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**CONSOLIDATED REPORT TO THE  
STANDING COMMITTEE OF ATTORNEYS  
GENERAL ON  
THE LAW OF WILLS**

**National Committee for Uniform Succession Laws**

Queensland Law Reform Commission  
Miscellaneous Paper 29  
December 1997

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## UNIFORM SUCCESSION LAWS PROJECT COMMITTEE

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### **NEW ZEALAND**

Law Commission  
**Mr D F Dugdale**

Special mention is made of Dr Peter Handford, Executive Officer and Director of Research, Law Reform Commission of Western Australia who was on the National Committee from its inception until August 1997. Dr Handford's enthusiasm for the project and his willingness to contribute of his time, ideas and legal skills were infectious. He played a large part in the development of the recommendations included in this Report. No replacement for Dr Handford has yet been nominated by the Attorney General for Western Australia.

The National Committee also acknowledges the valuable contributions made to this project by other past members of the National Committee: Professor Richard Sutton, former Commissioner with the Law Commission, New Zealand; Ms Margaret Cross, Attorney General's Department, South Australia; Ms Lyn Douglas and Ms Judy Bonner, Northern Territory Attorney General's Department; The Hon Dr Robert Dean MP and Mr James Guest, formerly of the Victorian Parliamentary Law Reform Committee. The Committee also acknowledges the outstanding contribution to the project by Mr Tony Lee, former part-time member of the Queensland Law Reform Commission and a consultant to that Commission on the Uniform Succession Laws Project. The National Committee wishes to thank the members and officers of the various Agencies and Government Departments from which its members have been drawn for their assistance, in particular, Mr Joseph Waugh and Ms Leonie Armstrong of the New South Wales Law Reform Commission, and Mr Tony Allingham formerly with the Tasmanian Law Reform Commissioner.

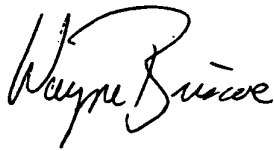
Please note: This publication is a report to the Standing Committee of Attorneys General and will be available for public distribution only with the approval of the Standing Committee of Attorneys General.

<sup>1</sup> Professor Tilbury is a part-time member of the New South Wales Law Reform Commission and Academic Secretary to the Victorian Attorney General's Law Reform Advisory Council.

<sup>2</sup> See note 1 of this Report.

To: The Standing Committee of Attorneys General

The National Committee for Uniform Succession Laws is pleased to present its Consolidated Report on *The Law of Wills*.



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Commissioner, Queensland Law Reform  
Commission, Co-ordinating Agency for Uniform  
Succession Laws Project, as Member of National  
Committee




Professor DRC Chalmers  
former Law Reform Commissioner of Tasmania  
and the Tasmanian Attorney-General's  
representative on the National Committee



The Honourable Justice P de Jersey  
Chairman, Queensland Law Reform Commission  
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the National Committee



# PREFACE

## 1. THE PROJECT'S BEGINNING AND THE CO-ORDINATING ROLE OF THE QUEENSLAND LAW REFORM COMMISSION

In 1991 the Standing Committee of Attorneys General approved the development of uniform succession laws for the whole of Australia. In 1992 the Queensland Law Reform Commission was requested by the Queensland Attorney General to co-ordinate that project.

At that time the Queensland Law Reform Commission was engaged upon a reference to reform Queensland's intestacy rules. Work on that reference was prioritised in the hope that updated Queensland intestacy rules could be used as the basis for work on a future uniformity project on intestacy. The Commission's work on that reference culminated in the completion of its Report, *Intestacy Rules*, in June 1993.<sup>3</sup>

In 1993 and 1994 Mr W A (Tony) Lee, a then part-time member of the Queensland Law Reform Commission (and currently a consultant to that Commission), assisted the Victorian Parliamentary Law Reform Committee in the preparation of its Report, *Reforming the Law of Wills*, and of the draft *Wills Act 1994* (Vic), which was included in that Report.<sup>4</sup>

In order to accommodate the work of the Victorian Law Reform Committee in the uniformity reference, the Queensland Law Reform Commission confined its initial attention to the law of wills. In 1994, the Queensland Law Reform Commission released an Issues Paper, *The Law of Wills*,<sup>5</sup> which identified a number of significant issues relating to uniform wills legislation. Shortly thereafter, the Commission published an Issues Paper, *Family Provision*.<sup>6</sup> Since 1994, the Commission has produced a large number of papers on various issues relating to wills, family provision and other succession law topics.<sup>7</sup>

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<sup>3</sup> Queensland Law Reform Commission, *Intestacy Rules* (R 42, June 1993).

<sup>4</sup> Victorian Law Reform Committee, *Reforming the Law of Wills* (Final Report, May 1994).

<sup>5</sup> Queensland Law Reform Commission, *Uniform Succession Laws for Australian States and Territories, Issues Paper No 1, The Law of Wills* (WP 46, July 1994, reprinted June 1995).

<sup>6</sup> Queensland Law Reform Commission, *Uniform Succession Laws for Australian States and Territories, Issues Paper No 2, Family Provision* (WP 47, June 1995). See page (vi) of this Preface for references to publications produced and consultations conducted in other jurisdictions.

<sup>7</sup> See, for example, page (v) of this Preface.



(ii)

## 2. THE NEED FOR UNIFORMITY AND ITS ACHIEVABILITY

Although the succession laws were uniform in the Australian colonies during the nineteenth century, they diverged during the twentieth century when the colonies began to enact their own legislation. Those divergences have become more marked as States and Territories have embarked on more purposive law reform. As a result, there are no two States or Territories in Australia where the succession laws are the same.

Among the States and Territories there are numerous significant differences in the law of wills. In intestacy, the rights of a surviving spouse vary greatly from jurisdiction to jurisdiction. In family provision schemes, qualification to apply for provision is far from uniform, as are also the grounds on which the courts in different jurisdictions may order that provision be made. In the administration of deceased estates, there is a lack of uniformity in the law relating to devolution of title and the payment of debts from assets, and uncertainty with respect to interstate recognition of grants of probate.

Less significant differences are numerous, particularly in those relatively neglected areas of law reform such as probate and administration. 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 financial value, it is ordinary people who suffer most from the inevitable increase in costs which must occur if a deceased estate has a connection with more than one jurisdiction.

To date, in Australia, State and Territory succession laws have been reformed in a piecemeal manner. 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.

Ideally, uniform laws should be identical, word for word, in every State and Territory, although in practical terms consistency might be the most achievable result. Whether uniform or consistent, 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.

Such a project inevitably entails law reform. Nevertheless, it may be said that, between them, the statutes of the States and Territories probably achieve all that could be desired to ensure that proper provision can be guaranteed for persons having legitimate claims on the estates of deceased persons. Furthermore, in recent years, a number of law reform bodies have reported on a need for reform in their respective jurisdictions in one or more significant areas of succession law. These reports invariably contain the most comprehensive and up-to-date thinking on the topics covered, and are the ideal starting point for a discussion on appropriate directions for uniformity.

(iii)

The development by the National Committee of model legislation<sup>8</sup> to be used as the basis for reform by individual States and Territories provides an opportunity for the States and Territories to adopt uniform, or at least consistent, laws relating to wills.

### 3. CO-ORDINATION OF THE PROJECT ON A NATIONAL BASIS

In order to ensure that the Uniform Succession Laws Project maintained an Australia-wide focus and was regarded as an undertaking of all Australian jurisdictions, the Queensland Law Reform Commission, as co-ordinator of the project, asked the Queensland Attorney General to request each of his counterparts in other Australian jurisdictions to nominate a person or agency to represent his or her respective jurisdiction on a National Committee to guide the project. Nominees were subsequently appointed in each Australian jurisdiction.

The New Zealand Law Commission asked to be represented on the National Committee. As the New Zealand Law Commission was also working on succession law reform, Professor Richard Sutton, a Commissioner of the Law Commission and an expert in succession law, was welcomed on to the National Committee.<sup>9</sup> The New Zealand Law Commission is strongly supportive of the Uniform Succession Laws Project, and that Commission's contribution will be of great assistance to the development of uniform succession laws in Australia and possibly between Australia and New Zealand.<sup>10</sup>

The current members of the committee are:<sup>11</sup>

- Professor Don Chalmers, Professor of Law, University of Tasmania<sup>12</sup>
- Professor Michael Tilbury, Academic Secretary to the Victorian Attorney General's Law Reform Advisory Council and Commissioner, New South Wales Law Reform Commission
- Mr Peter Hennessy, Executive Director, New South Wales Law Reform Commission
- Ms Margaret Doyle, Director, Policy and Research, Attorney General's Department, South Australia

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<sup>8</sup> Draft model wills legislation is included in this Report.

<sup>9</sup> Professor Sutton has subsequently retired from the Law Commission.

<sup>10</sup> The New Zealand Law Commission has recently reported on the law of wills in New Zealand: *Succession Law: A Succession (Wills) Act* (NZLC R 41, October 1997). The recommendations made in that Report were developed after considering the draft *Wills Act 1994* (Vic) and the initial work of the National Committee for Uniform Succession Laws.

<sup>11</sup> In August 1997, Dr Peter Handford, of the Law Reform Commission of Western Australia, resigned from the National Committee pursuant to the Attorney General of Western Australia's decision to restructure the Law Reform Commission of Western Australia of which Dr Handford is Executive Officer and Director of Research.

<sup>12</sup> Formerly the Tasmanian Law Reform Commissioner.

(iv)

- Ms Barbara Bradshaw, Policy Officer, Policy Division, Northern Territory Attorney-General's Department
- Mr Charles Rowland, Special Adviser (Succession Law), Community Law Reform Committee, Attorney-General's Department, Australian Capital Territory
- Ms Ruvani Wicks, Legal Officer, Victorian Department of Justice
- Mr David Edwards PSM, Deputy President, Australian Law Reform Commission
- Mr D F Dugdale, Commissioner, Law Commission, New Zealand
- Mr Wayne Briscoe, Commissioner, Queensland Law Reform Commission
- Ms Claire Riethmuller, Senior Research Officer, Queensland Law Reform Commission

Since the National Committee was first formed there have been some changes in its membership. This was to be expected given the nature of the organisations from which most National Committee members were drawn. Also, a number of the Attorneys General who were in office at the time the original nominations were made no longer hold office. Nevertheless, the National Committee has retained the expertise and interest in succession law that are vital to the success of the project.

Individual members of the National Committee are not necessarily plenipotentiaries of the organisations they represent, although, wherever possible, members of the National Committee have sought the views of their organisations before adopting a stance in relation to particular issues discussed at the National Committee level. The Queensland Law Reform Commission, for example, has considered all significant issues. The advantage in that approach for Queensland will be that the Queensland Law Reform Commission will be able to report to the Queensland Attorney General on reforms that should be implemented in Queensland to bring Queensland in line with the preferred uniform approach.

A number of the organisations from which the National Committee members are drawn have particular references from their respective Attorneys General that are relevant to the Uniform Succession Laws Project. For example, the New South Wales Law Reform Commission and the Queensland Law Reform Commission have specific references relating to the Uniform Succession Laws Project.

The Queensland Law Reform Commission as co-ordinating body for the project is indebted to the individual members of the National Committee for their interest and efforts to date. It is hoped that the National Committee structure will continue for future uniform succession law topics to be dealt with by this project.

#### 4. THE ACHIEVEMENTS OF THE UNIFORM SUCCESSION LAWS PROJECT TO DATE

##### (a) The Issues Papers

In an attempt to identify matters that could be the subject of a common approach to succession law throughout Australia, the Queensland Law Reform Commission prepared an Issues Paper on *The Law of Wills*<sup>13</sup> and an Issues Paper on *Family Provision*<sup>14</sup> as well as a number of memoranda, referred to below.

In Queensland, the Issues Papers were widely distributed to individuals and organisations with a particular interest or expertise in the issues under review. Submissions were received from within Queensland and from national organisations. Consultations in other jurisdictions were also based on the Issues Papers.

##### (b) The National Committee's deliberations

The National Committee established as a result of nominations from all Australian Attorneys General met for the first time in Brisbane in September 1995. All States and Territories, as well as the Commonwealth and New Zealand, were represented at that meeting. It was agreed at that meeting that the National Committee would concentrate on the law of wills as its first project and that the draft *Wills Act 1994* (Vic), included in the Victorian Parliamentary Law Reform Committee's Report, *Reforming the Law of Wills*,<sup>15</sup> would be used as the basis for discussion. The draft Victorian legislation was the most recent proposal for wills law reform in Australia.

It was also agreed at the 1995 meeting of the National Committee that work would be undertaken on the discrete topic of the abolition of the *lex situs* rule in relation to succession to immovable property. It was generally considered that the abolition of that rule may diminish the adverse effects of lack of uniformity.

Following the September 1995 meeting, the Queensland Law Reform Commission prepared a series of memoranda for the National Committee on particular issues raised by the draft *Wills Act 1994* (Vic) and on the *lex situs* rule.<sup>16</sup> The various memoranda were:

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<sup>13</sup> Queensland Law Reform Commission, *Uniform Succession Laws for Australian States and Territories, Issues Paper No 1, The Law of Wills* (WP 46, July 1994, reprinted June 1995).

<sup>14</sup> Queensland Law Reform Commission, *Uniform Succession Laws for Australian States and Territories, Issues Paper No 2, Family Provision* (WP 47, June 1995).

<sup>15</sup> Victorian Law Reform Committee, *Reforming the Law of Wills* (Final Report, May 1994) at xxv.

<sup>16</sup> See Queensland Law Reform Commission, *Uniform Succession Laws, Wills* (MP 15, February 1996) and Queensland Law Reform Commission, *Uniform Succession Laws: The Effect of the Lex Situs and Mozambique Rules on Succession to Immovable Property* (MP 16, February 1996).

