliance in those states that are parties to the Convention.[4]

The Washington Convention is a step in the continuing attempt to remedy will invalidity problems by unifying international probate laws.[5] These problems typically arise for testators who own property in several states whose legal systems differ radically in their treatment of testamentary dispositions. For instance, in the case of movables, common-law states apply the law of the testator's domicile at the testator's death to determine a will's validity.[6] This policy requires will drafters to predict where the testator will die.[7] Similar difficulties arise in civil-law states, which apply the law of the testator's nationality at the time of death.[8] Although more predictable than the domicile test, the nationality standard proves troublesome if a testator is either a national of more than one state or changes nationality after executing a will.[9] Finally, if a testator owns property in both common-law and civil-law states, the applicable laws are often contradictory, and the resulting conflicts ultimately may defeat the testator's intent.[10]

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3. CONVENTION PROVIDING A UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL, Oct. 27, 1973, S. TREATY DOC. No. 29, 99th Cong., 2d Sess. 1 (1986) [hereinafter TREATY DOCUMENT]. This document contains the Letter of Transmittal, Letter of Submittal, and the Explanatory Report on the Convention Providing a Uniform Law on the Form of an International Will, prepared by Mr. Jean-Pierre Plantard, Deputy Secretary-General of the International Institute for the Unification of Private Law (UNIDROIT).

4. *See* EXECUTIVE REPORT, *supra* note 2, at 1-2.

5. *See generally* Clifford Hall, *Towards a Uniform Law of Wills: The Washington Convention 1973*, 23 INT'L & COMP. L.Q. 851, 852-53 (1974).

6. William F. Fratcher, *The Uniform Probate Code and the International Will*, 66 MICH. L. REV. 469, 471 (1968).

7. Houston P. Lowry & Peter W. Schroth, *Survey of 1991 Developments in International Law in Connecticut*, 66 CONN. B.J. 64, 74 (1992). Mr. Lowry wrote a letter on behalf of the Connecticut Bar Association which recommends that the Senate Foreign Relations Committee ratify the Washington Convention. Reprinted in Four Treaties: Treaty Docs. 101-17, 101-15, 101-14, and 99-29: Hearing Before the Committee on Foreign Relations United States Senate, 102d. Cong., 1st Sess. 17 (1991).

8. Fratcher, *supra* note 6, at 477. Civil-law states also consider the law of the jurisdiction within which the will was executed. *Id.*

9. Lowry & Schroth, *supra* note 7, at 74.

10. *See* Richard D. Kearney, *The International Wills Convention*, 18 INT'L LAW. 613, 615-16 (1984). For example, the holographic will is generally recognized by both civil-law and common-law states, but some states require witnesses while others do not. Therefore, reliance on a holographic will to dispose of property in civil-law and com-

In the wake of these problems, scholars took the first significant step toward unification at the 1961 Hague Convention by introducing the Convention on Conflicts of Law Relating to the Clauses of a Will.[11] Article 1 of the Hague Convention provides that a will is formally valid if it complies with the internal law of any of the following: the place where the testator made the disposition; the state of the testator's nationality at the time of disposition; the state of the testator's nationality at the time of death; the testator's domicile at the time of the disposition; the testator's domicile at death; the testator's habitual residence at the time the disposition; the testator's habitual residence at death; or in the case of immovables, the state in which the property is located.[12]

The 1961 Hague Convention provided standards of form as well as standards of substance.[13] Twenty states, including Japan and most members of the European Community, have ratified the 1961 Hague Convention.[14] Although the United States has not ratified the Hague Convention, its provisions play a major role in estate planning for United States citizens with investments abroad.[15]

Even though the Hague Convention made international formal validity less complicated, its strong reliance on states' internal laws left problems that threaten complete uniformity. For example, the Hague Convention fails to define adequately the terms "domicile" and "habitual residence."[16] As a result, lawyers often face the task of proving domicile under the laws of a foreign state to establish formal validity in their own

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mon-law states, may not achieve the testator's intent and may lead to invalidation of the will. *Id.* at 616.

11. Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions, Oct. 5, 1961, 510 U.N.T.S. 175 (1964) [hereinafter Hague Convention]; *see also* Peter Chase, Note, *The Uniform International Will: The Next Step in the Evolution of Testamentary Disposition*, 6 B.U. INT'L L.J. 317, 324-26 (1988); Kurt H. Nadelmann, *The Formal Validity of Wills and the Washington Convention 1973 Providing the Form of an International Will*, 22 AM. J. COMP. L. 365, 365-66 (1974).

12. 1 JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING 450 (1982).

13. Nadelmann, *supra* note 11, at 366.

14. 1 SCHOENBLUM, *supra* note 12, at 457-58. The states that have ratified the Hague Convention are Austria, Belgium, Botswana, Denmark, Fiji, Finland, France, Germany, Ireland, Israel, Japan, Luxembourg, Mauritius, Norway, Poland, South Africa, Swaziland, Sweden, Switzerland, Tonga, the United Kingdom, and Yugoslavia. *Id.*

15. *Id.* The Uniform Probate Code (U.P.C.) adopted most of the Hague Convention provisions. *See* U.P.C. § 2-506.

16. *Id.* at 452. The only definition for habitual residence comes from case law which defines the term to be "a regular physical presence which must endure for some time." *Id.* (quoting Cruse v. Chittum, 2 All E.R. 940, 943 (1974)).

jurisdictions.[17] This leads to tedious litigation as courts are forced to apply the law of foreign states, thereby increasing the risk of judicial error and will invalidation.[18] The Hague Convention, while striving for a "maximization of testamentary freedom,"[19] falls short of its goal of unification, and instead promotes time-consuming litigation that continues to frustrate the testators' intentions.[20]

Following the Hague Convention's progress, the International Institute for the Unification of Private Law (UNIDROIT) convened in Rome in 1961 to revisit the conflict of law problem.[21] UNIDROIT took an approach different from the Hague Convention. Rather than attempting to harmonize the substantive conflict of law issues, UNIDROIT focused on harmonizing the basic principles of will formality.[22] In 1964 the United States became a member of UNIDROIT and assumed an active role in the formulation of the resulting convention.[23] In 1966 UNIDROIT submitted the Draft Convention to its member states for comments.[24] In 1971 UNIDROIT produced a final draft of the convention which served as the cornerstone for the 1973 Diplomatic Conference on Wills (Washington Convention).[25] At the United States invitation, forty-two states, including the United Kingdom, the Soviet Union, China, Japan, France, and the Federal Republic of Germany attended the Conference.[26] Nine states thus far have ratified the Washington Convention while another nine are signatories.[27]

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17. Kearney, *supra* note 10, at 618.

18. *Id.*

19. 1 SCHOENBLUM, *supra* note 12, at 456.

20. *See* Kearney, *supra* note 10, at 618-19. One of the most damaging effects of multijurisdictional disposition is the capital loss that results from protracted litigation.

21. Nadelmann, *supra* note 11, at 368.

22. *Id.*

23. Kearney, *supra* note 10, at 619. While UNIDROIT was working on the Convention, the American Bar Association and the National Conference of Commissioners on Uniform State Laws focused on the U.P.C. The United States State Department drew heavily on the resources of the U.P.C. group in formulating its recommendations for the Convention draft. *Id.*

24. Hall, *supra* note 5, at 853 n.5.

25. TREATY DOCUMENT, *supra* note 3, at 3.

26. Hall, *supra* note 5, at 853. The list of states in attendance also included Australia, Belgium, Brazil, Canada, Czechoslovakia, Ecuador, Greece, Guatemala, Honduras, Iran, Iraq, Ireland, Italy, Ivory Coast, Jordan, the Khmer Republic, Laos, Mexico, the Netherlands, Nicaragua, Panama, Paraguay, the Philippines, Poland, Portugal, San Marino, Senegal, Sierra Leone, Spain, Sweden, Switzerland, Thailand, Yugoslavia and Zaire. *Id.* Argentina, Denmark, Jamaica, South Africa, Trinidad and Tobago and the Republic of Vietnam each had observers present at the Conference. *Id.*

