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UNIFORM SUCCESSION LAWS

for

AUSTRALIAN STATES AND TERRITORIES

FIRST ISSUES PAPER

THE LAW OF WILLS

MP 10

Queensland Law Reform Commission
July 1994

The short citation for this Issues Paper is Q.L.R.C. W.P. XYZ
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CHAPTER 1

INTRODUCTION

1.1 Reference

The Standing Committee of Attorneys-General of Australia has decided that steps should be taken towards rendering uniform the succession laws of the Australian States and Territories. The Attorney-General for Queensland has remitted a reference to the Queensland Law Reform Commission to co-ordinate the project. This Issues Paper, the first of three, is concerned with the law of wills; the second is concerned with Intestacy and Family Provision; and the third with Administration and Probate.

1.2 The need for uniformity

English succession law and jurisdiction were imported into Australia upon the colonisation of the States and existing English succession legislation was duly copied into the State statute books. The succession laws were therefore uniform during the nineteenth century. During the twentieth century the succession laws diverged when States began to enact their own legislation. Those divergences have become more marked as States have embarked on more purposive law reform, in some cases as the result of recommendations of law reform agencies.

1.3 Differences between the States

The consequence of these divergent activities is that there are no two States or Territories in Australia where the succession laws are the same. In many respects the divergences are matters of detail; but often enough they are of great significance.

For example a will made by a testator may be recognised for admission to probate in some States but not others. The main reason for this is that some States are more exacting than others with respect to compliance with formalities of execution.

The intestacy rules, that is the rules that govern the distribution of a deceased estate to the extent that a will fails to, differ substantially between the States.

Where neither the will nor the intestacy rules make adequate provision for the proper maintenance and support of members of the deceased's family, all States and Territories confer a power upon the Court to make provision for them. But the laws differ markedly as to who may apply for such provision.

Less significant differences between the succession laws of the States and Territories are numerous, particularly in those relatively neglected areas of law reform such as probate and administration. If one extends the scope of the enquiry to the Rules of Court the conclusion is justified that to practise successfully in succession law requires State by State expertise. Since most succession practice is or should be concerned with minimising the costs of administering deceased estates the majority of which are of no great value, it is ordinary people who suffer most from the inevitable increase in costs which must occur if a deceased estate has connection with more than one jurisdiction.

1.4 Implications of differing legislation

To offer a general example, if a person dies domiciled in one State or Territory but leaves land in another State or Territory two (or more) systems of succession law will apply - the law of the place in which the land is situated (the *lex situs*), as far as that land is concerned, and the law of the place of the deceased's domicile (the *lex domicilii*), as far as property other than that land is concerned. Thus a person might die domiciled in South Australia but leaving land in Victoria and Queensland. A will of the deceased's might be admissible to probate in South Australia but not in Victoria or Queensland because of a deficiency in execution, tolerated in South Australia but not in Victoria or Queensland. The deceased would therefore die intestate so far as the land in Victoria and Queensland are concerned, but testate in South Australia.

Again, if the parents of the deceased person wished to make a family provision application with respect to the estate, they would not be able to do so with respect to the land situated in Victoria, because parents may not apply for family provision in that State; but they would be able to do so in Queensland, where parents may apply; and although the Queensland Court would not be able to make an order affecting the land in Victoria, it would be able to take its value into account in considering whether and what order it should make affecting any land in Queensland.¹

¹ *Re Butchart* [1932] N.Z.L.R. 125.

1.5 Recent legislative and law reform activity in Australia

There has been considerable activity, both by legislatures and by law reform agencies in most Australian States within the last decade or so.

Australian Capital Territory:

Amendments to *Wills Act 1968* made in 1991.

New South Wales:

Amendments to *Wills, Probate and Administration Act 1898* made in 1989 and 1991.

Queensland:

The *Succession Act 1981-83* has brought all the succession law together into one enactment of a mere 72 sections, incorporating some reforms of a ground breaking nature. In July 1993 the Queensland Law Reform Commission issued its Report No.42 entitled *Intestacy Rules*.

South Australia:

The *Wills (Miscellaneous) Amendment Act 1994* has just been enacted.

Tasmania:

The *Wills Act 1992* embodies some of the reforms recommended by Report No. 35 of the Law Reform Commission of Tasmania entitled *Reform in the Law of Wills (1983)*. But the 1992 Act goes further in including some additional provisions.

Victoria:

The *Administration and Probate Act 1994* has introduced changes to the intestacy rules, and makes provision with respect to the effect of divorce on wills. In addition the Victorian Law Reform Committee has published its comprehensive Report on the *Law Relating to Wills, 1994*, with a proposed *Wills Act 1994*. References in this Paper to the Victorian Law Reform Committee's recommendations are references to this Report. This proposed Act is of considerable significance for law reform and uniformity initiatives.

The Victorian Report was published when this Issues Paper was in its final stages of preparation. There are close similarities between the Report and the Issues Paper including identity of language in some places. This is not because the Issues Paper has drawn on the Report, but because a member of the Queensland Law Reform Commission assisted the Victorian Law Reform Committee as a consultant in its work in preparing the Report.

Western Australia:

The *Wills Amendment Act 1987* introduced provisions for the admission to probate of wills informally executed, following the *Report on Wills: Substantial Compliance* (Project No.76 - Part I, November 1985). Other Reports of the Law Reform Commission of Western Australia, including the *Report on the Recognition of Interstate and Foreign Grants of Probate and Administration* (Project No.34 - Part I, November 1984) the *Report on the Effect of Marriage and Divorce on Wills* (Project No.76 Part II, December 1981), and the *Report on the Administration Act 1903* (Project No.88, August 1990) have been published but have not resulted in enacted legislation.

This list of activity is not exhaustive.

To date in Australia State succession laws have been reformed piecemeal. There has never been an attempt to reconsider all the succession laws in their entirety in any State or Territory. Piecemeal reforms have tended to be concentrated on relatively urgent or popular issues. The most neglected part of succession law is the part that relates to procedure.

1.6 Law reform and the concept of uniformity

To a certain extent law reform and the search for uniformity of laws amongst the States and Territories of Australia do not go hand in hand. A law reform agency may find it difficult to recommend, in the interests of uniformity, provisions existing in other States with which it cannot agree; and a State which has recently enacted legislation, which it believes represents the best in up-to-date law, cannot be expected very soon afterwards to introduce further amendments merely in the interests of uniformity. It may be asked, therefore, what really are the objects of initiatives to render Australia's succession laws uniform.

1.7 Word for word uniformity

Ideally uniform laws should be identical, word for word, in every State and Territory. Where the subject matter of the legislation is of vital commercial significance word for word uniformity becomes a matter of political priority and can be accomplished, as in the uniform corporations legislation. In the relatively less urgent context of the law relating to private family wealth, however, political commitment sufficient to overcome relatively minor differences in the wording of legislation may be difficult to secure. It is therefore fair to ask whether "uniformity" can be achieved with something less than complete verbal identity of all State and Territory statutes.

1.8 Uniformity of policy

One form of uniformity can be uniformity of policy, even if word for word uniformity cannot be realised. If the substance of the legislation, section by section, is the same, then a great deal will have been achieved. For instance, if it is made quite clear, in all the legislation, that a will admissible to probate in any Australian jurisdiction is admissible in all jurisdictions, anxiety would be alleviated in those cases, which can exist under the present law, where a will is admissible to probate in some jurisdictions but not others. If rules about the effect of marriage and divorce on a will are uniform as far as policy is concerned, that is, the rule is the same and any standard of proof, (for example, respecting contrary intention) is the same, that there may be differences of drafting of the various provisions will not matter. The point is that it may be particularly difficult, in a search for uniformity, to secure agreement by parliamentary counsel in State or Territory A to accept that the drafting habits of parliamentary counsel in State or Territory B is either preferable or acceptable, practices of counsel being varied and guarded with some pride of expertise.

1.9 What are the goals of uniformity?

In a uniform statute all the succession laws must be up-to-date. The law of wills, intestacy, family provision, administration and probate, and administration of assets must be brought together in one piece of legislation and must share, as far as possible, a common underlying principle. Unnecessary provisions and old language must be recognised and removed. A uniformity project inevitably entails law reform.

1.10 Australian wills legislation

Wills legislation in all Australian States and Territories has the English *Wills Act 1837* as its origin. That Act sought amongst other things to resolve difficulties of earlier law. Its language therefore looks back to the eighteenth century as much as forward to the nineteenth. So far as the law of devises was concerned the *Wills Act* (U.K.) necessarily reflects old system conveyancing, 1837 style. A major general objective of any re-writing of the statutory law of wills must therefore ensure that all references to the pre-1837 law, whether expressed or implied, and all language redolent of old system conveyancing, must be eliminated.

1.11 Issues of wills law in most urgent need of uniformity

Issues in most urgent need of uniformity are:

- . formalities required for the execution of wills
- . a power enabling the Court to dispense with compliance with those formalities
- . a clear explanation of what property can pass by operation of will
- . assimilating, consistently with their function, the law of powers of appointment exercised by will with the law of wills
- . the effect of marriage and divorce on wills
- . extent of proof of contrary intention negating a statutory provision
- . conflict of laws issues

- . statutory rules for the construction of wills, with particular attention to getting rid of old language
- . statutory anti-lapse (substitutional) provisions
- . Court's power to rectify wills
- . Court's power to make wills for minors
- . Court's power to make wills for mentally incapable persons.

These issues are expressed in general terms and are not intended to be exhaustive.

There follows a section by section precis of all sections to be found in the wills legislation of the Australian States and Territories. The order which has been followed reflects most of the time the New South Wales *Wills, Probate and Administration Act 1898*.

1.12 Abbreviations

In the following chapters the State legislation is referred to as follows:

A.C.T.	The Australian Capital Territory <i>Wills Act 1968</i>
N.S.W.	The New South Wales <i>Wills, Probate and Administration Act 1898</i>
N.T.	The Northern Territory <i>Wills Act 1990</i>
Qld.	The Queensland <i>Succession Act 1981</i>
S.A.	The South Australian <i>Wills Act 1936</i>
Tas.	The Tasmanian <i>Wills Act 1992</i>
Vic.	The Victorian <i>Wills Act 1958</i>
Vic. (1994)	The Victorian <i>Wills Act 1994</i> as proposed by the Final Report of the Victorian Law Reform Committee, May, 1994.
W.A.	The Western Australian <i>Wills Act 1970</i>

CHAPTER 2

EXTENT OF WILL

CAPACITY AND FORMALITIES

2.1 What property may be disposed of by will

(A.C.T. s.7; N.S.W. s.5; N.T. s.5; Qld. s.7; S.A. s.4; Tas. s.5;
Vic. s.5; Vic. (1994) s.4; W.A. s.6)

The object of this provision, which appears at the beginning of all wills legislation, is to explain what property may be disposed of by will. The wording found in existing legislation derives from the *English Wills Act 1837* and its language is in all cases archaic.