(vi)

1. *Preliminary Matters and Capacity*
2. *Executing a Will*
3. *Revocation, Alteration and Revival*
4. *Interested Witnesses*
5. *Marriage and Divorce*
6. *Foreign Laws*
7. *Construction of Wills - The Anti-Lapse Rule*
8. *Construction of Wills and Miscellaneous Matters*
9. *Admission of Extrinsic Evidence*
10. *The Effect of the Lex Situs and Mozambique Rules on Succession to Immovable Property*

Consultations on the issues relating to the law of wills were undertaken in each jurisdiction by the National Committee's member in that jurisdiction.

The Queensland Law Reform Commission used the memoranda to seek specific comment from individuals and organisations within Queensland with an interest or expertise in the law of wills.

The New South Wales Law Reform Commission re-published and distributed the Issues Papers on *The Law of Wills*<sup>17</sup> and *Family Provision*<sup>18</sup> to assist in its consultation process.

The Law Reform Commission of Western Australia sought comment on the issues discussed in the memoranda from Mr Neville Crago of the University of Western Australia. Mr Crago has wide experience, both academic and professional, in the area of succession law. Comment was also sought from about forty individuals and organisations in Western Australia including judges, lawyer-politicians, academics, the Law Society, various government agencies and trustee companies. A press release was sent out and a notice was placed in the journal of the Law Society of Western Australia (*Brief*).

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<sup>17</sup> New South Wales Law Reform Commission, *Uniform Succession Laws: The Law of Wills* (Issues Paper 10, February 1996).

<sup>18</sup> New South Wales Law Reform Commission, *Uniform Succession Laws: Family Provision* (Issues Paper 11, February 1996).

(vii)

The Constitutional and Law Reform Branch of the Australian Capital Territory's Attorney General's Department sought advice from Mr Charles Rowland, then of the Australian National University. Mr Rowland is an internationally recognised expert on succession law and is now a member of the National Committee.

The Tasmanian Law Reform Commissioner convened an advisory committee of experienced Tasmanian legal practitioners and a member of the judiciary.

Members of the National Committee in other jurisdictions conducted such consultations as they considered appropriate.

The National Committee next met in Melbourne on 20 May 1996. The meeting was hosted by the Victorian Department of Justice and was chaired by Dr Robert Dean MP, Parliamentary Secretary to the Victorian Department of Justice and former member of the Victorian Parliamentary Law Reform Committee.

The principal aims of the Melbourne meeting were to:

- assist the process of wills law reform in Victoria (and hence provide a standard for other jurisdictions in Australia) by providing Australia-wide comment on the proposed Victorian wills legislation;
- assist the process of uniform succession law reform by exchanging views and seeking consensus on particular succession law issues - in particular, in relation to the law of wills and the *lex situs* rule; and
- set an agenda for future work on the Uniform Succession Laws Project.

The Melbourne meeting was very successful. All Australian jurisdictions except South Australia and the Northern Territory were represented. A representative of the New Zealand Law Commission also attended. Agreement was reached on a large number of issues. At the conclusion of the meeting, it was agreed that a report on wills law reform would be prepared for the Standing Committee of Attorneys General.

### **(c) The National Committee's Reports on Wills**

Following the May 1996 Melbourne meeting of the National Committee, the Queensland Law Reform Commission prepared a Report to the Standing Committee of Attorneys General on behalf of the National Committee. That Report addressed a number of significant issues relating to the law of wills.<sup>19</sup> It was forwarded to the Standing Committee of Attorneys General in October 1996.

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<sup>19</sup>

National Committee for Uniform Succession Laws, *Uniform Succession Laws for the Australian States and Territories: Report to the Standing Committee of Attorneys General: The Law of Wills* (MP 19, October 1996).

At an April 1997 meeting of the National Committee, it was noted that the Standing Committee of Attorneys General had expressed support for the concept of the National Committee and had requested the completion of the Wills project by the end of 1997. The National Committee decided to prepare a Consolidated Report for the Standing Committee of Attorneys General on the issues covered by the October 1996 Report as well as a number of outstanding wills issues.

It was also decided that the Consolidated Report should include draft model wills legislation based upon the National Committee's recommendations. The model legislation could form the basis of legislative reform in any jurisdiction interested in adopting the proposals contained therein.

The National Committee met further in September 1997 to finalise its recommendations and to consider a first draft of its model wills legislation.

This Consolidated Report on *The Law of Wills* represents the culmination of the National Committee's deliberations on this topic. It also includes draft model wills legislation prepared by the New South Wales Parliamentary Counsel on instructions from the National Committee. The National Committee gratefully acknowledges the assistance provided by the New South Wales Parliamentary Counsel to this project.

**(d) The next stages of this project**

At the April 1997 meeting of the National Committee, discussion commenced on the issues covered by the Issues Paper on *Family Provision*, and on a number of other issues with respect to family provision that had been raised primarily by respondents to the Issues Paper. It was noted that the Standing Committee of Attorneys General had requested the completion of the Family Provision project by the end of 1997.

That part of the Uniform Succession Laws Project has also now been completed. A Report on *Family Provision* will be presented to the Standing Committee of Attorneys General in December 1997, together with this Consolidated Report on *The Law of Wills*.

Work has commenced on the third stage of this project, the administration of estates. The final major stage of this project will be a review of intestacy laws.

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**DRAFT WILLS BILL 1997**





**DRAFT ONLY**

[STATE ARMS]

## **Wills Bill 1997**

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[STATE ARMS]

## Wills Bill 1997

No , 1997

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### A Bill for

An Act to reform the law relating to the making, alteration, revocation, rectification and construction of wills; and for other purposes.

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The Legislature of [insert name of State or Territory] enacts:

## Part 1 Preliminary

### 1 Name of Act

This Act is the *Wills Act 1997*.

### 2 Commencement

This Act commences on a day to be appointed by proclamation.

### 3 Purpose

The purpose of this Act is to reform the law relating to the making, alteration, rectification, revocation and construction of wills and to make particular provision for:

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

### 4 Definitions

- (1) In this Act:

*Court* means the [insert name of appropriate Court for jurisdiction].

*disposition* includes:

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

*document* means any paper or other material on which there is writing.

*minor* means a person under the age of 18 years.

*property* includes:

- (a) any contingent, executory or future interest in property, and
- (b) any right of entry or recovery of property or right to call for the transfer of title to property.

*Registrar* means [insert position of appropriate officer in jurisdiction].

*will* includes a codicil and any other testamentary disposition.

- (2) Notes in the text of this Act do not form part of this Act.

### 5 Application of Act

- (1) This Act applies only to wills executed on or after the commencement of this Act, except as provided by this section.
- (2) The [insert reference to appropriate Act of jurisdiction], as in force immediately before the commencement of this Act, continues to apply to wills executed before the commencement of this Act, in so far as those wills do not come under the operation of subsection (3) or under the operation of the sections specified in subsection (4).
- (3) Section 15 applies to a will executed before the commencement of this Act, if the granting of the decree absolute of the dissolution of the marriage or the annulment

of the marriage occurs on or after the commencement of this Act.

- (4) Sections *[insert sections]* apply to wills whether or not they are executed before, on or after the commencement of this Act, if the testator dies on or after that commencement.

## **Part 2 Capacity and formal requirements**

### **Division 1 Capacity**

#### **6 Property that may be disposed of by will**

- (1) A person may dispose by will of property to which the person is entitled at the time of his or her death.
- (2) A person may dispose by will of property to which the personal representative of that person becomes entitled by virtue of the office of personal representative after the death of that person. It does not matter if the entitlement of the person or of the personal representative did not exist at the date of the making of the will or at the time of the person's death.
- (3) A person may not dispose by will of property of which the person was trustee at the time of the death of the person.

#### **7 Minimum age for making a will**

- (1) A will made by a minor is not valid.
- (2) Despite subsection (1):
- (a) a minor may make a will in contemplation of marriage (and may alter or revoke such a will) but the will is of no effect if the marriage contemplated does not take place, and
- (b) a minor who is married may make, alter or revoke a will, and
- (c) a minor who has been married may revoke the whole or any part of a will made while the minor was married or in contemplation of that marriage.

**Note.** Division 1 of Part 3 provides for the authorisation by the Court of wills by minors.

### **Division 2 Execution of a will**

#### **8 How a will should be executed**

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

may exercise the power by a will that is executed in accordance with this section, but is not executed in that manner or with that solemnity.

**9 Witnesses need not know the contents of what they are signing**

A will that is executed in accordance with this Act is validly executed even if one or more witnesses to the will did not know that it was a will.

**10 When Court may dispense with the requirements for execution of wills**

- (1) A document or part of a document purporting to embody the testamentary intentions of a deceased person, even though it has not been executed in the manner required by this Act, constitutes a will of the deceased person, an alteration 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 alteration 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 or any part of 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 [insert name of jurisdiction].
- (4) For the purposes of this section:  
*document* means any record of information, and includes:
  - (a) anything on which there is writing, or
  - (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or
  - (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or
  - (d) a map, plan, drawing or photograph.

**11 Persons who cannot act as witnesses to wills**

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

**12 Can an interested witness benefit from a disposition under a will?**

- (1) If any beneficial disposition is given or made by will to a person (in this section called the *interested witness*) who attests the execution of the will, the disposition is void so far only as it concerns the interested witness or any person claiming under the interested witness.
- (2) However, a beneficial disposition given or made by will is not made void by this section if:
  - (a) at least 2 of the people who attested the execution of the will are not interested witnesses, or
  - (b) all the persons who would benefit directly from the avoidance of the disposition consent in writing to the distribution of the disposition according to the will (if those persons have the capacity to give that consent), or
  - (c) the Court is satisfied that the testator knew and approved of the disposition and it was given or made freely and voluntarily by the testator.



### Division 3 Revocation, alteration and revival of wills

#### 13 How a will may be revoked

The whole or any part of a will may be revoked only:

- (a) in the circumstances mentioned in Division 1 or 2 of Part 3 or by the operation of section 14 or 15, or
- (b) by a later will, or
- (c) by some writing declaring an intention to revoke it, executed in the manner in which a will is required to be executed by this Act, or
- (d) by the testator, or some person in his or her presence and by his or her direction, burning, tearing or otherwise destroying it with the intention of the testator of revoking it, or
- (e) by the testator, or some person in his or her presence and by his or her direction, writing on the will or dealing with the will in such a manner that the Court is satisfied from the state of the will that the testator intended to revoke it.

#### 14 Effect of marriage on a will

- (1) A will is revoked by the marriage of the testator.
- (2) However, the following are not revoked by the marriage of the testator:
  - (a) a disposition to the person to whom the testator is married at the time of his or her death, and
  - (b) any appointment as executor, trustee, advisory trustee or guardian of the person to whom the testator is married at the time of his or her death, and
  - (c) a will made in exercise of a power of appointment, if the property so appointed would not pass to the executor, administrator or *[name of the appropriate statutory body and name of legislation of the jurisdiction that governs the vesting of an intestate's estate until administration is granted in respect of the intestate's estate]* if the power of appointment was not exercised.
- (3) A will made in contemplation of a marriage, whether or not that contemplation is expressed in the will, is not revoked by the solemnisation of the marriage contemplated.
- (4) A will that is expressed to be made in contemplation of marriage generally is not revoked by the solemnisation of a marriage of the testator.

#### 15 Effect of divorce etc on a will

- (1) The ending of a testator's marriage revokes:
  - (a) any beneficial disposition made in a will in existence at the time the marriage ends by a testator to the testator's spouse, and
  - (b) any appointment of the testator's spouse as an executor, trustee, advisory trustee or guardian made by the will, and
  - (c) any grant made by the will of a power of appointment exercisable by, or in favour of, the testator's spouse.
- (2) However, the ending of a testator's marriage does not revoke:
  - (a) the appointment of the testator's spouse as trustee of property left by the will on trust for beneficiaries that include the spouse's children, or
  - (b) the grant of a power of appointment exercisable by the testator's spouse exclusively in favour of the children of whom both the testator and spouse are parents.

- (3) With respect to the revocation of any disposition, appointment or grant by this section, the will is to take effect as if the testator's spouse had died before the testator.
- (4) Subsection (1) does not apply if a contrary intention appears in the will or can otherwise be established.
- (5) For the purposes of this section, a marriage ends:
  - (a) when a decree of dissolution of the marriage becomes absolute under the *Family Law Act 1975* of the Commonwealth, or
  - (b) on the granting of a decree of nullity in respect of the marriage by the Family Court of Australia, or
  - (c) on the dissolution or annulment of the marriage in accordance with the law of a place outside Australia, but only if that dissolution or annulment is recognised in Australia under the *Family Law Act 1975* of the Commonwealth.
- (6) In this section:  
*testator's spouse* means the person who was the testator's spouse immediately before the marriage ended and includes a party to a purported or void marriage.

#### **16 How a will may be altered**

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

#### **17 How a revoked will may be revived**

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

### **Part 3 Wills made or rectified under Court authorisation**

#### **Division 1 Wills by minors**

##### **18 Court may authorise wills by minors**

- (1) The Court may, on application by or on behalf of a minor, make an order authorising the minor to make or alter a will in specific terms approved by the Court, or to revoke the whole or any part of a will of the minor.
- (2) An authorisation under this section may be granted on such conditions as the Court

thinks fit.

- (3) Before making an order under this section, the Court must be satisfied that:
  - (a) the minor understands the nature and effect of the proposed will, alteration or revocation and the extent of the property disposed of by it, and
  - (b) the proposed will, alteration or revocation accurately reflects the intentions of the minor, and
  - (c) it is reasonable in all the circumstances that the order should be made.
- (4) A will or instrument making or altering, or revoking the whole or any part of, a will made pursuant to an order under this section:
  - (a) must be executed as required by law and one of the attesting witnesses must be the Registrar, and
  - (b) must be retained by the Registrar and, in any such case, is taken to have been deposited with the Registrar in accordance with Part 6, and
  - (c) is not valid if it is made in breach of any condition subject to which an authorisation under this section is granted.
- (5) A will made by a deceased minor according to the law relating to wills of minors of the place where the deceased was resident at the time of execution is a valid will of the deceased.