27. Lowry & Schroth, *supra* note 7, at 74. The ratifying states are Belgium, Can-

The Washington Convention shares the Hague Convention's goal of maximizing testamentary freedom but maintains a greater allegiance to uniformity.[28] By employing the International Will Certificate, the Washington Convention breaks from the internal law concept that permeates and stifles the Hague Convention.[29] Attaching a properly completed International Will Certificate to a will precludes consideration of a state's will formation rules because the certificate raises the presumption of the will's formal validity.[30] The Washington Convention generally requires the law to be uniform in its application among member states, but does provide for a limited degree of state discretion in regulating authorization to act under its terms, the qualifications for witnesses, and the method of territorial accession in federal systems.[31] Notably, the authors of the Washington Convention presented it as an alternative means of disposition rather than as a replacement for a state's customary forms.[32]

In operation, the Washington Convention's requirements meet or exceed most states' formal requirements while obviating the need to investigate the law of every potentially relevant foreign state.[33] The Annex to

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ada, Cyprus, Ecuador, Italy, Libya, Niger, Portugal and Yugoslavia. The remaining signatories are China, the former Czechoslovakia, France, Iran, Laos, Sierra Leone, The Vatican, the former Union of Soviet Socialist Republics, the United Kingdom, and the United States. *Id.* The Uniform Probate Code adopted the Unified Form for an International Will in 1978, and eight states adopted the provision prior to the United States ratification. EXECUTIVE REPORT, *supra* note 2, at 2.

28. *See* SCHOENBLUM, *supra* note 12, at 460-61.

29. *Id.* at 449-60. Although the Hague Convention provides for a system of will validation, analysis of the laws of foreign states remains important because "all the formal requirements . . . must be satisfied under the law of at least one of the jursidictions" listed in the Hague Convention. *Id.* at 451.

30. *See* TREATY DOCUMENT, art. 12, *supra* note 3, at 34. Article 12 of the Annex to the Washington Convention states: "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." *Id.*

31. TREATY DOCUMENT, arts. II, XIV, Annex art. 15, *supra* note 3, at 29, 30, 34. Article II of the Washington Convention allows member states to "designate the persons authorized to act in connection with international wills." Article V applies the law of the jurisdiction that designated the authorized person to witness qualifications. Article XIV is the federal clause that allows a member state with multiple systems of law to specify those jurisdictions in which the Convention is enforceable. Article 15 of the Washington Convention's Annex curtails the discretionary nature of the Convention by applying the Uniform Law with an eye toward the international origin and the need for uniform interpretation.

32. Kearney, *supra* note 10, at 619.

33. *See generally* Jeffrey A. Schoenblum, *Multijurisdictional Estates and Article II of the Uniform Probate Code*, 55 ALB. L. REV. 1291, 1302 (1992).

the Washington Convention provides the Uniform Law that state parties must introduce into national legislation.[34] The Uniform Law dictates the requirements and procedures necessary for making an International Will.[35] The basic and most revolutionary premise of the International Will is that "an international will is valid irrespective of the state in which it is made, the nationality, domicile or residence of the testator and the place where the assets forming the estate are located."[36] The drafters designed the International Will to create a uniform alternative that would provide greater certainty with respect to a will's validity without replacing existing will forms.[37] Moreover, the International Will is not limited to the international sphere, it will compete with more complicated will forms in domestic estate planning.[38]

There are several formal requirements for a valid International Will.[39] The will must be in writing; there must be two witnesses; an authorized person must be present for the signing; the testator must declare that the document is the testator's will; all attending persons must sign the will; and the will cannot be a joint will.[40]

Under the Uniform Law, even if an International Will's transnational validity is denied, it still may be a valid will under a state's domestic law or under international law.[41] That is, when an International Will is in-

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34. TREATY DOCUMENT, art. 1, *supra* note 3, at 28. Article 1(1) states: "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." *Id.*

35. *Id.* at 11.

36. *Id.* at 17-18. Mr. Plantard's report, *supra* note 3, is the original explanation of the Washington Convention's provisions.

