

Copyright is retained by the Queensland Law
Reform Commission.

UNIFORM SUCCESSION LAWS: WILLS

Miscellaneous Paper
MP 15

Queensland Law Reform Commission
February 1996

The short citation for this Miscellaneous Paper is Q.L.R.C. M.P. 15.
Published by the Queensland Law Reform Commission, February, 1996.
Copyright is retained by the Queensland Law Reform Commission

ISBN:

Printed by: Queensland Law Reform Commission

(i)

PREFACE

The Standing Committee of Attorneys-General of Australia decided in 1991 that steps should be taken towards rendering uniform the succession laws of the Australian states and Territories. The Attorney-General for Queensland remitted a reference to the Queensland Law Reform Commission to co-ordinate the project in 1992.

Following agreement of all States and Territories to participate in the project it was agreed that each agency involved in the project would consult within their respective jurisdictions on identified issues. In 1995 the Queensland Law Reform Commission published two Issues Papers to assist all agencies in that consultation process. Issues Paper 1 on *The Law of Wills* (WP46) and Issues Paper 2 on *Family Provision* (WP47) have been circulated widely within Queensland and other Australian jurisdictions.

The national committee steering the uniformity project will next meet in May 1996 to discuss two items: the Law of Wills and the Abolition of the Lex Situs Rule. A number of memoranda have been prepared by the Queensland Law Reform Commission to assist members of the national committee in the lead up to the May meeting. Memoranda 1 - 9 are on the law of wills and discuss in more detail the issues raised in Issues Paper 1 *The Law of Wills* (WP46). These memoranda use clauses of proposed Victorian legislation on Wills as the basis of discussion. A further memorandum on *The Effect of the Lex Situs and Mozambique Rules on Succession to Immovable Property* addresses quite technical matters relating to the succession of property.

The Queensland Law Reform Commission would appreciate any comments you would like to make on any or all of the enclosed memoranda. If you have not already received a copy of the Issues Papers on *The Law of Wills* and on *Family Provision* and would like a copy of one or both, please contact the Commission's office.

(ii)

HOW TO MAKE COMMENTS AND SUBMISSIONS

You are invited to make comments and submissions on the issues and on the preliminary proposals in this Paper.

Written comments and submissions should be sent to:

The Secretary
Queensland Law Reform Commission
PO Box 312
ROMA STREET QLD 4003

or by facsimile on: (07) 3247 9045

Oral submissions may
be made by telephoning: (07) 3247 4544

Closing date: 19 April 1996

It would be helpful if comments and submissions addressed specific issues or preliminary recommendations in the Paper.

CONFIDENTIALITY

Unless there is a clear indication from you that you wish your submission, or part of it, to remain confidential, submissions may be subject to release under the provisions of the *Freedom of Information Act 1992* (Qld).

The Commission may refer to or quote from submissions in future publications. If you do not wish your submission or any part of it to be used in this way, or if you do not want to be identified, please indicate this clearly.

COMMISSIONERS

Chairperson: **The Hon Justice G N Williams**

Deputy Chairperson: **Ms R G Atkinson**

Members: **Mr W G Briscoe**
 Ms P A Cooper
 Dr J A Devereux
 Mr W A Lee
 Mr P D McMurdo QC

SECRETARIAT

Secretary: **Ms S P Fleming**

Director: **Ms C E Riethmuller**

Legal Officer: **Ms L K Flynn**

Administrative Officers: **Ms M L Basile**
 Ms A C Thompson

The Commission's premises are located on the 13th Floor, 179 North Quay, Brisbane. The postal address is GPO Box 312, Roma Street, Q 4003. Telephone (07) 3247 4544. Facsimile (07) 3247 9045

CONTENTS

PART 1

PRELIMINARY MATTERS AND CAPACITY 1

1. **PRELIMINARY** 1

 (a) Purpose 1 1

 (b) Commencement 2 1

 (c) Definitions 3 2

 (d) What property may be disposed of by Will? 4 2

2. **CAPACITY TO MAKE A WILL** 4

 (a) Minimum age for making a Will 5 4

 (b) Wills for persons without testamentary capacity 6 7

PART 2

EXECUTING A WILL 15

1. **HOW SHOULD A WILL BE EXECUTED?** 7 15

2. **MUST WITNESSES KNOW THE CONTENTS OF WHAT THEY ARE SIGNING?** 8 19

3. **WHEN MAY A COURT DISPENSE WITH THE REQUIREMENTS FOR EXECUTION OF WILLS?** 9 20

4. **WHAT PERSONS CANNOT ACT AS WITNESSES TO WILLS?** ... 10 24

PART 3

REVOCATION, ALTERATION AND REVIVAL 25

1. **HOW MAY A WILL BE REVOKED?** 14 25

2. **CAN A WILL BE ALTERED?** 15 28

3. **CAN A REVOKED WILL BE REVIVED?** 16 29

PART 4

INTERESTED WITNESSES 31

**CAN AN INTERESTED WITNESS BENEFIT FROM
 A DISPOSITION UNDER A WILL?** 11 31

PART 5

MARRIAGE AND DIVORCE 35

1. **WHAT IS THE EFFECT OF MARRIAGE ON A WILL?** 12 35

2. **WHAT IS THE EFFECT OF DIVORCE ON A WILL?** 13 40

PART 6

FOREIGN LAWS 45

WILLS TO WHICH FOREIGN LAWS APPLY 17-19 45

ANNEXURE 17-19 48

PART 7

CONSTRUCTION OF WILLS - THE ANTI-LAPSE RULE 49

1. **INTRODUCTION** 49

2. **THE ANTI-LAPSE RULE** 32 49

PART 8

CONSTRUCTION OF WILLS AND MISCELLANEOUS MATTERS 54

1. **CONSTRUCTION OF WILLS** 54

 (a) **Introduction** 54

 (b) **What interest in property does a Will operate to
 dispose of?** 20 54

 (c) **When does a will take effect?** 21 55

 (d) **What is the effect of a failure of a disposition?** 22 56

 (e) **What does a general disposition of land include?** 27 57

 (f) **What does a general disposition of property include?** 28 58

 (g) **What is the effect of a devise of land without words
 of limitation?** 29 59

 (h) **How are dispositions to issue to operate?** 30 59

 (i) **How are requirements to survive with issue construed?** ... 31 60

 (j) **No devise to trustees etc to pass a chattel interest** 61

(k)	Trustees under an unlimited devise to take the fee	61
(l)	Devises of estates tail shall not lapse	62
2.	MISCELLANEOUS	63
(a)	Introduction	63
(b)	What is the effect of a change in the testator's domicile? .. 24	63
(c)	Income on contingent and future dispositions	25 63
(d)	Beneficiaries must survive testator by 30 days	26 64
(e)	Construction of residuary dispositions	33 66
(f)	Dispositions to unincorporated associations of persons ... 34	67
(g)	Can a person, by Will, delegate the power to dispose of property?	35 70
(h)	What is the effect of referring to a valuation in a Will? 36	71
(i)	Can a Will be rectified?	37 71
(j)	Who may see a Will?	39(66A) 73

PART 9

ADMISSION OF EXTRINSIC EVIDENCE 75

ADMISSION OF EXTRINSIC EVIDENCE IN THE CONSTRUCTION OF WILLS	23	75
(a)	Proposed Victorian provision	75
(b)	General background	75
(c)	English legislation	75
(d)	Australian legislation	76
(i)	Victoria	76
(ii)	Tasmania	76
(iii)	Australian Capital Territory	77
(e)	Object of the legislation	77
(f)	Ambiguity and uncertainty	77
(g)	"Meaningless"	78
(h)	Preservation of admissibility of extrinsic evidence otherwise admissible by law	78
(i)	Contrary intention	79

PART 1

PRELIMINARY MATTERS AND CAPACITY

1. PRELIMINARY

(a) Purpose

Clause 1 of the Victorian Draft *Wills Act 1994* provides:

The purposes of this Act are to reform the law relating to the making, alteration and revocation of wills and to make particular provision for:

- (a) the formalities required for the making, alteration and revocation of wills and the dispensation of those requirements in appropriate cases;
- (b) the making of wills by minors and persons lacking testamentary capacity;
- (c) the effects of marriage and divorce on a will; and
- (d) the construction and rectification of wills.

Comment

This is a provision which may well vary from jurisdiction to jurisdiction. Some jurisdictions do not refer to the purposes of an Act. Differences between the jurisdictions may be allowed as they are not likely to go to substance.

(b) Commencement

Clause 2 of the Victorian Draft *Wills Act 1994* provides:

This Act comes into operation on a day to be proclaimed.¹

Comment

This is a provision which can vary from jurisdiction to jurisdiction. It is not likely to go to substance.

¹ This section is included for completeness, but is essentially a matter for Parliamentary Counsel.

(c) Definitions

Clause 3 of the Victorian Draft *Wills Act 1994* provides:

In this Act -

"Court" means the Supreme Court and in relation to an estate the value of which does not exceed the jurisdictional limit of the County Court, the Supreme Court or the County Court.

"Disposition" includes -

- (a) any gift, devise or bequest of property under a will;
- (b) the creation by will of a power of appointment affecting property; and
- (c) the exercise by will of a power of appointment affecting property;

and "dispose of" has a corresponding meaning.

"Document" means any paper or material on which there is writing.

"Minor" means a person under the age of 18 years.

"Probate" includes the grant of letters of administration, where the context allows.

"Will" includes a codicil and any other testamentary disposition.

Comment

The Victorian definition section is not as extensive as some; and it is in relatively up to date language.

Again it is unlikely that a definitions section would present difficulties in the process of achieving uniformity of substance, so far as that is possible, because the definitions section may reflect agreed outcomes, though some definitions sections are somewhat archaic in terms of drafting style.

(d) What property may be disposed of by Will?

Clause 4 of the Victorian Draft *Wills Act 1994* provides:

- (1) A person may dispose by will of property to which he or she is entitled at the time of his or her death.

- (2) A person may dispose by will of property to which the personal representative of that person becomes entitled by virtue of the office of personal representative after the death of that person.
- (3) It does not matter if the entitlement of the person or of the personal representative did not exist at the date of the making of the will or at the date of death.
- (4) "Property" in this section includes -
 - (a) any contingent, executory or future interest in property; and
 - (b) any right of entry or recovery of property or right to call for the transfer of title of property.
- (5) A person may not dispose by will of property of which the person was trustee at the time of death.

Comment

The object of this provision is to ensure that the Will disposes not only of property which the testator owns at the time of the making of the Will, but also property subsequently accruing to the testator before death and to the testator's estate after death. One commentator expressed some doubt as to whether the existing legislation in Western Australia covers the case of property accruing after death, but recommended that it is desirable that it should. In the absence of such a provision it is likely that there would be an intestacy as to property coming to the estate after the testator's death.

The provision that a testator cannot dispose of trust property by Will refers to an attempt by a testator to dispose of such property as a testamentary gift. It is not concerned with the devolution of trust property on death, a matter dealt with by trust legislation. A submission from Western Australia welcomes the Victorian provision as clarifying the law at least as far as Western Australia is concerned. It also draws the rule to the attention of the testator.

There should not be a significant difficulty in having this general policy accepted in all States and Territories.

The Queensland Law Reform Commission supports the policy behind the proposed Victorian provision.

2. CAPACITY TO MAKE A WILL²

(a) Minimum age for making a Will

Clause 5 of the Victorian Draft *Wills Act 1994* provides:

- (1) A will made by a minor is not valid.
- (2) Despite sub-section (1) -
 - (a) a minor may make a will in contemplation of marriage (and may alter or revoke such a will) but the will is of no effect if the marriage contemplated does not take place;
 - (b) a minor who is married may make, alter or revoke a will;
 - (c) a minor who has been married may revoke the whole or a part of a will made whilst the minor was married or in contemplation of that marriage.
- (3) The Court may, on application by or on behalf of a minor, make an order authorising the minor to make or alter a will in specific terms approved by the Court, or to revoke a will or a part of a will.
- (4) An authorisation under this section may be granted on such conditions as the Court thinks fit.
- (5) Before making an order under this section, the Court must be satisfied that -
 - (a) the minor understands the nature and effect of the proposed will, alteration or revocation and the extent of the property disposed of by it; and
 - (b) the proposed will, alteration or revocation accurately reflects the intentions of the minor; and
 - (c) it is reasonable in all the circumstances that the order should be made.
- (6) A will or instrument making or altering a will made pursuant to an order under this section -
 - (a) must be executed as required by law and one of the attesting witnesses must be the Registrar; and
 - (b) must be deposited with the Registrar under section 5A of the *Administration and Probate Act 1958*.

² Part 2 of the draft Victorian Bill also deals with formal requirements for the making of Wills. These requirements will be covered by subsequent memoranda to the Uniform Succession Laws Project Committee.

Comment

Reduction in age

The general question raised by the proposed Victorian provision is whether the age at which a person may make a Will generally should be reduced. Should the age limit of 18 be reduced to 16? You may care to give a specific answer - YES or NO to this question. It may well be that this is a question on which it would be difficult to get a uniform affirmative answer and that the age will remain at 18, with a possible reduction to 16 in the context of marriage. That result may be seen as further justified if there is a provision enabling the Court to make a Will for a minor.

The Tasmanian Law Reform Commissioner and the New South Wales Law Society in their submissions to the Queensland Law Reform Commission on the Issues Paper on Wills expressed the view that the age of legal capacity should be lowered from 18 to 16 (although the New South Wales Law Society suggested that it might be appropriate in such cases for a certificate to be given by a solicitor or other qualified person to the effect that the young person understands the Will and the effect of making a Will).

The New South Wales Law Reform Commission and the Queensland Public Trustee have objected to the lowering of the age of testamentary capacity from 18. The New South Wales Law Reform Commission based its objection on the fact that the age of 18 is consistent with the accepted age of majority and, in New South Wales, the Court can approve the making of a Will by a person younger than 18.

The Queensland Public Trustee's objection was based on his general perception of the average 16 year old:

Most 16 year olds would have insufficient assets to warrant the making of a will. They are in their formative years and may be subject to undue influence either from family members or outsiders. A number of wills are made in contemplation of the beneficiary attaining at least 18. Many older people believe 21 a more appropriate age....Generally speaking 16 year olds lack the maturity to understand the implications of making a will and should not be given the right to do so.

Jurisdiction in Court to approve making of Wills for people under 18

The Tasmanian Law Reform Commissioner was also in favour of providing jurisdiction to the Supreme Court to approve the making of Wills for people younger than 16. In New South Wales and South Australia the Courts are presently able to approve the making of Wills of people under the age of 18. The New South Wales Law Society noted the following reason for retaining such a provision:

With the unfortunate breakdown in the structure of the family unit and having regard to the high earnings of sports professionals and entertainers, we think it is important that, in certain circumstances minors have the power to direct where their estate might pass rather than have its direction determined in accordance with the laws of intestacy.

The Queensland Public Trustee agreed with the concept of enabling the Court to approve the making of a Will by a minor.

The proposed Victorian provision giving the Court power to make a Will is in almost identical terms to the South Australian provision (s6 *Wills Act 1936*). These are provisions which need not attract a great deal of controversy for several reasons.