It is arguable that the provision on its face does not go far enough. It should be made clear that a will may dispose of property to which the testator was not entitled either at the time of the making of the will or at the date of death. There may, for instance, be litigation pending at the time of the testator's death which is not resolved for a considerable time after the death but which results in the payment of a sum of money, or the transfer of property, to the testator's personal representatives; or there may be a possible claim upon which the testator has not embarked but upon which the personal representatives do embark, which results in the payment of money or the transfer of property to the representatives; or money may become payable or property transferable to the personal representatives as a result of a gift or will of another person which in the terms of the gift or will is payable to the representatives. All late accruals of money or property to the estate are subject to the terms of any will of the testator. The will differs from any gift *inter vivos* because it can include property which did not belong to the testator when the will was made, or even at the time of the death.

A uniform provision should reject the arcane language of the *English Wills Act 1837* and clearly bring out these principles.

2.2 Legal capacity to make a will

(A.C.T. s.8; N.S.W. s.6; N.T. s.6; Qld. s.8; S.A. s.5; Tas. ss.6-8; Vic. s.6; Vic. (1994) s.6; W.A. s.7)

A person under the age of eighteen cannot make a will unless he or she is married. The statutes differ as to the capacity to make a will of a person who has been married but is no longer married. Some provisions allow a person under the age of 18 who has been married to make a will (e.g. A.C.T. and in South Australia by s.5 inserted by the *Wills (Miscellaneous) Amendment Act 1994*); Queensland allows a person who has been married to revoke a will, but not to make a new will. A uniform policy must be achieved.

Should the age of capacity be reduced to 16, the age at which a person may marry?

Should the Court be given power to allow a minor to make a will?

This is permitted in New South Wales (s.6A) and in South Australia (s.6 inserted by the *Wills (Miscellaneous) Amendment Act 1994*) and has been recommended by the Victorian Law Reform Committee's Report on the Law relating to Wills (1994). In Tasmania the Public Trustee may approve of a minor's making a will, subject to certain conditions (s.7) and the Supreme Court may (s.8) subject to very similar conditions. See also Vic. (1994), s.6, a lengthy provision, concerned with adults as well as minors.

One circumstance in which a minor might wish to seek the approval of the Court to make a will is if one or both of the minor's parents has abandoned the minor; and the minor wishes to make a will in favour of the parent, or some other person, who has cared gratuitously or beyond the call of duty for the minor.

Should the Court be given power to make a will for an adult who lacks testamentary capacity?

This question raises wide issues. It presupposes that neither the existing will, if any, nor the relevant intestacy rules, nor the relevant family provision legislation, can do justice in certain circumstances. Once again an example may be where the person who lacks testamentary capacity has been abandoned by his or her family and it is right that a will should be made in favour of a person who has no rights upon intestacy or under family provision legislation, most probably a person who has cared gratuitously or beyond the call of duty for the incapacitated person, whether a member of the family or not.

To allow Courts to make a will for a person who lacks testamentary capacity may be seen as inconsistent with the policy underlying family provision legislation, which is concerned not with the will which a competent testator might make, but with making adequate provision for the proper maintenance and support of the persons entitled to make application under the legislation. In Victoria, for instance, the parents of a deceased person are not permitted to apply for family provision. In that State to allow a parent of an incapacitated person to apply to the Court to have a will made in his or her favour might be seen as compromising the policy of family provision legislation. It may be justifiable to do this in the case where the person concerned cannot make a will at all because of incapacity. Nevertheless this question does abut upon the possibility of reconsidering the underlying policy of family provision legislation.

The Victorian provision (Vic. (1994), s.6) provides a generalised precedent.

2.3 Execution requirements

(A.C.T. ss.9,10; N.S.W. s.7; N.T. ss.8,9; Qld. ss.9,10; S.A. ss.8,9; Tas. ss.10,11; Vic. ss.7,8; Vic. (1994) s.6; W.A. s.8)

Although there is some divergence between States and Territories concerning execution requirements all States still require the testator to sign, or acknowledge a previously made signature, in the presence of at least two witnesses, and requires the witnesses to sign, as an act of attestation of their having seen the signing or acknowledgment, in the presence of the testator. This basic requirement has survived since the English *Wills Act 1837*. The advantages of a standardised rule for the execution of wills are obvious from the point of view of probate administration, as well as the protection which the testator is afforded.

Should this requirement be modified and if so to what extent?

One possible modification of the two witness rule might be to allow a testator to sign in the presence of one witness and later to sign again or acknowledge in the presence of another. This would solve the problem that can arise where only one witness at a time seems to be available.

Should a testator be permitted to sign or acknowledge the signature in the presence of two witnesses serially rather than concurrently?

2.4 The position of the testator's signature

One perennial difficulty of the rules for the execution of wills has been the requirement of the *Wills Act 1837* that the testator's signature be made "at the foot or end" of the will. This requirement necessitated the inclusion of an additional provision attempting to explain the requirement. Nevertheless the requirement has generated a volume of litigation out of proportion to its importance. Recent reforms to wills legislation have addressed this question and as a result the requirement has been omitted from the legislation in New South Wales and Western Australia and the Victorian Law Reform Committee has recommended that it be omitted (see Vic. (1994), s.6(1)). Tasmania has retained the requirement. This does not affect the principle that the signature of the testator must be made with the intention of executing the will (see Vic. (1994), s.6(2)).

Should the requirement that a testator sign "at the foot or end" of the will be dropped?

2.5 The execution of powers of appointment by will

(A.C.T. s.10; N.S.W. s.9; N.T. s.10; Qld. s.11; S.A. s.10; Tas. s.17; Vic. s.9; Vic. (1994) s.6(3),(4); W.A. s.9)

A power of appointment is a power given to a person, called a donee of a power, enabling that person to decide who is to take certain property described in the power. For instance a testator may leave property to a spouse or child for life and allow the spouse or child to decide who should take the property upon his or her death. Often such a power is exercisable by the will of the donee of the power of appointment. Usually the donor of the power does not include any requirement, in the instrument creating the power, concerning the way in which the donee of the power should exercise it; but the donor can insist that the power should be exercised with formalities differing from and perhaps exceeding those required for the execution of a will. A result of that could be that a power of appointment exercised in a properly executed will could be ineffective.

To ensure that the exercise of a power is not invalidated by such a formal requirement, since at least 1837 a provision has been included in wills legislation to the effect that where a testator exercises a power of appointment by will, the power must be exercised in accordance with the requirements for the execution of wills; and that if any additional requirement as to form is prescribed by the instrument creating the power, the person exercising the power need not comply with it.

The drafting of this provision differs to a certain extent between States and Territories but the principle has never been questioned.

Nevertheless other issues concerning the exercise by will of a power of appointment may exist. For instance, if a power of appointment happened to allow the donee to appoint amongst the "issue" of a particular person and the testator exercised the power in favour of "the issue of" that person, there are statutory rules for the construction of wills which determine who such issue are and in what proportions they should take (see paragraph 6.11 below). It is not necessarily the case that the law of construction of powers of appointment would give the same result. It is arguable that the law relating to powers of appointment exercisable by will should be the same as the law relating to legacies contained in wills, except to the extent that the instrument creating the power of appointment otherwise provides. This is an area which may require some research.

2.6 The execution of alterations

(A.C.T. s.12; N.S.W. s.18; N.T. s.24; Qld. s.12; S.A. s.24; Tas. s.16; Vic. s.19; Vic. (1994) s.15; W.A. s.10)

All States and Territories' legislation make provision with respect to the execution of alterations to wills. The provisions derive from the *Wills Act 1837* (U.K.). In some States there has been a very slight relaxation in the requirement respecting the position of the signature or initials of the testator and the witnesses relating to an alteration. Perhaps more surprising is the fact that the provision is found close to the section regarding execution of wills in some legislation, but many sections away from it in others. There is no reason why a common draft of this provision should not be achievable as the policy of the provisions is the same. Even if exact identity of wording cannot be achieved in the short term it should be possible to achieve uniformity in the positioning of this section. In this paper it is placed in the earlier position.

This section needs to be redrafted in clearer English.

2.7 Publication of will unnecessary

(A.C.T. s.13; N.S.W. s.11; N.T. no provision; Qld. s.13; S.A. no provision; Tas. s.12; Vic. s.11; Vic (1994) s.8; W.A. no provision)

There was a pre-1837 rule that in some cases a testator should "publish" his

or her will by declaring to the witnesses to the execution that the document was a will. That is no longer required and this section says so in some States (e.g. New South Wales) in the original language of the *Wills Act 1837* and in others (e.g. Queensland) more directly. A form of words recommended by the Victorian Law Reform Committee's **Draft Wills Bill 1994**, s.8, is in the following terms:

Must witnesses know the contents of what they are signing?

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.

In some States the provision has simply been omitted from the legislation, to make way for new material. A likely objective of the process of rendering this provision uniform will therefore be to remove it or to clarify it perhaps in the manner of the Victorian recommended draft.

2.8 Competence of witnesses

(A.C.T. ss.14,18,19; N.S.W. s.12; N.T. ss.16, 17(2), 18, 19; Qld. s.14; S.A. ss.16, 17, 18, 19; Tas. ss.13, 14, 15; Vic. ss.12, 14, 15; Vic. (1994) s.10; W.A. ss.11, 12)

Before 1837 certain categories of persons were considered to be incompetent to act as witnesses in civil proceedings, in particular persons whose testimony might be self serving. The difficulty about this, in probate proceedings, was that if such witnesses had witnessed the execution of a will the will could not be proved. Piecemeal changes in the law of wills, some of which are described in the next paragraph (Gifts to attesting witnesses to be void), became redundant as a result of changes to the law of evidence in England made in the mid nineteenth century. Nevertheless in some States (e.g. South Australia, Tasmania) antiquated provisions remain; but in others (e.g. Queensland) there is a more recent provision.

There is one particular respect in which a person cannot act as witness to a will and that is where the witness cannot see the signature of the testator because the witness is blind. Hence the provision in the Queensland *Succession Act 1981* (s.14) that any person competent to be a witness in civil proceedings in Court, other than a blind person, may act as a witness to a will.

It is possible that none of these provisions is really necessary in succession legislation and that who may be a witness, in probate proceedings, should be left entirely to the law of evidence.

2.9 Gifts to attesting witnesses to be void

(A.C.T. no provision; N.S.W. s.13; N.T. s.17; Qld. s.17; S.A. no provision; Tas. ss.44, 45, 46; Vic. s.13; Vic. (1994) s.11; W.A. s.13)

The rule that neither a witness to a will nor the spouse of a witness to a will can take any benefit under it has been increasingly questioned in recent times. The rule has been abolished by the *American Uniform Probate Code*, Section 2-505, in South Australia in 1972 and in the Australian Capital Territory in 1991. The Victorian Law Reform Committee's *Draft Wills Bill* 1994, s.11, abolishes the rule in direct language.