37. *Id.* at 18.

38. *Id.* The Uniform Law does not define "will" or qualify the term "international" because such definitions are substantive in nature and the Uniform Law is designed to affect only form. *Id.*

39. *Id.*

40. *Id.* Annex arts. 2-5, at 32. Article 2 prohibits joint wills; article 3 requires the will to be written, although it can be written in any language; article 4 requires the testator to declare his knowledge of the contents of the will; and article 5 outlines who must sign the will. *Id.* The remaining requirements of the Uniform Law are for purposes of convenience only and failure to comply with them does not result in invalidation of the will. *Id.* These requirements are as follows: signatures are to be placed at the end of the will; if the will has multiple sheets then each sheet must be numbered and signed by either the testator, the testator's signor, or the authorized person; and the date of the will should be noted at the end of the will by the authorized person. *Id.* Annex arts. 6-7, at 32.

41. *Id.* Annex art. 1(2), at 31. The Annex to the Uniform Law on the Form of an International Will states that "The invalidity of the will as an international will shall

validated as such, it loses the advantages of the Uniform Law and faces the scrutiny and requirements of the law under which it is introduced for probate.[42]

Procedurally, the most unique aspect of an International Will is its requisite certificate. Under the Uniform Law, the authorized person has the burden of executing and attaching a certificate to the testator's will.[43] Only the authorized person may complete the form and sign the certificate.[44] The completed certificate guarantees that the will meets the formalities prescribed by the Uniform Law.[45]

The certificate consists of several numbered sections that require information regarding the identity of the witnesses, the testator, and the authorized person; a list of the formalities of the Uniform Law with which the will complies; and any declaration the testator may choose to make concerning the safekeeping of the will.[46] The drafter should use these numbered sections to identify the same information in every certificate, thereby facilitating the location and interpretation of information when a court in a foreign state probates the will.[47]

The Uniform Law also requires the authorized person to provide three copies of the certificate with original signatures. One copy is attached to the will, the testator receives one, and the authorized person keeps the third.[48] Having several copies in circulation serves two purposes: first, it makes it more likely that the testator's heirs will learn of the will's existence and, second, it makes it less likely that anyone can fraudulently alter the will.[49]

Despite the United States role in the development and implementation of the Washington Convention, it was not until 1986 that the President formally transmitted the Convention to the Senate for ratification.[50] The Senate then passed the measure to its Committee on Foreign Relations

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not affect its formal validity as a will of another kind." *Id.*

42. *Id.* at 18-19. For example, an International Will that the authorized person did not sign could still be probated as a valid holographic will. *Id.*

43. *Id.* Annex art. 9, at 33.

44. *Id.* The certificate will not operate as conclusive evidence unless it is attached to the will. *Id.*

45. *Id.* at 24.

46. *Id.* The Washington Convention's authors included the certificate in the actual Uniform Law to underscore the importance of the certificate. *Id.*

47. *Id.*

48. *Id.* at 25.

49. *Id.* Another benefit of requiring multiple certificates is that the certificate will remind the testator of the will's existence. This is of greater importance when the testator does not keep a copy of the will. *Id.*

50. TREATY DOCUMENT, *supra* note 3, at 1-2.

for review, and on July 30, 1991, the Committee on Foreign Relations submitted its report on the Washington Convention to the entire United States Senate.[51] Without amendment, the Committee approved the Convention and recommended that the Senate ratify it.[52] In its report, however, the Committee recognized a need to postpone deposit of the ratification documents until after the passage of federal legislation that the Convention required.[53] Accordingly, on August 2, 1991, the Senate ratified the Convention, but because the necessary federal legislation remains unwritten, the ratification documents remain unfiled.[54] Thus, the last obstacle to implementation of the Washington Convention is the enactment of federal legislation to bring the United States into compliance with the Convention's requirements.