1. There is a good case for giving the Court such a jurisdiction. In the case of a minor an application to the Court would be made infrequently, but when made it would most probably be in a context where the ability of the Court to act would be very much needed. For example, where a minor:
 - (a) is suffering from an illness or injury which may well be fatal; and
 - (b) has a sufficient estate to make application to the Court worthwhile; and
 - (c) wishes the estate to be distributed otherwise than in accordance with the intestacy rules which might well only benefit both the parents of the minor. That is, the minor may wish his or her estate to go to one parent rather than both, or, where the minor is estranged from both parents or has no parent, to another person or persons, for example a de facto spouse, a particular sibling or a carer.
2. Even if some jurisdictions would prefer not to give the Court power to make a Will for a minor, a uniformity project is unlikely to be significantly disadvantaged by it. Courts in jurisdictions which do not have the provision would nevertheless recognise a Will made by a Court in a jurisdiction which has the provision, because the Will would be admitted to probate in that jurisdiction. It is highly unlikely that a minor would forum shop in order to have a Court approve a Will, or that a Court would approve a Will on behalf of a minor who has no connection with the jurisdiction.
3. Even though different jurisdictions may prefer a different mode of procedure to that contemplated by the Victorian proposal, that is only a matter of procedure. Each jurisdiction should be able to specify its own procedure without jeopardising the principle of uniformity.

Married minors

Subsection (2)(c) of the proposed Victorian provision would enable a minor who has been married but who no longer is, to revoke a Will already made or part of it. That is, a person who has been married but no longer is, and is still under the age of 18, may not make a new Will. However, in South Australia a minor who is or has been married may make, alter or revoke a Will as if he or she were an adult.

Wills by minors in contemplation of marriage

Both the proposed Victorian provision and the South Australian provision would enable a minor to make a Will in contemplation of marriage but the Will would only be of effect if the contemplated marriage was solemnised.

The Queensland Law Reform Commission is willing to consider, in the light of submissions received during this project, the concepts that:

- * people should have the ability to make, revoke and alter Wills at the age of 16 as if they were adults;
- * the Court should have power to make a Will for a minor under 18 along the lines of the proposed Victorian provision.

(b) Wills for persons without testamentary capacity³

Clause 6 of the Victorian Draft *Wills Act 1994* provides:

- (1) The Court may, on application by any person made with the leave of the Court, make an order authorising the making or alteration of a will in specific terms approved by the Court, or the revocation of a will, on behalf of a person who lacks testamentary capacity.

³ Throughout the body of the Victorian report this section is referred to as section 5A, but it is convenient to renumber it here as section 6. This is possible because the Committee has recommended that s7 of the 1991 *Draft Wills Bill* not be proceeded with, and hence 1991 draft s6 (How should a Will be executed?) becomes section 7 of the Committee's proposed *Wills Act*.

- (2) The Court is not bound to authorise the making of an entire will for the person who lacks testamentary capacity: it may authorise the making of a particular, specific testamentary provision.
- (3) No application under sub-section (1) shall be heard by the Court unless the application is made before or within six months after the death of the person who lacks testamentary capacity, provided that the time for making an application may be extended for a further period by the Court if the time for making an application under Part IV of the *Administration and Probate Act 1958* has not expired and the interests of justice so require.

Leave of Court

- (4) The leave of the Court must be obtained before the application for an order is made.
- (5) The Court must refuse to give leave if it is not satisfied that:
 - (a) there is reason to believe that the person for whom the statutory will is to be made under the order is or may be incapable of making a will; or
 - (b) the proposed will, alteration of a will, or revocation of a will, is or might be one which would have been made by the person if he or she had testamentary capacity; or
 - (c) it is or may be appropriate for a statutory will to be made for the person; or
 - (d) the applicant is an appropriate person to make an application; or
 - (e) adequate steps have been taken to allow representation of all persons with a legitimate interest in the application, including persons who have reason to expect a gift or benefit from the estate of the person for whom the statutory will is to be made.

Applications for leave: making the application

- (6) In applying for leave to make an application under this section the applicant for leave must, subject to the Court's discretion, furnish to the Court -
 - (a) a written statement of the general nature of the application and the reasons for making it;
 - (b) an estimate, so far as the applicant is aware of it, of the size and character of the estate of the person on whose behalf approval of the making of a will is sought;
 - (c) a proposed initial draft of the will or testamentary provision for which the applicant is seeking the court's approval;
 - (d) any evidence, so far as it is available, relating to the wishes of the person on whose behalf approval for the making of the will is sought;

- (e) evidence of the likelihood of the person on whose behalf approval for the making of the will is sought acquiring or regaining capacity to make a will at any future time;
- (f) any testamentary instrument or copy of any testamentary instrument in the possession of the applicant, or details known to the applicant of any testamentary instrument, of the person on whose behalf approval for the making of a will is sought;
- (g) evidence of the interests, so far as they are known to the applicant, or can be discovered with reasonable diligence, of any person who would be entitled to receive any part of the estate of the person on whose behalf approval for the making of the will is sought if the person were to die intestate;
- (h) evidence of any facts indicating the likelihood, so far as they are known to the applicant, or can be discovered with reasonable diligence, of an application being made under Part IV - Family Provision of the *Administration and Probate Act 1958* for or on behalf of a person entitled to make an application under that Part in respect of the property of the person on whose behalf approval for the making of a will is sought;
- (i) evidence of the circumstances, so far as they are known to the applicant, or can be discovered with reasonable diligence, of any person for whom the person on whose behalf approval for the making of the will is sought might reasonably be expected to make provision under will;
- (j) a reference to any gift for a body, whether charitable or not, or charitable purpose which the person on whose behalf approval for the making of the will is sought might reasonably be expected to give or make by will;
- (k) any other facts which the applicant considers to be relevant to the application.

Application for leave: the orders of the court

- (7) On hearing an application for leave the Court may -
 - (a) refuse the application;
 - (b) adjourn the application;
 - (c) give directions, including directions about the attendance of any person as witness and, if it thinks fit, the attendance of the person on whose behalf approval for the making of a will is sought;
 - (d) revise the terms of any proposed will, alteration or revocation;
 - (e) grant the application on such terms as it thinks fit; and

- (f) if it is satisfied of the propriety of the application, allow the application for leave to proceed as an application to authorise the making, alteration or revoking of the will, and allow the application.

Application for authorisation of making of statutory will

- (8) Where leave has been granted to a person to apply for an order authorising the making, alteration or revocation of a will in specific terms, upon hearing the application for authorisation the Court may, after considering the course of the application for leave, and any further material or evidence it requires, and resolving any doubts -
- (a) refuse the application; or
- (b) grant the application on such terms and conditions, if any, as it thinks fit.

Rules of Court

- (9) Rules of Court may authorise the Registrar to exercise the powers of the Court -
- (a) without limit as to the value of the interests affected, in all cases in which all persons with a legitimate interest in the application, including persons who have reason to expect a gift or benefit from the estate of the person for whom the statutory will is to be made, consent; and
- (b) even if there is not consent, in all cases in which the value of the interests affected does not exceed a sum specified in the Rules.

Comment

The Victorian proposal is derived from recommendations of the New South Wales Law Reform Commission.⁴ If enacted, it would be the most comprehensive statutory Will making scheme in Australia. South Australia is currently the only Australian jurisdiction with legislation providing for any type of statutory Will-making scheme. New Zealand and the United Kingdom have relevant provisions which would be useful to examine in the context of determining the most appropriate approach to adopt in Australia.

Australia: Legislation

In South Australia the Supreme Court has a limited power to alter existing Wills of people declared to be protected persons under the *Aged and Infirm Person's Property Act 1940* (sections 16A, 29 and 33 - 40). That Act

⁴ *Wills of Persons Lacking Will-Making Capacity* LRC 68 1992.

also gives power to the Court to supervise the making of testamentary provisions by a protected person and to examine the circumstances of a protected person's execution of a Will or codicil. Section 16A is duplicated by section 43 of the *Guardianship and Administration Act 1993* (SA). No other Australian jurisdiction currently has statutory Will-making provisions for adults lacking testamentary capacity.

England: Legislation

In England, the *Mental Health Act 1983* provides that a judge can make Wills for persons incapable of administering their property by reason of mental disorder. Section 96(1)(e) states:

- (1) Without prejudice to the generality of section 95 above [general functions of the judge with respect to property and affairs of patient], the judge shall have power to make such orders and give such directions and authorities as he thinks fit for the purposes of that section and in particular may for those purposes make orders or give directions or authorities for -
 - ... (e) the execution for the patient of a will making any provision (whether by way of disposing of property or exercising a power or otherwise) which could be made by a will executed by the patient if he were not mentally disordered...

New Zealand: Legislation

A Family Court in New Zealand has a supervisory role in relation to the testamentary disposition of property of people within the contemplation of the *Protection of Personal and Property Rights Act 1988*. Under sections 54, 55 and 56 of the Act the Court may, for example:

- * direct that a person subject to a property order under that Act, may make a testamentary disposition only by leave of the Court. The person's manager may be authorised by the Court to execute a Will for and on behalf of that person on such terms as the Court directs;
- * if it appears to the Court that a testamentary disposition was made when the person was unable to manage his or her affairs in relation to his or her property, cause inquiries to be made as to whether the disposition expresses the present desire and intention of the person;
- * if the Court is satisfied that the testamentary disposition does not express the present desire and intention of the person, cause the present desire and intention of the person to be ascertained to the

Court's satisfaction, and may authorise the manager of a new testamentary disposition of that person's estate in accordance with that present desire and intention.

Australia: Proposals

In Australia there have been proposals made in three jurisdictions for the establishment of statutory Will-making schemes.

1. New South Wales

In its Report on *Wills for Persons Lacking Will-Making Capacity*⁵ the New South Wales Law Reform Commission recommended the introduction of a statutory Will-making scheme which would enable Wills to be made on behalf of persons lacking testamentary capacity. The power would be exercised in situations where a Will or a new Will is necessary to avoid a person's property being distributed in a manner contrary to his or her intentions or what those intentions would have been if he or she had testamentary capacity at the present time. It was considered that a statutory Will-making scheme would greatly enhance the rights and dignity of persons with disabilities by enabling their property to be devised appropriately by having regard to their current situation.

The New South Wales Law Reform Commission recommended that the power to make statutory Wills be vested in the Supreme Court of New South Wales. Submissions had been made to the Commission that the New South Wales Guardianship Board would be the preferable body to have this responsibility primarily on the ground that it would be less expensive and less formal.

The New South Wales Law Reform Commission preferred the Supreme Court over the Guardianship Board on the bases that:

- * testamentary capacity is a legal concept familiar to the Courts and customarily applied by the Courts;
- * the Protective Division of the New South Wales Supreme Court can also provide the informality and privacy which are claimed to be the virtues of the Guardianship Board; and,
- * the Protective Division already has an analogous power to examine whether a person is capable of managing his or her affairs and to order that the estate of the person be subject to management.

⁵ LRC 68 1992.

The New South Wales Law Reform Commission's recommendations are yet to be implemented.

The New South Wales Law Society in its submission to the Queensland Law Reform Commission also supported the concept of enabling Wills to be made for adults lacking testamentary capacity:

We believe that the Court should also be given power to make a Will for an adult who lacks testamentary capacity. We agree that the Court would have to be satisfied as to certain criteria, perhaps similar to those in Section 6A of the New South Wales Act. We support a change along these lines because with the increase in dementia cases and the speed with which this disease, in many cases, can affect the mind, we think it is important that the Court attempt to preserve as much as possible the implementation of the testator's original wishes.

2. Victoria

The proposed Victorian statutory Will-making scheme is similar to the scheme recommended by the New South Wales Law Reform Commission - that is, nominating the Supreme Court as the appropriate body to authorise the making of statutory Wills.

3. Tasmania

In Tasmania there is a Bill which proposes the establishment of a statutory Will-making scheme for adults lacking testamentary capacity. The *Wills Legislation Amendment Bill 1994* proposes that the Guardianship and Administration Board in Tasmania have jurisdiction to make orders to enable the execution of a Will if the Board is satisfied that the person has not made a valid Will, is incapable of making a valid Will and that in all the circumstances, a Will should be made for him or her. A Will executed further to this scheme would be signed by the President or Deputy President of the Board and witnessed as per any other valid Will. Before exercising its powers under the proposed legislation the Board would be required to consider a number of matters, such as any evidence relating to the wishes of the person for whom the Will is made, and the likelihood that the person would acquire or regain testamentary capacity.

The Tasmanian Law Reform Commissioner supports the proposal that the Tasmanian Guardianship and Administration Board, as opposed to the Supreme Court, have power to make Wills for adults lacking capacity. In that context:

the Court should exercise a general supervisory function to oversee 'guardianship wills', rather than exercise that power itself.

An Alternative Scheme

An alternative to current proposals and legislative schemes would be for a power to be given jointly to the relevant Guardianship Board (in those jurisdictions where one exists) and the Supreme Court. It has been suggested that concurrent jurisdiction may have the following advantages:

- * the Board would already be dealing with the question of lack of capacity in respect of a number of personal and financial issues;
- * the Board may have members with judicial or legal practice experience who would bring to the Board the experience of issues such as testamentary capacity;
- * the operation of the Board provides a less formal milieu for considering these issues. The Board is most likely to be inquisitorial and not adversarial. Therefore, it is suited to address straightforward, less complex and non contested applications;
- * a proportion of applications for substituted Will-making will be marked by a high degree of conflict and uncertainty. In those cases, applicants may feel it more appropriate to go directly to the Supreme Court where, in any event, an appeal from the Guardianship Board would most likely be heard;
- * concurrent jurisdiction will provide families and individuals with a choice designed to meet economic and situational requirements of each case.

Apart from the options for the appropriate body to authorise or to make a Will on behalf of an adult lacking testamentary capacity set out above (Guardianship Board, the Supreme Court, or concurrent jurisdiction in the Guardianship Board and the Supreme Court), there are a number of other issues which could be examined in detail at a later stage (for example, the capacity of the Court or Guardianship body to alter pre-existing Wills).

Although it would be a major departure for succession law to give the Court, or other agency, a power to make a Will for a person who lacks capacity to make a Will for himself or herself, the Queensland Law Reform Commission is in principle agreeable to the conferring of a power to make a Will for a person lacking testamentary capacity upon the Supreme Court and/or upon a Guardianship Board.⁶

⁶ Although Queensland is the only Australian State or Territory jurisdiction without a Guardianship Tribunal, the Queensland Law Reform Commission is currently finalising a Report in which such a Tribunal will be proposed. See *Assisted and Substituted Decisions* QLRC Draft Report WP 43 (Feb 1995).

PART 2

EXECUTING A WILL

1. HOW SHOULD A WILL BE EXECUTED?⁷

Clause 7 of the Victorian Draft *Wills Act 1994* provides:

- (1) A will is not valid unless -
 - (a) it is in writing and signed by the testator or by some other person in the presence of and at the direction of the testator; and
 - (b) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
 - (c) at least two of those witnesses attest and sign the will in the presence of the testator (but not necessarily in the presence of each other).
- (2) The signature of the testator must be made with the intention of executing the will; but it is not essential that the signature be made at the foot of the will.
- (3) It is not essential for a will to have an attestation clause.
- (4) Where a testator purports to make an appointment by his or her will in the exercise of a power of appointment by will, the appointment is not valid unless the will is executed in accordance with this section.
- (5) Where a power is conferred on a person to make an appointment by a will that is to be executed in some particular manner or with some particular solemnity, the person may exercise the power by a will that is executed in accordance with this section, but is not executed in that manner or with that solemnity.

⁷ This section corresponds to s6 of the 1991 Victorian Draft *Wills Bill*.

Comment

This provision covers a number of issues with which there may be some disagreement.

1. Execution and attestation

Must the witnesses to the execution of a Will continue to be required to witness, attest and sign concurrently or may they be permitted to witness, attest and sign serially?

Until recently in all Wills legislation deriving from the English *Wills Act 1837* the testator has been required to make or acknowledge his or her signature "in the presence of two or more witnesses present at the same time" and such witnesses "shall attest and shall subscribe the will in the presence of the testator". This requirement of concurrence of presence is sometimes misunderstood by testators who make their own Wills. For example:

- (a) sometimes the testator signs or acknowledges in the presence of one witness and later acknowledges the signature in the presence of another witness. This may be termed serial witnessing; and
- (b) sometimes the testator signs or acknowledges his or her signature in the presence of both witnesses but one witness, after attesting and signing, leaves the room before the other witness attests and signs. Both witnesses are present at the signing of the Will but they are not in each other's presence when they attest and sign themselves.