The original rule of evidence law was that a person, and that person's spouse, were disqualified from giving evidence in a cause in which either of them was interested. A consequence of this was that if a beneficiary, or the spouse of a beneficiary, witnessed a will that witness could not testify as to the execution of the will in probate proceedings. A result of that was that sometimes a will could not be admitted to probate at all and the testator's obvious intention was thwarted. By the *Wills Act 1750* the rule was changed, enabling the witness to give evidence in probate proceedings but disqualifying the witness and the witness's spouse from taking a benefit under the will. The former rules of evidence were reformed in the nineteenth century in particular by the *Evidence Act 1851* and the *Evidence Amendment Act 1853*; but the disqualification of beneficiary-witnesses remained embedded in the *Wills Act 1837* and a revised justification for it was posited namely that if a witness or a witness's spouse were allowed to take a benefit under a will an opportunity for undue influence would arise.

The difficulty with the rule is that it does not distinguish between the innocent and the guilty witness. The editors of the *American Uniform Probate Code*, commenting on abolishing the rule disqualifying witnesses from taking a benefit observe (s.2-505):

Of course the purpose of this change is not to foster the use of interested witnesses, and attorneys will continue to use disinterested witnesses. But the rare and innocent use of a member of the testator's family in a home-drawn will is not penalised.

This approach does not increase appreciably the opportunity for fraud or undue influence. A substantial devise by will to a person who is one of the witnesses to the execution of the will is itself a suspicious circumstance, and the devise might be challenged on the grounds of undue influence. The requirement of disinterested witnesses has not succeeded in preventing fraud and undue influence; and in most cases of undue influence, the influencer is careful not to sign as witness, but to procure disinterested witnesses.

It is understood that in the twenty years since the rule was abolished in South Australia there have been no problems.

Misgivings about the harshness of the rule have resulted in various attempts, on the part of legislatures and the judiciary, to soften its impact. Thus in some States the rule does not apply if there is a sufficiency of disinterested witnesses. In Victoria there is a provision which allows an interested witness to take an intestacy share or the benefit left by the will, whichever is the less (s.13(3)(c)); and a provision that a witness can approach the Court for relief (Part V of the *Wills Act 1958*). In some States solicitors who have witnessed the execution of a will have been relieved of the disqualification in respect of a provision in the will allowing them their reasonable costs for acting in the administration of the deceased estate.

In Tasmania there is a provision in sections 45 and 46 which allows a disqualified person to apply to the Court for an order that person be entitled under the will. There are requirements as to time limits and notice. The Court must be satisfied of the propriety of the person's conduct.

The accretion of exceptions to the disqualification rule has made the provision prolix, even counterproductive. Thus 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;² and have been easily satisfied, where they are permitted to consider it, of the propriety of the witness's conduct.³

The abolition of the disqualification will 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;⁴ or that there has been undue influence.

It is unlikely that, in the absence of adverse experience of the effect of the abolition of the rule, States which have abolished it could be persuaded to re-instate it; and consequently the probable direction of a search for uniformity would be to abolish the rule throughout Australia. The divergence of the present law, however, requires that comparisons be made and that, if it is desired to retain the rule, some inexpensive procedure should be allowed to ensure that the innocent witness is not disqualified.

² E.G. *Estate of Brian* [1974] 2 NSWLR 231; *Re Finmore* [1991] 1 WLR 793.

³ *Re Emanuel* [1981] VR 113.

⁴ See e.g. *Wintle v Nye* [1959] 1 WLR 284.

2.10 Wills of members of the armed forces

(A.C.T. s.16; N.S.W. no provision; N.T. ss.7, 7A; Qld. s.16; Tas. s.9; S.A. s.11; Vic. s.10; Vic. (1994) no provision; W.A. s.17)

Historically the law has exempted from both the requirements of form and the disqualification of minority "any soldier being in actual military service or any mariner or sailor being at sea". The legislatures of the Australian States have tended to enlarge the classes of persons given this "privilege".

The value of this privilege has been greatly doubted. Thus Jeremy Bentham is quoted as follows:⁵

As if it were a favour done to a man to enable an imposter to dispose of his property in his name! - as if the exception could be beneficial, unless the rule were mischievous.

The "privilege" enabling soldiers and sailors to make wills without any formality and at any age may have been justifiable in the eighteenth century when such persons had no recourse to legal advice. But it is arguable that, in the light of the policy of the Commonwealth Department of Defence to encourage all members of the armed forces to make wills, and to provide free legal advice to enable them to do so, it is no longer appropriate. To continue the "privilege" would be to allow the persons to whom it is granted to revoke without formality wills made with the assistance of proper legal advice. It would be to undermine the policy and practice of the Defence Department.

The privilege has been abolished in New South Wales and its abolition has been recommended by the Victorian Law Reform Committee.

In any case to render the privilege uniform might in itself give rise to difficulties because a comparison of the legislation granting the privilege reveals wide differences of approach. To reconcile them all would almost certainly entail broadening this doubtful privilege. It is therefore arguable that the best form of uniformity will be to abolish it altogether.

⁵ By Hardingham, Neave & Ford in *Wills and Intestacy in Australia and New Zealand* 2nd ed 1991 at 93.

CHAPTER 3

FORMALITIES - A DISPENSING POWER

3.1 Should the Court be empowered to dispense with the formal requirements for the execution, alteration and revocation of wills?

(A.C.T. s.11A; N.S.W. s.18A; N.T. s.12; Qld. s.9(a) and (b); S.A. s.12; Tas. s.26; Vic. no provision; Vic. (1994) s.9; W.A. no provision.)

For some time there has been opinion that there should be some mechanism to enable the Court to admit to probate a will which has not been executed in compliance with the requirements as to form of the Wills Act legislation.

In 1972 South Australia legislated to give the Court a dispensing power, allowing it to admit to probate a will not duly executed. The legislation has been amended by the *Wills (Miscellaneous) Amendment Act 1994*.

In 1975 the distinguished American Professor John Langbein wrote an article *Substantial Compliance with the Wills Act* in (1975) 88 Harvard Law Review at 489 in which it was argued that if there was substantial compliance with the requirements for execution of wills the Court should be able to admit the document to probate.

In 1981 the Queensland *Succession Act* by s.9 took up Professor Langbein's "substantial compliance" doctrine. A description of that legislation follows.

In 1983 the Tasmanian Law Reform Commission recommended in its Report No. 35 on the *Reform of the Law of Wills* adoption of the Queensland "substantial compliance" approach but in its *Wills Act, 1992* has followed the "dispensing power" model.

In 1987 Western Australia legislated, inserting Part X - Informal Wills into its *Wills Act 1970*. This legislation adopts the South Australian, "dispensing power" approach rather than the Queensland "substantial compliance" approach.

In 1989 New South Wales legislated, inserting s.18A into its *Wills, Probate and Administration Act 1898* also adopting the South Australian "dispensing power" approach in preference to the Queensland "substantial compliance" approach.

In 1990 the American *Uniform Probate Code* took the matter further with a comprehensive provision, described in paragraph 16 below.

In the context of a drive towards uniform succession laws for Australia the Australian case history and precedents must be scrutinised and evaluated and any experience gained from them carefully considered.

3.2 Case History

There has been a recent, authoritative survey of the cases in which the dispensing power has been exercised, in South Australia, the jurisdiction with the longest history of the jurisdiction, and in New South Wales, the jurisdiction with the shortest experience of it. The survey is by Powell J. of the New South Wales Supreme Court and is published in the January 1993 issue of the *Australian Law Journal*. It is entitled *Recent developments in New South Wales in the Law Relating to Wills*. The article lists, in an Appendix, 41 South Australian and New South Wales cases in which the dispensing power has been invoked. The article and the Appendix of cases give a clear picture of the sorts of cases in which the dispensing power can be expected to be exercised in favour of probate and those in which the power is unlikely to be exercised. Of 43 cases (namely 41 included in the Appendix and two other cases, *Re Kolodnicky* (1981) 27 S.A.S.R.374 and *Re Ryan* (1986) 40 S.A.S.R. 305), 21 were admitted to probate under the jurisdiction. These include those numbered 1, 4, 9, 12, 16, 18, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33, 36, 38 and 39 in the Appendix, *Kolodnicky* and *Ryan*. Twelve cases were refused admission to probate, all of which were concerned with draft wills, notes and instructions for wills, wills engrossed but not executed and lists of legacies or amendments. They are numbered 1, 5, 6, 15, 19, 20, 22, 26, 34, 37, 40 and 41 in the Appendix. "Mirror" wills have been admitted (numbers 3 and 11). Unsigned wills are not usually admitted but can be if the failure to sign is accidental, that is, the intention is present (numbers 36, 38 and 39).

Many of the refusals mentioned in Powell J.'s article occurred in the early stages of the exercise of the jurisdiction, when the boundaries of the jurisdiction were being tested. They indicate a policy which distinguishes between instruments which the testator intends to be a will and drafts, letters of instruction, even engrossments of wills which were not intended to be the will at the time they were under consideration by the testator. The advantage for any jurisdiction which adopts wording similar to that found in South Australia and New South Wales is that it will have a substantial body of persuasive precedent to enable the Courts to establish the jurisdiction, and the legal profession will have guidance in predicting likely outcomes in individual fact situations.

Further literature on the subject has been generated in the United States partly as a result of the South Australian initiative. In particular there is Professor Langbein's article *Excusing Harmless Errors in the Execution of Wills: a Report on Australia's Tranquil Revolution in Probate Law*.⁶

3.3 The existing legislation in Australia

There is existing legislation in the Australian Capital Territory, New South Wales, the Northern Territory, Queensland and South Australia. Legislation has been recommended in Tasmania by the Tasmanian Law Reform Commission of Tasmania and in Victoria by the Victorian Law Reform Committee. The American *Uniform Probate Code* also has a provision.

3.4 Australian Capital Territory

Section 11A of the Australian Capital Territory *Wills Act 1968*, inserted in 1991, is in terms not dissimilar to that of the New South Wales provision (see paragraph 3.5 below). It sets the civil standard of proof, namely that the Court must be satisfied of the testator's intention.

3.5 New South Wales

Section 18A of the New South Wales *Wills, Probate and Administration Act 1898* reads as follows:

18A. (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 the will of a deceased person, 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, an amendment of 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 other 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.

⁶ (1987) 87 Colum LR 87.

3.6 Comment

The jurisdiction in New South Wales is in its early days. Its effectiveness has been indicated by the article of Powell J's mentioned in paragraph 3.2 above.

3.7 Northern Territory

Section 12 of the Northern Territory *Wills Act 1990* is in the same terms as the former South Australian legislation. It requires proof that there can be "no reasonable doubt" (see paragraph 3.12 below).

3.8 Queensland

Section 9(a) and (b) of the Queensland *Succession Act 1981* reads as follows:

(a) the Court may admit to probate a testamentary instrument executed in substantial compliance with the formalities prescribed in this section if the Court is satisfied that the instrument expresses the testamentary intention of the testator; and

(b) the Court may admit extrinsic evidence including evidence of statements made at any time by the testator as to the manner of execution of a testamentary instrument.

3.9 Comment

Although the standard of proof required is that the Court be satisfied of the testator's intention, the requirement that there be "substantial compliance" has proved so great a stumbling block that the jurisdiction has had poor success, and cases which would almost certainly have been found to come within the dispensing power in South Australia or New South Wales have failed in Queensland. In the following cases substantial compliance was not found.