II. THE NEXT STEP: FEDERAL AND STATE LEGISLATION

The United States Senate delayed the Washington Convention's deposit of ratification because the Convention expressly requires a contracting state to adopt the Uniform Law into its own national legislation within six months after the Convention comes into force in that state.[55] According to article XI of the Washington Convention, the date of entry into force is the date six months after a state's deposit of ratification or accession.[56] Therefore, at most, a state has one year from the date of ratification to enact the Uniform Law nationwide.[57] Rather than risk invalid implementation, the Senate Committee on Foreign Relations acquired a guarantee from the Bush Administration that it would not deposit the ratification documents before Congress passed the required legislation.[58] The Committee's precautions proved well founded because two years later, legislation to enact the Washington Convention remains in committee.

The delay is not wholly or necessarily a result of congressional inaction. Legislation necessary to enforce the Washington Convention is complicated in a federal system that contains multiple autonomous legal

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51. 137 CONG. REC. S11,371 (daily ed. July 30, 1991).
52. EXECUTIVE REPORT, *supra* note 2, at 3.
53. *Id.* at 2.
54. *See supra* note 1.
55. *See supra* note 34.
56. TREATY DOCUMENT, art. XI, *supra* note 3, at 30.
57. *Id.* at 12.
58. EXECUTIVE REPORT, *supra* note 2, at 2. The ratification report of the Senate states that "the instrument of ratification will be deposited only after the necessary Federal legislation is enacted." Thus, the Convention will come into effect six months after such deposit is made. *Id.*

systems.[59] The Washington Convention's drafters tried to simplify the enforcement requirement for federal states by adopting article XIV which allows a state to declare the Convention valid only in certain territorial units.[60] This provision alone, however, does not remedy the Washington Convention's constitutional and political obstacles.

Property law in the United States has traditionally been a province of the individual states.[61] Indeed, some commentators have questioned whether the United States federal government has the constitutional power to impose the widespread changes that the Uniform Law requires.[62] The federal government arguably must show that "there is a legitimate international concern sufficient to overbear traditional state prerogatives" before states need to adhere to any federal legislation.[63] In the area of wills, this concern is easily overcome because federal legislation implementating international probate law would encourage international investment and commerce, and protect United States interests.[64] Furthermore, the United States Supreme Court has suggested that Congress' treaty power may apply directly to treaties concerning disposition of property. In *Geofroy v. Riggs*,[65] the Court stated:

> That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments 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 of regulation by mutual stipulations between the two countries.[66]

Even though it is unlikely that there is a constitutional barrier to federal enactment of the Uniform Law, questions remain as to whether the federal government can properly address the discretionary aspects of the Washington Convention.[67]

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59. Hall, *supra* note 5, at 865.

60. TREATY DOCUMENT, art. XIV, *supra* note 3, at 30.

61. 1 SCHOENBLUM, *supra* note 12, at 472.

62. *See generally* Jerome J. Curtis, Jr., *The Convention on International Wills: A Reply to Kurt Nadelmann*, 23 AM. J. COMP. L. 119 (1975). Mr. Curtis offers an extensive constitutional criticism of the Washington Convention and Uniform Law. *Id.*

63. 1 SCHOENBLUM, *supra* note 12, at 472 n.39.

64. *Id.* Although Professor Schoenblum does not believe that the Convention is unconstitutional, he questions whether it is appropriate for the federal government to become involved in probate law. *Id.*

65. 133 U.S. 258 (1889).

66. *Id.* at 266.

67. *See infra* notes 71-75 and accompanying text.

Another obstacle is the United States record of failing to join conventions that determine applicable law for private international law issues.[68] Both the Hague Convention of 1961 and the 1980 United Nations Convention on Contracts for the International Sale of Goods received acclaim from organizations such as the American Bar Association, yet the United States has not ratified either convention.[69] The Washington Convention faces a similar problem because unifying international probate laws does not command headlines or sway voters at election time.[70] Moreover, as one scholar noted, "[h]owever unsatisfactory the existing legal situation may be, there is a natural reluctance to change the law, particularly if the situation is initially unfamiliar and involves new uncertainties."[71]

The political roadblocks that the Washington Convention faces, however, may fall to growing international pressure. In addition to the legislation the Washington Convention requires, the Committee on Foreign Relations may soon have before it the 1984 Hague Convention on the Law Applicable to Trusts and on Their Recognition[72] and the 1988 Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons.[73] Although these conventions address different aspects of probate law, they strongly suggest that international probate law is developing rapidly, and absent some action by the Committee,[74] the United States may not enjoy the benefits these conventions afford.