There has been a debate to the effect that witnesses should be permitted to attest and sign serially in the presence of the testator. The Victorian proposal quoted above requires both the witnesses to be present at the signing of the Will and to attest and sign the Will in the presence of the testator but not necessarily in the presence of each other. This is the situation referred to in (b) above.

The New South Wales Law Society in a submission to the Queensland Law Reform Commission has supported a modification of the current requirements along the same lines as the Victorian proposal.

However, both the New South Wales Law Reform Commission and the Tasmanian Law Reform Commissioner have expressed their support for the current requirements. The New South Wales Commission takes the view that the current requirements make evidence of the testator's

understanding and capacity more reliable and easier to verify and counteracts the possibility of forgery and fraud. The Tasmanian Law Reform Commissioner submitted that the current requirements ensure the solemnity of the execution.⁸ He also observed that the current requirements as to signatures are well known. A submission from Western Australia added that the formalities bring home to the mind of the testator the significance of the fact that he or she is disposing by one single act of all the assets that it has taken a lifetime to acquire.

Another argument for retaining the existing requirement is that where it is breached by witnesses signing serially rather than concurrently the Court can in most jurisdictions dispense with the requirement and admit the Will to probate if it is satisfied that the Will represents the testator's intentions.

2. The position of the testator's signature: the "foot or end" of the Will

A certain amount of litigation has been generated by the requirement that the Will be signed by the testator "at the foot or end thereof". These words were found in the English *Wills Act 1837* and initially copied into all Australian legislation. But the words have caused problems.

In some cases the word "foot" seems to have resulted in decisions that words following a signature in point of position cannot be admitted to probate.⁹ The printed Will form, which invites the testator to sign in a given space, can give rise to this. The "foot" of the Will seems to suggest the physical bottom of the document.

On the other hand, the word "end" does not seem to suggest a physical part of the document. It suggests more that the testator has reached the end of making the Will and then signs it. So Lord Penzance said in *Re Kimpton*:¹⁰

I am inclined to say that where any portion of the writing appears to the satisfaction of the Court to form part of the context, anterior to the signature, it ought to be considered as following that context, though the position it may occupy in the paper may be different.

⁸ The Queensland Public Trustee also noted that the current requirement highlights the solemnity of the occasion.

⁹ *Re Harris* [1952] P 319.

¹⁰ (1864) 3 Sw & Tr 427 at 428-429; 164 ER 1340 at 1341.

The Victorian proposal only requires the Will to be signed by the testator. It does not require the signature to be in any particular position. It expresses the situation in slightly different terms by saying, in Clause 7(2), that "the signature of the testator must be made with the intention of executing the will; but it is not essential that the signature be made at the foot of the will". The first part of this provision is declaratory of the law and implies that the executing signature is the last thing that the testator writes. As to the second part of the sentence since the words "foot or end" have been removed from the legislation, it has the effect of jettisoning beyond doubt any residue of doctrine about the "foot" of a Will.

The proposed Victorian provision would conform to the legislation in most Australian jurisdictions except Queensland and Tasmania.

It is probable that the Queensland Law Reform Commission would view the Victorian proposal favourably.

3. Powers of appointment¹¹

The Victorian provision is not significantly different from provisions in all other Australian jurisdictions. There does not appear to be any significant problem with the fact that jurisdictions differ as to wording of the provision. These provisions are only concerned with the formalities with which a power of appointment exercised by Will must comply. Without them, a power of appointment exercised by a Will executed in accordance with formalities prescribed for Wills, but not executed in accordance with different formalities which might be (but not often are) prescribed by the instrument creating the power, would be regarded as not properly exercised and any gift over would take effect. It has been considered inappropriate, since 1837 at least, to insist that powers of appointment be exercised in accordance with two different and cumulative requirements of form.

¹¹ The Queensland Public Trustee in his submission to the Queensland Law Reform Commission advised that he could not recall a power of appointment in Wills or estates for over 30 years and queried whether powers of appointment should be retained. The Public Trustee encourages testators to nominate the beneficiaries in their Wills to avoid the possibility of their estates being distributed to someone whom they would not wish to benefit. In appropriate circumstances this may amount to best practice although there may be circumstances where a power of appointment will continue to be appropriate. The Public Trustee's experience and practice no doubt represent the current state of affairs. Nevertheless powers of appointment are not infrequently found in *inter vivos* discretionary trusts and it is possible that a power of appointment created by an *inter vivos* trust might be declared to be exercisable by the Will of a donee of the power. Even if powers of appointment, and some of the legal phenomena with which they are often inextricably intertwined, in particular life and protected life interests and remainders, may be found infrequently in practice, that is not, it is submitted, a sufficient reason for considering their abolition in the present context of a uniform Wills project.

2. MUST WITNESSES KNOW THE CONTENTS OF WHAT THEY ARE SIGNING?

Clause 8 of the Victorian Draft *Wills Act 1994* provides:

A will which is executed in accordance with this Act is validly executed even if a witness to the will did not know that it was a will.

Comment

Since 1837 there has been no legal requirement in any Australian jurisdiction for the witnesses to be informed that what they were about to sign was the Will of the testator even though a number of jurisdictions have specific provisions stating that such publication is unnecessary. In South Australia the provision has simply been omitted from the legislation to make way for new material.

The Issues Paper posed the question whether, for the purposes of uniformity, these provisions should be removed or at least clarified - perhaps in line with the proposed Victorian provision.

In the submissions received by the Queensland Law Reform Commission there has been support for the return of a provision requiring the publication of Wills to witnesses. The Queensland Public Trustee believes that a declaration by the testator that the document that is being witnessed is a Will ensures that the minds of the witnesses are focussed in the solemnity of the event and that the witnesses are more likely later to have a clearer recollection of the event, particularly if the question of capacity arises.

A member of the public submitted to the Queensland Law Reform Commission that "it is absolute stupidity" that witnesses do not know that what they are signing is a Will. "It is legalised fraud". However, even if a potential witness is informed that the document he or she is being asked to sign is a Will, the person could not be absolutely sure that it is a Will unless he or she read it. Testators may be quite rightly reluctant to permit the person to read his or her testamentary intentions. Such a reluctance must be respected. The law regards the Will of a testator as a private document until his or her death.

Query whether there is a case to reintroduce the requirement to publish Wills, and if not, is there a need to standardise the existing Australian provisions, perhaps along the lines of the proposed Victorian provision?

3. WHEN MAY A COURT DISPENSE WITH THE REQUIREMENTS FOR EXECUTION OF WILLS?

Clause 9 of the Victorian Draft *Wills Act 1994* provides:

- (1) A document purporting to embody the testamentary intentions of a deceased person, even though it has not been executed in accordance with the formal requirements of this Act, constitutes a will of the deceased person, the exercise of a power of appointment, an amendment of such a will or the revocation of such a will if the Court is satisfied that the deceased person intended the document to constitute his or her will, the exercise of a power of appointment, an amendment to his or her will or the revocation of his or her will.
- (2) In forming its view, the Court may have regard (in addition to the document) to any evidence relating to the manner of execution or testamentary intentions of the deceased person, including evidence (whether admissible before the commencement of this section or otherwise) of statements made by the deceased person.
- (3) This section applies to a document whether it came into existence within or outside the State.
- (4) Rules of Court may authorise the Registrar to exercise the powers of the Court -
 - (a) without limit as to the value of the interests affected, in all cases in which those affected consent; and
 - (b) even if there is no consent, in all cases in which the value of the interests affected does not exceed a sum specified in the Rules.

Comment

The Issues Paper described the different provisions existing in the various Australian jurisdictions enabling the Court to admit to probate a Will which has not been executed in compliance with the requirements as to form of the Wills legislation.

There has been strong support expressed for the adoption by all jurisdictions of the South Australian provision which is the basis of the proposed Victorian provision and the provisions in Tasmania, Western Australia and New South Wales. The Tasmanian and Western Australian provisions, however, require a high standard of proof - by including the words "that there can be no reasonable doubt". The standard of proof in Western Australia is that the Court be satisfied "that there can be no reasonable doubt that the deceased intended the document to constitute his will", whereas the South Australian provision now only requires the Court to be "satisfied" of the testator's intention (as in the New South Wales and the proposed Victorian provision).

The Queensland requirement that there must be "substantial compliance" has proven to be so great a stumbling block that the provision has had poor success and cases which would almost certainly have been found to come within the dispensing power in South Australia, New South Wales, Tasmania or Western Australia have failed in Queensland.

In its submission to the Queensland Law Reform Commission, the New South Wales Law Society expressed its concern with the haphazard way in which the body of law in New South Wales has developed and with the proliferation of informal Wills and the consequent increase in litigation:

In a number of cases solicitors have been forced to concede informal Wills purely to avoid the expenses of litigation. We are by no means impressed by the legislation in its current form. It creates uncertainty and renders it difficult to advise. Perhaps if the legislation were to include specific matters to be considered it might be of assistance. What is important is that the testamentary intentions of an intending testator should be given effect, and particularly in view of some practitioners where such intentions have been communicated or confirmed.

The New South Wales Law Reform Commission agreed that the dispensing power provision warrants considerable attention. The Tasmanian Law Reform Commissioner believes that the Tasmanian provision adequately deals with the matter but queries whether, rather than a dispensing power, there should be a fundamental simplification of the law: for example, a Will may be held to be valid if it satisfies the formal requirements or if the Court is satisfied that the document embodies the testamentary intentions of the deceased. The validity of the Will which does not comply with the formal requirements is then a question of fact for

the Court to determine.

Comment is invited as to whether this simplified approach is a more attractive reform option. If this is not adopted, the Tasmanian Law Reform Commissioner agrees that the "reasonable doubt" test should be removed from the Tasmanian legislation and replaced with the present South Australian provision (simply "if the Court is satisfied").

In South Australia the dispensing provision enables the Rules of Court to authorise the Registrar to exercise the powers of the Court under that provision. This will also be the case in Victoria if the proposed Victorian provision is enacted. The Queensland Public Trustee applauds this provision and observes that it would avoid the expenses associated with an application being heard by a Judge.

The wording of the provision is vitally important as evidenced by legislation in Manitoba which, although based on the South Australian provision, now requires amendment to save it from being interpreted as a "substantial compliance" provision. Section 23 of the *Wills Act* (Manitoba) was enacted on the basis of the South Australian general dispensing power. The Manitoba Law Reform Commission had recommended the introduction of this type of provision after rejecting the substantial compliance approach of Queensland.¹² However, the heading to the section when enacted appeared as "Substantial Compliance". Section 23 came before the Manitoba Court of Appeal in 1990 in *Langseth Estate v Gardiner*.¹³ The majority judgment of the Court set out a two-step process which must be followed to determine whether a document should be admitted to probate. First, the judge must be satisfied that the document, and its alterations, accurately embody the deceased's testamentary intentions. Secondly, the Court must consider whether it should give effect to the Will as altered. In this second determination:¹⁴

regard must be had to the formal requirements of execution found in other sections of the Act and to the purposes they are intended to fulfil.

In applying s.23 of the Act, the court must be satisfied that there has been some compliance, some attempt to comply, with the formal requirements.

¹² This is despite the misleading title to the Report. Manitoba Law Reform Commission *The Wills Act and the Doctrine of Substantial Compliance* Report # 43 1980.

¹³ (*sub nom. Re Langseth*) (1990) 75 DLR (4th) 25 (Man C.A.).

¹⁴ *Id* at 38.

Only then may a Court allow a document to be accepted as a Will. That is, the majority adopted the substantial compliance option. The dissenting judge in essence adopted the general dispensing power.¹⁵

In a 1992 informal report¹⁶ to the Minister for Justice and Attorney General of Manitoba, the Manitoba Law Reform Commission stressed that the focus of the Courts, when called upon to apply section 23, should be on the intentions of the testator:

Having regard to all of the circumstances (including the manner in which the document in question came into being), does the document clearly represent the testator's wishes? If so, section 23 should allow the court to give effect to those wishes, despite the failure of the testator to make the document in accordance with the *Wills Act*. Accordingly, it is our view that section 23 of the *Wills Act* should be amended to make it clear that a general dispensation power is being conferred upon the courts. A very minor amendment should suffice to effect this important clarification.

Such an amendment has been introduced to the current session of the Manitoba Legislature.¹⁷

The Queensland Law Reform Commission is in favour of a general dispensing power as found in the proposed Victorian provision and of allowing jurisdiction to be conferred on the Registrar of Probate in relevant cases.

¹⁵ The Saskatchewan Court of Appeal has also recently examined the interpretation of their equivalent to section 23, section 35.1, in the case of *Re Bunn Estate* [1992] 4 WWR 240 (Sask. CA). After reviewing *Langseth Estate v Gardiner* the Court unanimously concluded that it preferred the interpretation in the dissenting judgment to that of the majority. The Saskatchewan Court of Appeal rejected the two-step approach put forward by the majority in *Langseth*. It indicated that the degree of compliance with the formalities is but one factor which the Court must consider when determining whether the document represented the deceased's testamentary intentions.

¹⁶ Manitoba Law Reform Commission *Section 23 of The Wills Act Revisited* Informal Report # 22B, 1992.

¹⁷ Bill 9, *The Wills Amendment Act* First Sess. 36th Leg. Man., 1995. The amended provision would read:

Dispensation power

23 Where, upon application, if the court is satisfied that a document or any writing on a document embodies

(a) the testamentary intentions of a deceased; or

(b) the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will;

the court may, notwithstanding that the document or writing was not executed in compliance with any or all of the formal requirements imposed by this Act, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be.

4. WHAT PERSONS CANNOT ACT AS WITNESSES TO WILLS?

Clause 10 of the Victorian Draft *Wills Act 1994* provides:

A person who is unable to see and attest that a testator has signed a document may not act as a witness to a will.

Comment

There is no apparent dissatisfaction with this provision although it could be argued that it discriminates against people who are unable to see. The provision does however emphasise the need for there to be witnesses who are able to observe the testator execute his or her Will. In Queensland section 14 of the *Succession Act 1981* provides that a blind person cannot witness a Will.

PART 3

REVOCATION, ALTERATION AND REVIVAL

1. HOW MAY A WILL BE REVOKED?¹⁸

Clause 14 of the Victorian Draft *Wills Act 1994* provides:

The whole or any part of a will may not be revoked except -

- (a) under section 5, 6 or 9 or by the operation of section 12 or 13; or
- (b) by a later will; or
- (c) by some writing declaring an intention to revoke it, executed in the manner in which a will is required to be executed by this Act; or
- (d) by the testator, or some person in his or her presence and by his or her direction, burning, tearing or otherwise destroying it with the intention of revoking it.

Comment

The proposed Victorian provision refers directly or by cross reference to other relevant provisions in the draft Victorian Bill, to all possible ways of revoking a Will, including the Court's proposed dispensing power. The Tasmanian Law Reform Commissioner would go one step further and have a single provision containing a consolidation of all manner of revocations. The Queensland Public Trustee in a submission to the Queensland Law Reform Commission has also called for one all-encompassing provision relating to the manner of revocation. For example, revocation should be by:

- (a) destruction
- (b) by another Will or codicil
- (c) marriage - except:
 - (i) if made in contemplation ..., or
 - (ii) if de facto spouses marry and the primary/residuary beneficiary is the de facto partner
- (d) divorce - Will only to be revoked as far as the spouse is the beneficiary or executor as per the Queensland provision or unless made in contemplation of divorce.

However, the New South Wales Law Society suggested that there should be separate provisions dealing with "revocation by act of Testator, revocation by marriage, revocation by divorce and revocation by Court order because testators may not always be aware of revocation operating by law".