Re Grosert [1985] 1 Qd.R.513	There were signatures of two witnesses on the will, but one self-interested witness swore that only she had been present when the will was executed and the other witness could not be traced.
Re Johnson [1985] 1 Qd.R.516	One witness subscribed a folded document, the testator's signature not being visible. A second witness attested at a different time, the testator's signature then being visible.
Re Henderson (Unrep) Q.S.C., Case No. 231, 1985	Only one witness attested, a Justice of the Peace, who informed the testator that his attestation would suffice.
Will of Eagles [1990] 2 Qd.R.501	A codicil was witnessed by two witnesses, but there was evidence that they were not present at the same time and there was no evidence as to who attested first or of the interval between the first and second attestations.

On the other hand substantial compliance has been found on a few occasions.

Re Mclroy (Unrep) Q.S.C., Case No.E375, 1984	One witness testified that the other witness was not present when the will was executed. The other witness testified that both witnesses were present.
Re Matthews [1989] 1 Qd.R.300	The first witness attested and signed in the presence of the testator; then, at the testator's request, took the will to another person to witness, which was done in the absence of the testator.
Re Gaffney (Unrep) Q.S.C., Case No.1653, 1987	The will was executed but not at the foot or end.
Re Cashin [1992] 2 Qd.R.63	The will was executed in the presence of one witness; the next day the second witness signed in the presence of the testator.

3.10 Comment

The difficulty with *Mclroy* and *Gaffney* is that they both could have been decided in favour of probate under existing law, without the need to plead the "substantial compliance" doctrine. In *Mclroy* the judge could have found for the will by believing the witness who maintained that both witnesses were present at the same time. In *Gaffney* there are precedents which show that the Courts can admit to probate wills which have been signed by the testator in an unconventional place. *Re Cashin* probably indicates the limited use to which the provision can be put.

The profession in Queensland has found the jurisdiction difficult to predict and it is rarely used. As the cases above indicate, far more is required than is required either in New South Wales or South Australia. In a search for uniformity it would be difficult to persuade any State or Territory to replace existing legislation, which appears to be working as intended, with the Queensland precedent, or the similar provision recommended by the Law Reform Commission of Tasmania, which is not working well.

3.11 South Australia - s.12(2) - Validity of will

When first introduced in 1972 this section read:

*12.(1) ...

(2) A document purporting to embody the testamentary intentions of a deceased person will, notwithstanding that it has not been executed with the formalities required by this Act, be taken to be a will of the deceased person if the Supreme Court, upon application for admission of the document to probate as the last will of the deceased, is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his or her will.

This provision has been amended by the *Wills (Miscellaneous) Amendment Act 1994* as follows:

*(2) Subject to this Act, if the Court is satisfied that a document that has not been executed with the formalities required by this Act expresses testamentary intentions of a deceased person, the document will be admitted to probate as a will of the deceased person.

(3) If the Court is satisfied that a document that has not been executed with the formalities required by this Act expresses an intention by a deceased person to revoke a document that might otherwise have been admitted to probate as a will of the deceased person, that document is not to be admitted to probate as a will of the deceased person..

(4) This section applies to a document whether it came into existence within or outside the State.

(5) Rules of Court may authorise the Registrar to exercise the powers of the Court.

3.12 Comment

What is significant about the amended law is that it lowers the standard of proof required in cases of this kind. Under the original legislation the Court had to be satisfied that there could be "no reasonable doubt" as to the intention of the testator. By the proposed amendment, the Court has only to be "satisfied" of the testator's intention. It is apprehended that this means that the more flexible test of satisfaction clarified by the High Court in *Briginshaw v. Briginshaw*⁷ is applicable. The express reference to the power to authorise the Registrar to exercise the powers of the Court is of significance. Under the former law the Court had to be satisfied that there could be no reasonable doubt of the testator's intention. It is understood that because of the former proof requirement it was felt that the jurisdiction should be exercised only by the judiciary; and the Registrar was not permitted to exercise the jurisdiction even in uncontested cases.

3.13 Tasmania

The Tasmanian *Wills Act 1992*, s.26 is as follows:

26. (1) A document purporting to embody the testamentary intentions of a deceased person is taken, notwithstanding that it has not been executed in accordance with Division 3, to be a will of the deceased person, an amendment of such a will or the revocation of such a will if the Court, on application for a grant of probate of the last will of the deceased person, is satisfied that there can be no reasonable doubt that person intended the document to constitute the will of that person, an amendment of such a will or the revocation of such a will.

(2) In considering a document for the purposes of subsection (1) the Court may have regard, in addition to the document, to any other evidence relating to the manner of execution or the testamentary intentions of the deceased person, including evidence, whether admissible before the commencement of this Act or otherwise, of statements made by the deceased person.

3.14 Comment

This provision departs from the recommendation of the Tasmanian Law Reform Commission's *Report on the Law of Wills* (Report No. 35, 1983) in that it has not adopted the Queensland "substantial compliance" model, but

⁷ (1938) 60 CLR 336.

the South Australian "dispensing power" model. Nevertheless it does require a high standard of proof by the inclusion of the words "that there can be no reasonable doubt".

3.15 Victoria

A proposed section 9 for the Victorian *Wills Act 1994*, recommended by the Victorian Law Reform Committee reads as follows:

9. When may the Court dispense with requirements for execution or revocation?

- (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.

3.16 American Uniform Probate Code

Section 2-503 of the *American Uniform Probate Code* reads as follows:

Writings Intended as wills, Etc

Although a document or writing added upon a document was not executed in compliance with Section 2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent's will, (ii) partial or complete revocation of the will, (iii) an addition or alteration of the will, or (iv) a partial or complete revival of his [or her] formerly revoked portion of the will.

The commentary to this provision refers to the existence of similar legislation in Manitoba and Israel. The Uniform Laws Conference of Canada approved a comparable measure for the Canadian *Uniform Wills Act* in 1987. The Commentary also pays considerable attention to the South Australian legislation and the experience derived under it.

It will be vital for any uniform succession law to ensure that the Court's power to admit to probate defectively executed wills, alterations and revocations is, at least as far as policy is concerned, the same in all States. The standard of proof should be the same. It would be contrary to uniformity if a defectively executed will could be admitted to probate under a dispensing power in some States but not in others.

CHAPTER 4

REVOCATION BY ACT OF TESTATOR

EFFECT OF MARRIAGE AND DIVORCE ON WILL

4.1 No will to be revoked by presumption

(A.C.T. no provision; N.S.W. s.16; N.T.s.21; Qld. s.19; S.A. s.21; Tas. s.22; Vic. s.17; Vic. (1994) no provision; W.A. no provision)

This provision is that no will shall be revoked by any presumption of an intention on the ground of an alteration of circumstances.

It should be omitted and included in a general provision about when a will is revoked, such as the provision which follows (paragraph 4.2 below).

4.2 Manner of revocation

(A.C.T. s.21; N.S.W. s.17; N.T. s.22; Qld. s.20; S.A. s.22; Tas. s.23; Vic. s.18; Vic. (1994) s.13; W.A. s.15)

This section is concerned with the manner in which a will is revoked, viz. by the testator by a later will, by a revoking instrument, and by destruction of the will with the intention of revoking it, and by operation of law, viz. by marriage and divorce, or order of the Court under a dispensing or other power. It begins with words like "A will or part of a will is revoked only by..." and is therefore intended to be comprehensive as to revocation.

It is arguable that perhaps there should be separate provisions dealing with revocation by act of the testator, revocation by marriage, revocation by divorce and revocation by Court order. It is likely that this provision was originally intended to refer only to revocation by act of the testator and that the added references to sections providing for revocation by other means are drafting short cuts. The Tasmanian provision fails to include a cross reference to the Court's dispensing power (s.26).

4.3 Revival of revoked wills

(A.C.T. s.22; N.S.W. s.19; N.T. s.25; Qld. s.21; S.A. s.25; Tas. s.27;
Vic.(1994) s.16; W.A. s.16)

These provisions are concerned with the revival of a will that has been revoked. They are affected by provisions that in some States allow the Court to dispense with requirements for the execution of wills, including revivals. The provisions tend to be in the language of the English *Wills Act* of 1837 so some reconsideration of the drafting would be appropriate.

4.4 Effect of marriage on will

(A.C.T. s.20; N.S.W. s.15; N.T. s.20; Qld. s.16; S.A. s.20; Tas. ss.18,19;
Vic. s.16; Vic. (1994) s.12; W.A. s.14)

The *Wills Act* 1837 provided that a will is revoked by the marriage of the testator, except to the extent that it exercised a power of appointment irrelevant to the married status of the testator. Subsequent legislation allowed the will to remain on foot, despite the marriage, if the testator indicated an intention contrary to the rule. The wording commonly adopted was that the will should be "expressed to be made in contemplation of marriage". This wording placed a high degree of proof upon the issue of intention and generated litigation.⁸ Later revisions to the legislation have concentrated on the question of the testator's contrary intention and the degree of proof required. Thus in the Report of the Law Reform Commission of Western Australia entitled *Effect of Marriage or Divorce on Wills* (Project No.76, Part II) dated 1991 the recommendations of the Commission respecting the effect of marriage on a will are principally concerned with the proof of the testator's contrary intention.

The Victorian legislation is similarly preoccupied with issues of proof of contrary intention; but it has made a considerable contribution to the solution of the problem by a provision that 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. So far as the cases brought to Court were an attempt by a spouse to take a benefit left by a will made before marriage, this provision has the effect of short circuiting the problem of proof of contrary intention.

⁸ See e.g. *Re Taylor* [1949] VLR 201; *Re Chase* [1951] VLR 477.

The more general issue raised is that of the extent to which testators should be allowed to indicate an intention contrary to a statutory rule. It is arguable that marriage is so important a step that a person getting married should be encouraged to make a new will after the event, rather than to try to make a will before the event attempting to take into account the consequences of a particular marriage or of marriage generally. On the other hand it is arguable that the testator's intention, as is his or her presumed intention, should be an underlying concern of all wills legislation. A major factor to be considered is the costs factor of showing a contrary intention which is not expressed in the clearest terms.

There is a more general observation which places these issues in context. The average age of marriage in Australia is in the early to mid twenties. The average age of death for men is in the early seventies and for women in the later seventies. A will made before marriage is therefore unlikely to be relevant to a testator dying some fifty years later. That is to say, legislation about the effect of a contrary intention on the rule that marriage revokes the will is based on a statistically negligible assumption of early death. A statutory provision which allows an intention over fifty years old to be litigated is unrealistic. It is arguable that it would be better to lay down an absolute rule, viz. that marriage revokes a will. This argument can be reinforced by the observation that a surviving spouse today fares far better, under intestacy rules, than he or she did in 1837; and that family provision laws also ensure that adequate provision is made for the proper maintenance and support of the surviving spouse. An absolute rule would be far easier as a basis for legal advice respecting the making of a will by persons intending to marry.

However the Victorian solution which saves a will to the extent that it confers a benefit on a person to whom the testator is married at the time of death seems to be a useful compromise, although it requires consideration both as to principle and drafting.

These issues and the divergences of approach between the various statutes on this matter require consideration.