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68. Nina L. Kaufman, *"Old Wine in New Bottles": The Uniform International Will Revisited*, 11 PROB. L.J. 29, 53 (1992). Kaufman claims that the United States normally only joins procedural conventions. This would jeopardize the Washington Convention, she claims, because it contains some substantive law issues. *Id.* The basis of her argument is contrary to the majority belief that the Washington Convention applies only to form and not to substance. TREATY DOCUMENT, *supra* note 3, at 18.

69. *Id.* at 52.

70. *Id.* at 53. Kaufman cites a conversation with Peter H. Pfund, Legal Advisor on Private International Law, in which Mr. Pfund said, "[t]here is not much motivation on the part of politicians to become familiar with the subject [of international probate]." *Id.*

71. *Id.*; *see also* Peter H. Pfund, *U.S. Participation in International Unification of Private Law*, 19 INT'L LAW. 505, 517 (1985).

72. Hague Convention on Private International Law: Convention on the Law Applicable to Trusts and on Their Recognition, and Final Act of the Fifteenth Session, Oct. 20, 1984, 23 I.L.M. 1388 (1984).

73. Hague Conference on Private International Law: Convention on the Law Applicable to Succession to the Estates of Deceased Persons, and Final Act of Sixteenth Session, Oct. 20, 1988, 28 I.L.M. 146 (1989). Schoenblum, *supra* note 33, at 1302 n.55; *see also* Kaufman, *supra* note 61, at 53.

74. *See generally* Kaufman, *supra* note 68, at 52-53.

A. *Federal Legislation*

The United States Congress has three options for designing federal legislation that would enact the Uniform Law. First, it may designate under article XIV of the Uniform Law those states to which the Convention would apply upon enactment.[75] When a state subsequently enacts the appropriate legislation, the federal government may modify its designation of authorized states to include that state.[76] One commentator who favors this approach believes that it "would permit the sort of experimentation necessary with any new and provocative development in law."[77] This approach, however, would result in a "checkerboard" of states in which the law would apply and would confuse international and domestic testators.[78] Rather than unifying the law, the International Will would further fragment it, thereby increasing the risks and compounding the conflicts it is designed to alleviate.[79]

Second, the federal government may make the law applicable to all jurisdictions in the United States.[80] Under this approach, the federal government would exercise its discretionary powers and designate the authorized persons and the safekeeping mechanisms.[81] The states would have the option of naming additional groups to the list of authorized persons, but in cases of conflict federal law would prevail.[82]

This second approach has the advantage of guaranteeing national compliance and recognition of International Wills. The law would require every state to recognize not only foreign wills made under the Convention, but also International Wills made in other states in the United States.[83] The Uniform Law would be most potent under this form of legislation, and its goals of unification and testamentary flexibility would dominate both international and domestic probate. Eventually, the importance of executing every will as an International Will to ensure

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75. Uniform Probate Code, Uniform International Wills Act, 8 Uniform Laws Annotated 178, 181-82 (1983) [hereinafter Uniform Wills Act].

76. 1 SCHOENBLUM, *supra* note 12, at 472-73.

77. *Id.* at 473. Professor Schoenblum, however, fears that the liberal form requirements of the International Will would supplant the existing laws and thus generate unpredictable consequences in United States probate law for the sake of greater international flexibility. *Id.*

78. Kearney, *supra* note 10, at 629.

79. Nadelmann, *supra* note 11, at 375. Mr. Nadelmann supports an approach of either nonuse or universal use, rather than any piecemeal approach. *Id.*

80. Uniform Wills Act, *supra* note 75, at 181-82.

81. *Id.*

82. *Id.*

83. *Id.*

its validity would become apparent.