## **Division 2 Wills for persons without testamentary capacity**

### **19 Court may make certain orders**

- (1) The Court may, on application by any person, make an order authorising the making or alteration of a will in specific terms approved by the Court, or the revocation of the whole or any part of a will, on behalf of a person who lacks testamentary capacity.
- (2) The Court may authorise the making or alteration of a will that deals with the whole of the property of a person, the making or alteration of a will that deals with part only of the property of a person or the alteration of part only of any will.
- (3) The Court is not to make an order under this Division unless the person on whose behalf approval for the making of a will is sought is alive when the order is made.
- (4) The Court may make an order under this Division in respect of a minor.

### **20 Leave of Court is required to make an application**

- (1) The leave of the Court must be obtained before an application for an order under this Division is made.
- (2) In applying for leave to make an application for an order under this Division the applicant for leave must, subject to the Court's discretion, furnish to the Court:
  - (a) a written statement of the general nature of the application and the reasons for making it, and
  - (b) an estimate, so far as the applicant is aware of it, of the size and character of the estate of the person on whose behalf approval for the making of a will or of any alteration or revocation is sought (the *proposed testator*), and
  - (c) an initial draft of the proposed will, alteration or revocation for which the applicant is seeking the Court's approval, and
  - (d) any evidence, so far as it is available, relating to the wishes of the proposed testator, and
  - (e) evidence of the likelihood of the proposed testator acquiring or regaining capacity to make a will at any future time, and

- (f) any will, or any copy of any will, in the possession of the applicant, or details known to the applicant of any will, of the proposed testator, and
- (g) any evidence of the interests, so far as they are known to the applicant, or can be discovered with reasonable diligence, of any person who would be entitled to receive any part of the estate of the proposed testator if the proposed testator were to die intestate, and
- (h) any evidence of any facts indicating the likelihood, so far as they are known to the applicant, or can be discovered with reasonable diligence, of an application being made, under the [*insert the short title of the relevant Act of the jurisdiction that deals with family provision*], and
- (i) any evidence of the circumstances, so far as they are known to the applicant, or can be discovered with reasonable diligence, of any person for whom the proposed testator might reasonably be expected to make provision under a will, and
- (j) a reference to any gift for a body, whether charitable or not, or for a charitable purpose that the proposed testator might reasonably be expected to give or make by will, and
- (k) any other facts that the applicant considers to be relevant to the application.

**21 Court must be satisfied as to certain matters**

The Court must refuse leave to make an application for an order under this Division unless the Court is satisfied that:

- (a) there is reason to believe that the proposed testator is or may be incapable of making a will, and
- (b) the proposed will, alteration or revocation is or might be one that would have been made by the proposed testator if he or she had testamentary capacity, and
- (c) it is or may be appropriate for an order authorising the making, alteration or revocation of a will to be made for the proposed testator, and
- (d) the applicant is an appropriate person to make an application, and
- (e) adequate steps have been taken to allow representation of all persons with a legitimate interest in the application, including persons who have reason to expect a gift or benefit from the estate of the proposed testator.

**22 Application for leave: the orders of the Court**

On hearing an application for leave, the Court may:

- (a) refuse the application, or
- (b) adjourn the application, or
- (c) give directions, including directions about the attendance of any person as a witness and, if it thinks fit, the attendance of the proposed testator, or
- (d) revise the terms of any initial draft of the proposed will, alteration or revocation for which the Court's approval is sought, or
- (e) grant the application on such terms as it thinks fit, or
- (f) if it is satisfied of the propriety of the application, allow the application for leave to proceed as an application to authorise the making, alteration or revocation of a will, and allow the application.

**23 Application for authorisation of making, alteration or revocation of a will**

- (1) In considering an application for an order authorising the making, alteration or revocation of a will, the Court:

- (a) may have regard to any information given to the Court in support of an application for leave, and
  - (b) may inform itself of any other matter in any manner it sees fit, and
  - (c) is not bound by the rules of evidence.
- (2) On hearing an application for an order authorising the making, alteration or revocation of a will in specific terms, the Court may, after considering the course of the application for leave to make the application, and any further material or evidence it requires:
- (a) refuse the application, or
  - (b) grant the application on such terms and conditions, if any, as it thinks fit.

#### **24 Execution of a will**

A will, or instrument altering or revoking a will, made pursuant to an order under this Division, must be signed by the Registrar and must be sealed with the seal of the Court.

#### **25 Retention of a will or instrument**

- (1) A will, or instrument altering or revoking a will, made pursuant to an order under this Division, must be retained by the Registrar and, when so retained, is taken to have been deposited with the Registrar in accordance with Part 6.
- (2) Despite section 50, the will may not be withdrawn from deposit with the Registrar by or on behalf of the person on whose behalf it was made unless the Court has made an order under this Division authorising the revocation of the will (in which case the Registrar must withdraw it on presentation of a copy of the order) or the person has acquired or regained testamentary capacity.

#### **26 Recognition of statutory wills**

- (1) A statutory will made according to the law of the place where the deceased was resident at the time of execution is to be regarded as a valid will of the deceased.
- (2) In this section:  
*statutory will* means a will executed by virtue of a statutory provision on behalf of a person who, at the time of execution, lacked testamentary capacity.

### **Division 3 Rectification of wills by Court**

#### **27 Court may rectify a will**

- (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 make an application for an order under this section must apply to the Court within 6 months after the date of the death of the testator.
- (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) A personal representative who makes a distribution to a beneficiary is not liable if:
  - (a) the distribution is made under section 53, or
  - (b) the distribution is made:
    - (i) at a time when the personal representative was not aware of any

application for rectification or any application having been made under the [*insert the name of the Act of the jurisdiction that deals with family provision*], and

- (ii) at least 6 months after the death of the testator.
- (5) The Court may direct that a certified copy of an order made under this section be attached to a will to which it applies and must, if it so directs, retain the will until the copy of the order is attached.

## **Part 4 Construction of wills**

### **28 What interest in property does a will dispose of?**

If :

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

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

### **29 When a will takes effect**

- (1) A will takes effect, with respect to the property disposed of by the will, as if it had been executed immediately before the death of the testator.
- (2) This section does not apply if a contrary intention appears (whether in the will or elsewhere).

### **30 Effect of failure of a disposition**

- (1) To the extent that any disposition of property, other than the exercise of a power of appointment, is ineffective wholly or in part, the will takes effect as if the property or the undisposed part of the property were part of the residuary estate of the testator.
- (2) This section does not apply if a contrary intention appears (whether in the will or elsewhere).

### **31 Use of extrinsic evidence to clarify a will**

- (1) In proceedings to construe a will, evidence, including evidence of the testator's intention, is admissible to the extent that the language used in the will renders the will, or any part of the will:
  - (a) meaningless, or
  - (b) ambiguous on the face of the will, or
  - (c) ambiguous in the light of the surrounding circumstances.
- (2) Evidence of a testator's intention is not admissible to establish any of the circumstances referred to in subsection (1) (c).
- (3) Nothing in this section prevents evidence that is otherwise admissible at law from being admissible in proceedings to construe a will.

### **32 Effect of a change in testator's domicile**

The construction of a will is not altered because of any change in the testator's domicile after executing the will.

### **33 Income on contingent, future or deferred dispositions**

A contingent, future or deferred disposition of property, whether specific or

residuary, includes any intermediate income of the property that has not been disposed of by the will.

**34 Beneficiaries must survive testator by 30 days**

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

**35 What does a general disposition of property include?**

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

**36 What does a general disposition of land include?**

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

**37 Effect of devise of real property without words of limitation**

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

**38 How dispositions to issue operate**

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

**39 How requirements to survive with issue are construed**

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

**40 Dispositions not to fail because issue have died before testator**

- (1) If a person makes a disposition to any of his or her issue and:
  - (a) the disposition is not a disposition to which section 38 applies, and

(b) the interest in the property disposed is not determinable at or before the death of the issue, and

(c) the issue does not survive the testator for 30 days,

the disposition is held on trust for the issue of that issue who survive the testator for 30 days in the shares they would have taken of the residuary estate of the testator if the testator had died intestate leaving only issue surviving.

- (2) Subsection (1) applies to dispositions to issue either as individuals or as members of a class.
- (3) This section does not apply if a contrary intention appears in the will.
- (4) A general requirement or condition that issue survive the testator or attain a specified age does not indicate a contrary intention for the purposes of this section and a gift of a joint tenancy will not on its own indicate a contrary intention.
- (5) If a condition is imposed on an original beneficiary and that beneficiary fails to survive the testator for 30 days, the issue of that beneficiary may not take under this section unless the original beneficiary has fulfilled the condition.

#### **41 Construction of dispositions**

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

#### **42 Legacies to unincorporated associations of persons**

- (1) A disposition:
  - (a) to an unincorporated association of persons, that is not a charity, or
  - (b) to or on trust for the aims, objects or purposes of an unincorporated association of persons, that is not a charity, or
  - (c) to or on trust for the present and future members of an unincorporated association of persons, that is not a charity,has effect as a legacy or devise in augmentation of the general funds of the association.
- (2) Property that is or that is to be taken to be a disposition in augmentation of the general funds of an unincorporated association must be:
  - (a) paid into the general fund of the association, or
  - (b) transferred to the association, or
  - (c) sold or otherwise disposed of on behalf of the association and the proceeds paid into the general fund of the association.
- (3) If the personal representative pays money to an association under a disposition, the receipt of the Treasurer or a like officer, if the officer is not so named, of the association is an absolute discharge for that payment.
- (4) If the personal representative transfers property to an association under a disposition, the transfer of that property to a person or persons designated in writing by any two persons holding the offices of President, Chairperson, Treasurer or Secretary or like officers, if those officers are not so named, is an absolute discharge to the personal representative for the transfer of that property.



- (5) Subsections (3) and (4) do not apply if a contrary intention appears in the will.
- (6) It is not an objection to the validity of a disposition to an unincorporated association of persons that a list of persons who were members of the association at the time the testator died cannot be compiled, or that the members of the association have no power to divide assets of the association beneficially among themselves.

**43 Can a person, by will, delegate the power to dispose of property?**

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

**44 Effect of referring to valuation in a will**

- (1) Except to the extent that a method of valuation is at the relevant time required under a law of [*insert name of jurisdiction*] or any other place, or is provided for in the will, an express or implied requirement in a will that a valuation of property be made or accepted for any purpose is to be construed as if it were a reference to a valuation of the property as at the date of the testator's death made by a competent valuer.
- (2) This section does not apply if a contrary intention appears in the will.

**Part 5 Wills under foreign law**

**45 Definition of "internal law"**

In this Part:

*internal law*, in relation to a place, means the law that would apply in a case where no question of the law in force in any other place arose.

**46 General rule as to formal validity**

- (1) A will is taken to be properly executed if its execution conforms to the internal law in force in the place:
  - (a) where it was executed, or
  - (b) that was the testator's domicile or habitual residence, either at the time the will was executed, or at the testator's death, or
  - (c) of which the testator was a national, either at the date of execution of the will, or at the testator's death.
- (2) The following wills are also taken to be properly executed:
  - (a) a will executed on board a vessel or aircraft, if the will has been executed in conformity with the internal law in force in the place with which the vessel or aircraft may be taken to have been most closely connected having regard to its registration and other relevant circumstances,
  - (b) a will, so far as it disposes of immovable property, if it has been executed in conformity with the internal law in force in the place where the property is situated,
  - (c) a will, so far as it revokes a will or a provision of a will that has been executed in accordance with this Act, or that is taken to have been properly executed by this Act, if the later will has been executed in conformity with any law by which the earlier will or provision would be taken to have been validly executed,
  - (d) a will, so far as it exercises a power of appointment, if the will has been executed in conformity with the law governing the essential validity of the power.

- (3) A will to which this section applies, so far as it exercises a power of appointment, is not taken to have been improperly executed because it has not been executed in accordance with the formalities required by the instrument creating the power.

**47 Ascertainment of system of internal law**

If the internal law in force in a place is to be applied to a will, but there is more than one system of internal law in force in the place that relates to the formal validity of wills, the system to be applied is determined as follows:

- (a) if there is a rule in force throughout the place that indicates which system of internal law applies to the will, that rule must be followed,
- (b) if there is no rule, the system of internal law is that with which the testator was most closely connected either:
- (i) at the time of his or her death, if the matter is to be determined by reference to circumstances prevailing at his or her death, or
- (ii) in any other case, at the time of execution of the will.

**48 Construction of the law applying to wills under foreign law**

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

**Part 6 Deposit of wills with Registrar**

**49 Will may be deposited with Registrar**

- (1) Any person may deposit a will in the office of the Registrar.
- (2) Any will deposited in the office of the Registrar under this Act must be in a sealed envelope that has written on it:
- (a) the testator's name and address (as they appear in the will), and
- (b) the name and address (as they appear in the will) of any executor, and
- (c) the date of the will, and
- (d) the name of the person depositing the will,
- and must be accompanied by the fee prescribed by the regulations.
- (3) A fee is not payable in respect of any will deposited with the Registrar if the deposit is made:
- (a) in accordance with Part 3, or
- (b) because a legal practitioner has died, or has ceased, or is about to cease, practising in [*insert name of jurisdiction*].
- (4) The regulations may prescribe fees for the purposes of this section.
- (5) Any regulations made under this section:
- (a) may prescribe fees in respect of a particular class or classes of wills or will makers, and
- (b) may prescribe different fees in respect of different classes of wills or will

- makers, and
- (c) may authorise the Registrar to waive fees in particular cases or classes of cases.