4.5 Effect of divorce on will

(A.C.T. s.20A; N.S.W. s.15A; N.T. no provision; Qld. s.18; Tas. s.20; S.A. no provision; Vic. no provision; Vic. (1994) s.14; W.A. no provision)

Divorce, like marriage, has a considerable impact on the economic situation of both parties. One object of a divorce is to terminate every aspect of the relationship which existed between the parties and to ensure that they are

afterwards, so far as possible, economically independent of each other. If either party to a marriage has made a will benefiting the other it is likely that party would wish to make substantial changes to that will in the event of divorce. So far as the will makes provision for the spouse it is likely that in the event of divorce the testator would wish that part of the will to be revoked. But so far as the will makes provision for others for whom the testator has decided, for whatever reason, to make provision it is probable that the testator would wish those provisions to continue.

Some States have already legislated. In the Australian Capital Territory, New South Wales and Queensland there is a provision the general tenor of which is that divorce revokes the 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 wills of the spouses altogether, thus obliging them to make new wills.

The Law Reform Commission of Western Australia in a Report on the *Effect of Marriage or Divorce on Wills* (Project No.76 Part II) in 1991 recommended that divorce have the effect of partially revoking any wills of the spouses. The South Australian Law Reform Committee issued a Report entitled *The Effect of Divorce upon Wills* in 1977 also recommending that divorce have the effect of partially revoking any wills of the spouses. A provision was included in a *Wills (Miscellaneous) Amendment Bill* in 1993 but did not find its way into ensuing legislation (*Wills (Miscellaneous) Amendment Act 1994*). The Victorian Law Reform Committee has recommended that divorce have the effect of partially revoking any wills of the spouses - see proposed **Wills Act 1994**, s.14.

As in the case of the effect of marriage on wills, all these provisions attempt to define the extent to which a testator may displace the statutory provision by an expression of contrary intention. It is worth considering whether this statutory rule should be capable of being displaced by a contrary intention contained in the will. After all the divorced parties may live for many years after the divorce and the intention of a 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.

These issues, the absence of legislation in some States and the Northern Territory, and differences between States that do have legislation, await examination.

CHAPTER 5

FORMAL VALIDITY OF WILLS

(A.C.T. Part IIA, ss.15A-15H; N.S.W. Part IA, ss. 32A-32F; N.T. ss.13-15C; Qld. ss.22-25; S.A. ss.25a-25c; Vic. Part 1A, ss.20A-20D; Vic. (1994) ss.17-19; Tas. ss.28-30; W.A. Part VII, ss.20-23)

5.1 Introduction

These provisions are about the recognition of wills made in other jurisdictions. They are concerned with the requirements for execution of such wills, establishing what system of law applies to such wills, and the construction of the law applying to these wills. They are intended to conform with the *Hague Convention* of 1960 on the conflict of laws relating to the form of testamentary disposition. The problem is that in adopting the Convention drafters have improved upon the original draft which appeared in the English *Wills Act 1963*. Queensland adopted the English precedent almost verbatim; but other jurisdictions have used their own drafting styles. The rules may come to be of greater significance within Australia if Australian succession laws diverge substantially as a result of law reform. One main objective of having uniform succession laws is to prevent conflicts problems arising within Australia.

Nevertheless these sections do date back to a Convention of 1960 and there does not appear to have been any substantial reconsideration of their substance in the mean time. There may therefore be some case for their reconsideration; but there is no reason why they should not be rendered uniform, the present differences between them being largely matters of drafting preference.

Reconsideration of this part of succession law requires a conflict of laws approach as well as an Australian constitutional law approach .

CHAPTER 6

GENERAL RULES FOR THE CONSTRUCTION OF WILLS

6.1 When a devise is not to be rendered inoperative - Effect of subsequent conveyance on will

(A.C.T. s.23; N.S.W. s.20; N.T. s.26; Qld. s.27; S.A., s.26; Tas. s.32; Vic. s.21; Vic. (1994) s.20; W.A. s. 25)

The gist of this provision is that a devise of land is not adeemed, that is revoked, altogether by a conveyance made subsequent to the will by which some part or interest in the land devised is conveyed away from the testator. Before 1837 any change in the testator's interest in relation to realty could cause the revocation of any devise of that land contained in the testator's will. The drafting of the provision raises the issue of the extent to which the drafting of a modern law of wills should be constrained by pre 1837 law.

It is likely that this provision can be repealed altogether if a comprehensive draft can be achieved concerning what property may be disposed of by will (see paragraph 2.1 above).

6.2 Will to speak from death of testator

(A.C.T. s.24; N.S.W. s.21; N.T. s.27; Qld. s.28(a); S.A. s.27; Tas. s.24; Vic. s.22; Vic. (1994) s.21; Tas. s.33; W.A. s.26(a))

This provision is the first of four or five sections appertaining to the construction of wills. In Queensland and Western Australia these sections have been conflated into one, abridged and put into relatively up-to-date language. This provision establishes the rule that a will is to be construed, with reference to the property comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator. One of its objects is to ensure that property acquired by a person after he or she has made a will can be included in provisions of an existing will. It therefore abuts upon the question of what property may be disposed of by will - see paragraphs 6.1 and 2.1 above. To this extent the provision requires careful consideration.

6.3 What a residuary devise shall include

(A.C.T. s.25; N.S.W. s.22; N.T. s.28; Qld. s.28(b); S.A. s.28; Tas. s.25; Vic. s.23; Vic. (1994) s.22; Tas. s.34; W.A. s.26(b))

This is the second of four sections, conflated into one in Queensland and Western Australia, about the construction of wills. The gist of this provision is that property the subject of a disposition in a will that fails to take effect is to be included in any residuary disposition contained in the will.

It is an important rule which requires up-to-date drafting.

6.4 Devise of land includes leasehold land

(A.C.T. s.26(1); N.S.W. s.23(1); N.T. s.29; Qld. s.28(c) S.A. s.29; Tas. s.26; Vic. s.24; Vic. (1994) s.27; Tas. s.35; W.A. s.26(c))

It seems that before 1837 a general disposition of land by will might include only freehold land; and that if the testator owned leasehold land it would not pass under the general devise. A likely reason for this was that in a general devise the testator would use the correct words of limitation for the conveyance of the freehold so inferentially excluding any leasehold. The *Wills Act 1837* abolished the requirement that the correct words of limitation be used in the devise of land, (see paragraph 6.6 below) and this provision, viz. that a general disposition of land or of land in a particular area includes leasehold land whether or not the testator owns freehold land, is consequential.

This relict of pre-1837 law has left at least one unsolved problem. Suppose a testator's will provides: "I devise all my realty in Queensland to X". Would this provision include leaseholds in Queensland? Since the language of the will is traditionally associated with realty - both by the use of the word "devise" and of the word "realty", it is arguable that leaseholds could not pass. This section does not solve this problem. For a possible approach to the solution of the problem consideration of s.29(a) of the *Queensland Succession Act 1981* may assist (see paragraph 7.4 below).

6.5 General devise or bequest can execute a general power of appointment

(A.C.T. s.26(2),(3); N.S.W. s.23(2),(3); N.T. s.30; Qld. s.28(d); S.A. s.30;
Tas. s.27; Vic. s.25; Vic. (1994) s.28; Tas. s.36; W.A. s.26(d))

This provision or provisions is to the effect that a general devise of land and a general bequest of personalty can operate as the execution of a power of appointment.

The object is to ensure that the will deals comprehensively with the testator's property including property over which he or she had a power of appointment.

Example

By the will of X a power to appoint Bectare is given to Y, to be exercised in favour of such of X's children as Y shall appoint and in default of appointment to X's children in equal shares. Y has died leaving a will which includes the provision "I devise all my realty to X2". X2 is one of X's children. The statutory provision ensures that the general devise contained in Y's will exercises the power conferred on Y by X's will in favour of X2. Otherwise the gift over in default of appointment would have applied and Bectare would have been divided amongst all the surviving children of X. X2 will also take any realty belonging to Y.

6.6 The effect of a devise without words of limitation

(A.C.T. s.27; N.S.W. s.24; N.T. s.31; Qld. s.28(e); S.A. s.31; Tas. s.28;
Vic. s.26; Vic. (1994) s.29; Tas. s.37; W.A. s.26(e))

At common law a devise of realty was considered to be a conveyance and the fee simple could pass only if the required words of limitation - i.e. "to A and his heirs" or "to A and the heirs of his body" were used. If these words were not used the devise could not pass the fee simple. This provision abolishes that rule. Since words of limitation are no longer required to pass the fee simple it should be considered whether this provision needs to be retained. It is about pre 1837 law and old system conveyancing.

6.7 How the words "die without issue", or "die without leaving issue" or "have no issue" shall be construed

(A.C.T. s.28; N.S.W. s.25; N.T. s.32; Qld. s.30; S.A. s.32; Tas. s.39; Vic. s.27; Vic. (1994) s.31; W.A. no provision)

There must have been pre 1837 cases in which a disposition of property in the event of a designated person dying without issue, or without leaving issue, or having no issue, had been construed as referring to failure of issue at any time in the future, and not failure during the life of the person designated. Such a disposition might then have been in danger of being held to be void for breach of the rule against perpetuities. The possibility of this construction being arrived at has been negated by this provision. It is perhaps not without significance that the rule has been omitted from the Western Australian legislation. It will be worth reconsidering this provision and examining its history, since it may be justifiable to omit it as one of those provisions which hark back to before 1837.

6.8 No devise to trustees etc to pass a chattel interest

(A.C.T. s.29; N.S.W. s.26; N.T. s.33; Qld. no provision; S.A. s.33; Tas. s.39; Vic. s.28; Vic. (1994) no provision; W.A. no provision)

This is a provision intended to ensure that devises to trustees or executors carry the entire fee simple if the testator has the fee simple. It has the appearance of a remnant from the days when words of limitation were required in devises even to trustees. That is it is about old system conveyancing. It has already been covered by the general provision that the entire interest of the testator in property whether realty or personalty passes under the will - see paragraph 2.1 above. Its omission from the Western Australian and Queensland legislation, and the Victorian proposed *Wills Act 1994* is clearly correct.

6.9 Trustees under an unlimited devise to take the fee

(A.C.T. s.30; N.S.W. s.27; N.T.34; Qld. no provision; S.A. s.34; Tas. s.39; Vic. s.29; Vic. (1994) no provision; W.A. no provision)

This again is a provision dating from the time when a devise to trustees might be found not to have transferred the fee simple to them. That is it is a provision about old system conveyancing. It was intended to ensure that the

fee simple was vested in the trustees. The same comments apply as in the case of the last paragraph. In the *Tasmanian Wills Act 1992* this provision and the last have been conflated into one section.

6.10 Devises of estates tail shall not lapse

(A.C.T. no provision; N.S.W.s.28; N.T. s.35; Qld. no provision; S.A. s.35; Tas. s.40; Vic. s.30; Vic. (1994) no provision; W.A. no provision)

This is an anti-lapse provision designed to ensure that if a person to whom an estate tail was devised died in the lifetime of the testator the devise would not fail but would pass to those who would have taken had the person died immediately after the testator. Estates tail are now so anomalous as to cast doubt upon the utility of this provision. It has been justifiably omitted from the legislation in the Australian Capital Territory, Queensland and Western Australia and proposed legislation in Victoria.