¹⁸ As explained in the Victorian Report at paragraph s13.2, this section corresponds to s13 of the 1991 Victorian Draft *Wills Bill*.

Some concern was expressed at the fact that in some statutes provisions relative to revocation are found next to provisions relative to execution, but in other statutes they are found several sections further on. This is a matter of detail but in the Victorian provision they are placed immediately after the provisions about the effect of marriage and divorce on Wills.

The New South Wales Law Reform Commission in its submission to the Issues Paper on Wills recommended that symbolic acts of destruction should be sufficient to revoke a Will. A recommendation to this effect made by the Commission in 1986¹⁹ was enacted in New South Wales in 1989 by section 17(3)(c) of the *Wills, Probate and Administration Act 1898*. That provision reads:

17. (3) A will may be revoked
- ...
- (c) by some writing on the will, or by any dealing with the will, by the testator or by some person in the presence of the testator and by the testator's direction, if the Court is satisfied from the state of the will that the writing was made or the dealing was done with the intention of revoking the will.

The New South Wales Law Reform Commission was concerned that the traditional statutory requirements for revocation by destruction had resulted in a number of cases where the testator's intention to revoke a Will had been thwarted. The Commission observed:

Courts have held symbolic acts of destruction, such as

- * writing 'cancelled' on the Will;
- * drawing a line through it; or
- * crumpling the Will and throwing it away

as insufficient to revoke a properly executed Will, even where there is considerable evidence to indicate the testator thought he or she had effectively revoked the document.²⁰

Although the Commission agreed that the traditional rules regarding revocation provided some protection against a stranger getting hold of the Will and purporting to cancel it without the knowledge or authority of the testator, they considered that:

it is also important that the law reflect the desire to implement the clear intentions of a testator not only in creation of a will but also in its revocation.

¹⁹ *Wills - Execution and Revocation Report* 47 1986.

²⁰ Cases cited as examples include: *Re Jones' Will* (1895) 6 QLJ; *In the Will of Gordon* (1898) 9 BC (NSW) 12; *Cheese v Lovejoy* (1877) 2 PD 251. Also see *Re Sakzewski* [1943] QWN 38; *Re Marsini* [1934] QWN 41; *Estate of Shepherd* (1982) 29 SASR 247.

In considering a Law Reform Commission of British Columbia recommendation that there be legislation enabling the symbolic destruction and thereby revocation of Wills, the New South Wales Law Reform Commission did not agree that the consequence of the revocatory act need be apparent on the face of the Will as such a requirement would likely produce uncertainty and disputes. The New South Wales Commission did conclude, however, that there should be some requirement of a physical relationship between the act and the Will. It recommended that there should be a requirement that there be "writing on" the Will or some physical "dealing with" the Will coupled with the requisite intent before there can be revocation by this mode. The Commission's recommendation that the Court be satisfied "from the state of the document" that the writing on the Will or the dealing with it was done with a particular intent was intended to also underline the requirement of a physical relationship.

The New South Wales Commission considered that the Court should be satisfied that the testator intended the relevant act to revoke the Will.

Such a test would place an evidentiary onus on those alleging revocation. For that reason alone, most testators would be encouraged to prefer the more traditional modes of revocation involving some writing expressing an intention to revoke which is duly attested and signed by witnesses.

This standard of proof seems to accord with the standard in that State for the exercising of the dispensing power.

Should there be a provision relating to symbolic destruction of a Will, revoking the Will?

The Queensland Law Reform Commission will not object to a provision similar to the New South Wales provision.

2. CAN A WILL BE ALTERED?

Clause 15 of the Victorian Draft *Wills Act 1994* provides:

- (1) An alteration to a will after it has been executed is not effective unless the alteration is executed in the manner in which a will is required to be executed by this Act or comes under section 5, section 6 or section 9.
- (2) Sub-section (1) does not apply to an alteration to a will if the words or effect of the will are no longer apparent because of the alteration.
- (3) If a will is altered, it is sufficient compliance with the requirements for execution, if the signature of the testator and of the witnesses to the alteration are made -
 - (a) in the margin, or on some other part of the will beside, near or otherwise relating to the alteration; or
 - (b) as authentication of a memorandum referring to the alteration and written on the will.

Comment

The main concern with this and similar provisions in other jurisdictions is the position of the provision in the legislation. In the proposed Victorian legislation it is found in a division of the legislation entitled "Executing a will", while in other jurisdictions it is found in other parts of the relevant legislation. Again, this is a matter of style and presentation which should not be of significant concern to us.

There are slight differences in the requirements as to the position of the signature or initials of the testator and the witnesses relating to an alteration - but is this significant enough for the purposes of the uniform succession project? The Queensland provision, section 12(2)(a), is slightly more relaxed in its use of the words "or otherwise relating to", words also included in the Victorian proposal.

One submission to the Queensland Law Reform Commission expressed the belief that the altering of Wills should be discouraged and that if a Will needs altering a new Will should be made. It is hard to see, however, how one can prevent testators making small alterations or, therefore, large alterations, although it may be advisable in practice for a new Will to be drawn up.

3. CAN A REVOKED WILL BE REVIVED?

Clause 16 of the Victorian Draft *Wills Act 1994* provides:

- (1) A will or part of a will that has been revoked is revived by re-execution or by execution of a codicil showing an intention to revive the will or part.
- (2) A revival of a will which was partly revoked and later revoked as to the balance only revives that part of the will most recently revoked.
- (3) Sub-section (2) does not apply if a contrary intention appears in the will.
- (4) A will which has been revoked and later revived either wholly or partly is to be taken to have been executed on the date on which the will is revived.

Comment

Similar provisions to the draft Victorian provision appear in all Wills legislation. There is general agreement that the provisions should be re-drafted in simple English (the New South Wales Law Society noted that this is especially so in New South Wales in light of *Trickey v Davies*²¹).

The Tasmanian Law Reform Commissioner believes that the concept of revival is outdated and that revocation should be final. This is also the belief of the Queensland Public Trustee, whose policy it is not to revive revoked Wills. The Public Trustee suggested that the Will drafter should be conscious of what may have to be provided for in the redraft and overcome any problems which may be associated with partial revocation of Wills or partial revivals.

Nevertheless, although no doubt it is better practice to execute a new Will than to revive revoked provisions contained in a former Will, that is not good reason for denying a testator the right to revive a revoked provision if he or she wishes to do so. Such a testator might lack the benefit of legal advice and problems might arise as a result of that; but what is in issue is whether effect is to be given to the testator's expressed intention. Indeed, whether a provision has the effect of reviving a revoked earlier provision is not a matter of probate law. It is a question of construction of a provision which may have a larger testamentary purpose than merely the revival of an earlier provision. Moreover, there is no reason why the Court's dispensing power should not be available to admit such a provision to probate.

The Queensland Law Reform Commission has no difficulties with the Victorian proposals in these contexts.

²¹ (1994) 34 NSWLR 539.

PART 4

INTERESTED WITNESSES

CAN AN INTERESTED WITNESS BENEFIT FROM A DISPOSITION UNDER A WILL?

Clause 11 of the Victorian Draft *Wills Act 1994* provides:

A person who, or whose spouse, witnesses a will is not disqualified from taking a benefit under it.

Comment

In all Australian jurisdictions except South Australia and the Australian Capital Territory neither a witness to a Will nor the spouse of a witness to a Will can take any benefit under the Will. The rule was abolished in South Australia and the Australian Capital Territory in 1972 and 1991 respectively and it is not apparent that the abolition of the rule has been the cause of concern in either jurisdiction since then.

As noted in the Issues Paper on Wills, the difficulty with the rule is that it does not distinguish between the innocent and the guilty witness.

The harshness of the rule has been addressed in a piecemeal way by legislatures and the judiciary. In some States the rule does not apply if there is a sufficiency of disinterested witnesses, and in Victoria there is currently a provision which allows an interested witness to take an intestacy share or the benefit left by the Will, whichever is the less. In Victoria there is also a provision that the witness can approach the Court for relief. In some States solicitors who have witnessed the execution of a Will allowing them their reasonable costs for acting in the administration of the deceased estate have been relieved of the disqualification. In Tasmania there is a provision which allows a disqualified person to apply to the Court for an order that the person be entitled under the Will.

In New South Wales there is a provision (section 13(2)(b)) which enables all the persons who would directly benefit from the avoidance of the gift to consent in writing to the distribution of the gift according to the Will. These persons must have capacity to do so. This provision is perhaps declaratory.

In the Issues Paper it was also observed that the accretion of exceptions to the disqualification rule has made the provision unnecessarily wordy and even counterproductive. For example, the Victorian exception allowing the witness to take an intestacy benefit can have the effect of giving that benefit without any possibility of questioning the propriety of the witness's conduct.

The Courts have tended to creativity in diminishing the force of the rule by the doctrine of dependent relative revocation,²² and have been easily satisfied, where they are permitted to consider it, of the propriety of the witness's conduct.

The Issues Paper submitted that the abolition of the rule would not prevent the Court from requiring a witness-beneficiary to answer an allegation that there is a suspicious circumstance concerning the execution of the Will; or that there has been undue influence.

The Tasmanian Law Reform Commissioner was of the opposite view. He suggested that the rule should be re-instated to operate in all jurisdictions and if not, the onus should be on the witness/beneficiary to establish the absence of any suspicious circumstance. He did concede that there should be a simple exception allowing a disqualified witness to apply to the Court for an order of entitlement, as in Tasmania.

Similarly, the New South Wales Law Reform Commission believes that attestation by disinterested parties is to be encouraged and that such a provision creates an impediment to fraudulent or improper practices. The New South Wales provision places the onus on the interested witness to prove the propriety of the gift and, according to the New South Wales Law Reform Commission, there is no evidence that the New South Wales provision has created any injustice.

The New South Wales Law Society and the Queensland Public Trustee in their submissions to the Queensland Law Reform Commission were also of the view that the rule should not be abolished. The Public Trustee suggested, however, that there should be a mechanism for the Court to be able to grant relief. The Public Trustee was also attracted to the proposition that the applicant should have the onus of proving that the witnessing occurred by accident or inadvertence thus negating any undue influence. An acceptable alternative would be for the other beneficiaries named in the Will to consent unanimously to the witnessing beneficiary taking, without any formal assignment attracting *ad valorem* stamp duty.

A further submission to the Queensland Law Reform Commission suggested that:

To have a witness benefit financially from the will he witnesses except in a fee for service form would be another absurd concept - leading to fraud.

The argument that the witness rule strikes at the guilty as well as the innocent gives a false impression. A person minded to deal unfairly in the context of the execution of a Will would almost certainly know of the witness rule and avoid it by making sure that some other person witnesses. It is likely that the witness

²² See *Will of Mills* [1968] 2 NSWLR 393. Cf *Estate of Brian* [1974] 2 NSWLR 231.

rule strikes at the innocent far more often than the guilty.

But another argument for the repeal of the witness rule is that, because of its monolithic character, it constitutes an impediment to the development of a mature doctrine of suspicious circumstances surrounding the execution of a Will. The doctrine is undoubted. Thus, for instance, if a solicitor who prepares a Will takes a benefit under it, the solicitor will have great difficulty in persuading the Court that it is not suspicious.²³ It is clearly a suspicious circumstance when a witness to a Will takes a benefit under it; but because of the statute, an innocent witness is not allowed to show that the circumstances of the particular case are not suspicious at all. It is this fact that impedes clear thinking about beneficiary witnesses and the suspicious circumstances doctrine. The doctrine is about what sorts of circumstances have the effect of shifting the onus of proof in relation to an allegation of undue influence, the testator's competence, and the testator's knowledge and approval of the contents of the Will. This has been clarified by the recent Canadian case of *Vout v Hay*²⁴.

If one retains the witness rule, instead of also retaining a myriad of specific, sometimes petty, exceptions to it, it is arguable that the number of exceptions should be reduced and that a general exception should be framed in terms of the suspicious circumstances doctrine - that is, that the witness may retain the benefit if the witness can satisfy the Court that there are no suspicious circumstances infecting the gift. A submission from Western Australia draws attention to the view of Dr Ian Hardingham²⁵ that in matters relevant to undue influence the persuasive burden rests on the party challenging the Will. From this it is arguable that if the witness rule is retained, the beneficiary witness should be allowed to persuade the Court that there is no suspicious circumstance infecting the benefit and that he or she should be permitted to keep it.

On the other hand, if one repeals the witness rule, as in South Australia, the Australian Capital Territory and for that matter as does the United States *Uniform Probate Code*, and as is proposed for Victoria, room is given for the suspicious circumstances doctrine to occupy the space left by the repeal.

It is a fine balance whether the rule should be retained (but with a general exception allowing the witness to take the benefit upon satisfying the Court that there are no suspicious circumstances affecting the gift), or whether the rule should be abolished (which would have the effect that no onus would be placed on the witness beneficiary, although there would be an initial onus on those who

²³ *Wintle v Nye* [1959] 1 WLR 284 per Viscount Simmonds at 291.

²⁴ (1995) 125 DLR (4th) 431.

²⁵ Victorian Law Reform Committee *Reforming the Law of Wills* May 1994 at 92.

wished to challenge the benefit). Jurisdictions which have considered this question have opted to abolish the rule. It appears that where the rule has been abolished, the abolition has never caused any problem.

If one accepts that the rule falls more heavily on the innocent than the guilty then it is arguably unfair to retain it because even if a general exception is allowed, an onus is on the innocent.

Is it possible for there to be agreement that the rule be abolished as proposed in Victoria, and as has happened in South Australia and the Australian Capital Territory and the Uniform American Probate Code?

It is unlikely that South Australia and the Australian Capital Territory could be convinced to reintroduce the rule, even with the exceptions referred to above. Nevertheless, if it is not possible to have the rule abolished in all remaining jurisdictions, is it possible to agree to a common statutory formulation for the rule and to agree to the exceptions, if any, that should be included?

The Queensland Law Reform Commission is likely to be in favour of the abolition of the rule, subject to the consideration of submissions to be received.

PART 5

MARRIAGE AND DIVORCE

1. WHAT IS THE EFFECT OF MARRIAGE ON A WILL?

Clause 12 of the Victorian Draft *Wills Act 1994* provides:

- (1) A will is revoked by the marriage of the testator.
- (2) Despite sub-section (1) -
 - (a) a disposition to the person to whom the testator is married at the time of his or her death; and
 - (b) any appointment as executor, trustee, advisory trustee or guardian of the person to whom the testator is married at the time of his or her death; and
 - (c) the exercise by will of a power of appointment when, if the testator did not exercise the power, the property so appointed would not pass to the executor or administrator or the State Trustee under section 19 of the *Administration and Probate Act 1958* -
is (sic) not revoked by the marriage of the testator.
- (3) A will is not revoked by the marriage of the testator if it appears from the terms of the will, or from those terms taken together with circumstances existing at the time the will was made, that the testator contemplated marrying and intended the will to take effect in that event.

Comment

1. Wills made in contemplation of marriage

The Issues Paper on Wills mentioned arguments for the introduction of an absolute rule that marriage revokes a Will, irrespective of any contrary intention being expressed in the Will by the testator prior to his or her marriage. Such a rule would introduce certainty and would highlight the significance of marriage. It would also be consistent with the statistics relating to the average ages of marriage and death in Australia - which would suggest that Wills made prior to marriage may be over fifty years old at the time of the testator's death - and the testator's intentions as expressed in the Will have more than likely been eclipsed by his or her subsequent marriage and lifelong commitment to his or her spouse.

On the other hand, in a submission from Western Australia, it is observed that the argument that marriage should always revoke a Will fails to take account of the context in which some testators do make Wills in contemplation of marriage. In particular, there is the case where the testator has been married and has a family for whom he or she wishes to make provision, but is marrying again. A Will made in that context, before the marriage, may embody a serious attempt to make fair provision for the testator's family by a previous marriage as well as for the spouse to be.