**50 Delivery of wills by Registrar**

- (1) If a will has been deposited with the Registrar under this Act, the testator may at any time apply in writing to the Registrar to be given the will or to have the will given to a person as directed by the testator.
- (2) On receiving the application, the Registrar must give the will to the testator or to any person nominated by the testator, but only if the testator is, at the time of making the application, not a minor and not a person who lacks testamentary capacity.
- (3) If a will has been deposited with the Registrar under this Act and the testator has died, any executor named in the will or any person entitled to apply for letters of administration with the will annexed may apply in writing to the Registrar to be given the will.
- (4) On receiving the application, the Registrar must give the will to the executor or other person or to any legal practitioner or trustee company nominated by that executor or person.
- (5) The Registrar may examine any will to enable the Registrar to comply with this Part.
- (6) The Registrar must ensure that an accurate copy of every will given to a person under this section is made and retained by the Registrar.
- (7) If there is any doubt as to whom a will should be given, the Registrar, or any other person, may apply to the Court for directions as to whom the Registrar should give the will.

**51 Retention of wills**

Any failure by the Registrar to retain a will as required by this Act does not affect the validity of the will.

**Part 7 Miscellaneous**

**52 Persons entitled to see will**

- (1) Any person having the possession or control of a will including a revoked will, or a copy of any such will and any part of such a will (including a purported will) of a deceased person must allow any or all of the following persons to inspect and, at their own expense, take copies of it:
  - (a) any person named or referred to in it, whether as beneficiary or not,
  - (b) the surviving spouse, any parent or guardian and any issue of the testator,
  - (c) any person who would be entitled to a share of the estate of the testator if the testator had died intestate,
  - (d) any creditor or other person having any claim at law or in equity against the estate of the deceased,
  - (e) any beneficiaries of prior wills of the deceased,
  - (f) a parent or guardian of a minor referred to in the will or who would be entitled to a share of the estate of the testator if the testator had died intestate.
- (2) Any person having the possession or control of a will, including a revoked will, or a copy of any such will and any part of such a will (including a purported will), of

a deceased person must produce it in Court if required to do so.

**53 Personal representatives may make maintenance distributions within 30 days**

- (1) If a surviving person who is wholly or substantially dependent on the testator has an entitlement under a will that does not become absolute until 30 days after the testator's death, the personal representative may make a distribution for the maintenance, support or education of that person within that 30 day period.
- (2) The personal representative is not liable for any such distribution that is made in good faith.
- (3) The personal representative may make such a distribution even though the personal representative knew at the time the distribution was made of a pending application under the *[insert the name of the Act of the jurisdiction that deals with family provision]*.
- (4) Any sum distributed is to be deducted from any share of the estate to which the person receiving the distribution becomes entitled, but if any person to whom any distribution has been made does not survive the testator for 30 days any such distribution is to be treated as an administration expense.

**54 Regulations**

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

**55 Amendment of *[insert name of appropriate Act of jurisdiction]***

The *[insert name of appropriate Act of jurisdiction]* is amended as set out in Schedule 1.

**Schedule 1            Amendment of *[insert name of appropriate Act of jurisdiction]***

*[Amendments to be inserted here]*

(Section 55)

# CHAPTER 1

## PRELIMINARY

### 1. COMMENCEMENT

#### (a) Basis for the model provision

The basis for the model provision was clause 2 of the draft *Wills Act 1994 (Vic)*. Clause 2 provides:

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

#### (b) The National Committee's decision

The National Committee accepted clause 2.

#### (c) Recommendation

The National Committee recommends that a commencement provision to the effect of clause 2 of the draft *Wills Act 1994 (Vic)* be included in the draft model wills legislation.<sup>20</sup>

#### (d) Model provision: clause 2

**2**      *Commencement*

**This Act commences on a day to be appointed by proclamation.**

### 2. PURPOSE

#### (a) Basis for the model provision

The basis for the model provision was clause 1 of the draft *Wills Act 1994 (Vic)*. Clause 1 provides:

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<sup>20</sup>

In this Report, the term "draft model wills legislation" is a reference to the draft *Wills Bill 1997*, which is found at the beginning of this Report.

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

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

**(b) The National Committee's decision**

The National Committee accepted clause 1.

**(c) Recommendation**

The National Committee recommends that a purposes provision to the effect of clause 1 of the draft *Wills Act 1994 (Vic)* be included in the draft model wills legislation.

**(d) Model provision: clause 3**

**3 Purpose**

The purpose of this Act is to reform the law relating to the making, alteration, rectification, revocation and construction of wills and to make particular provision for:

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

### 3. DEFINITIONS

#### (a) Basis for the model provision

The basis for the model provision was clause 3 of the draft *Wills Act 1994 (Vic)*. Clause 3 provides:

In this Act -

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

**"Disposition"** includes -

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

and "dispose of" has a corresponding meaning.

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

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

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

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

#### (b) The National Committee's decision

The National Committee accepted clause 3, save that it agreed that:

- each jurisdiction should define "court" according to its own requirements;
- a definition of "registrar" should be adopted. It should also be defined by each jurisdiction according to its own requirements; and
- the definition of "property" in clause 4(4) of the draft *Wills Act 1994 (Vic)* should be relocated to this provision.

The National Committee acknowledges that the definition of "document" in clause 3 is quite narrow, particularly given current advances in information technology. However, the National Committee has recommended a broad definition of "document" for clause

10 of the draft model wills legislation, which gives the court the power to dispense with the formal requirements for a will.<sup>21</sup>

In the National Committee's view, it is preferable to have a narrow general definition of "document"<sup>22</sup> and a general requirement that a will be in writing<sup>23</sup> and to leave the question of other forms of recording a testator's intentions to the court's scrutiny under the proposed dispensing power. Under that provision, a document (as defined in that provision) that does not comply with the formal requirements for the execution of wills will constitute a person's will only if the court is satisfied that the deceased person intended the document to constitute his or her will.

### (c) Recommendation

The National Committee recommends that a provision to the effect of clause 3 of the draft *Wills Act 1994* (Vic) be included in the draft model wills legislation, save that:

- each jurisdiction will require its own definitions of "court" and "registrar"; and
- the definition of "property" in clause 4(4) of the draft *Wills Act 1994* (Vic) should be relocated to the definitions provision in the draft model wills legislation.

### (d) Model provision: clause 4

<p><b>4</b></p> <p><b>(1)</b></p>	<p><b>Definitions</b></p> <p><b>In this Act:</b></p> <p><b><i>Court</i> means the [insert name of appropriate Court for jurisdiction].</b></p> <p><b><i>disposition</i> includes:</b></p> <p><b>(a) any gift, devise or bequest of property under a will, and</b></p> <p><b>(b) the creation by will of a power of appointment affecting property, and</b></p> <p><b>(c) the exercise by will of a power of appointment affecting property.</b></p>
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<sup>21</sup> See page 16 of this Report.

<sup>22</sup> Apart from cl 10, where "document" is specifically defined, the word "document" is used only in cl 11 of the draft model wills legislation, which provides:

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

<sup>23</sup> See the discussion of cl 7 of the draft *Wills Act 1994* (Vic) and cl 8 of the draft model wills legislation at pages 10-11 of this Report.



***document*** means any paper or other material on which there is writing.

***minor*** means a person under the age of 18 years.

***property*** includes:

- (a) any contingent, executory or future interest in property, and
- (b) any right of entry or recovery of property or right to call for the transfer of title to property.

***Registrar*** means *[insert position of appropriate officer in jurisdiction]*.

***will*** includes a codicil and any other testamentary disposition.

- (2) Notes in the text of this Act do not form part of this Act.

## CHAPTER 2

### CAPACITY

#### 1. PROPERTY THAT MAY BE DISPOSED OF BY WILL

##### (a) Basis for the model provision

The basis for the model provision was clause 4 of the draft *Wills Act 1994 (Vic)*. Clause 4 provides:

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

##### (b) The National Committee's decision

The National Committee accepted clause 4, but was of the view that the definition of "property" in subclause (4) should be relocated to the definitions provision of the draft model wills legislation.<sup>24</sup>

##### (c) Recommendation

The National Committee recommends that a provision to the effect of clause 4 of the draft *Wills Act 1994 (Vic)* be included in the draft model wills legislation, save that the definition of "property" in subclause (4) should be relocated to the definitions provision of the draft model wills legislation.

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See the discussion of cl 3 of the draft *Wills Act 1994 (Vic)* and cl 4 of the draft model wills legislation at pages 3-5 of this Report.

**(d) Model provision: clause 6**

- 6** *Property that may be disposed of by will*
- (1)** A person may dispose by will of property to which the person is entitled at the time of his or her death.
- (2)** A person may dispose by will of property to which the personal representative of that person becomes entitled by virtue of the office of personal representative after the death of that person. It does not matter if the entitlement of the person or of the personal representative did not exist at the date of the making of the will or at the time of the person's death.
- (3)** A person may not dispose by will of property of which the person was trustee at the time of the death of the person.

**2. MINIMUM AGE FOR MAKING A WILL**

**(a) Basis for the model provision**

Subclauses 5(1) and (2) of the draft *Wills Act 1994 (Vic)* were the basis for the model provision. Those subclauses provide:

- (1)** A will made by a minor is not valid.
- (2)** Despite sub-section (1) -
- (a)** a minor may make a will in contemplation of marriage (and may alter or revoke such a will) but the will is of no effect if the marriage contemplated does not take place;
- (b)** a minor who is married may make, alter or revoke a will;
- (c)** a minor who has been married may revoke the whole or a part of a will made whilst the minor was married or in contemplation of that marriage.

**(b) The National Committee's decision**

The National Committee generally accepted subclauses 5(1) and (2). It agreed that there should be no general lowering of the age of capacity (that is, the age of capacity to make a will should remain at eighteen), but that a married minor should be able to make a will.

The National Committee gave consideration to a number of specific issues in relation to this provision.

**(c) Specific issues**

**(i) Minor who is no longer married**

Clause 5(2)(c) of the draft *Wills Act 1994* (Vic) would enable a minor who had been, but was no longer, married to revoke a will already made, or part of it. However, that clause would not enable a minor who had been, but was no longer, married to make a new will.<sup>25</sup>

In South Australia, a minor who is, or has been, married may make, alter or revoke a will as if he or she were an adult.<sup>26</sup>

The National Committee considered whether a minor who had been, but was no longer, married should still have capacity to make a will. In the view of the National Committee, the capacity of a married minor to make a valid will should properly be seen as an incident of marriage. For that reason, the National Committee does not favour the South Australian approach, whereby a minor who has been, but is no longer, married still retains the will-making capacity acquired upon marriage.

The National Committee has recommended that, in certain circumstances, the court should be able to authorise the making of a will for a minor.<sup>27</sup> The National Committee regards that recommendation as sufficient to cater for those circumstances.

**(ii) Wills by minors in contemplation of marriage**

Both clause 5(2) of the draft *Wills Act 1994* (Vic) and section 5(3) of the *Wills Act 1936* (SA) would enable a minor to make a will in contemplation of marriage, but the will would be of effect only if the contemplated marriage were solemnised.

The National Committee agrees with that approach.

**(d) Recommendation**

The National Committee recommends that a provision to the effect of subclauses 5(1) and (2) of the draft *Wills Act 1994* (Vic) be included in the draft model wills legislation so that:

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<sup>25</sup> This would require court authorisation. See the discussion about court-authorized wills for minors at pages 40–43 of this Report.

<sup>26</sup> *Wills Act 1936* (SA) s 5(2).

<sup>27</sup> See pages 40–43 of this Report.

- the age of capacity to make a will generally remains at 18 years of age;
- a married minor may make, alter or revoke a will;
- a minor may make a will in contemplation of marriage, although a will made under this provision would come into effect only if the contemplated marriage were solemnised; and
- a minor who has been married may revoke the whole or any part of a will.

**(e) Model provision: clause 7**

**7 *Minimum age for making a will***

**(1) A will made by a minor is not valid.**

**(2) Despite subsection (1):**

- (a) a minor may make a will in contemplation of marriage (and may alter or revoke such a will) but the will is of no effect if the marriage contemplated does not take place, and**
- (b) a minor who is married may make, alter or revoke a will, and**
- (c) a minor who has been married may revoke the whole or any part of a will made while the minor was married or in contemplation of that marriage.**

**Note.** Division 1 of Part 3 provides for the authorisation by the Court of wills by minors.

# CHAPTER 3

## EXECUTION OF A WILL

### 1. HOW A WILL SHOULD BE EXECUTED

#### (a) Basis for the model provision

The basis for the model provision was clause 7 of the draft *Wills Act 1994* (Vic). Clause 7 provides:

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

#### (b) The National Committee's decision

The National Committee accepted clause 7. It agreed that the required number of witnesses must be present when the testator signs or acknowledges the will, but that they need not attest and sign the will in the presence of each other. It also agreed that there should no longer be a requirement that a will be signed "at the foot or end thereof".<sup>28</sup>

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For a discussion of this issue, see Queensland Law Reform Commission, *Uniform Succession Laws: Wills* (MP 15, February 1996) at 17-18.

**(c) Recommendation**

The National Committee recommends that a provision to the effect of clause 7 of the draft *Wills Act 1994* (Vic) be included in the draft model wills legislation.

**(d) Model provision: clause 8**

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

**2. WITNESSES NEED NOT KNOW THE CONTENTS OF WHAT THEY ARE SIGNING**

**(a) Basis for the model provision**

The basis for the model provision was clause 8 of the draft *Wills Act 1994* (Vic). Clause 8 provides:

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

**(b) Background**

The requirement that a witness had to be aware that the document he or she was witnessing was a will was abolished in England in 1837. The National Committee sees no valid reason for its re-introduction.