A general anti-lapse provision (see paragraph 6.11 below) will take care of this kind of case where the issue is issue of the testator. Where a life interest and remainder is given the intention of the testator will prevail and the death before the testator of a person intended to be a life tenant will not affect the rights of the remainderman who survives the testator. It is doubtful whether any attention has been paid to this provision for some time, so perhaps some consideration of it in general terms may be desirable; although it is probable that it should just be omitted from future legislation.

6.11 Gifts to children or other issue of the testator who leave issue living at the testator's death shall not lapse - statutory substitutional provision

(A.C.T. s.31; N.S.W. s.29 (and Conveyancing Act 1919, s.37); N.T. s.36; Qld. s.33; S.A. s.36; Tas. s.41; Vic. s.31; Vic. (1994) s.32; W.A. s.27)

The ordinary law of wills is that if a beneficiary dies before the testator the benefit left does not take effect. It is said to lapse. The reason for this is that it is conceived that the benefit is intended to be personal to the beneficiary and is not intended to go to a deceased beneficiary's estate. The rule is old and is never questioned.

A testator who contemplates the possibility of a beneficiary predeceasing the testator may include a substitutional provision in the will naming another beneficiary to take in the event of the death before the testator of the original beneficiary. In the case of gifts to issue of a testator wills legislation

furnishes a ready made substitutional provision, with the object of favouring issue of predeceased issue.

The history of the statutory substitutional (or anti-lapse) provision has not been without difficulties. In the *Wills Act 1837* the rule was framed to provide that the issue was deemed to have survived the testator. The effect of that was that the property left to the issue would pass to the estate of that issue and then under the will, if any, of that issue. The difficulty of this was that the will might leave the property elsewhere, for instance to the spouse, to the exclusion of that person's (and the testator's) own issue.

Another difficulty was that the rule at one time was held not to apply in the case of a gift to a class - for example "to such of my children as survive me". If one child died before the testator a statutory substitutional provision could not be applied for the benefit of that child's issue because the child was considered not to be within the description of the "surviving" children.

Revisions of the anti-lapse rule have attempted to address these questions; but these attempts have the appearance of being piecemeal. What a statutory anti-lapse provision should ensure is that issue of predeceasing issue should take the property left as if the pre-deceasing issue had died intestate without leaving a spouse, that is per stirpes. An anti-lapse provision should apply expressly to class gifts to issue; and although the rule should be subject to a contrary intention a contrary intention should require stronger language than a mere reference to issue as having predeceased the testator. A draft provision recommended by the Victorian Law Reform Committee's Report on the *Law of Wills*, 1994 reads as follows:

Draft s.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 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

This provision addresses the difficulties which have been encountered as a result of the drafting of earlier provisions.

Of the provision in subsection (2) the Victorian Report says:

s.32.6 It has been argued that consistency with the Committee's views on s.30 requires the condition in s.32(2) of the 1991 Draft Wills Bill as to attaining the age of 18 years or marrying to be omitted because they have no place in Victoria's law of intestate succession. However the point of s.30 is to identify persons included in the description of issue, whereas s.32 attempts to give effect to the presumed or most likely intention or preference of testators who have indicated the importance of survivorship. The Wills Working Party recommended the inclusion of the condition, and gave as a reason that it would prevent property of one side of the family going to the other side of the family on the intestacy of a minor. The Committee accepts that a testator would ordinarily prefer his or her property not to be distributed on the early death of an intestate minor who had never controlled it.

This is not found in other legislation, but the reason given for its inclusion warrants consideration for adoption.

The provision in subsection (4) is new for Victoria; but was included in the *Queensland Succession Act 1981*, s.33(2).

Under the existing Victorian law, if a testator leaves property to, for example, "such of my children as survive me and attain the age of 18", and the testator is survived by one child, and three grandchildren the children of a deceased child, the property will be taken only by the surviving child and the grandchildren will take nothing.

See *Bassett v. Hall* [1994] 1 V.R. 432.

Under the Queensland provision the grandchildren will take the property their parent would have taken had he or she survived the testator.

Re Macaudo (1993) 2 Qd.R. 269.

CHAPTER 7

RECENT REFORMS

This Chapter is concerned with certain reforms which have appeared in Australian wills legislation in the last decade or so. The provisions all address substantial issues of wills law reform mostly not found in other jurisdictions; but some are inspired by recent law reform elsewhere.

7.1 Beneficiaries must survive testator by thirty days

(A.C.T. no provision; N.S.W. no provision; N.T. no provision; Qld. s.32; Tas. no provision; Vic. (1994) s.26 and proposed addition of s.99A to the Administration and Probate Act 1958; W.A. no provision)

As has already been mentioned in paragraph 6.11 above if a beneficiary dies before a testator the benefit left does not take effect. It is said to lapse.

In Queensland s.32 of the *Succession Act 1981* provides:

'(1) Unless a contrary intention appears by the will, where any beneficial disposition of property is made to a person who does not survive the testator for a period of thirty days the disposition shall be treated as if that person had died before the testator and, subject to this Act, shall lapse'.

The intestacy rules contain a similar provision. (*Succession Act 1981*, s.35(2).) No other Australian State has followed this precedent, which has as its precedent s.2-702 of the American *Uniform Probate Code* as well as a not uncommon practice of including in well drawn wills a similar provision at least in relation to more important provisions.

There are several arguments in favour of the provision. Its theoretical justification is the same as the justification for the lapse rule, that is that testamentary benefits are intended to be personal to the beneficiary and are not intended to accrue to the estate of a beneficiary who dies before the testator. The statutory provision only extends that rule by a period of thirty days. The more practical context is that of multiple deaths of members of a family in a war time catastrophe or road or other accident.

Example (1)

John and Mary are married. Mary is John's second wife. They are killed in a car accident, Mary surviving John by a few hours. Each had made a will leaving everything to the other. Probate of John's will must be obtained, under which Mary's estate would take everything. Probate of Mary's will would then be obtained but her estate would be distributed to her issue or other blood relatives upon intestacy. John's family would get nothing. Under the Queensland provision John's estate would pass as upon his intestacy; and Mary's as upon hers.

Example (2)

A father and child die in one accident, the father having left part of his estate to the child, and the child having survived the father by a few hours. The part of the father's estate left to the child would pass to the child's estate and thence, if the child had not made a will, to the child's intestacy beneficiaries. Under the Queensland provision the child's share would pass under the residuary provision of the father's will.

There are several advantages to the provision.

(1) In each of the above examples a costly double administration is avoided by a thirty days rule.

(2) One reason why lawyers used to include a thirty days' survivorship provision in wills was the English context of high death or estate duties. Two lots of duties would be imposed if there were two deaths in quick succession. A thirty day rule can ensure that death duties legislation will not impact too heavily on a family. Although there are not death duties in Australia at the present time there may be tax implications to a double succession which would be avoided by a thirty days' rule.

(3) If there are doubts as to whether one survived the other for a matter of seconds or minutes in the event of a fatal accident, a thirty days rule resolves any difficulties of proof.

The Victorian Law Reform Committee has recommended a similar provision.

7.2 Is thirty days an appropriate period for a general anti-lapse rule?

There is some opinion that thirty days is "too long" to wait to find out whether a beneficiary under a will or intestacy will or will not be entitled to a benefit. If a testator leaves all of his or her estate to a spouse or child and there is no reason to believe that the spouse or child will fail to survive for thirty days, the rule means that no part of the estate can be distributed to the spouse during a period of time, immediately after the death, when he or she may be in special need of financial resources, for instance to pay for a funeral and perhaps unexpected debts, or to obtain access to the deceased's bank account.

Queensland has to a certain extent met this criticism of a thirty day rule by a provision in s.49(3) of the *Succession Act 1981* which is as follows:

The personal representatives may, during and after the period of thirty days after the death of a deceased person, make reasonable provision out of the estate for the maintenance (including hospital and medical expenses) of any spouse or issue of the deceased who would, if he survived the deceased for a period of thirty days, be entitled to a share in the estate, and any sum so expended shall be deducted from that share; but if any spouse or issue of the deceased person for whom any provision has been made does not survive the deceased person for a period of thirty days any sum expended in making such provision shall be treated as an administration expense.

This provision meets the difficulty at a practical level but not at a theoretical level and the Victorian Law Reform Committee in its 1994 Report on the *Law of Wills* has recommended the inclusion of a similar provision as s.99B of its *Administration and Probate Act 1958*.

The provision may have broader interest as a possible mechanism for dealing more generally with the financial difficulties which can arise upon the death of a person. For instance it might be worth considering whether to provide a statutory authority to banks to pay for the funeral of a deceased person out of the deceased person's bank account, without having to await probate of a will or letters of administration, or other means, to obtain access to the account.

Perhaps of some interest in this context is information furnished to the Queensland Law Reform Commission by the Queensland Police Service of the length of time those involved in fatal road accidents survive the accident. Of 390 deaths resulting from motor vehicle accidents in Queensland between 1 September 1992 and 31 August 1993, 377 victims died instantly or within seven days. The remaining 13 victims all died within nineteen days after the accident. No victims died more than nineteen and less than thirty

days after the accident. Persons who died more than thirty days after the accident are considered not to have died as a result of the accident and so are not included in the gathering of statistics.

On this information a period of 21 days could perhaps justifiably be substituted for thirty days. The period of thirty days derives from wills precedents directed to the same issues. However, any reduction of the period should not be regarded as a reason for not considering the more practical question of access to assets of the deceased for immediate and important needs of the deceased's family in the days and weeks immediately following a death. This is, however, not so much an issue of the law of wills but of the administration of estates.

A careful comparison of the differing laws in Australia is needed and a clear policy for reform and uniformity reached.

7.3 Power of Court to rectify wills

A.C.T. s.12A; N.S.W. s.29A; N.T. no provision; Qld. s 31; S.A. s.25AA (inserted by Wills (Miscellaneous) Amendment Act 1994; Tas. s.47; Vic. no provision; Vic. (1994) s.37; W.A. no provision

In 1981 Queensland introduced a modest power of rectification in its *Succession Act 1981*, s.31(1) of which reads as follows:

31. Power of Court to rectify wills

(1) As from the commencement of this Act the Court shall have the same jurisdiction to insert in the probate copy of a will material which was accidentally or inadvertently omitted from the will when it was made as it has hitherto exercised to omit from the probate copy of a will material which was accidentally or inadvertently inserted in the will when it was made.

Subsection (2) requires the matter to be brought to Court within six months of the death of the testator.

At common law the probate Court was bound to omit from probate material accidentally or inadvertently inserted in a will.

In 1989 New South Wales inserted into the *Wills, Probate and Administration Act 1898* s.29A which provides, by subsection (1), that:

"If the Court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, it may order that the will be rectified so as to carry out the testator's intentions".

In 1991 the Australian Capital Territory inserted a very wide and lengthy provision in s.12A of its *Wills Act 1968*:

Rectification

12A. (1) If the Court is satisfied that the probate copy of the will of a testator is so expressed that it fails to carry out his or her intentions, it may order that the will be rectified so as to carry out the testator's intentions.