An absolute rule that marriage revokes a Will would be a departure from the current law in all Australian jurisdictions and presumably it would be very difficult to convince every jurisdiction to replace or repeal current provisions. Such a rule would increase the risk of some people dying intestate between the wedding and the first opportunity to make a Will. However, the idea of dying intestate may only be abhorrent to those who believe that the intestacy rules are inadequate or inappropriate. For example, the New South Wales Law Society, in its submission to the Queensland Law Reform Commission, was not in favour of an absolute rule that marriage revokes a Will as that would lead to an increase in intestacies and promote unwelcome family provision claims. It suggested that the testator should be able to indicate that the Will should be revoked by a particular marriage. However, the Society had reservations as to whether the testator should be allowed to indicate that the Will should not be revoked by marriage generally and it was not in favour of the saving provision included in the proposed Victorian provision:

The Victorian legislation appears to imply increased litigation. We reject the argument that persons getting married should be encouraged to make Wills after they are married. This does not fit with the social practice as it is common for people to seek the assistance of lawyers in drafting a Will prior to marriage.

The Tasmanian Law Reform Commissioner agreed that it would be preferable to have a simple rule that marriage revokes a Will, with the exception that Wills

made in contemplation of marriage should be valid. The Commissioner observed that:

It was considered important that this area of the law should be made as simple and straightforward as possible. The rule as to revocation by marriage is fairly well known within the general community and should not be disturbed.

It is not uncommon for people to make wills in contemplation of marriage. Wills are frequently and beneficially used by couples in a de facto relationship. The operation of this exception has practical benefits and should be allowed to continue.

The Queensland Public Trustee suggested that marriage should revoke a Will except if the Will was made in contemplation of the marriage or if de facto spouses marry and the primary or residuary beneficiary is the surviving de facto spouse. The quantum of the benefit passing to the de facto spouse should be the subject of discussion. The Public Trustee suggests that items which may need to be taken into account include:

- length of time living in de facto relationship
- length of time married
- number of children of former marriage(s) and
- dependence on the deceased

The Queensland Women's Legal Service also rejected the idea of an absolute rule that marriage revokes a Will. The Service favours a qualified law where marriage revokes a Will, except if the Will is made in contemplation of marriage. It also favours a provision similar to the proposed Victorian provision, that a Will not made in contemplation of marriage should be saved to the extent that it confers a benefit on the spouse of the deceased at the time of death.

2. Proof of contemplation of marriage

The English *Wills Act 1837* did not allow a Will to be made in contemplation of marriage. Later Wills legislation allowed a Will to be made in contemplation of marriage but the Will was required to be "expressed to be made in contemplation of marriage". Case law shows that that requirement generated litigation because sometimes there might well have been an implied contemplation of marriage without an express contemplation of marriage.²⁶

In Victoria, the requirement that the contemplation be expressed has been revoked. The present (and proposed) legislation is that a Will is not revoked by the marriage of the testator:

²⁶ See eg *Re Coleman* [1976] Ch 1.

if it appears from the terms of the will, or from those terms taken together with the circumstances at the time the will was made, that the testator contemplated marrying and intended the disposition made by the will to take effect in that event.

In New South Wales, section 15(3) of the *Wills, Probate and Administration Act 1898* provides:

(3) A will made after the commencement of this subsection in contemplation of a marriage, whether or not that contemplation is expressed in the will, is not revoked by the solemnisation of the marriage contemplated.

This provision appears to enable any extrinsic evidence to be admitted to show the contemplated intention of the testator.

In Queensland, the *Succession Act 1981* replaced the words "expressed to be made" with the words "contains an expression of contemplation of that marriage". This slightly relaxes the former onus of proof and appears to work reasonably well.

A requirement that an expression of contemplation of marriage be contained in the Will is formalistic and may defeat a testator's intention. On the other hand, no one has argued that the exception to the revocation by marriage rule should be extended to contemplation of marriage generally. There should continue to be a requirement that the contemplation of marriage is to a particular marriage and that the marriage has taken place. Such a Will and the circumstances in which it is made will virtually always be inextricably bound together; and to refuse admission of evidence of the circumstances of the making of the Will is arguably unrealistic. In addition there is the question of whether evidence of the testator's actual intention should be admissible. Would a statement by the testator that the Will he or she is making, or has made, is to make provision for the future spouse, a "circumstance" within the meaning of the Victorian provision? The more general language of the New South Wales provision seems to allow it. Ordinary evidence of a testator's actual intention is admissible in probate proceedings, if not in construction proceedings.

The Western Australian Law Reform Commission's Report on *The Effect of Marriage or Divorce on Wills*²⁷ fully canvasses arguments for and against the wide New South Wales position as against the narrower Victorian and Queensland provisions. In brief, on the one hand it is argued that to admit extrinsic evidence will lead to the promotion of false claims; whilst on the other hand it is argued that restrictions on the admissibility of evidence are backward looking and out of step with the most up-to-date reforms to Wills law which seeks to give effect to the testator's intention wherever possible.

²⁷ Report No 76 Part II, 1991.

To conclude, the Western Australian Law Reform Commission, in its Report, recommends that:²⁸

It should be expressly provided that extrinsic evidence (including evidence of statements by the testator) should be admissible to establish that the will was made in contemplation of the marriage and that this may be established by such extrinsic evidence alone.

In light of the general proposition that uniform laws should preferably reflect the less, rather than the more, restrictive of current provisions, it is asked whether this recommendation of the Western Australian Law Reform Commission should be the basis for uniformity.

The Queensland Law Reform Commission is generally in favour of the New South Wales and Western Australian approach.

3. Provision for spouse not revoked by marriage

With reference to the Victorian proposal that the marriage does not revoke the Will to the extent that it makes provision for the person to whom the testator is married at the time of death, the New South Wales Law Reform Commission has rejected the proposal on the grounds that the New South Wales intestacy provisions make sufficient provision for the surviving spouse.²⁹

The question raised by this difference in approach is whether the surviving spouse should be entitled to take both the benefit saved by the Will and full intestacy rights. The Queensland Law Reform Commission has argued³⁰ that the surviving spouse's rights upon intestacy are about minimum, not maximum, entitlements and that there is no justification for requiring a surviving spouse to bring into account, against the intestacy provision, other benefits to which the spouse might be or become entitled under any trust, testamentary provision or superannuation scheme.

²⁸ *The Effect of Marriage or Divorce on Wills* Report 76 Part II 1991 at para 3.25. The Tasmanian Law Reform Commissioner does not support this approach.

²⁹ *Wills: Execution and Revocation* Report No 47 1986.

³⁰ Queensland Law Reform Commission *Intestacy Rules* Report 42 June 1993 para.s 2.9, 2.10.

2. WHAT IS THE EFFECT OF DIVORCE ON A WILL?³¹

Clause 13 of the Victorian Draft *Wills Act 1994* provides:

- (1) Termination of the marriage or the annulment of the marriage of a testator revokes -
- (a) any disposition by the testator in favour of his or her spouse other than a power of appointment exercisable by the spouse exclusively in favour of the spouse's children; and
 - (b) any appointment made by the testator of his or her spouse as executor, trustee, advisory trustee or guardian other than an appointment of the spouse as guardian of the spouse's children, or as trustee of property left by the will to trustees upon trust for beneficiaries including the spouse's children

except so far as a contrary intention appears by the will.

- (2) If a disposition or appointment is revoked by sub-section (1), that disposition or appointment takes effect as if the spouse had predeceased the testator.
- (3) For the purposes of this section, the termination or annulment of a marriage occurs, or shall be taken to occur -
- (a) when a decree of dissolution of the marriage pursuant to the *Family Law Act* becomes absolute; or
 - (b) on the making of a decree of nullity pursuant to the *Family Law Act* in respect of a purported marriage which is void; or
 - (c) on the termination or annulment of the marriage, in accordance with the law of a place outside Australia if the termination or annulment is recognised in Australia in accordance with the *Family Law Act*.

- (4) In this section -

"Family Law Act" means the *Family Law Act 1975* of the Commonwealth;

"spouse", in relation to a testator, means the person who, immediately before the termination of the testator's marriage, was the testator's spouse, or, in the case of a purported marriage of the testator which is void, was the other party to the purported marriage.

³¹ As explained in the Victorian Report at paragraph s13.2 and s14.26, this clause corresponds to s14 of the 1991 Draft *Wills Bill*.

Comment

In the Australian Capital Territory, New South Wales and Queensland there is legislation to the effect that divorce revokes a Will to the extent that it provides benefits for the spouse, or appoints the spouse to be executor, trustee, advisory trustee or sometimes guardian. In Tasmania the effect of divorce is that it revokes the Will altogether, thus obliging the testator to make a new Will.

The proposed Victorian provision would have the effect that divorce would partially revoke any Will of the testator, along the lines of the Australian Capital Territory, New South Wales and Queensland provisions, except so far as a contrary intention appears by the Will.

The Issues Paper questioned whether the statutory rule should be capable of being displaced by a contrary intention contained in the Will. The Issues Paper noted that divorced parties may live for many years after the divorce and the intention of the Will made before the divorce may seem to be irrelevant to a situation if death occurs many years later. It is arguable that the costs of showing such a contrary intention might often be too high a price to pay for this liberty and that a more absolute rule preventing a testator from indicating a contrary intention is justified. A clear rule would enable legal advisers to give divorced persons simple and correct advice and bring them to a clear realisation of the need to make new Wills after divorce.

The New South Wales Law Reform Commission in its Report 47 *Execution and Revocation* stated that there is no compelling reason why the proof of a contrary intention should be restricted to expressions in the Will. The New South Wales legislation enacting the Commission's recommendations therefore allows statements of the testator as evidence of his or her intention. The potential for fraud and uncertainty were considered to be outweighed by the need to ensure that a testator's real intentions are not frustrated.

The New South Wales Law Reform Commission has also noted other differences between the New South Wales legislation and the proposed Victorian provision:

- (1) Pursuant to the New South Wales provision, subject to any contrary intention, powers of appointment exercisable by the spouse exclusively in favour of the spouse's children or any appointment as guardian of the spouse's children would be revoked, whereas a similar appointment or power of appointment in Victoria is expressly preserved.

- (2) The Victorian Law Reform Committee expressly rejected the qualification found in NSW s15A(1)(c) whereby it is provided that no class of beneficiaries under the Will shall close earlier than it would have closed if the beneficial gift had not been revoked.
- (3) The Victorian Law Reform Committee also expressly rejected any provision along the lines of NSW s15A(2)(b) which provides that any gift, power of appointment or appointment in favour of a former spouse is saved if the Will is republished after the termination of the marriage.

As to (1), above, the argument for preserving a power of appointment conferred by Will upon a spouse, despite any divorce, is that if the Will creates a trust for the issue of the spouses and gives a power of appointment amongst the children to the surviving spouse it is, after all, the mother or father of the children who will be making the appointment. If the power to appoint is taken away, then the trust for the issue is deprived of a facility which might well have been exercisable so as to reduce the incidence of taxation amongst the beneficiaries as a whole. A gift over in default of appointment might then be the only functioning part of the testamentary trust so far as the distribution of benefits is concerned. If the power of appointment is retained, the trust will remain fully functional. If the testator wishes to retain the testamentary trust for the issue and does not wish his or her former spouse to make appointments under it, the Will can be altered. The New South Wales provision might be seen as too vigorous.

As to (2), above, if the Will leaves a life interest to the testator's spouse with remainders to the children of the marriage, what happens when the testator dies and the former spouse survives after that for 20 years? Must the distribution of the fund be deferred until the death of the surviving spouse on the grounds that it is only upon that death that the members of the beneficiary class can be ascertained? The effect of the New South Wales provision appears to be that the class cannot close as a result of the divorce.

The death of a life tenant is often the occasion for the closing of the class. When a life tenancy determines prematurely there are no doubt some difficulties in determining whether the class should close at the premature determination or remain open. But, it is submitted, it is best to leave the law as it is and not introduce a rigid statutory provision which prevents a class from closing where it is clearly beneficial and in accordance with the objectives of the class closing rules, which is to ensure prompt distribution of the deceased estate, particularly amongst issue of the testator. It is therefore submitted that it is sufficient to say that the effect of the divorce is the same as if the divorced spouse had predeceased the testator; and to leave the class closing rules to operate as they usually do.

As to (3) above, the provision in section 15A(2)(b) that the provisions in the Will revoked by the divorce are, in effect, revived by a simple republication of the Will should be considered carefully. Suppose that after the divorce the testator executes a codicil "to my will dated 10th October 1995" leaving \$5,000 to a given charity. The execution of a codicil which refers to the Will republishes it.³² Such a codicil would neither evidence any intention to revoke nor revive the gift, power of appointment or appointment contained in the Will which had been revoked by the divorce. So apparently under the New South Wales wording the execution of such a codicil would have the effect of reversing the effect of the statute.

It may be argued that the provisions of section 15A(2)(b) fail to make a distinction between republication and revival. A republication does not always effect the revival of a revoked part of a Will. To do that, the republishing provision must in addition evince an intention to revive.³³ The New South Wales provision does not require that there be an intention to revive, only an intention not to revoke. So absent a limiting interpretation of the provision by the judiciary, the statutory revocations consequent upon divorce can be negated by any republication of the Will, except a republication which indicates an intention that the revocation be continued.

The Tasmanian Law Reform Commissioner agreed that the law relating to the effect of divorce on Wills should be consistent with the law relating to the effect of marriage on Wills. Thus a simple rule that a Will is revoked by divorce would be consistent with the law relating to the effect of marriage on Wills:

It is clear and straightforward and will avoid unnecessary litigation.

The Tasmanian Law Reform Commissioner also believes that, as with Wills made in contemplation of marriage, the rule as to revocation by divorce should be subject to the exception that Wills made in contemplation of divorce should be valid. It was suggested that section 21(a), (b) and (c) of the *Tasmanian Wills Act 1992* should be repealed and a provision substituted which simply permits a Will to be made in contemplation of a dissolution of marriage. Although the Tasmanian provision has the advantage of simplicity, and could easily be taught to the public, it could have the effect, if not expressed to be made in contemplation of divorce, of destroying a Will made precisely in contemplation of divorce and providing perhaps for a de facto spouse whom the testator intended to marry after the divorce. If the Will is revoked entirely by the divorce and the testator happens to die before the de facto spouse the de facto spouse would be forced to resort to a family provision application.

³² *Will of Eteson* (1927) 28 SR (NSW) 119.

³³ See Hardingham, Neave and Ford *Wills and Intestacy in Australia and New Zealand* 2nd edition 1989 para [723] ff.

Further than that, as the other States and Territories have tended to go in the same direction, which is the same as that taken by the American Probate Code, it is unlikely that they could be persuaded to repeal existing provisions. This may be a case where, in due course, Tasmania might reconsider its position in light of legislation on the subject elsewhere.

The Tasmanian Law Reform Commissioner also believes that a Will made in contemplation of divorce should:

- have to be made in contemplation of the dissolution of a particular marriage, and not any marriage which may be made in the future; and
- be able to be made at any time, and not restricted to being made after divorce proceedings are instituted.

The Tasmanian Law Reform Commissioner has noted that if such an absolute rule in relation to divorce is not acceptable, then the proposed Victorian provision could be introduced.

The Queensland Public Trustee, in his submission to the Queensland Law Reform Commission, agreed with the current Queensland provision, but went further and suggested that the Will should not be revoked if made in contemplation of divorce. The New South Wales Law Society in its submission to the Queensland Law Reform Commission agreed.

The Queensland Law Reform Commission would be amenable to a proposal that a Will made in contemplation of divorce should not be revoked by the divorce (perhaps in similar terms to Clause 12(3) of the Victorian Draft Wills Act 1994 which relates to revocation by marriage).