**(c) The National Committee's decision**

The National Committee accepted clause 8. In the National Committee's view, a testator should have the right to make a will without having to disclose its contents to a witness, and without even having to disclose to a witness that the testator is making a will. The purpose of the witnessing requirement is simply to verify the authenticity of the testator's signature, and to ensure that the testator is signing voluntarily.

**(d) Recommendation**

The National Committee recommends that a provision to the effect of clause 8 of the draft *Wills Act 1994* (Vic) be included in the draft model wills legislation.

**(e) Model provision: clause 9**

**9 *Witnesses need not know the contents of what they are signing***

**A will that is executed in accordance with this Act is validly executed even if one or more witnesses to the will did not know that it was a will.**

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

**(a) Basis for the model provision**

The basis for the model provision was clause 9 of the draft *Wills Act 1994* (Vic). Clause 9 provides:

- (1) A document purporting to embody the testamentary intentions of a deceased person, even though it has not been executed in accordance with the formal requirements of this Act, constitutes a will of the deceased person, the exercise of a power of appointment, an amendment of such a will or the revocation of such a will if the Court is satisfied that the deceased person intended the document to constitute his or her will, the exercise of a power of appointment, an amendment to his or her will or the revocation of his or her will.



- (2) In forming its view, the Court may have regard (in addition to the document) to any evidence relating to the manner of execution or testamentary intentions of the deceased person, including evidence (whether admissible before the commencement of this section or otherwise) of statements made by the deceased person.
- (3) This section applies to a document whether it came into existence within or outside the State.
- (4) Rules of Court may authorise the Registrar to exercise the powers of the Court -
  - (a) without limit as to the value of the interests affected, in all cases in which those affected consent; and
  - (b) even if there is no consent, in all cases in which the value of the interests affected does not exceed a sum specified in the Rules.

## (b) Background

The Issues Paper, *The Law of Wills*,<sup>29</sup> described the different provisions existing in the various Australian jurisdictions that enable the court to admit to probate a will that has not been executed in compliance with the requirements of the wills legislation that deal with the form of a will.

There has been strong support expressed for the adoption by all jurisdictions of the South Australian provision, which is the basis of the proposed Victorian provision, and was also the basis of the provisions in Tasmania, Western Australia and New South Wales. The Tasmanian and Western Australian provisions,<sup>30</sup> however, require a high standard of proof - by including the words "that there can be no reasonable doubt". The standard of proof in Western Australia is that the court be satisfied "that there can be no reasonable doubt that the deceased intended the document to constitute his will", whereas the South Australian provision now only requires the court to be "satisfied" of the testator's intention<sup>31</sup> (as in the New South Wales provision<sup>32</sup> and clause 9 of the draft *Wills Act 1994* (Vic)).

The Queensland requirement that there must be "substantial compliance"<sup>33</sup> has proven to be so great a stumbling block that the provision has had poor success, and cases

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<sup>29</sup> Queensland Law Reform Commission, *Uniform Succession Laws for Australian States and Territories, Issues Paper No 1, The Law of Wills* (WP 46, July 1994, reprinted June 1995) at 15-22.

<sup>30</sup> *Wills Act 1992* (Tas) s 26; *Wills Act 1970* (WA) s 34.

<sup>31</sup> *Wills Act 1936* (SA) s 12(2).

<sup>32</sup> *Wills, Probate and Administration Act 1898* (NSW) s 18A.

<sup>33</sup> *Succession Act 1981* (Qld) s 9(a).

that would almost certainly have been found to come within the dispensing power in South Australia, New South Wales, Tasmania or Western Australia have failed in Queensland.<sup>34</sup>

**(c) The National Committee's decision**

The National Committee was generally in favour of a dispensing power as found in clause 9 of the draft *Wills Act 1994* (Vic), subject to giving consideration to the following subsidiary issues.

**(d) Subsidiary issues**

**(i) The requisite standard of proof**

In the National Committee's view, the civil standard of proof that a court is "satisfied" of the testator's intention should be adopted.

**(ii) Definition of "document"**

The National Committee agreed that the definition of "document" should cover computer-generated material. It agreed to incorporate into the draft model wills legislation the definition of "document" that is found in section 21(1) of the *Interpretation Act 1987* (NSW), which provides:<sup>35</sup>

"document" means any record of information, and includes:

- (a) anything on which there is writing, or
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or
- (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or
- (d) a map, plan, drawing or photograph.

This expanded definition of "document" should initially apply only to the dispensing power and not to the whole of the draft model wills legislation.<sup>36</sup>

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<sup>34</sup> See Queensland Law Reform Commission, *Uniform Succession Laws for Australian States and Territories, Issues Paper No 1, The Law of Wills* (WP 46, July 1994, reprinted June 1995) at 17-18.

<sup>35</sup> This definition is identical to the definition of "document" in the Dictionary to both the *Evidence Act 1995* (NSW) and the *Evidence Act 1995* (Cth).

<sup>36</sup> See the definition of "document" recommended in cl 4 of the draft model wills legislation at page 5 of this Report.

### (iii) Application of provision to part of a document

The National Committee agreed that the dispensing power should apply to “a part of a document” as well as to “a document”. The National Committee considered the dispensing power in section 11A of the *Wills Act 1968* (ACT) to be better drafted than clause 9 of the draft *Wills Act 1994* (Vic) in so far as it refers to “a document, or a part of a document”. Section 11A provides:

- (1) A document, or a part of a document, purporting to embody testamentary intentions of a deceased person shall, notwithstanding that it has not been executed in accordance with the formal requirements of this Act, constitute a will of the deceased person, an amendment of the will of the deceased person or a revocation of the will of the deceased person if the Supreme Court is satisfied that the deceased person intended the document or part of the document to constitute his or her will, an amendment of his or her will or the revocation of his or her will respectively.
- (2) In forming a view of whether a deceased person intended a document or a part of a document to constitute his or her will, an amendment of his or her will or a revocation of his or her will, the Supreme Court may, in addition to having regard to the document, have regard to -
  - (a) any evidence relating to the manner of execution of the document; or
  - (b) any evidence of the testamentary intentions of the deceased person, including evidence (whether admissible before the commencement of this section or not) of statements made by the deceased person.

### (iv) Registrar’s jurisdiction

The National Committee is of the view that clause 9(4) of the draft *Wills Act 1994* (Vic), which deals only with procedural matters, should be omitted from the draft model wills legislation.<sup>37</sup>

### (e) Recommendation

The National Committee recommends that a provision to the effect of clause 9 of the draft *Wills Act 1994* (Vic) be included in the draft model wills legislation, save that:

- the model provision should include the definition of “document” found in section 21(1) of the *Interpretation Act 1987* (NSW);

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See the National Committee’s recommendation at pages 54-55 of this Report in relation to another procedural provision.

- subclause (1) should be amended so as to apply to “a document or part of a document”;
- the reference to “the exercise of a power of appointment” in subclause (1) should be omitted from the model provision. In the National Committee’s view, this reference is unnecessary. If the intention is to exercise the power by will, the relevant intention is to make a will and the additional words are not needed; and
- subclause (4) should be omitted from the model provision.

**(f) Model provision: clause 10**

**10 When Court may dispense with the requirements for execution of wills**

- (1) A document or part of a document purporting to embody the testamentary intentions of a deceased person, even though it has not been executed in the manner required by this Act, constitutes a will of the deceased person, an alteration 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 alteration 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 or any part of 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 [insert name of jurisdiction].**
- (4) For the purposes of this section:**  
**document means any record of information, and includes:**
  - (a) anything on which there is writing, or**
  - (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or**
  - (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or**
  - (d) a map, plan, drawing or photograph.**

#### 4. PERSONS WHO CANNOT ACT AS WITNESSES TO WILLS

##### (a) Basis for the model provision

The basis for the model provision was clause 10 of the draft *Wills Act 1994* (Vic). Clause 10 provides:

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

##### (b) The National Committee's decision

The National Committee accepted clause 10. In its Report, *Reforming the Law of Wills*,<sup>38</sup> the Victorian Law Reform Committee preferred the expression "unable to see" to "blind", which is used in the Queensland precedent.<sup>39</sup> It was concerned that the Queensland provision invited questions as to the definition of "blind", and did not deal with the possibility of a person who was only temporarily unable to see.<sup>40</sup>

##### (c) Recommendation

The National Committee recommends that a provision to the effect of clause 10 of the draft *Wills Act 1994* (Vic) be included in the draft model wills legislation.

##### (d) Model provision: clause 11

**11** *Persons who cannot act as witnesses to wills*

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

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<sup>38</sup> Victorian Law Reform Committee, *Reforming the Law of Wills* (Final Report, May 1994) at 81.

<sup>39</sup> *Succession Act 1981* (Qld) s 14.

<sup>40</sup> Victorian Law Reform Committee, *Reforming the Law of Wills* (Final Report, May 1994) at 81.

## 5. CAN AN INTERESTED WITNESS BENEFIT FROM A DISPOSITION UNDER A WILL?

### (a) Background to the interested witness rule<sup>41</sup>

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 to the execution of the will in probate proceedings. The result 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 1752* (UK)<sup>42</sup> 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* (UK) and the *Evidence Amendment Act 1853* (UK). However, the disqualification of beneficiary witnesses remained embedded in the *Wills Act 1837* (UK) 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.

### (b) Problems with the interested witness rule

The difficulty with the rule is that it does not distinguish between the innocent and the guilty witness. The editors of the *Uniform Laws Annotated* comment on the abolition of the interested witness rule in the *Uniform Probate Code* (US) as follows:<sup>43</sup>

Of course, the purpose of this change is not to foster use of interested witnesses, and attorneys will continue to use disinterested witnesses in execution of wills. But the rare and innocent use of a member of the testator's family on a home-drawn will would no longer be penalised.

This change does not increase appreciably the opportunity for fraud or undue influence. A substantial gift by will to a person who is one of the witnesses to the execution of the will would itself be a suspicious circumstance, and the gift could be challenged on 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 use disinterested witnesses.

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<sup>41</sup> This is taken from an article by Yale DEC, "Witnessing Wills and Losing Legacies" (1984) 100 *Law Quarterly Review* 453-467.

<sup>42</sup> 25 Geo II c 6.

<sup>43</sup> *Uniform Probate Code (UPC)* s 2-505.

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

The harshness of the rule has been addressed in a piecemeal way by legislatures and the judiciary. In some States the rule does not apply if there is a sufficiency of disinterested witnesses, and in Victoria there is currently a provision that allows an interested witness to take the lesser of an intestacy share or the benefit left by the will.<sup>44</sup> In New South Wales there is a provision that allows the witness to approach the court for relief.<sup>45</sup> In some States solicitors who have witnessed the execution of a will allowing them their reasonable costs for acting in the administration of the deceased estate have been relieved of the disqualification. In Tasmania a disqualified person may apply to the court for an order that the person be entitled under the will.<sup>46</sup>

In New South Wales there is a provision that enables all the persons who would directly benefit from the avoidance of the gift to consent in writing to the distribution of the gift according to the will.<sup>47</sup> These persons must have capacity to do so. This provision is perhaps declaratory.

It is arguable that the accretion of exceptions to the disqualification rule has made the provision unnecessarily wordy and even counter-productive. For example, the current Victorian exception, which allows 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 towards creativity in diminishing the force of the rule by the doctrine of dependent relative revocation,<sup>48</sup> and have been easily satisfied, where they are permitted to consider it, of the propriety of the witness's conduct.<sup>49</sup>

It is unlikely, in the absence of adverse experience of the effect of the abolition of the rule, that jurisdictions that have abolished the rule could be persuaded to re-instate it. Consequently, the probable direction of a search for uniformity would be to abolish the

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44 *Wills Act 1958 (Vic)* s 13(3)(c). Note, however, that the *Wills Act 1958 (Vic)* will be repealed when the *Wills Act 1997 (Vic)* commences. The new Act will abolish the interested witness rule: see s 11.

45 *Wills, Probate and Administration Act 1898 (NSW)* s 13(2)(c).

46 *Wills Act 1992 (Tas)* ss 45 and 46.

47 *Wills, Probate and Administration Act 1898 (NSW)* s 13(2)(b).

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

49 *Re Emanuel* [1981] VR 113.

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, a procedure should be allowed to ensure that the innocent witness is not disqualified.

The abolition of the rule would not prevent the court from requiring a beneficiary witness to answer an allegation that there was a suspicious circumstance concerning the execution of the will, or that there had been undue influence.

Another argument for the repeal of the interested witness rule is that, because of its monolithic character, it constitutes an impediment to the development of a mature doctrine of suspicious circumstances surrounding the execution of a will. The existence of the doctrine is undoubted. For instance, if a solicitor who prepares a will takes a benefit under it, the solicitor will have great difficulty in persuading the court that it is not suspicious.<sup>50</sup> It is clearly a suspicious circumstance when a witness to a will takes a benefit under it, but, because of the statute, an innocent witness is not allowed to show that the circumstances of the particular case are not suspicious at all. It is this fact that impedes clear thinking about beneficiary witnesses and the suspicious circumstances doctrine. The doctrine is about what sorts of circumstances have the effect of shifting the onus of proof in relation to an allegation of undue influence, the testator's competence, and the testator's knowledge and approval of the contents of the will. This has been clarified by the recent Canadian case of *Vout v Hay*.<sup>51</sup>

If one retains the interested witness rule, instead of also retaining a myriad of specific, sometimes petty, exceptions to it, it is arguable that the number of exceptions should be reduced and that a general exception should be framed in terms of the suspicious circumstances doctrine - that is, that the witness may retain the benefit if the witness can satisfy the court that there are no suspicious circumstances infecting the gift. A submission from the Wills Advisory Group to the Victorian Law Reform Committee drew attention to the view of Dr Ian Hardingham - that is, in matters relevant to undue influence, the persuasive burden rests on the person wishing to challenge the will.<sup>52</sup> From this it is arguable that, if the interested witness rule is retained, the beneficiary witness should be allowed to persuade the court that there is no suspicious circumstance infecting the benefit and that he or she should be permitted to keep it.