(2) If the Court is satisfied that circumstances or events existed or occurred before, at or after the execution by a testator of his or her last will, being circumstances or events -

- (a) that were not known to, or anticipated by, the testator;
- (b) the effects of which were not fully appreciated by the testator; or
- (c) that occurred at or after the death of the testator;

in consequence of which the provisions of the will applied according to their tenor would fail to accord with the probable intention of the testator had he or she known of, anticipated or fully appreciated the effects of those circumstances or events, the Court may, if it is satisfied that it is desirable in all the circumstances to do so, order that the probate copy of the will be rectified so as to give effect to that probable intention.

There are further detailed provisions respecting the time within which an application must be made; notification and procedure.

Comment

A power of rectification, particularly one as broad as that of the Australian Capital Territory, raises a number of matters for consideration.

- (1) To what extent should a power to rectify a will be modelled on a power to rectify a contract? In the case of contracts the parties are usually available to give evidence to the Court. In the case of a will the testator cannot.
- (2) Another major issue of the existence of a broad power to rectify a will is its consequence on the accepted rules for the construction of wills.

The rules for the construction of wills represent the accumulated experience of the Courts regarding what testators usually mean when they use certain forms of words. A general power of rectification could have the effect of destabilising the rules of construction, leaving executors and their legal advisers with no guidance concerning the meaning of a will.

- (3) The large power conferred on the Court in the Australian Capital Territory may be considered to go beyond the concept of rectification. It is difficult to see as rectification a power to take into account matters or events taking place at or after the death of the testator.

The Australian Capital Territory's provision seeks to enable justice to be done in the light of circumstances prevailing at or after the death of a testator. It can be a means of circumventing (a) inadequacies in the law of wills, (b) inadequacies in the intestacy rules and (c) inadequacies in family provision law. It is arguable, however, that to attempt to meet such inadequacies by a very enlarged power to rectify is merely to provide a short cut. What is needed, particularly in the context of a drive towards uniformity, is a more detailed investigation of the reasons why succession laws, as a whole, still fail to correct occasional patent injustices.

In 1994 South Australia inserted s.25AA into its *Wills Act 1936* which reads as follows:

Power of rectification

25AA. (1) If the Court is satisfied that a will does not accurately reflect the testamentary intentions of a deceased person, the Court may order that the will be rectified so as to give proper expression to those intentions.

(2) An application for an order under this section must not, except with the consent of the Court, be made more than six months after the grant of probate or letters of administration.

(3) Nothing in this section affects the operation of section 29 of the *Trustee Act 1936*.

This power is almost as radical as the Australian Capital Territory power.

The Tasmanian *Wills Act 1992* contains the following provision:

Declaration by Supreme Court as to non-application of section 44

46(1) Where the Court is satisfied that the entitlement of the applicant under the will was known to and approved by the testator and was not included in the will as the result of fraud, duress or the exercise of undue influence by any person, the Court may, by order, declare that section 44 does not apply in relation to the applicant in respect of the will in respect of which the application was made.

(2) On a copy of an order under subsection (1) being served on the personal representative of the testator, the will of the testator has effect as if section 44 does not apply in relation to the applicant in respect of the will of the testator.

(3) In an application under section 45 the applicant is not entitled to rely on any evidentiary presumption to prove or assist in proving that the testator knew and approved of the contents of the will.

In 1994 the Victorian Law Reform Committee recommended the adoption of a rectification provision the substantive provision of which is as follows:

Draft s.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.

Application must be made to the Court within six months from the date of the grant of probate to invoke this jurisdiction. There are further provisions concerning notice and procedure.

Clearly with these diverse precedents respecting the rectification of wills substantial reconsideration of the entire question is needed.

7.4 Construction of residuary dispositions

(A.C.T. no provision; N.S.W. no provision; N.T. no provision; Qld. s.29; S.A. no provision; Tas. no provision; Vic proposed Wills Bill 1994 s.33; Vic. 1994) s.33; W.A. no provision)

There are several provisions in the Queensland *Succession Act 1981* which are not found in other legislation the object of which is to reduce the incidence of partial intestacies of residue. Section 29 is one of them. It reads as follows:

29 Construction of residuary dispositions

Unless a contrary intention appears by the will -

- (a) a residuary disposition referring only to the real estate of the testator or only to the personal estate of the testator shall be construed to include all the estate of the testator both real and personal; and
- (b) subject to this Act, where a residuary disposition in fractional parts fails as to any of such parts for any reason that part shall pass to that part of the residuary disposition which does not fail and if there is more than one part which does not fail to all those parts proportionately."

Paragraph (a) attempts to deal with the case where a testator mistakenly uses the word "personalty" or "realty" in a residuary gift in a will, without realising the legal meaning of these technical words, intending to leave all the estate. Thus if a testator leaves in a residuary provision "all my realty to X", then X cannot take any personalty, and unless the personalty has been expressly given elsewhere the testator will die intestate as to residuary personalty. Likewise if a testator leaves in a residuary provision "all my personalty to X" then X cannot take any of the testator's realty and the testator will die intestate as to residuary realty. The reason for this is that the testator, in using technical legal words, is considered to have intended the consequences. Examples are *Harter v. Harter*⁹ and *Re Cook*.¹⁰

The Queensland legislation is based on the view that testators should not be held to the technical meanings of words which they use inadvertently, in the belief, perhaps, that they sound legal, where the consequence is that the testator dies partially intestate. It is observed that the Western Australian Law Reform Commission has considered adopting the Queensland provision in its Report on the *Administration of Assets of Solvent Estates of Deceased Persons in the Payment of Debts and Legacies*, Project No.34 - Part VII, 1988. However it appears to have misunderstood the object of the Queensland provision - see paragraph 5.18 above. This is not a vital provision, as it is only very occasionally that a testator can be expected to use technical terms inadvertently with such undesirable consequences; but it does clear up a problem and is justifiable to consider if for inclusion in uniform legislation.

Paragraph (b) of s.29 is in relation to residuary estates which are left in fractional shares amongst persons. The provision is that if a fractional share fails it passes to the others to whom fractional shares were given. It too is concerned with preventing a probably unintended partial intestacy of residue. In *Re Harvey*¹¹ it was held that a gift of all the estate was not a gift of residue and that the provision could not apply to it. That has been seen by the Victorian Law Reform Committee as placing an undue restriction on the efficacy of the provision and in the Victorian Law Reform Committee's *Draft Wills Act 1994* there is the following provision:

Draft s.33

(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

⁹ (1873) LR 3 P&D 11.

¹⁰ [1948] Ch 212.

¹¹ [1990] Qd R 508.

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.

7.5 Income on contingent and future dispositions

(A.C.T. s.30A; N.S.W. no provision; N.T. no provision; Qld. s.62; S.A. no provision; Tas. no provision; Vic. no provision; Vic. (1994) s.25; W.A. no provision)

Under case law the beneficiary of a deferred residuary gift did not take the income arising before the gift vested.¹² The income would pass to those entitled upon intestacy. In the case of a specific bequest, too, there was a rule that the beneficiary was not entitled to income accruing to the bequest until the bequest vested,¹³ unless a fund was set aside for the purpose of answering the bequest.¹⁴ Difficulties in knowing whether a legacy or devise would carry intermediate income from the date of the death or from a later date led the Queensland Law Reform Commission to recommend that there be a general rule giving intermediate income to the beneficiary of the capital in all cases unless the income were given elsewhere. Section 62 of the *Succession Act 1981* gave effect to this recommendation. It clears up a difficult part of the law and avoids the occasional partial intestacy of income. It has been accepted in the Australian Capital Territory and in the Victorian proposed *Wills Act 1994*.

¹² *Re Gillett's Will Trusts* [1950] Ch 102; *Re Geering* [1964] Ch 136.

¹³ *Guthrie v Walrond* (1883) Ch D 573.

¹⁴ *Re Woodin* [1895] 2 Ch 309.

7.6 Delegation of will making power

(A.C.T. no provision; N.S.W. no provision; N.T. no provision; Qld. s.64;
S.A. no provision; Tas. no provision; Vic. no provision; Vic. (1994) s.35;
W.A. no provision)

There is extensive literature concerning the rule that a testator cannot delegate the power to make a will. Difficulty is caused by reason of the fact that the ability to include in wills powers of appointment that are standard in settlements made inter vivos is subject to considerable doubt. The doubt was fuelled, in Australia, by remarks of Fullagar J. in *Tatham v. Huxtable*,¹⁵ the decision in *Horan v. James*,¹⁶ where it was held that a testator could not create a hybrid power by will, and *Re Norway*¹⁷ where a power given to trustees of a will to "make such further payments" to the widow of the testator "either in the form of payments to her or payments for her benefit as they may consider reasonable after the balancing the interests of all parties" was held to be invalid as a delegation of the testator's will making power. An entire Chapter in Hardingham, Neave & Ford's *Wills and Intestacy in Australia and New Zealand* (2nd ed.1989), Chapter 5, is devoted to the subject. It is probable that much of the difficulty of the subject was generated by a probably misconceived article by D.M.Gordon *Delegation of Will Making Power in* (1953) 69 L.Q.R.334.

It is anomalous that there should be one law for trusts created inter vivos but a different, far more restrictive law for trusts created by will. Furthermore it has the effect that developments in precedents for inter vivos trusts cannot be relied on when drafting wills. Since developments in drafting trusts inter vivos are frequently driven by tax planning considerations, the supposed non delegation rule has the effect of placing testators in an historical strait jacket.

The Victorian Law Reform Committee has recommended the following provision in s.35 of its proposed *Wills Act 1994*:

***Draft s.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

¹⁵ (1950) 81 CLR 638.

¹⁶ [1982] 2 NSW 376 L.

¹⁷ (Unrep.) Vic. Sup. Ct. 1963 Case No 63/4731.

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."

CHAPTER 8

8.1 Disposition to unincorporated Associations of persons ¹⁸

(A.C.T. no provision; N.S.W. no provision; N.T. no provision; Qld. s.63;
S.A. no provision; Tas. no provision; Vic. no provision; Vic. (1994) s.34)

If the aims, objects or purposes of an unincorporated association of persons are not charitable in law (e.g. a social or sports club), a legacy or devise on trust for those aims or purposes would fail for want of charity. This question is dealt with in detail in Ford & Lee *Principles of the Law of Trusts* 2nd ed. Law Book Co., 1990 at [527-531] and was considered by the Queensland Law Reform Commission in its *Report on the Law relating to Succession* (1978). The following comment was made in that Report.

A lay testator, minded to include in his will a legacy or devise for an unincorporated association of persons, has a phenomenal series of legal obstacles to overcome. If he leaves the benefit to the members of the association for the time being the legacy will take effect. But, if he leaves it to the present and future members of the association, it will fail. If he leaves it to augment the general funds of the association the legacy will take effect; but, if he leaves it for the purposes of the association, then, unless the purposes are charitable, it will fail. None of the problems arise if the association of persons happens to be incorporated. Perhaps even less explicable, in laymen's terms, is the fact that one may easily make a gift in one's lifetime to an unincorporated association of persons, but, if one attempts the same thing by one's will inordinate technicalities block the way. Further, how is anyone to understand why it is that a legacy to "the Communist Party of Australia" should fail,¹⁹ - the same fate would, of course, await the same legacy to any unincorporated political party - whereas a legacy "for the general purposes of the Loyal Orange Institution of Victoria",²⁰ or a Masonic Lodge,²¹ or the Old Bradfordian Club,²² should succeed?