The problem with this approach is that such legislation is impractical in the United States. The federal government lacks experience and precedent in creating testamentary law.[84] Notably, no federal law exists that governs those articles of the Convention that apply the law of the place from which the authorized person derives authority.[85] Moreover, problems arise as to which law should apply in the case of consular agents authorized to issue International Wills to nationals in foreign states.[86] To alleviate these problems, the government could enact standards for witnesses, for the safekeeping of wills, and for the allowance of substitute signatures. However, considering the myriad of different state requirements in existence, the federal government would have great difficulty consolidating all formal requirements into standards that would not unduly intrude upon or supersede state law.[87] Other possible solutions are to forego establishing any standards, or simply to apply the law of a particular jurisdiction to consular cases.[88] These solutions, however, have their shortcomings. A lack of standards for consular officials would be generally unfavorable to the foreign jurisdictions hosting such officials, and choosing the standards of one state may draw accusations of political favoritism. Thus, complete federal control and implementation of the Uniform Law is not the best solution.

The third and most favorable option is to apply the Uniform Law to all states for purposes of recognizing International Wills, while giving the states full discretion to adopt the law that makes the International Will a testamentary option for its citizens.[89] This approach has the advantage of preserving state autonomy while bringing the Convention into force in all states. The states would have the option of designating who may serve as authorized persons in their jurisdictions.[90] Thus, Louisiana, the civil-law state in the United States, may maintain its civil-law notary as an authorized person, while the forty-nine common-law states may designate certain officers within their probate courts to serve as author-

84. Nadelmann, *supra* note 11, at 376.

85. *Id.*

86. *Id.*

87. *Id.* at 376-77.

88. *Id.* Under the *Erie* doctrine, federally designated persons could be instructed to apply the law of the state in which they sit. *See* Kearney, *supra* note 10, at 626. If no federal law exists, the consular and diplomatic agents could receive instructions concerning the requisite restrictions. *Id.*

89. Uniform Wills Act, *supra* note 75, at 182.

90. *Id.*

ized persons.[91] Most commentators assume that all states will designate licensed attorneys as authorized persons.[92] Furthermore, each state's laws would control the requirements for witnesses, the safekeeping of wills, and the allowance of substitute signatories for the testator.

An additional benefit of this form of legislation is that testators would immediately have the benefits of the International Will. Foreign testators in contracting states would have an initial advantage over United States citizens because only eight states currently provide for execution of International Wills, but as more states enact legislation, the International Will will serve United States citizens domestically and abroad.[93] This form of legislation may appear to be forcing states to adopt the Uniform Law to provide their citizens with the benefits other states offer, but the reluctance of some states to move away from the antiquated common-law principals of movables and real property suggests that no amount of pressure will modernize the probate law of some jurisdictions.[94]

B. *State Legislation*

Assuming Congress passes legislation that affords the states discretion to enact the aforementioned probate laws and thereby determine who shall act as an authorized person, the final issue is whether states should pass supporting law and how they should supplement the law to complement the existing law of the state.

Upon federal enforcement of the Washington Convention, every state should follow suit by enacting its own version of the Uniform Law. Most states have waited to see if the Washington Convention would wither on the international vine, before considering the adoption of the Uniform Law.[95] With the support of the United States and Canada, other industrial states such as the United Kingdom and Japan will probably follow suit and adopt the Uniform Law.[96] As international acceptance grows, so will the benefits for those who use the International Will. More importantly, if United States federal law requires every state to recognize the validity of an International Will, several of the problems associated with domestic probate will disappear.[97] Furthermore, the

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91. *See* Nadelmann, *supra* note 11, at 376-77.
92. *Id.* at 377; *see also* Kearney, *supra* note 10, at 630.
93. *See generally* Uniform Wills Act, *supra* note 75, at 182.
94. *Id.*
95. Kearney, *supra* note 10, at 631.
96. TREATY DOCUMENT, *supra* note 3, at 10. This is a reference to the Letter of Submittal signed by Secretary of State George P. Shultz. *Id.*
97. *See supra* notes 6-11 and accompanying text.

avoidance of validation hearings will produce greater efficiency in court, which should result in lower probate costs for will beneficiaries. Judges and lawyers will also benefit from the reduction in research time associated with determining the applicable laws of a testator's domicile or the site of a will's execution.