On the other hand, if one repeals the interested witness rule, as in South Australia, the Australian Capital Territory, and as is proposed for Victoria,<sup>53</sup> room is given for the suspicious circumstances doctrine to occupy the space left by the repeal.

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

51 [1995] 2 SCR 876.

52 Victorian Law Reform Committee, *Reforming the Law of Wills* (Final Report, May 1994) at 92.

53 See note 44 of this Report.



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

### **(c) The National Committee's decision**

The National Committee agreed that the interested witness rule should be retained, but that it should not absolutely disqualify a witness from taking a benefit. It was agreed that the rule should be redrafted to place the onus on the interested witness to satisfy the court that it was appropriate to take the benefit.

Three options for the rule were considered by the National Committee (the differences are between subclause (2) of each version):<sup>54</sup>

#### *Version A:*

- (1) If any beneficial gift is given or made by will to a person (in this section called "the interested witness") who attests the execution of the will or to the interested witness's spouse, the gift is void so far only as it concerns the interested witness or the interested witness's spouse or any person claiming under either of them, unless subsection (2) applies.
- (2) A beneficial gift given or made by will is not made void by this section if the court is satisfied that -
  - (a) the benefit was fair in all the circumstances; and
  - (b) there was an absence of suspicious circumstances surrounding the making of the will.

#### *Version B:*

- (1) [As above]
- (2) A beneficial gift given or made by will is not made void by this section if the court is satisfied that -
  - (a) the testator intended to make the disposition; and
  - (b) there was no undue influence.

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Note the reference in subclause (1) of Version A to the witness's spouse. At the time the National Committee was considering the general approach to take in relation to the interested witness rule, it had not yet made the decision to exclude the witness's spouse from the operation of the rule. See pages 23-24 of this Report as to that decision.

*Version C*: (which is based on section 13(2)(c) of the *Wills, Probate and Administration Act 1898* (NSW)):

- (1) [As above]
- (2) A beneficial gift given or made by will is not made void by this section if the court is satisfied that -
  - (a) the testator knew and approved of the gift; and
  - (b) the gift was given or made freely and voluntarily by the testator.

The National Committee preferred Version C, based in part on the current New South Wales provision, to the other two suggested versions. In the National Committee's view, Version C avoids some of the ambiguities in the drafting of Version B, especially the reference to the testator's intention in subclause 2(a). Version C also more closely reflects the concept of testamentary intention.

#### **(d) Subsidiary issues**

The National Committee also considered a number of subsidiary issues in relation to the interested witness rule, the first two of which concern the scope of the rule.

##### **(i) Should the rule cover all witnesses to the execution of a will and not simply attesting witnesses?**

It was suggested that, if the interested witness rule were to be retained, it should be extended to apply to all witnesses to the execution of a will and not be confined to those witnesses who actually attest the execution of a will.

The interested witness rule has traditionally applied only to a witness who attests a will. A person may, however, orchestrate the making of a will in his or her favour, obtain the services of a solicitor, virtually dictate the terms of the will, ensure that the solicitor reads out the will to the testator, and be present at the execution of the will. There is no rule of law that allows that process to be questioned.

If the interested witness rule has substance to it, there is some logic to extending its operation to all persons who are in fact witnesses to the execution, and not confining it to the witnesses who happen to attest the will. (Of course a non-attesting witness could always leave the room just prior to execution of the will - but at least the chances of intimidation would be reduced, as the testator would have an opportunity to question the contents of what he or she was about to sign without that witness being present.)

However, the majority of the National Committee was against extending the interested witness rule to a non-attesting witness. South Australia and the Australian Capital Territory have already abolished the interested witness rule and it is extremely unlikely that it will be reintroduced in those jurisdictions. In light of the general trend to abolish the rule altogether, its expansion was seen as undesirable.

**(ii) Disqualification of the witness's spouse**

The National Committee has considered whether the rule, if retained, should continue to disqualify the spouse of a witness from taking a benefit under a will and, if so, whether "spouse" should be defined to include a *de facto* partner.<sup>55</sup>

The Committee noted that the Victorian Law Reform Committee had recommended that, if the interested witness rule were to be retained, the current disqualification in respect of the spouse of a witness should be removed.<sup>56</sup> The reasons cited by the Victorian Law Reform Committee were:<sup>57</sup>

[T]o retain the rule with respect to spouses but to refrain consciously from extending it to *de facto* partners might be seen as discriminatory against spouses, particularly in the current context of the growth in the number of *de facto* relationships.

A better solution might be to remove the disqualification of the spouse. When the rule was originally legislated husband and wife were one at law. The disqualification of the spouse would at that date have been almost automatic. This was remedied by legislation in the latter part of the nineteenth century.<sup>58</sup> If the disqualification of the spouse were removed it would make the rule less draconian. It is less likely that a husband and a wife would collude to pressure a testator to confer a benefit on a spouse than that a beneficiary-witness would do so on his or her own. The suspicious circumstances doctrine could still be invoked in the case of an unjustifiable disposition to the spouse of a witness. The solution would preclude criticism that spouses were being dealt with less fairly than informal partners. [some footnotes omitted]

The National Committee has agreed that the interested witness rule should no longer disqualify a witness's spouse from taking a benefit under a will. The historical origins of the spousal disqualification no longer apply. Further, if the disqualification is to be logical, it should be extended so that a witness's *de facto* partner is also disqualified.

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55 For example, s 15 of the *Succession Act 1981* (Qld) would not currently apply to a *de facto* partner, but only to a lawful spouse.

56 Victorian Law Reform Committee, *Reforming the Law of Wills* (Final Report, May 1994) at 94.

57 *Ibid.*

58 See *Married Women's Property Act 1870* (Vic).

However, given the trend towards abolishing the interested witness rule altogether,<sup>59</sup> there seems little point in recommending that the operation of the rule should be expanded so as to disqualify a witness's *de facto* partner, in addition to a witness's spouse.

Consistent with its view on whether the rule should be expanded to cover all witnesses, rather than merely attesting witnesses,<sup>60</sup> the National Committee is of the view that, rather than expand the ambit of the rule so as to disqualify the *de facto* partner of an interested witness from taking a benefit under a will, the preferable course is to remove the disqualification of the witness's spouse altogether.

### (iii) Agreement of the other beneficiaries

It is always possible for a witness in whose favour a disposition has been made to take that disposition if the other beneficiaries agree that the witness beneficiary should take his or her share under the will.

Although legislation is not required to enable such an agreement to be made, in New South Wales there is a provision to that effect. Section 13(2)(b) of the *Wills, Probate and Administration Act 1898* (NSW) provides:

- (2) A beneficial gift given or made by will is not made void by this section if:
- ...
- (b) all the persons who would benefit directly from the avoidance of the gift consent in writing to the distribution of the gift according to the will (all those persons having capacity at law to do so), ...

A concern has been expressed to the National Committee about stamp duty implications in the event that beneficiaries were to agree that an interested witness should take his or her benefit under a will. In New South Wales, such an agreement would not be liable to stamp duty. Section 13(4) of the *Wills, Probate and Administration Act 1898* (NSW) provides:

A consent referred to in subsection (2)(b) is not liable to duty under the *Stamp Duties Act 1920*.

While section 13(2)(b) is really declaratory in nature, it seems to the National Committee that the inclusion of provisions to the effect of subsections 13(2)(b) and (4) of the *Wills, Probate and Administration Act 1898* (NSW) is desirable.

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<sup>59</sup> See pages 19-20 of this Report.

<sup>60</sup> See pages 22-23 of this Report.

The National Committee agrees that section 13(2)(b) should be included in the draft model wills legislation. However, as section 13(4) is concerned with the imposition of stamp duty, it should be located in each jurisdiction's relevant stamp duty legislation, rather than in the draft model wills legislation.

**(iv) A sufficiency of disinterested witnesses**

Both Queensland and New South Wales have provisions to the effect that a disposition to an interested witness will not be void if there is a sufficiency of disinterested witnesses.

Section 15(2) of the *Succession Act 1981* (Qld) provides:

The attestation of a will by a person to whom or to whose spouse there is made any disposition as aforesaid shall be disregarded if the will is duly executed without the person's attestation and without that of any other such person, whether or not the attestation was made upon the execution of a will before the passing of this Act.

Section 13(2)(a) of the *Wills, Probate and Administration Act 1898* (NSW) provides:

- (2) A beneficial gift given or made by will is not made void by this section if:
- (a) at least 2 persons who attest the execution of the will are not persons to whom any such gift is so given or made or the spouses of any such persons, ...

The National Committee is of the view that it is desirable to include such a provision in the model provision dealing with interested witnesses. Given that the interested witness provision recommended by the National Committee has largely been based on the New South Wales provision, the National Committee favours incorporating section 13(2)(a) of the *Wills, Probate and Administration Act 1898* (NSW) rather than section 15(2) of the *Succession Act 1981* (Qld), save for the reference to the witness's spouse, which is no longer relevant in light of the decision at page 24 above.

**(e) Recommendation**

The National Committee recommends that the interested witness rule should be included in the draft model wills legislation, but in a modified form. In particular, the National Committee recommends that:

- a witness should not be absolutely disqualified from taking a benefit under a will, but should be able to retain the gift if:

- (a) there is a sufficiency of disinterested witnesses, that is, at least two witnesses who are not beneficiaries under the will;
- (b) all the persons who would benefit directly from the avoidance of the gift consent in writing to the distribution of the gift according to the will (all those persons having capacity at law to do so), or
- (b) the court is satisfied that:
  - (i) the testator knew and approved of the gift; and
  - (ii) the gift was given or made freely and voluntarily by the testator;
- the rule should no longer disqualify the spouse of a witness from taking a benefit under a will;
- each jurisdiction should amend its stamp duty legislation to include a provision to the effect of section 13(4) of the *Wills, Probate and Administration Act 1898* (NSW), so that a consent under the subclause 2(a) of the model provision will not be liable to stamp duty.

**(f) Model provision: clause 12**

**12 Can an interested witness benefit from a disposition under a will?**

- (1) If any beneficial disposition is given or made by will to a person (in this section called the *interested witness*) who attests the execution of the will, the disposition is void so far only as it concerns the interested witness or any person claiming under the interested witness.**
- (2) However, a beneficial disposition given or made by will is not made void by this section if:**
  - (a) at least 2 of the people who attested the execution of the will are not interested witnesses, or**
  - (b) all the persons who would benefit directly from the avoidance of the disposition consent in writing to the distribution of the disposition according to the will (if those persons have the capacity to give that consent), or**
  - (c) the Court is satisfied that the testator knew and approved of the disposition and it was given or made freely and voluntarily by the testator.**

## CHAPTER 4

### REVOCATION, ALTERATION AND REVIVAL OF WILLS

#### 1. HOW A WILL MAY BE REVOKED

##### (a) Basis for the model provision

The basis for the model provision was clause 14 of the draft *Wills Act 1994* (Vic). Clause 14 provides:

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

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

##### (b) The National Committee's decision

The National Committee accepted clause 14 of the draft *Wills Act 1994* (Vic), but was of the view that the model provision should also incorporate section 17(3)(c) of the *Wills, Probate and Administration Act 1898* (NSW). Section 17(3)(c) provides for revocation by certain symbolic acts of destruction:

A will may be revoked:

...

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

The following provision was suggested as a redraft of clause 14 of the draft *Wills Act 1994* (Vic), based on incorporating section 17(3)(c) of the *Wills, Probate and Administration Act 1898* (NSW):

A will is revoked wholly or in part -

- (a) in the circumstances mentioned in section 5, 6 or 9 or by operation of section 12 or 13; or
- (b) by a later will; or

- (c) by some writing declaring an intention to revoke it, executed in the manner in which a will is required to be executed by this Act; or
- (d) by the testator, or some person in his or her presence and by his or her direction, burning, tearing or otherwise destroying it with the intention of revoking it; or
- (e) by the testator, or some person in his or her presence and by his or her direction, writing on the will or dealing with the will in such a manner that the court is satisfied from the state of the will that the testator intended to revoke it.

The National Committee considers the redrafted provision generally to be an improvement on clause 14 of the draft *Wills Act 1994* (Vic).

However, the National Committee is of the view that the introductory words to the model provision should exclude any other means of revoking a will. This is important, as the draft *Wills Act 1994* (Vic) does not include a provision to the effect that a will is not revoked by any presumption of an intention on the ground of an alteration of circumstance.<sup>61</sup>

For this reason, the National Committee prefers the original introductory words to clause 14 of the draft *Wills Act 1994* (Vic) to the introductory words in the redrafted version of clause 14.

### (c) Recommendation

The National Committee recommends that a provision to the effect of clause 14 of the draft *Wills Act 1994* (Vic), as redrafted above, be included in the draft model wills legislation, save that the introductory words of the model provision should make it clear that the provision is exhaustive as to the means by which a will may be revoked.

### (d) Model provision: clause 13

**13 How a will may be revoked**

**The whole or any part of a will may be revoked only:**

- (a) in the circumstances mentioned in Division 1 or 2 of Part 3 or by the operation of section 14 or 15, or
- (b) by a later will, or
- (c) by some writing declaring an intention to revoke it, executed in the manner in which a will is required to be executed by this Act, or

<sup>61</sup>

See, for example, s 19 of the *Succession Act 1981* (Qld).



- (d) by the testator, or some person in his or her presence and by his or her direction, burning, tearing or otherwise destroying it with the intention of the testator of revoking it, or
- (e) by the testator, or some person in his or her presence and by his or her direction, writing on the will or dealing with the will in such a manner that the Court is satisfied from the state of the will that the testator intended to revoke it.