¹⁸ See Lee, W A *Trusts and Trust-like Obligations with Respect to Unincorporated Associations* Ch 10 of *Essays in Equity* (Ed P D Finn), Law Book Co 1985.2.

¹⁹ *Bacon v Pianta* (1976) 114 CLR 634.

²⁰ *Re Goodson* [1971] VR 801.

²¹ *Re Turkington* [1973] 4 All ER 501.

²² *Re Drummond* [1914] 2 Ch 90.

In Queensland section 63 of the *Succession Act 1981* was inserted to relieve testators, who clearly wish to provide a benefit for a lawful, non charitable unincorporated association of persons, from these often fatal technicalities.

Subsection (1) reads as follows:

(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 of 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.

Legacies or devises coming under (b) and (c) would almost certainly fail without the gloss of this provision. A legacy coming under (a) may be effective, if it can be interpreted as a legacy or devise in augmentation of the general funds of the association, that is, not upon trust for the aims or purposes of the association, or on trust for present and future beneficiaries. As the Privy Council said in *Leahy v. A.-G.(N.S.W.)*:²³

In law a gift to such a society simpliciter (that is, where, to use the words of Lord Parker in *Bowman v. Secular Society Ltd.*,²⁴ neither the circumstances of the gift nor the directions given nor the objects expressed impose on the donee the character of a trustee) is nothing else than a gift to its members at the date of the gift as joint tenants or tenants in common. It is for this reason that the prudent conveyancer provides that a receipt by the treasurer or other proper officer of the recipient society for a legacy to the society shall be a sufficient discharge to executors.

The provision is intended to marshal these principles so as to ensure the validity of gifts intended for unincorporated associations of persons.

²³ [1959] AC 457 at 477.

²⁴ [1917] AC 406 at 437.

Subsection (3) takes care of the problem where a testator fails to include, in a will, provisions respecting the giving of a receipt by a Treasurer or other officer.

The benefits of the provision are very clear and the Victorian Law Reform Committee's Proposed *Wills Act 1994* proposes a similar provision, but makes it clear, unlike the Queensland precedent, that the provision only applies to unincorporated associations which are "not a charity". The Queensland provision should have contained such a provision. If an unincorporated association has aims objects or purposes which are exclusively charitable, or which can be considered to be exclusively for charitable purposes²⁵, then the law relating to charities should govern not only the validity but also the administration of that gift.

Subsection (4) of the Queensland provision reads:

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.

The provision is worthy of comment. It might be argued that if a complete list of all the members of an unincorporated association of persons could not be compiled at the date of death of the testator a disposition to them could not take effect because it could not be divided amongst them in equal shares. That is, the assumption is that the gift must be divisible amongst the members before it can be valid. This assumption stems from a principle, as formerly understood, of the law of trusts that to be valid all the beneficiaries of a trust must be listable, or, in the case of a gift to a class, that each member of the class must be identifiable. Although that principle is no longer insisted upon in the law of trusts, since *McPhail v. Doulton*,²⁶ this provision is intended to stave off arguments based on the former understanding of that principle.

The Victorian proposed *Wills Act 1994* has a provision, section 34, based on the Queensland provision but which goes further by providing in subsection (5) as follows:

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

²⁵ For instance, by statute, eg *Conveyancing Act 1919* (NSW), s.37D; *Trusts Act 1973* (Qld), s.104; *Trustee Act 1936* (SA), s.69a; *Property Law Act 1958* (Vic), s.131; *Trustees Act 1962* (WA), s.102.

²⁶ [1971] AC 424s.

association beneficially amongst themselves.

The reason for the addition of the underlined words is that there are, and have in the past been, many unincorporated associations of persons the members of which cannot terminate the association and divide the assets amongst themselves. Today these are associations which enjoy taxation benefits. In the case of such associations there is usually a requirement of the Commissioner of Taxation that in the case of termination of the association any assets must be distributed to a similar, tax exempt association and not divided amongst the members of the terminating association. Not all such associations are necessarily charitable, although the Courts use concepts from charity law to ensure the validity of such gifts over. (see for example *Darwin Cyclone Tracy Relief Trust Fund*).²⁷

The Victorian Law Reform Committee proposal is intended to cover this point.

8.2 The admission of extrinsic evidence in the construction of wills

(A.C.T. s.12B; N.S.W. no provision; N.T. no provision; Qld. no provision; S.A. no provision; Tas. s.43; Vic. s.22A; W.A. no provision)

Apart from statute the law of wills allows the admission of extrinsic evidence in the construction of wills in three cases.

First it recognises the "armchair" rule. The armchair rule allows to be admitted evidence of the circumstances in which a testator made a will, including the testator's habits of language to assist in the construction of a will. The principle is examined in detail in *Wills and intestacy in Australia and New Zealand* by Hardingham, Neave and Ford (Law Book Co., 2nd. ed.1989 at paragraph 1103).

Secondly, evidence of the testator's actual intention, whilst not ordinarily admissible to assist in the construction of a will, is admissible where there is what is described as "equivocation" in the will, that is, where a description, usually of a person, is equally capable of referring to more than one person. Extrinsic evidence of the testator's actual intention is then admissible which may show that yet another person was intended by the testator.²⁸

²⁷ (1979) 39 FLR 260.

²⁸ *Re Fleming* [1963] VR 17 is a remarkable illustration of this rule.

Thirdly, where equity raises a presumption of intention, for instance, where equity raises a presumption that a legacy is in satisfaction of a prior debt, or that a legacy is adeemed by a later portions payment, extrinsic evidence of the testator's actual intention is admissible to fortify or rebut the presumption.²⁹

The potentially restrictive nature of the concept of equivocation in the second principle, and the arcane nature of the third, has understandably led law reformers and legislatures to propose statutory rules respecting the admissibility of extrinsic evidence.

In 1981 Victoria inserted s.22A into its *Wills Act 1958*. The section reads:

Provisions as to the construction of wills

22A. (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.

(2) Where in any matter relating to the construction of the will any evidence adduced by a party is admissible by reason of and by reason only of the provisions of subsection (1), the party or parties by which that evidence is adduced or relied upon shall bear such part of the costs of the proceedings as is attributable to the introduction of that evidence unless the Court or judge otherwise determines.

The 1994 *Report on the Law of Wills* of the Victorian Law Reform Committee recommended the retention of this provision which had been recommended by a *Report on the Construction of Wills* (1980) by the Victorian Chief Justice's Law Reform Committee.

In 1982 the English *Administration of Justice Act* made provision for the admission of extrinsic evidence in the construction of wills. It allows extrinsic evidence, including evidence of the testator's intention, to be admitted only:

(a) in so far as any part [of the will] is meaningless;

²⁹ *Re Tussaud's Estate* (1878) 9 Ch D 363 at 373-375.

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

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

The provision represents a compromise between conservative and progressive voices to be found in a Report of the English Law Reform Committee on the *Construction of Wills* in 1973.

In 1986 the New South Wales Law Reform Commission recommended the English model in its *Report on Wills - Execution and Revocation* but the recommendation has not been acted upon.

In 1991 the Australian Capital Territory inserted section 12B in its *Wills Act 1968* as follows:

Extrinsic evidence

12B. 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).

It is clear from the above that this is a matter which requires careful consideration. What is at stake is the fundamental principle that a will must be in writing; and the extent to which it is appropriate to compromise that principle where there is extrinsic evidence that the writing does not embody the testator's intention.

This provision, in identical terms, is found in the Tasmanian *Wills Act 1992*.

8.3 Reference in a will to a valuation

(A.C.T. no provision; N.S.W. no provision; N.T. no provision; Qld., s.67; S.A. s.38; Tas. no provision; Vic., s.22B; Vic. (1994) s.36; W.A. no provision)

There are provisions in Queensland, South Australian and Victorian wills legislation, which are intended to clarify the law in relation to a reference in a will to the taking of a valuation. The issue needs to be considered since it is arguable that in Queensland the provision was linked to estate duty considerations, but in Victoria it is a more general enabling provision.

8.4 Who may see a will?

(A.C.T. no provision; N.S.W. no provision; N.T. no provision; Qld. no provision; S.A. no provision; Tas. no provision; Vic. no provision; Vic. (1994) proposed insertion of s.66A into Administration and Probate Act 1958; W.A. no provision)

There is a novel provision in the Victorian proposed *Wills Act 1994* which reads as follows:

Any person having the possession or control of a 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 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 equity against the estate of the deceased .

A major reason for the proposed insertion of this provision is that sometimes a person having control of a will is reluctant to show it to anyone. The reluctance may be caused by a misconceived view that a will is a private document. Since not all wills are brought to Court for probate, particularly where the estate is small and not worth the expense of taking to Court, possible beneficiaries and other claimants can be placed in an invidious position because they may not know anything. A person with a claim under family provision legislation may not be able to discover whether the testator has made provision for him or her by will and so will not be able to begin to consider whether to make a claim. An intestacy beneficiary may need to know whether the will lacks a valid residuary provision; and a creditor may need to know whether the testator had assets, information which may be discoverable to a certain extent from a will.

The provision does not allow persons not interested to see the will, for instance the press, or creditors of small sums which can be paid quickly by the representative. In any case persons entitled to share in the estate should be able to see the contents of a will. This information is always available once the will has been admitted to probate. This provision is intended to ensure the same thing before the will is admitted to probate.

8.5 Deposit of will in Registry by testator during lifetime

(A.C.T. no provision; N.S.W. s.32; N.T. no provision; Qld. no provision; S.A. no provision; Tas. no provision; Vic. no provision; W.A. no provision)

There is a provision in the New South Wales *Wills, Probate and Administration Act 1898*, section 32, which permits a testator to deposit a will in the Registry. There is no such provision in the wills legislation of other States; but there may be in administration legislation.

The New South Wales provision raises not only the general issue of whether it is desirable to deposit wills in the Probate Registry before the death of the testator but also the question of whether there should be insistence that all wills, after death, should be brought into Court, whether intended to be admitted to probate or not. That leads to the question of whether there should be a national register of wills of deceased persons. This is a large issue which belongs not to the law of wills as such but to the more general issue of the administration of deceased estates.

8.6 Conclusion

The law of wills still contains, even in its most recent forms, some dead wood; and some major policy decisions remain to be made before progress to uniformity can be made. This first Issues Paper does not necessarily cover every issue to be considered and debated. The views of the judiciary, Registrars of probate, the legal profession, trustee companies, Public Trust Offices, and law reform agencies, as well as those of ordinary members of the public who have to deal with the practical problems of administering very small deceased estates as well as very large estates, must be canvassed to ensure that the widest reconsideration of the law of wills ever undertaken in Australia can lead to an effective, viable and efficient uniform law for the twenty-first century.