PART 6

FOREIGN LAWS

WILLS TO WHICH FOREIGN LAWS APPLY

Clauses 17-19 of the Victorian Draft *Wills Act 1994* provide:

17. When do requirements for execution under foreign law apply?
 - (1) A will is to be taken to be properly executed if its execution conforms to the law in force in the place -
 - (a) where it was executed; or
 - (b) which was the testator's domicile or habitual residence, either at the time the will was executed, or at the testator's death; or
 - (c) of which the testator was a national, either at the date of execution of the will, or at the testator's death.
 - (2) The following wills are also to be taken to be properly executed:
 - (a) A will executed on board a vessel or aircraft, if the will has been executed in conformity with the law in force in the place with which the vessel or aircraft may be taken to have been most closely connected having regard to its registration and other relevant circumstances; or
 - (b) A will, so far as it disposes of immovable property, if it has been executed in conformity with the law in force in the place where the property is situated; or
 - (c) A will, so far as it revokes a will or a provision of a will which has been executed in accordance with this Act, or which is taken to have been properly executed by this Act, if the later will has been executed in conformity with any law by which the earlier will or provision would be taken to have been validly executed; or
 - (d) A will, so far as it exercises a power of appointment, if the will has been executed in conformity with the law governing the validity of the power.
 - (3) A will to which this section applies, so far as it exercises a power of appointment, is not to be taken to have been improperly executed because it has not been executed in accordance with the formalities required by the instrument creating the power.
18. What system of law applies to these wills?

- (1) If the law in force in a place is to be applied to a will, but there is more than one system of law in force in the place which relates to the formal validity of wills, the system to be applied is determined as follows:
 - (a) If there is a rule in force throughout the place which indicates which system applies to the will, that rule must be followed; or
 - (b) If there is no rule, the system must be that with which the testator was most closely connected either -
 - (i) at the time of his or her death, if the matter is to be determined by reference to circumstances prevailing at his or her death; or
 - (ii) in any other case, at the time of execution of the will.

19. Construction of the law applying to these wills

- (1) In determining whether a will has been executed in conformity with a particular law, regard must be had to the formal requirements of that law at the time of execution, but account may be taken of a later alteration of the law affecting wills executed at that time, if the alteration enables the will to be treated as properly executed.
- (2) If a law in force outside Victoria is applied to a will, a requirement of that law that special formalities must be observed by testators of a particular description or that the witnesses to the execution of a will must have certain qualifications, is to be taken to be a formal requirement only, despite any rule of that law to the contrary.

Comment

The Hague Convention of 1960 on the conflict of laws relating to the form of testamentary provisions has been adopted in most Australian jurisdictions by legislation based on the English *Wills Act 1963*, passed to comply with the Convention.

Understandably, all the jurisdictions used their own drafting styles when adopting the Convention; but some jurisdictions did not adopt every part of the English complying legislation, and others merged provisions. The attached Table shows very roughly, starting with the New South Wales legislation, how the differing sections relate to each other, although the correlations cannot be exact because they relate mainly only to headers and some legislation uses only three sections whilst others use eight.

Two questions arise:

1. Should we attempt to achieve word for word uniformity in this legislation, having regard to the fact that its object is to give effect to the Hague Convention?
2. Are there, to the knowledge of any participants, any reforms required for this legislation, which might have the effect of departing from the Hague Convention? If so, should we concern ourselves with such reforms now or leave them to a later project?

Subject to receipt of submissions to the contrary, the Queensland Law Reform Commission sees no need to attempt word for word uniformity for these provisions. If any reforms are identified which might depart from the Hague Convention, they should be considered in a later project.

ANNEXURE

FORMAL VALIDITY OF WILLS - CORRELATION OF SECTIONS										
Uniform Succession Laws										
Heading	NSW Wills, Probate and Administration Act 1898	QLD Succession Act 1981	SA Wills Act 1936	Tas Wills Act 1992	Vic Wills Act 1958	Vic 1994 Draft	WA Wills Act 1970	ACT Wills Act 1968	NT Wills Act 1990	
Interpretation	32A	5	25A	3	20A	18,19	23	15A,15B, 15E	15A	
Application	32B	22		28	20A		20	15H	15A	
General rule as to formal validity	32C	23	25B	29	20B	17	21	15C	13,15B	
Additional rules	32D	24	25C	30	20C	17	22	15D	15C	
Certain requirements to be treated as formal	32E	25		28	20A	19		15F		
Construction of Wills	32F	26		33	20D		24	15G	23	

PART 7

CONSTRUCTION OF WILLS - THE ANTI-LAPSE RULE

1. INTRODUCTION

This is the first memorandum concerning the construction of Wills and is devoted exclusively to the anti-lapse rule. This rule is found in all jurisdictions, but there are considerable differences of language between the various provisions, and major differences of substance. The reason why there are differences of language is that the anti-lapse provision of the English *Wills Act 1837* (s33) was defective and stimulated individual attempts by some States and Territories, but not all, at law reform.

Other issues of uniformity with respect to the construction of Wills will probably not raise serious difficulties from the uniformity point of view, at least so far as substance is concerned. Although they do derive from the *Wills Act 1837* they are clearly beneficial and are embedded in the law. They will be the subject of the next memorandum.

2. THE ANTI-LAPSE RULE

Clause 32 of the Victorian Draft *Wills Act 1994* provides:

32. Dispositions not to fail because issue have died before the testator
- (1) If a person makes a disposition to any of his or her issue, where the disposition is not a disposition to which section 30 applies, and where the interest in the property disposed is not determinable at or before the death of the issue, and the issue does not survive the testator for thirty days, the issue of that issue who survive the testator for thirty days take that disposition in the shares they would have taken of the residuary estate of the testator if the testator had died intestate leaving only issue surviving.
 - (2) Sub-section (1) applies so that issue who attain the age of 18 years or who marry take in the shares they would have taken if issue who neither attain the age of 18 years nor marry under that age had predeceased the testator.
 - (3) Sub-section (1) applies to dispositions to issue either as individuals or as members of a class.
 - (4) This section is subject to any contrary intention appearing in the will; but a general requirement or condition that issue survive the testator or attain a specified age is not a contrary intention for the purpose of this section.

Comment

Since at least 1837 it has been the law that a benefit left by Will does not lapse where the beneficiaries are issue of the testator who fail to survive the testator, but who leave issue who do survive the testator.

The English *Wills Act 1837* provided that in that case the Will should take effect as if the death of the issue had happened immediately after the death of the testator.

This provision was found to be defective because if the deceased issue, deemed to have survived the testator, had made a Will leaving his or her estate away from his or her issue, for instance to a spouse, the surviving issue would take nothing. This was seen as failing to give effect to the testator's presumed intention to benefit, for example, the testator's grandchildren, rather than son-in-law or daughter-in-law.

As a result, reforming legislation provides that, in effect, the surviving issue should take their deceased parent's share *per stirpes*, that is, in the same way as if the deceased parent had died intestate leaving only issue surviving.

One commentator has suggested that the anti-lapse rule has been uncritically accepted as beneficial; and that a testator might well disapprove of the life style of a grandchild whom the anti-lapse rule might benefit if the grandchild's parent failed to survive the testator.

There are substantial arguments both for retaining a general anti-lapse rule and for a provision that the benefit saved should be distributed *per stirpes* amongst the surviving issue of the intended beneficiary.

One argument is that the anti-lapse rule corrects testaments which have failed to express the reasonably predictable intention of testators in the unforeseen event of their children predeceasing them leaving issue surviving them. Parents ordinarily assume, even when making a Will, and particularly if they make a Will without legal advice, that their children will survive them. It is not improper for the law to consider what should be done if it appears that the testator has not contemplated the possibility that he or she is not survived by his or her children.

Secondly, an anti-lapse rule ensures that grandchildren take the share intended for their parent. That tends to cement family bonds. Judging by submissions received in connection with this project and other succession law projects, nothing causes greater disharmony within the family than a Will which, as far as

those disappointed by it are concerned, gives some family members an unfairly large share of the estate and others an unfairly small share.³⁴

It has always been an accepted principle of equity, when it has concerned itself with the disposition of benefits, that persons in the same position, that is relations in the same degree such as brothers and sisters, should be treated equally.

As an example, suppose that a testator makes a Will leaving the estate to "such of my children as survive me and if more than one in equal shares". The testator dies at a good age leaving one surviving child, A and four grandchildren, A1 (A's child), B1 (the child of B, a predeceased child of the testator's) and C1 and C2 (the children of C, another predeceased child of the testator's). If there were no anti-lapse rule, A would take the entire estate, which would presumably pass to A1 on A's death. B1, C1, and C2 would take nothing. Under the anti-lapse rule, however, B1 will take the share the testator intended for B and C1 and C2 will take between them the share the testator intended for C. The fairness of that outcome scarcely needs justification. Moreover, it is matched by the *per stirpes* rule which applies in the case of intestacy. If the policy of the law were that surviving issue must be preferred to the issue of predeceased issue there would be no *per stirpes* rule.

Section 31(5) of the *Wills Act 1968* (ACT)³⁵ provides as follows:³⁶

This section does not apply where an original beneficiary has not fulfilled a contingency required by the will as a condition of attaining the vested estate or interest, being a contingency other than surviving the testator or attaining a specified age.

Thus, if a testator leaves a benefit to "my daughter Carol provided she has completed her degree at the University of Sydney" and the daughter dies before completing the degree leaving issue who survive the testator, then the issue cannot take the benefit intended for the daughter in that event.

³⁴ It seems to be an infallible formula for the destruction of sibling relationships. In one such case where one sister benefited greatly but the other received virtually nothing of their mother's estate, the disappointed beneficiary's (oral) submission to the Queensland Law Reform Commission insisted that "the whole system should be changed". It would probably not be difficult to uncover a general opinion amongst children that parents should not be permitted to make a Will at all.

³⁵ Inserted in 1991.

³⁶ The Australian Capital Territory's legislation is the most extensively, and perhaps comprehensively, drafted.

Participants may care to consider whether this restriction is appropriate. There could be argument that the failure of a beneficiary to comply with a specific condition precedent should not prevent the beneficiary's issue from benefiting from the anti-lapse rule.

Turning to the anti-lapse sections which exist in Australian statutes, but without analysing each of them, a desirable and complete anti-lapse provision would appear to include the following:

1. a provision designating when a beneficial provision does not lapse - that is, the survival of issue of the (predeceased) issue whom the testator intended to benefit.
2. reference to any 30 day survivorship rule - to be considered in a later memorandum.
3. applicability to direct benefits to issue and to appointed benefits to issue.
4. applicability to gifts to beneficiaries whether as individuals or as members of a class.
5. provision for *per stirpes* rights for surviving issue, that is, the same rights as if the benefit had accrued to the estate of the predeceased issue and that issue had died intestate leaving only issue.
6. a provision enabling a contrary intention expressed by the Will to override the section. This would take the form of a specific gift over in the event of the predecease of the issue beneficiary. This is the mechanism which a testator should use if he or she disapproves sufficiently of the conduct of a grandchild or other issue who might benefit from the rule.
7. a provision³⁷ that a general requirement or condition that issue survive the testator or attain a specified age is not a contrary intention for the purpose of the section. The effect of this is that if the provision is for "such of my children as survive me and attain the age of 25", the surviving issue of a child who predeceased the testator aged 23 would still take the share intended for the deceased child.
8. a provision that the rule does not apply to a disposition to beneficiaries as joint tenants.

³⁷ See for instance s32(4) of the Victorian Draft Wills Act 1994.

One method of reducing the length of the draft would be to refer to the intestacy rules, or to use the phrase *per stirpes*, rather than to attempt to set them out.

The Western Australian provision is simplified because it is restricted to the predecease of children of the testator and gives the benefit intended for the child to the grandchildren in equal shares. However, the English *Wills Act 1837* was not restricted to children.

To conclude, a modern anti-lapse provision appears to constitute a substitutional intestacy benefit for surviving issue of a predeceased issue.

The Queensland Law Reform Commission agrees with the principles set out in 1 to 7 above but will consider any relevant submissions before deciding on the appropriateness of 8, above. Where the testator leaves property to "children" as joint tenants the Queensland Law Reform Commission doubts whether this should preclude the operation of the anti-lapse rule.

PART 8

CONSTRUCTION OF WILLS AND MISCELLANEOUS MATTERS

1. CONSTRUCTION OF WILLS

(a) Introduction

Most of the statutory provisions for the construction of Wills derive from the English *Wills Act 1837* and were received into Australian law without amendment. They have not been the subject of detailed analytical attention from law reformers although there has been some simplification of the language of some of the provisions. One uniformity question which can be asked is whether some of them can simply be omitted on the grounds that they are reformatory of pre-1837 law and perhaps there is no need now to continue to hold on to those reforms.

(b) What interest in property does a Will operate to dispose of?

Clause 20 of the Victorian Draft *Wills Act 1994* provides:

20. What interest in property does a will operate to dispose of?

If -

- (a) a testator has made a will disposing of property; and
- (b) after the making of the will and before his or her death, the testator disposes of an interest in that property -

the will operates to dispose of any remaining interest the testator has in that property.

Comment

This is a simplified version of the English *Wills Act 1837*, section 23. But on close inspection it may be observed that the last line of the Victorian provision refers to:

any remaining interest the testator has in that property.

But the *Wills Act 1837* says:

such Real or Personal estate as the testator shall have Power to dispose of by will at the Time of his Death.

Perhaps the Victorian wording might be considered not to extend to property to which the personal representative becomes entitled after the death of the testator, which the testator does have power to dispose of.³⁸

The Queensland law Reform Commission considers that the last line of the Victorian provision should read:

the will operates to dispose of any interest in the property which the testator has power to dispose of by will.

(c) When does a will take effect?

Clause 21 of the Victorian Draft *Wills Act 1994* provides:

21. When does a will take effect?
- (1) A will takes effect, with respect to the property disposed of by the will, as if it had been executed immediately before the death of the testator.
 - (2) Sub-section (1) does not apply if a contrary intention is shown in the will.

Comment

In some jurisdictions (for example, Queensland and Western Australia) this provision, with provisions similar to clauses 22, 27, 28 and 29 of the Victorian Draft *Wills Act 1994* are conflated (see Queensland section 28 and Western Australia section 26).

The substance of this provision is that a Will is to be construed, with respect to the property disposed by it, as if it had been executed immediately before the death of the testator.

This provision was originally enacted to ensure that in particular, a devise of land was not construed as at the date of the making of the Will. At one time a devise was regarded as a conveyance at law and so incapable of including property not owned by the testator at the date of the making of the conveyance.

³⁸ See *Wills Memo 1 - Preliminary Matter and Capacity - 1(d) What property may be disposed of by Will.*

The Queensland Law Reform Commission has no reason to believe this provision to be deficient.

(d) What is the effect of a failure of a disposition?

Clause 22 of the Victorian Draft *Wills Act 1994* provides:

22. What is the effect of a failure of a disposition?
- (1) If any disposition of property, other than the exercise of a power of appointment, is ineffective, the will takes effect as if the property were part of the residuary estate of the testator.
 - (2) Sub-section (1) does not apply if a contrary intention is shown in the will.

Comment

This provision ensures that property not effectively disposed of by Will passes to the residuary estate of the testator. It expresses a policy of avoiding partial intestacies. The exception from the provision of property the subject of an exercise of a power of appointment is not controversial, although it is not found in section 25 of the English *Wills Act 1837*. If the exercise of a power of appointment fails, the property the subject of the power passes in accordance with the provisions of any gift over contained in the instrument creating the power. The drafter of the *Wills Act 1837* might well have thought it unnecessary to mention this.

In the Issues Paper it was suggested that the provision needs redrafting. One commentator has expressed the view that the present draft is acceptable.

The Queensland Law Reform Commission believes this provision to be sound whether or not it refers to property the subject of a power of appointment.