## 2. EFFECT OF MARRIAGE ON A WILL

### (a) Basis for the model provision

The basis for the model provision was clause 12 of the draft *Wills Act 1994* (Vic). Clause 12 provides:

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

### (b) The National Committee's decision

The National Committee initially agreed to adopt subsections 15(3) and (4) of the *Wills, Probate and Administration Act 1898* (NSW) instead of clause 12(3) of the draft *Wills Act 1994* (Vic) in relation to wills made in contemplation of marriage, but subject to considering whether the equivalent Australian Capital Territory provision (section 20 of the *Wills Act 1968* (ACT)) was clearer.

**(c) Specific issues****(i) Expression of contemplation of marriage**

Subsections 15(3) and (4) of the *Wills, Probate and Administration Act 1898* (NSW) provide:

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

Section 20 of the *Wills Act 1968* (ACT) provides:

- (1) Subject to subsections (2) and (3), where a person marries after having made a will, the will is revoked by the marriage unless the will was expressed to have been made in contemplation of that marriage.
- (2) Where a testator marries after he has made a will by which he has exercised a power of appointing real property or personal property by will, the marriage does not revoke the will in so far as it constitutes an exercise of that power if the property so appointed would not, in default of the testator exercising that power, pass to an executor under any other will of the testator or to an administrator of any estate of the testator.
- (3) Where a will contains a devise or bequest to, an appointment of property in favour of, or a conferral of a power of appointment on, a person, being a devise, bequest, appointment or conferral expressed to be in contemplation of the marriage of the testator to that person-
  - (a) the devise, bequest, appointment or conferral is not revoked by the marriage; and
  - (b) the remaining provisions of the will are not revoked by the marriage unless a contrary intention appears from the will or from evidence admitted pursuant to section 12B.

The New South Wales provision is broader than clause 12(3) of the draft *Wills Act 1994* (Vic), which limits the circumstances in which a will is not revoked by marriage to where it appears from the "terms of the will", or from those terms taken together with "circumstances existing at the time the will was made", that the testator contemplated marrying and intended the will to take effect in that event. The draft Victorian provision does not permit the admission of evidence of statements made by the testator; nor does it save a will if the contemplation of marriage is not expressed in the will.

The Australian Capital Territory provision requires a will to be "expressed to have been made in contemplation of" the particular marriage, both generally and

(subsection (3)) where only part of the will is affected. The New South Wales provision does not require the will to be “expressed” to be made in contemplation of marriage, unless the will is made in contemplation of marriage generally. Where a particular marriage is contemplated, that contemplation may be shown by extrinsic evidence.

The National Committee prefers subsections 15(3) and (4) of the *Wills, Probate and Administration Act 1898* (NSW).

**(ii) Commencement of provision**

A concern was expressed about the inclusion of the words in subsections 15(3) and (4) of the *Wills, Probate and Administration Act 1898* (NSW) that would, if incorporated into the model provision, prevent the model provision from applying to wills made before its commencement. Given that the purpose of the model provision is remedial, the National Committee is of the view that the provision should have an expansive operation and that the words “after the commencement of this subsection” in section 15(3) and the words “made after the commencement of subsection (3)” in section 15(4) should be omitted from the model provision.

**(d) Recommendation**

The National Committee recommends that a provision to the effect of subclauses 12(1) and (2) of the draft *Wills Act 1994* (Vic) and subsections 15(3) and 15(4) of the *Wills, Probate and Administration Act 1898* (NSW) be included in the draft model wills legislation, save that the words “after the commencement of this subsection” in what will become subclause (3) of the model provision, and the words “made after the commencement of subsection (3)” in what will become subclause (4) of the model provision should be omitted.

The model provision should incorporate the concepts that:

- a will is not revoked if made in contemplation of a particular marriage and that marriage is solemnised (there being no need for the contemplation of marriage to be expressed in the will); and
- a will is not revoked if expressed to be made in contemplation of marriage generally and the testator subsequently marries.

**(e) Model provision: clause 14**

- 14 Effect of marriage on a will**
- (1) A will is revoked by the marriage of the testator.
- (2) However, the following are not revoked by the marriage of the testator:
- (a) a disposition to the person to whom the testator is married at the time of his or her death, and
  - (b) any appointment as executor, trustee, advisory trustee or guardian of the person to whom the testator is married at the time of his or her death, and
  - (c) a will made in exercise of a power of appointment, if the property so appointed would not pass to the executor, administrator or [name of the appropriate statutory body and name of legislation of the jurisdiction that governs the vesting of an intestate's estate until administration is granted in respect of the intestate's estate] if the power of appointment was not exercised.
- (3) A will made in contemplation of a marriage, whether or not that contemplation is expressed in the will, is not revoked by the solemnisation of the marriage contemplated.
- (4) A will that is expressed to be made in contemplation of marriage generally is not revoked by the solemnisation of a marriage of the testator.

**3. EFFECT OF DIVORCE ON A WILL****(a) Basis for the model provision**

The basis for the model provision was section 16A of the *Wills Act 1958* (Vic). Section 16A provides.<sup>62</sup>

62

Section 16A was inserted by s 14 of the *Administration and Probate (Amendment) Act 1994* (Vic) (No 10 of 1994). Section 16A will itself be repealed when the *Wills Act 1997* (Vic) commences. The original provision included in the draft *Wills Act 1994* (Vic) provided:

- 13(1) Termination of the marriage or the annulment of the marriage of a testator revokes -
- (a) any disposition by the testator in favour of his or her spouse other than a power of appointment exercisable by the spouse exclusively in favour of the spouse's children; and
  - (b) any appointment made by the testator of his or her spouse as executor, trustee, advisory trustee or guardian other than an appointment of the spouse as guardian of the spouse's children, or as trustee of property left by the will to trustees upon trust for beneficiaries including the spouse's children
- except so far as a contrary intention appears by the will.
- (2) If a disposition or appointment is revoked by sub-section (1), that disposition or appointment takes effect as if the spouse had predeceased the testator.

- (1) The ending of a marriage revokes -
- (a) any disposition made in a will in existence at the time the marriage ends by a testator to the testator's spouse; and
  - (b) any appointment of the testator's spouse as an executor, trustee, advisory trustee or guardian made by the will; and
  - (c) any grant made by the will of a power of appointment exercisable by, or in favour of, the testator's spouse.
- (2) For the purposes of this section, a marriage ends -
- (a) when a decree of dissolution of the marriage becomes absolute under the *Family Law Act 1975* of the Commonwealth; or
  - (b) on the granting of a decree of nullity in respect of the marriage by the Family Court of Australia; or
  - (c) on the dissolution or annulment of the marriage in accordance with the law of a place outside Australia, but only if that dissolution or annulment is recognised in Australia under the *Family Law Act 1975* of the Commonwealth.
- (3) Despite sub-section (1), the ending of a marriage does not revoke -
- (a) the appointment of the testator's spouse as the guardian of the spouse's children or as a trustee of property left by the will upon trust for beneficiaries that include the spouse's children; or
  - (b) the grant of a power of appointment exercisable by the testator's spouse exclusively in favour of the spouse's children.
- (4) With respect to the revocation of any disposition, appointment or grant by this section, the will is to take effect as if the spouse had died before the testator.
- (5) This section does not apply to any disposition, appointment or grant if it appears from the terms of the will that the testator did not want the disposition, appointment or grant to be revoked on the ending of the marriage.
- (6) In this section "spouse" means the person who was the testator's spouse immediately before the marriage ended and includes a party to a purported or void marriage.

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- (3) For the purposes of this section, the termination or annulment of a marriage occurs, or shall be taken to occur -
- (a) when a decree of dissolution of the marriage pursuant to the *Family Law Act* becomes absolute; or
  - (b) on the making of a decree of nullity pursuant to the *Family Law Act* in respect of a purported marriage which is void; or
  - (c) on the termination or annulment of the marriage, in accordance with the law of a place outside Australia if the termination or annulment is recognised in Australia in accordance with the *Family Law Act*.
- (4) In this section -  
 "Family Law Act" means the *Family Law Act 1975* of the Commonwealth;  
 "spouse", in relation to a testator, means the person who, immediately before the termination of the testator's marriage, was the testator's spouse, or, in the case of a purported marriage of the testator which is void, was the other party to the purported marriage.

**(b) The National Committee's decision**

The National Committee agreed on the following matters:

- The phrase “any beneficial disposition” should be substituted for “any disposition” in the model provision based on section 16A(1)(a) of the *Wills Act 1958* (Vic).
- The model provision should be subject to the testator’s contrary intention, which should be able to be shown either in the will or by extrinsic evidence.
- It is not necessary for the model provision to define the phrase “any beneficial disposition” to include a liability pursuant to a promise. It had been suggested that divorce should not revoke a provision made by will for a spouse where the provision was made in pursuance of a promise made by the testator to the spouse. That suggestion may have been made in the context of the New Zealand *Testamentary Promises* legislation.<sup>63</sup>

However, the National Committee is of the view that there is no need to refer to such promises. Where there is a promise for valuable consideration to confer a benefit by will, if the testator fails to leave the legacy in his or her will, or revokes it, the promisee can claim payment from the testator’s estate.<sup>64</sup>

- The words “as the guardian of the spouse’s children or”, which appear in section 16A(3)(a) of the *Wills Act 1958* (Vic), should be omitted from the model provision. It appears that these words were inserted in error. A testator may appoint a person to be the guardian of his or her own children, but not of someone else’s children. A testator may well appoint a spouse to be the guardian of a child of the testator who is not also the spouse’s child; and in the event of divorce that appointment would be revoked. But a testator cannot appoint his or her spouse to be the guardian of the spouse’s child if the child is not also the testator’s child. In any event, if the child is the child of the testator and the surviving spouse, the appointment is unnecessary; the surviving spouse is by law the guardian of that child and always has been by natural right. The words in the section represent a misunderstanding of this law.
- The present wording of subsection (3)(b) would have the effect that, notwithstanding divorce, the testator’s spouse could exercise a power of appointment in favour of children who were children of the spouse, but not of the testator.

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<sup>63</sup> Under the *Law Reform (Testamentary Promises) Act 1949* (NZ) a person who has contributed work or services to a deceased person may claim a reasonable reward for the work or services if the deceased person fails to keep a promise, express or implied, to reward the person.

<sup>64</sup> *Schaefer v Schuhmann* [1972] AC 572 at 585 (PC) (NSW). The promisee’s position is even stronger in relation to a devise or bequest of specific property (at 586).

The National Committee is of the view that subsection (3)(b) of the model provision should be amended so that it refers to a power of appointment that is exercisable by the testator's spouse exclusively in favour of children who are children of both the testator and the spouse. This is to avoid placing the spouse in a position where he or she has to choose between children of a marriage with the testator and possibly children of a current marriage.

If the testator wishes to benefit children of a former spouse, who are not also children of the testator, he or she should, following the divorce, make a new will to that effect.

### (c) Recommendation

The National Committee recommends that a provision to the effect of section 16A of the *Wills Act 1958* (Vic) be included in the draft model wills legislation, save that:

- the word "beneficial" should be inserted before the word "disposition" in subsection (1)(a);
- the words "as the guardian of the spouse's children or" should be deleted from subsection (3)(a); and
- subsection (3)(b) should be redrafted to delete the reference to "the spouse's children" and to include a reference to "children of whom both the testator and spouse are parents".

The provision should be subject to the testator's contrary intention, which should be able to be shown either in the will or by extrinsic evidence.<sup>65</sup>

### (d) Model provision: clause 15

#### **15 Effect of divorce etc on a will**

##### **(1) The ending of a testator's marriage revokes:**

- (a) any beneficial disposition made in a will in existence at the time the marriage ends by a testator to the testator's spouse, and**
- (b) any appointment of the testator's spouse as an executor, trustee, advisory trustee or guardian made by the will, and**

<sup>65</sup>

Section 16A(5) of the *Wills Act 1958* (Vic) currently provides that s 16A is subject to a contrary intention. The *Wills Act 1958* (Vic) will be repealed when the *Wills Act 1997* (Vic) commences.

- (c) any grant made by the will of a power of appointment exercisable by, or in favour of, the testator's spouse.
- (2) However, the ending of a testator's marriage does not revoke:
- (a) the appointment of the testator's spouse as trustee of property left by the will on trust for beneficiaries that include the spouse's children, or
- (b) the grant of a power of appointment exercisable by the testator's spouse exclusively in favour of the children of whom both the testator and spouse are parents.
- (3) With respect to the revocation of any disposition, appointment or grant by this section, the will is to take effect as if the testator's spouse had died before the testator.
- (4) Subsection (1) does not apply if a contrary intention appears in the will or can otherwise be established.
- (5) For the purposes of this section, a marriage ends:
- (a) when a decree of dissolution of the marriage becomes absolute under the *Family Law Act 1975* of the Commonwealth, or
- (b) on the granting of a decree of nullity in respect of the marriage by the Family Court of Australia, or
- (c) on the dissolution or annulment of the marriage in accordance with the law of a place outside Australia, but only if that dissolution or annulment is recognised in Australia under the *Family Law Act 1975* of the Commonwealth.
- (6) In this section:
- testator's spouse* means the person who was the testator's spouse immediately before the marriage ended and includes a party to a purported or void marriage.

#### 4. HOW A WILL MAY BE ALTERED

##### (a) Basis for the model provision

The basis for the model provision was clause 15 of the draft *Wills Act 1994* (Vic). Clause 15 provides:

- (1) An alteration to a will after it has been executed is not effective unless the alteration is executed in the manner in which a will is required to be executed by this Act or comes under section 5, section 6 or section 9.



- (2) Sub-section (1) does not apply to an alteration to a will if the words or effect of the will are no longer apparent because of the alteration.
- (3) If a will is altered, it is sufficient compliance with the requirements for execution, if the signature of the testator and of the witnesses to the alteration are made -
  - (a) in the margin, or on some other part of the will beside, near or otherwise relating to the alteration; or
  - (b) as authentication of a memorandum referring to the alteration and written on the will.