If a state decides to enact the Uniform Law, it must examine the Uniform International Wills Act of the Uniform Probate Code.[98] Each of the eight states that have already adopted the Uniform Law have done so by adopting the International Wills Act either as a separate statute or as part of the Uniform Probate Code.[99] The Act combines the articles of the Uniform Law in ten sections. The first eight sections are identical to the Uniform Law, but sections 9 and 10 provide for the discretionary appointment of the authorized person and the procedures for the safekeeping of International Wills.[100]

Section 9 of the Code designates "[i]ndividuals who have been admitted to practice law before the courts of this state and who are in good standing as active law practitioners in this state, [are] authorized persons in relation to international wills."[101] The Commentary to the Uniform International Wills Act best summarizes the reason for choosing lawyers as authorized persons:

> The duties imposed by the Uniform Law upon the person doing the certifying go beyond legalization of signatures, the domain of the notary public. At least paralegal training is a necessity. Abroad, in countries with law trained notary, the designation is likely to go to this class or at least to include it. Similarly, in countries with a closely supervised class of solicitors, their designation may be expected.
>
> Attorneys are subject to training and licensing requirements everywhere in this country. The degree to which they are supervised after qualification varies considerably from state to state, but the trend is definitely in the direction of more rather than less supervision. Designation of attorneys in the uniform law permits a state to bring the statute into its local law books without undue delay.[102]

Obviously, the Uniform Probate Code does not bind states, and states may find it beneficial to supplement their lists of authorized persons or to restrict authorization to more specialized groups. Whatever the decision, more authorized persons means more citizens who will benefit from

98. Uniform Wills Act, *supra* note 75, at 178-211.
99. *Id.* at 191.
100. *Id.* at 209-10.
101. *Id.* at 209.
102. *Id.* at 181 (quoting Nadelmann, *supra* note 11, at 377).

the International Will.

Section 10 of the Code provides for the establishment of a system of registry for the safekeeping of wills.[103] It gives a state's Secretary of State the duty of creating a system to record and distribute information for the efficient awareness and location of International Wills.[104] This provision is unique in that it provides for an official means of safekeeping wills that is more effective and reliable than traditional statutes which require the anti-mortem deposit of wills with probate courts.[105]

Uniformity's benefits will be best served if most states follow the legislation proposed by the Uniform Probate Code. Uniformity in legislation will aid uniformity in implementation—a policy favored, and enumerated, by the Convention's drafters in article 15 of the Annex.[106] If each state uses substantially similar statutory language, then each jurisdiction can draw from the precedents of other states and thereby encourage uniformity in enforcement as well as in implementation.

III. CONCLUSION

Unlike several of its predecessors, the Washington Convention survived Congress's procedural gauntlet and made it though ratification. Unfortunately, it appears that political disinterest is delaying the introduction of legislation necessary for enactment and enforcement of the Convention. Considering the potential for enacting legislation that will not interfere with state sovereignty, and the overwhelming support of groups such as the American Bar Association, the American College of Trust and Estate Counsel, and the National Conference of Commissioners on Uniform State Laws, the United States should end the delay and enact the Washington Convention. Most scholars agree that the other industrial powers will follow the United States lead and become party to the Washington Convention once it comes into force in the United States.[107] Consequently, the Washington Convention would rapidly become a potent and invaluable tool for international testators.

In addition, the International Will has the potential to profoundly affect United States probate law by introducing a new method of will-making that would eliminate the risk of formal invalidity without threatening the desired objective of implementing a standard will form. Fed-

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103. Uniform Wills Act, *supra* note 75, at 209.

104. TREATY DOCUMENT, *supra* note 3, at 27.

105. *Id.*

106. *See supra* note 31.

107. Kaufman, *supra* note 68, at 51; *see also* Chase, *supra* note 11, at 334; TREATY DOCUMENT, *supra* note 3, at 10.

eral states, like the United States, stand to benefit the most from the Washington Convention because it would make such states more responsive to the intentions of their testators.

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