(e) What does a general disposition of land include?

Clause 27 of the Victorian Draft *Wills Act 1994* provides:³⁹

27. What does a general disposition of land include?
- (1) A general disposition of land or of the land in a particular area includes leasehold land whether or not the testator owns freehold land.
 - (2) Sub-section (1) does not apply if a contrary intention appears in the will.

Comment

The Issues Paper sketched a background to this provision. It is the product of the fact that land might be either realty, for instance the fee simple, or personality (leaseholds), and of the fact that the wording of the Will might lead to a construction that a disposition of land could not include leaseholds.

Whether this provision needs to be retained in such a particular form might perhaps be debated although, so far as the Commission is aware, it has not been criticised. Could one say:

A disposition of property disposes of the entire interest of the testator in that property of which the testator can dispose by Will?

Is it desirable to consider this sort of change? It should not matter that the testator's interest in the property is not correctly described so long as the property is identifiable.

Subject to submissions received during this project, the Queensland Law Reform Commission is in favour of the proposed Victorian provision but would also be in favour of the more general provision set out above.

³⁹ (Please note that the Victorian clause 23 is dealt with in a separate memorandum and clauses 24 to 26 are dealt with later in this memorandum.)

(f) What does a general disposition of property include?

Clause 28 of the Victorian Draft *Wills Act 1994* provides:

28. What does a general disposition of property include?
- (1) A general disposition of all or the residue of the testator's property, or of all or the residue of his or her property of a particular description, includes all the property of the relevant description over which he or she has a general power of appointment exercisable by will and operates as an exercise of the power.
 - (2) Sub-section (1) does not apply if a contrary intention appears in the will.

Comment

The gist of this provision is that a general disposition of property exercises a power of appointment which the testator may exercise with respect to property within the description of the general disposition.

It matches the provision that where a power is exercised by Will it has only to comply with the execution formalities prescribed for Wills, without, in addition, having to comply with any additional forms required for the execution of the power by the instrument creating it.⁴⁰

The Queensland Law Reform Commission knows of no reason why this provision should not be retained.

⁴⁰ See Wills: Memo 2 - Executing a Will - 3. When may a Court Dispense with the Requirements for Execution of Wills?

(g) What is the effect of a devise of land without words of limitation?

Clause 29 of the Victorian Draft *Wills Act 1994* provides:

29. What is the effect of a devise of real property without words of limitation?
- (1) A disposition of real property to a person without words of limitation is to be construed as passing the whole estate or interest of the testator in that property to that person.
 - (2) Sub-section (1) does not apply if a contrary intention appears in the will.

Comment

Perhaps the draft provision suggested in (e) above, in relation to clause 27 of the Victorian Draft *Wills Act 1994* might cover this?

Another question is whether it is worth retaining a provision which is essentially about pre Torrens conveyancing.

Subject to consideration of (e) above (What does a general disposition of land include?), the Queensland Law Reform Commission would be in favour of the deletion of clause 29.

(h) How are dispositions to issue to operate?

Clause 30 of the Victorian Draft *Wills Act 1994* provides:

30. How are dispositions to issue to operate?
- (1) A disposition to a person's issue without limitation as to remoteness must be distributed to that person's issue in the same way as if that person had died intestate leaving only issue surviving.
 - (2) Sub-section (1) does not apply if a contrary intention appears in the will.

Comment

In some jurisdictions this provision and the next are found in the same section. The Issues Paper did not refer to this provision. The Victorian draft provision

updates the language of the *Wills Act 1837*. In the light of sub-clause (2) of the Victorian draft provision, could we perhaps omit, from sub-section (1) the words "without limitation as to remoteness?" Does not the substance of the provision by-pass any possible doubt on the grounds of remoteness?

Subject to the deletion of the words "without limitation as to remoteness?" the Queensland Law Reform Commission has no objection to the proposed Victorian provision.

(i) How are requirements to survive with issue construed?

Clause 31 of the Victorian Draft *Wills Act 1994* provides:

31. How are requirements to survive with issue construed?

- (1) If there is a disposition to a person in a will which is expressed to fail if there is either -
 - (a) a want or a failure of issue of that person either in his or her lifetime or at his or her death; or
 - (b) an indefinite failure of issue of that person -those words must be construed to mean a want or failure of issue in the person's lifetime or at the person's death and not an indefinite failure of his or her issue.
- (2) Sub-section (1) does not apply if a contrary intention appears in the will.

Comment

This provision updates the language of the *Wills Act 1837*. A commentator from Western Australia regards the provision as desirable.

The Queensland Law Reform Commission has no objection to the proposed Victorian provision.

(j) No devise to trustees etc to pass a chattel interest⁴¹

Comment

Section 30 of the *Wills Act 1837* provides in effect that a devise to a trustee passes the fee simple or other interest the testator had power to dispose of. It has already been covered in clauses 4 and 2 of the Victorian Draft *Wills Act 1994*.⁴² A separate provision for trustees is unnecessary and has been omitted from the Queensland *Succession Act 1981*, the Western Australian *Wills Act 1970* and the Victorian Draft *Wills Act 1994*. In the absence of strong argument to the contrary it is unlikely that any of these jurisdictions could be persuaded to restore it.

(k) Trustees under an unlimited devise to take the fee⁴³

Comment

This is another provision intended to ensure that a devise to a trustee passes the testator's entire interest in the subject matter of the devise even if there were no appropriate words of limitation. It is found in section 31 of the English *Wills Act 1837*. It is covered by the provisions mentioned in the last paragraph and there is no need to retain it for trustees. It has been omitted in Queensland and Western Australia and is not included in the Victorian draft. In the absence of strong argument to the contrary it is unlikely that any of these jurisdictions could be persuaded to restore it.

⁴¹ The Victorian Draft *Wills Act 1994* omits such a provision.

⁴² See *Wills: Memo 1. Preliminary Matters and Capacity - 1(d) What property may be disposed of by Will?* and clause 29 Victorian Draft *Wills Act 1994* set out in (g) above.

⁴³ The Victorian Draft *Wills Act 1994* omits such a provision.

(l) Devises of estates tail shall not lapse⁴⁴

Comment

Such a provision is found in section 32 of the English *Wills Act 1837*. However, estates tail are now so rare that the Australian Capital Territory, Queensland and Western Australia have omitted this provision and it is not included in the Victorian draft. While some legal research might illuminate the original need for this provision, it seems likely that if a devise were made "to X in fee tail" and X were to predecease the testator, the provision would be construed in the same way as if the devise said "to X for life with remainder to" the person who would be entitled under a fee tail. The predecease would not deprive the remainderman of the benefit. In the absence of strong argument to the contrary it is unlikely that any of these jurisdictions could be persuaded to restore this provision.

⁴⁴ The Victorian Draft *Wills Act 1994* omits such a provision.

2. MISCELLANEOUS

(a) Introduction

The following matters are discussed in Chapter 7 of the Issues Paper. They represent relatively recent amendments found in some Wills legislation and have been included in the Victorian Draft *Wills Act 1994*.

(b) What is the effect of a change in the testator's domicile?

Clause 24 of the Victorian Draft *Wills Act 1994* provides:

24. What is the effect of a change in the testator's domicile?

The construction of a will shall not be altered by reason of any change in the testator's domicile after the execution of the will.

Comment

This provision in one sense belongs in Memo 6⁴⁵ but is found detached from the provisions referred to in that Memo in most legislation. It is uniform and speaks for itself. Unless an argument is forwarded to question it there seems no reason why it should be not part of the uniform provisions.

(c) Income on contingent and future dispositions

Clause 25 of the Victorian Draft *Wills Act 1994* provides:

25. Income on contingent and future dispositions

A contingent, future or deferred disposition of property, whether specific or residuary, includes any intermediate income of the property which has not been disposed of by the will.

Comment

This provision was introduced by Queensland in its *Succession Act 1981*. There is a similar provision in the Australian Capital Territory (s.30a) and in the Western

⁴⁵ Wills: Memo 6 - Wills to which Foreign Laws apply.

Australian Property Law Act 1969 (section 118). It is arguable that it is a provision which belongs in property law rather than the law of Wills; but most of the problems associated with income on contingent and future dispositions arise from testamentary dispositions. Comment is invited but the old rules, which this provision replaces, were so confused and unpredictable that jurisdictions which have adopted the provision will be unlikely to repeal it without replacing it with a clearly better alternative.

(d) Beneficiaries must survive testator by 30 days

Clause 26 of the Victorian Draft *Wills Act 1994* provides:

26. Beneficiaries must survive testator by 30 days

- (1) If a disposition is made to a person who dies within 30 days after the death of the testator, the will is to take effect as if the person had died before the testator.
- (2) Sub-section (1) does not apply if a contrary intention appears in the will.
- (3) A general requirement or condition that a beneficiary survive the testator does not indicate a contrary intention for the purpose of this section.

Comment

There is a certain resistance to the general proposition that unless a beneficiary survives the testator for a period of time (30 days) the benefit left lapses. The provision extends the operation of the doctrine of lapse, a doctrine which has not been subject to criticism, by a month from the date of death of the testator. Wills made in England were often found to include a similar provision, driven by the desire to minimise the accumulation of death duties where the beneficiary survived the testator for a short period of time, usually in the context of a common calamity such as a car crash.

The rule also simplifies problems of proof where it is not clear whether a beneficiary survived the testator by a few minutes or even a few days.

Where the beneficiary is issue of the testator any surviving issue of that issue will take as long as they survive for a period of thirty days. It is not unreasonable to argue that this would probably represent the wishes of the testator.

Nevertheless, there does seem to be some anxiety about the length of the period stipulated. Thus a commentator from Western Australia has drawn attention to the statistics provided in the Issues Paper⁴⁶ which reveal that persons who die as a result of a car crash usually do not survive for more than nineteen days after the crash. Whether that statistic alone is justification for reducing the survival period from 30 days to perhaps 21 is open for argument. But in the administration of a deceased estate the period of one month after the death is not long, particularly having regard to the fact that if there is any possibility of a family provision claim the distribution of the estate cannot be made until after the period within which such a claim must be brought, usually six months after the death or grant.

In Queensland there is an additional provision contained in section 49(3) of the *Succession Act 1981* enabling the estate to be used, during the 30 day period, to maintain the spouse and issue of the deceased (who would be entitled to a share in the estate if they survived for the requisite period) during that 30 day period. That provision is seen as a desirable accessory to the rule. A similar provision is recommended by the Victorian Law Reform Committee as a proposed section 99B of the *Administration and Probate Act 1958*.⁴⁷

Could the rule have any beneficial effect from the point of view of capital gains tax?

Is it really necessary to argue about reducing the period to, say 21 days? Is there a general concern about freezing beneficial entitlements for a month?

Subject to submissions received during this project the Queensland Law Reform Commission is in favour of retaining the 30 day rule.

⁴⁶ See Issues Paper No 1 *The Law of Wills* (QLRC WP46) at 43.

⁴⁷ The Victorian Report at lli.

(e) **Construction of residuary dispositions**

Clause 33 of the Victorian Draft *Wills Act 1994* provides:

33. Construction of residuary dispositions
- (1) A disposition of the whole or of the residue of the estate of a testator which refers only to the real estate of the testator or only to the personal estate of the testator is to be construed to include both the real and personal estate of the testator.
 - (2) If any part of a disposition in fractional parts of the whole or of the residue of the estate of a testator fails, the part that fails passes to the part which does not fail, and, if there is more than one part which does not fail, to all those parts proportionately.
 - (3) This section does not apply if a contrary intention appears in the will.

Comment

Queensland included in its *Succession Act 1981* a number of provisions intended to reduce the incidence of partial intestacies caused by testators' mistakes. One such provision, section 29, has been taken up in the Victorian draft.

Subsection (1) is designed to remedy the problem which might be caused if a testator leaves a residuary provision which says something like: "I leave the residue of my real property to Z". Under traditional principles of construction the testator would die intestate as to all property not realty. Similarly, if the testator were to leave "the residue of my personal property" to Z, any realty undisposed of by Will would pass on intestacy. The statutory provision ensures that a partial intestacy does not occur in these fact situations. The rule is subject to a contrary intention so if the testator leaves "the residue of my personalty" to Z and "the residue of my estate to Y", Z would take the residue of the personalty and Y the residue of any realty.

It is to be noted that the wording of the Victorian draft differs slightly from that of the Queensland precedent in referring, in its opening words, to a disposition of the whole or of the residue. This is because, as mentioned in the Issues Paper, the courts in Queensland have construed the Queensland provision narrowly.

A commentator from Western Australia has pointed out that the suggestion in the Issues Paper that the provision may have been misunderstood in Western Australia is not correct. However, the commentator supports the provision.

The second part of the provision is intended to ensure that where the residue of an estate is divisible into fractional parts and one such part fails, the part that fails should not pass as on intestacy but should be added to the other fractional parts.

The Western Australian commentator also expresses the view that ambiguity in the phrase "fractional parts" might be reduced if it were replaced by the phrase "expressed to be in fractional parts". Incidentally a similar result can be achieved by the process of construction.⁴⁸

Although there could be some discussion as to the best clear drafting of these provisions, the Queensland Law Reform Commission considers their general purpose to be desirable.

(f) Dispositions to unincorporated associations of persons

Clause 34 of the Victorian 1994 Draft *Wills Act 1994* provides:

34. Dispositions to unincorporated associations of persons

(1) A disposition -

- (a) to an unincorporated association of persons, which is not a charity; or
- (b) to or upon trust for the aims, objects or purposes to an unincorporated association of persons, which is not a charity; or
- (c) to or upon trust for the present and future members of an unincorporated association of persons, which is not a charity -

has effect as a legacy or devise in augmentation of the general funds of the association.

(2) Property which is or which is to be taken to be a disposition in augmentation of the general funds of an unincorporated association must be -

- (a) paid into the general fund of the association; or
- (b) transferred to the association; or

⁴⁸ See *Re Green* [1928] SASR 473.

- (c) sold or otherwise disposed of on behalf of the association and the proceeds paid into the general fund of the association.
- (3) If -
- (a) the personal representative pays money to an association under a disposition, the receipt of the Treasurer or a like officer, if the officer is not so named, of the association is an absolute discharge for that payment; or
 - (b) the personal representative transfers property to an association under a disposition, the transfer of that property to a person or persons designated in writing by any two persons holding the offices of President, Chairman, Treasurer or Secretary or like officers, if those officers are not so named, is an absolute discharge to the personal representative for the transfer of that property.
- (4) Sub-section (3) does not apply if a contrary intention appears in the will.
- (5) It is not an objection to the validity of a disposition to an unincorporated association of persons that a list of persons who were members of the association at the time the testator died cannot be compiled, or that the members of the association have no power to divide assets of the association beneficially amongst themselves.

Comment

This provision varies section 63 of the Queensland *Succession Act 1981* which first introduced a provision of this kind. The object of the provision is to save legacies and devises to unincorporated associations of persons which would be invalid for certain reasons, in particular where they might be construed as a trust for non charitable persons, or where they might breach the rule against perpetuities. These grounds of invalidity could hardly affect gifts *inter vivos*. The provision is an attempt to bring the law about legacies and devises into line with gifts *inter vivos*.

There are differences of approach between the Queensland provision and the proposed Victorian provision.

1. The proposed Victorian provision expressly excludes dispositions to associations which are charities. This is because the grounds of invalidity mentioned above do not apply to charities.

2. The proposed Victorian provision (clause 34(5)) says that it is not an objection to the validity of the disposition "that the members of the association have no power to divide assets of the association beneficially amongst themselves". These words do not appear in the Queensland provision. The reason for including them is that some unincorporated associations of persons are not able, because of a specific provision in their constitutions, to divide assets amongst members in the event of the winding up of the association. Such a provision is to be expected where the association has been in receipt of fiscal benefits and the Australian Tax Office requires that surplus moneys, in the event of winding up, be transferred to a similar association, enjoying similar fiscal benefits. To the extent that the idea of a legacy or devise to an unincorporated association of persons is intended as a gift to the members personally, a provision in the constitution preventing the members from sharing the assets of the association might seem to be counter to a testator's wishes to benefit members as persons in making the disposition by Will. The same argument has already been addressed in the earlier words of the section which saves the disposition even although a list of the members cannot be compiled - ordinarily a requirement for the validity of a strict gift or trust for persons.

The experience of participants is sought, but it is unlikely that Queensland would be prepared to drop this provision which facilitates the undoubted wishes of testators and is designed solely to prevent arguments of a highly technical nature. The Victorian variations are acceptable to the Queensland Law Reform Commission.

(g) Can a person, by Will, delegate the power to dispose of property?

Clause 35 of the Victorian Draft *Wills Act 1994* provides:

35. Can a person, by will, delegate the power to dispose of property?

A power or a trust to dispose of property, created by will, is not void on the ground that it is a delegation of the testator's power to make a will, if the same power or trust would be valid if made by the testator, by instrument during his or her lifetime.

Comment

This provision originated in the Queensland *Succession Act 1981*, section 64. It is intended to prevent argument that a power of appointment contained in a Will might constitute an unacceptable delegation of the testator's power to make a Will. It is perhaps unfortunate that it is mainly in Australia that credence has been given to such an argument.⁴⁹

Although the original arguments that the creation of powers of appointment by Will constitute a delegation of the testator's Will-making power have been discredited, it seems to be desirable to include a provision of this kind in legislation to make sure that they are not advanced again. To omit it might be seen as a signal that there has been merit in these arguments.

The Queensland Law Reform Commission supports the retention of such a provision.

⁴⁹ More detail is to be found in Issue Paper No.1 *The Law of Wills* (QLRC WP46), at para 7.6.

(h) What is the effect of referring to a valuation in a Will?

Clause 36 of the Victorian Draft *Wills Act 1994* provides:

36. What is the effect of referring to a valuation in a will?

Except to the extent that a method of valuation is at the relevant time required under a law in Victoria or any other jurisdiction, or is provided for in the will, an express or implied requirement in a will that a valuation be made or accepted for any purpose is to be construed as if it were a reference to a valuation of the property as at the date of the testator's death made by a competent valuer.

Comment

This provision, as section 67 of the Queensland *Succession Act 1981* clearly shows, is designed to facilitate the making of a valuation of property disposed of by Will, particularly where a valuation for the purposes of probate or other duty was specifically referred to in the Will but where such a valuation could not take place for a probate or other duty reason.

The provision is the result of cases in which specific references to valuations not possible to be made have been found to cause difficulty in giving effect to the testator's intention.

The need for the provision might perhaps be debated.

The Queensland Law Reform Commission would welcome any information about the origins of and continued need for this provision.

(i) Can a Will be rectified?

Clause 37 of the Victorian Draft *Wills Act 1994* provides:

37. Can a will be rectified?

(1) The Court may make an order to rectify a will to carry out the intentions of the testator if the Court is satisfied that the will does not carry out the testator's intentions because -

(a) a clerical error was made; or

- (b) the will does not give effect to the testator's instructions.
- (2) A person who wishes to claim the benefit of sub-section (1) must apply to the Court within six months from the date of the grant of probate.
- (3) The Court may extend the period of time for making the application if the Court thinks this is necessary, even if the original period of time has expired, but not if the final distribution of the estate has been made.
- (4) If a personal representative makes a distribution to a beneficiary, the personal representative is not liable if -
- (a) the distribution has been made under section 99B of the *Administration and Probate Act 1958*; or
 - (b) the distribution has been made -
 - (i) at a time when the personal representative has not been aware of any application for rectification or any application under Part IV of the *Administration and Probate Act 1958* having been made; and
 - (ii) at least six months after the grant of probate.

Comment

This is a difficult matter because some jurisdictions have not legislated at all, Queensland has legislated in a narrow manner by section 31 of the *Succession Act 1981*. Other States, including Victoria, have legislated in a relatively substantial manner and the Australian Capital Territory in a manner which might be considered to be revolutionary.

The Queensland Law Reform Commission would welcome input on this matter from participants with experience of new legislation. Perhaps the Australian Capital Territory might indicate whether its provision has caused any flood of litigation, and any responses that the legislation has evoked.

The Queensland Law Reform Commission would probably support the Victorian proposal, subject to the consideration of submissions.

(j) Who may see a Will?

The Victorian Draft *Wills Act 1994* proposes a new section 66A for the *Administration and Probate Act 1958* (Victoria) which reads:

66A. Who may see a will?

Any person having the possession or control of a will (including a purported will) of a deceased person must -

- (a) produce it in Court if required to do so;
- (b) allow the following persons to inspect and, at their own expense, take copies of it, namely -
 - (i) any person named or referred to in it, whether as beneficiary or not;
 - (ii) the surviving spouse, any parent or guardian and any issue of the testator;
 - (iii) any person who would be entitled to a share of the estate of the testator if the testator had died intestate; and
 - (iv) any creditor or other person having any claim at law or in equity against the estate of the deceased.

Comment

The provision would provide certain persons with the right to see a Will.

Some personal representatives, or others having control of a testamentary instrument of the deceased's after death, see fit to take the view that the instrument is private and is none of the business of anyone other than beneficiaries named in it, and that, even in the case of a named beneficiary, the beneficiary is entitled only to see that part of the Will in which he or she is named.

Once a testamentary instrument is admitted to probate it becomes a public document; but until that happens there seems to be no easily accessible rules. There can be no doubt that if personal representatives were to gain the impression that they could suppress a Will, they could cause considerable difficulties for persons who have an interest in knowing whether or not provision is made for them by it. For instance, the contents of a Will may be of great significance for a prospective family provision claimant whose name may not appear at all in the Will.

A personal representative minded to commit fraud can, by denying access to the contents to a legitimate enquirer, facilitate the fraud of simply not paying out legacies or transferring property disposed of.

As to whether a right to see a Will should be given to creditors, it may be argued that the local newsagent, owed \$20 for newspapers delivered to the testator before death, should not be allowed to see the Will. This is undoubtedly so; but the personal representative's solution to that problem, if it were to arise, is to pay the bill. On the other hand, for creditors of large amounts, a Will may be a source of valuable information about the extent and identity of the testator's assets.

Apart from possible debate on this particular point, the Queensland Law Reform Commission is in favour of making it clear to personal representatives and others having control or custody of a Will after death, that the Will is not a private document the contents of which they may suppress or divulge capriciously, but a document which certain persons are entitled to see, including some persons not actually mentioned as beneficiaries. By stating rules in clear terms in legislation, personal representatives will be denied any possible argument justifying, in their opinion, the suppression of any portion of a Will.

A commentator from Western Australia observes that there is no procedure for ensuring that personal representatives or anyone else having control of a Will do in fact produce the Will. This is a proper criticism and perhaps it should be addressed. On the other hand it is arguable that if statute makes it clear that the Will must be produced few will seek to refuse to do what the statute says they must, or make some procedural objection. A written request from a person entitled to see the Will should suffice. If proceedings were successfully brought against a person for refusing to produce against the provision, costs would presumably be awarded against the defendant.

The Queensland Law Reform Commission is, in principle, in favour of a provision along the lines of the proposed Victorian provision.

PART 9

ADMISSION OF EXTRINSIC EVIDENCE

ADMISSION OF EXTRINSIC EVIDENCE IN THE CONSTRUCTION OF WILLS

(a) Proposed Victorian provision

Clause 23 of the Victorian Draft *Wills Act 1994* provides:

23. Is extrinsic evidence admissible to clarify a will?

(1) If -

- (a) any part of a will is meaningless; or
- (b) any of the language used in a will is ambiguous on the face of it; or
- (c) evidence, which is not, or to the extent that it is not, evidence of the testator's intention, shows that any of the language used in a will is ambiguous in the light of surrounding circumstances -

extrinsic evidence may be admitted to assist in the interpretation of that part of the will or that language in the will, as the case may be.

- (2) Extrinsic evidence which may be admitted under sub-section (1)(b) includes evidence of the testator's intention.

(b) General background

Issues Paper No 1 *The Law of Wills*⁵⁰ refers at paragraph 8.2 (which deals with the traditional law of wills concerning the admissibility of extrinsic evidence in the construction of wills) to the restrictive nature of the doctrine of equivocation and the arcane nature of equitable presumptions of testators' intentions.

(c) English legislation

A starting point for a uniform provision is the amendment in 1982 of the English *Wills Act 1837* by section 21 of the *Administration of Justice Act 1982*. That provision allows extrinsic evidence, including evidence of the testator's intention, to be admitted to assist in the interpretation of the will only:

- (a) in so far as any part of it [the will] is meaningless;
- (b) in so far as the language used in any part of it [the will] is ambiguous on the face of it;

⁵⁰ Queensland Law Reform Commission WP 46 July 1994, reprinted June 1995.

- (c) in so far as evidence, other than evidence of the testator's intention, shows that the language used in any part of it [the will] is ambiguous in the light of surrounding circumstances.

(d) Australian legislation

(i) Victoria

Section 22A of the Victorian *Wills Act 1958* was inserted in 1981 following a 1980 Report of the Victorian Chief Justice's Law Reform Committee.⁵¹ The substantive part of that section reads as follows:

- (1) In the construction of a will acts, facts and circumstances touching intention of the testator shall be considered and evidence of such acts, facts and circumstances shall be admitted accordingly but evidence of a statement by the testator declaring the intention to be effected or which had been effected by the will or any part thereof shall not be received in proof of the intention declared unless the statement would apart from this section be received in proof of the intention declared.

In its 1994 Report *Reforming the Law of Wills* the Victorian Law Reform Committee observed⁵² that this provision may not unfairly be described as a statutory rendition of the "armchair" rule which, briefly, allows evidence of the testator's verbal habits. The Committee recommended adoption of the English provision.⁵³

The Victorian Committee's proposal is based on the English provision referred to above.

(ii) Tasmania

Tasmania has a similar provision to the Victorian proposal and the English provision. Section 43 of the *Wills Act 1992* (Tas) reads:

In proceedings relating to the construction of a will, evidence, including evidence of the testator's dispositive intention, is admissible to the extent that the language used in the will renders the will, or any part of the will -

- (a) meaningless; or
- (b) ambiguous on the face of the will; or

⁵¹ Chief Justice's Law Reform Committee *Report on the Construction of Wills* May 1980. This Report preceded the enactment of the English provision, which is found in the *Administration and Justice Act 1982*.

⁵² Victorian Law Reform Committee *Reforming the Law of Wills* Report No 82 May 1994 at para s.23.10

⁵³ *Id* at 132 (Recommendation 43).

- (c) ambiguous in the light of the surrounding circumstances -

but evidence of a testator's dispositive intention is not admissible to establish any of the circumstances referred to in paragraph (c).

(iii) Australian Capital Territory

In 1991 the Australian Capital Territory inserted a provision dealing with the admissibility of extrinsic evidence into its *Wills Act 1968*.⁵⁴ The Australian Capital Territory provision is as follows:

In proceedings to construe a will, evidence, including evidence of the testator's dispositive intention, is admissible to the extent that the language used in the will renders the will, or any part of the will -

- (a) meaningless;
- (b) ambiguous or uncertain on the face of the will; or
- (c) ambiguous or uncertain in the light of the surrounding circumstances;

but evidence of a testator's dispositive intention is not admissible to establish any of the circumstances referred to in paragraph (c).

(e) Object of the legislation

The object of all the provisions is to extend the admissibility of evidence of the testator's actual intention, which is allowed where the wording of the will is found to be equivocal, to cases where the wording is found to be merely ambiguous.

"Equivocal" in its literal meaning means referring equally to two or more possible persons or pieces of property, and that is the way in which it has been applied by the Courts⁵⁵. It is the narrowness of the equivocation doctrine which is being relaxed.

(f) Ambiguity and uncertainty

The adaptations in the Australian Capital Territory extend the language of the English and Tasmanian provisions and of the Victorian proposal by its use of the word "uncertain" as well as "ambiguous". The extension of the provision to include uncertainty as well as ambiguity is not insignificant.

To be ambiguous it must be possible to say of words in the will that they may mean (a) or (b) or perhaps (c), to any of which effect could be given. Extrinsic evidence is admitted to resolve whether the testator intended (a) or (b) or (c).

⁵⁴ *Wills Act 1968* (ACT) s12B inserted by No 67 of 1991.

⁵⁵ See Hardingham I J, Neave M A & Ford H A J *Wills and Intestacy in Australia and New Zealand* (Law Book Co 2nd ed 1989) at para [1113].

Where the words of a will are uncertain, however, there can be no possibility of (a) or (b) or anything else. Moreover, the words cannot be rendered certain by the application of the "armchair" rule. That is, it could not be shown that "when the testator said that he meant so and so". But it does mean that evidence of the testator's intention is admissible although nothing in the will itself or in the circumstances in which it was made can throw light on that intention. If one allows that evidence to be admitted in all cases of meaninglessness and uncertainty, why should it not be admitted to resolve equivocation or ambiguity?

(g) "Meaningless"

Other questions also arise. What is the difference between "meaningless" in (a) of each of the Australian provisions⁵⁶ and "uncertain" in paragraph (b) of the Australian Capital Territory provision? Further, why do the words "on the face of the will" appear in paragraph (b) but not in paragraph (a) of the provisions?

(h) Preservation of admissibility of extrinsic evidence otherwise admissible by law

It is further suggested that words of the following import should also be included in the provision:

"Nothing in this section renders inadmissible extrinsic evidence which is otherwise admissible by law."

Words of similar import are found in section 22A of the Victorian *Wills Act 1958* quoted above.⁵⁷ This could foreclose possible argument that the provision is a comprehensive code. It cannot be, because it does not address the question of admissibility of extrinsic evidence of the testator's intention to fortify or rebut equitable presumptions of intention; nor does it, for that matter, refer to the case of equivocation.

The Trustee Companies Association of Australia has commented upon Issues Paper No 1 *The Law of Wills*⁵⁸ and says of this question that it recommends adoption of the Australian Capital Territory's provision, quoted above.⁵⁹

⁵⁶ *Wills Act 1968* (ACT) s12B; *Wills Act 1992* (Tas) s43.

⁵⁷ At 2.

⁵⁸ Queensland Law Reform Commission WP 46 July 1994, reprinted June 1995.

⁵⁹ At 2-3.

(i) Contrary intention

Many sections in the Victorian Draft *Wills Act 1994* include the provision:⁶⁰

Sub-section (x) does not apply if a contrary intention is shown in the will.

The question is whether these words should be extended, if a more general right of recourse to extrinsic evidence is allowed, to read:

Sub-section (x) does not apply if a contrary intention is shown in the will or by admissible extrinsic evidence.

⁶⁰ See ss21, 22, and 26-34.

Issues for Consideration

- (1) Should legislation provide for the admissibility of extrinsic evidence in the construction of wills?
- (2) Should evidence of the testator's actual intention be allowed where the will is -
 - (a) equivocal;
 - (b) ambiguous;
 - (c) meaningless; or
 - (d) uncertain,

or only where the will is equivocal or ambiguous in the light of surrounding circumstances?

- (3) Should the Australian Capital Territory version be preferred to the English and Tasmanian version and the Victorian proposal?
- (4) Should words be included, as suggested above, to ensure that nothing in the section renders inadmissible extrinsic evidence which is otherwise admissible by law?
- (5) Should the legislative provisions concerning the construction of wills be subject not only to a contrary intention shown in the will itself, but to a contrary intention shown in admissible extrinsic evidence?

Subject to submissions received, the Queensland Law Reform Commission would tend to support the Victorian proposal.