**(b) The National Committee's decision**

The National Committee accepted clause 15.

**(c) Recommendation**

The National Committee recommends that a provision to the effect of clause 15 of the draft *Wills Act 1994* (Vic) be included in the draft model wills legislation.

**(d) Model provision: clause 16**

**16 How a will may be altered**

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

## 5. HOW A REVOKED WILL MAY BE REVIVED

### (a) Basis for the model provision

The basis for the model provision was clause 16 of the draft *Wills Act 1994* (Vic). Clause 16 provides:

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

### (b) The National Committee's decision

The National Committee accepted clause 16, subject to the following amendments being made:

- The word "will" should be substituted for the word "codicil" in subclause (1) of the model provision to make the effect of the provision clearer. Subclause (1) would then provide:

A will or part of a will that has been revoked is revived by re-execution or by execution of a *will* showing an intention to revive the will or part.

- The word "reviving" should be inserted before the word "will" in subclause (3) of the model provision to make the effect of the provision clearer. Subclause (3) would then provide:

Subsection (2) does not apply if a contrary intention appears in the *reviving* will.

### (c) Recommendation

The National Committee recommends that a provision to the effect of clause 16 of the draft *Wills Act 1994* (Vic) be included in the draft model wills legislation, subject to amending subclauses (1) and (3) to provide:<sup>66</sup>

<sup>66</sup>

The first underlined word has been substituted for the word "codicil" appearing in cl 16 of the draft *Wills Act 1994* (Vic). The second underlined word has been added to that provision.

- (1) A will or part of a will that has been revoked is revived by re-execution or by execution of a will<sup>67</sup> showing an intention to revive the will or part.

...

- (3) Subsection (2) does not apply if a contrary intention appears in the reviving will.

**(d) Model provision: clause 17**

**17 How a revoked will may be revived**

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

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<sup>67</sup> "Will" includes a codicil: see cl 3 of the draft *Wills Act 1994* (Vic) and cl 4 of the draft model wills legislation at page 5 of this Report.

## CHAPTER 5

### WILLS MADE OR RECTIFIED UNDER COURT AUTHORISATION

#### 1. WILLS BY MINORS

##### (a) Basis for the model provision

Subclauses 5(3) to (6) were the basis for the model provision. Those subclauses provide:

- (3) The Court may, on application by or on behalf of a minor, make an order authorising the minor to make or alter a will in specific terms approved by the Court, or to revoke a will or a part of a will.
- (4) An authorisation under this section may be granted on such conditions as the Court thinks fit.
- (5) Before making an order under this section, the Court must be satisfied that -
  - (a) the minor understands the nature and effect of the proposed will, alteration or revocation and the extent of the property disposed of by it; and
  - (b) the proposed will, alteration or revocation accurately reflects the intentions of the minor; and
  - (c) it is reasonable in all the circumstances that the order should be made.
- (6) A will or instrument making or altering a will made pursuant to an order under this section -
  - (a) must be executed as required by law and one of the attesting witnesses must be the Registrar; and
  - (b) must be deposited with the Registrar under section 5A of the *Administration and Probate Act 1958*.

##### (b) The National Committee's decision

The National Committee generally accepted subclauses 5(3) to (6), although it gave consideration to a number of specific issues.

##### (i) Court-authorised wills

Subclauses 5(3) to (6) of the draft *Wills Act 1994* (Vic), which give the court power to make a will for a minor, are almost identical to section 6 of the *Wills Act 1936* (SA).

In the case of a minor, an application to the court would be made infrequently, but, when made, it would most probably be in a context where the court's jurisdiction would be very much needed. For example, where a minor:

- was suffering from an illness or injury that may well be fatal; and
- had a sufficient estate to make application to the court worthwhile; and
- wished the estate to be distributed otherwise than in accordance with the intestacy rules, which might well only benefit both the parents of the minor. A minor may wish his or her estate to go to one parent rather than both, especially where the minor is estranged from one of his or her parents, or the minor may simply wish to benefit another person, for example, a *de facto* spouse, a particular sibling or a carer.

**(ii) Should a will made under this provision be retained by the registrar?**

Subsections 7(9) and (10) of the *Wills Act 1936* (SA) provide, in relation to wills for persons lacking testamentary capacity, that an authorised will must be signed by the registrar, sealed with the seal of the court and retained by the registrar. Section 7(11) makes provision for the removal of the authorised will from the depositary.<sup>68</sup>

The National Committee is of the view that the same considerations apply in the case of a court-authorized will for a minor, and that it is desirable that the will should be retained in the registry. This gives the court continuing control over the will created under its jurisdiction.

Although this is a procedural matter, it is nevertheless recommended because it allows the court to oversee the authorised will. It has, however, been suggested by a member of the National Committee that a failure to retain the will in the registry should not result in the will's invalidity. The National Committee agrees with that suggestion.

**(iii) Should a minor's will authorised in one jurisdiction be accepted for probate in another jurisdiction?**

There is a specific provision in section 25D of the *Wills Act 1936* (SA) for the recognition of a statutory will for a person lacking testamentary capacity that is made according to the law of the place where the deceased person was resident at the time of execution. Section 25D provides:

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Those subsections are set out at page 48 of this Report.

- (1) A statutory will made according to the law of the place where the deceased was resident at the time of execution will be regarded as a valid will of the deceased.
- (2) In this section -  

**"statutory will"** means a will executed by virtue of a statutory provision on behalf of a person who, at the time of execution, lacked testamentary capacity.

Thus a statutory will made in another jurisdiction would be accepted in an application for probate in South Australia.

The National Committee is of the view that the same considerations apply in the case of a court-authorized will for a minor. It is clearly a desirable provision in the context of a uniformity project and is therefore recommended.

#### **(iv) Registrar's jurisdiction**

The National Committee considered whether it would be appropriate for a registrar to be able to authorise a will for a minor in relation to a small estate (with authorisation by the court for larger estates). The following question was put to the National Committee:

*Should the Court or the Chief Justice have the power to authorise the registrar to deal with certain matters? (This would cover the proposal to enable registrars to deal with "small estates" without having to settle on a uniform definition of "small estate".)*

The National Committee has agreed that the draft model wills legislation should be confined to substantive matters on which it is important that uniformity be achieved. The question of the registrar's jurisdiction is procedural only; it is not a matter on which uniformity between the States and Territories is necessary. Any jurisdiction that considers it desirable for a registrar to have the power to approve certain wills for minors, for example, wills in relation to small estates, may always confer that power by its relevant rules of court.

#### **(c) Recommendation**

The National Committee recommends that a provision to the effect of subclauses 5(3) to (6) of the draft *Wills Act 1994* (Vic), with the necessary changes to give effect to the Committee's decisions be included in the draft model wills legislation so that:

- the court may authorise a minor to make, alter or revoke a will;
- the court-authorized will of a minor must be retained by the registrar, but a failure to do so should not result in the will's invalidity; and

- a minor's will made under an equivalent provision in another jurisdiction should be accepted for probate.

**(d) Model provisions: clauses 18 and 51**

**18 Court may authorise wills by minors**

- (1) The Court may, on application by or on behalf of a minor, make an order authorising the minor to make or alter a will in specific terms approved by the Court, or to revoke the whole or any part of a will of the minor.**
- (2) An authorisation under this section may be granted on such conditions as the Court thinks fit.**
- (3) Before making an order under this section, the Court must be satisfied that:**
  - (a) the minor understands the nature and effect of the proposed will, alteration or revocation and the extent of the property disposed of by it, and**
  - (b) the proposed will, alteration or revocation accurately reflects the intentions of the minor, and**
  - (c) it is reasonable in all the circumstances that the order should be made.**
- (4) A will or instrument making or altering, or revoking the whole or any part of, a will made pursuant to an order under this section:**
  - (a) must be executed as required by law and one of the attesting witnesses must be the Registrar, and**
  - (b) must be retained by the Registrar and, in any such case, is taken to have been deposited with the Registrar in accordance with Part 6, and**
  - (c) is not valid if it is made in breach of any condition subject to which an authorisation under this section is granted.**
- (5) A will made by a deceased minor according to the law relating to wills of minors of the place where the deceased was resident at the time of execution is a valid will of the deceased.**

**51 Retention of wills**

**Any failure by the Registrar to retain a will as required by this Act does not affect the validity of the will.**

## 2. WILLS FOR PERSONS WITHOUT TESTAMENTARY CAPACITY

### (a) Basis for the model provisions

The basis for the model provisions was clause 6 of the draft *Wills Act 1994* (Vic). Clause 6 provides:

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

#### Leave of Court

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

#### Applications for leave: making the application

- (6) In applying for leave to make an application under this section the applicant for leave must, subject to the Court's discretion, furnish to the Court -
  - (a) a written statement of the general nature of the application and the reasons for making it;



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

**Application for leave: the orders of the court**

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

- (e) grant the application on such terms as it thinks fit; and
- (f) if it is satisfied of the propriety of the application, allow the application for leave to proceed as an application to authorise the making, alteration or revoking of the will, and allow the application.

**Application for authorisation of making of statutory will**

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

**Rules of Court**

- (9) Rules of Court may authorise the Registrar to exercise the powers of the Court -
  - (a) without limit as to the value of the interests affected, in all cases in which all persons with a legitimate interest in the application, including persons who have reason to expect a gift or benefit from the estate of the person for whom the statutory will is to be made, consent; and
  - (b) even if there is no consent, in all cases in which the value of the interests affected does not exceed a sum specified in the Rules.

**(b) South Australian provision**

In considering the issue of wills for persons without testamentary capacity, the National Committee also gave specific consideration to section 7 of the *Wills Act 1936* (SA). Section 7 provides:

- (1) The Court may, on application by any person made with the leave of the Court, make an order authorising the making or alteration of a will in specific terms approved by the Court, or the revocation of a will, on behalf of a person who lacks testamentary capacity.
- (2) An authorisation under this section may be granted on such conditions as the Court thinks fit.
- (3) Before making an order under this section, the Court must be satisfied that-
  - (a) the person lacks testamentary capacity; and
  - (b) the proposed will, alteration or revocation would accurately reflect the likely intentions of the person if he or she had testamentary capacity; and
  - (c) it is reasonable in all the circumstances that the order should be made.

- (4) In considering an application for an order under this section, the Court must take into account the following matters:
- (a) any evidence relating to the wishes of the person;
  - (b) the likelihood of the person acquiring or regaining testamentary capacity;
  - (c) the terms of any will previously made by the person;
  - (d) the interests of-
    - (i) the beneficiaries under any will previously made by the person;
    - (ii) any person who would be entitled to receive any part of the estate of the person if the person were to die intestate;
    - (iii) any person who would be entitled to claim the benefit of the *Inheritance (Family Provision) Act 1972* in relation to the estate of the person if the person were to die;
    - (iv) any other person who has cared for or provided emotional support to the person;
  - (g) any gift for a charitable or other purpose the person might reasonably be expected to give by a will;
  - (h) the likely size of the estate;
  - (i) any other matter that the Court considers to be relevant.
- (5) An order may be made under this section in relation to a minor.
- (6) The Court is not bound by rules of evidence in proceedings under this section.
- (7) The following persons are entitled to appear and be heard at proceedings under this section:
- (a) the person in relation to whom the order is proposed to be made;
  - (b) a legal practitioner representing the person or, with the leave of the Court, some other person representing the person;
  - (c) the person holding or acting in the office of Public Advocate under the *Guardianship and Administration Act 1993*;
  - (d) the person's administrator, if one has been appointed under the *Guardianship and Administration Act 1993*;
  - (e) the person's guardian or enduring guardian, if one has been appointed under the *Guardianship and Administration Act 1993*;
  - (f) the person's manager, if one has been appointed under the *Aged and Infirm Persons' Property Act 1940*;
  - (g) the person's attorney, if one has been appointed under an enduring power of attorney;

- (h) any other person who has, in the opinion of the Court, a proper interest in the matter.
- (8) In determining an application under this section, the Court may make such incidental orders relating to costs or other matters as it thinks fit.
- (9) A will or instrument altering or revoking a will made pursuant to an order under this section must be executed as follows:
- (a) it must be signed by the Registrar; and
  - (b) it must be sealed with the seal of the Court.
- (10) The will or instrument altering or revoking a will must be retained by the Registrar and will be taken to have been deposited with the Registrar under section 13 of the *Administration and Probate Act 1919*.
- (11) The will may not be withdrawn from deposit with the Registrar by or on behalf of the person on whose behalf it was made unless the Court has made an order under this section authorising the revocation of the will (in which case the Registrar must withdraw it on presentation of a copy of the order) or the person has acquired or regained testamentary capacity.
- (12) In this section-
- “testamentary capacity” means the capacity to make a will<sup>1</sup>.
- <sup>1</sup> The cause of incapacity to make a will may arise from mental incapacity or from physical incapacity to communicate testamentary intentions.

**(c) Background to clause 6 of the draft *Wills Act 1994 (Vic)*<sup>69</sup>**

When the Victorian Law Reform Committee was considering the reform of the law of wills, it considered the issue of legislation enabling the court to make a will for a person lacking testamentary capacity.

Prior to that, the Chief Justice of Victoria’s Law Reform Committee had, in 1985, adopted a Report of a subcommittee on *Wills for Mentally Disordered Persons*,<sup>70</sup> which recommended that legislation along the lines of sections 96 and 97 of the *Mental Health Act 1983 (UK)* be adopted but with some modifications.<sup>71</sup>

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<sup>69</sup> The following information relating to the background to clause 6 is taken from Victorian Law Reform Committee, *Reforming the Law of Wills* (Final Report, May 1994) at 34-53.

<sup>70</sup> Chief Justice’s Law Reform Committee (Vic), *Wills for Mentally Disordered Persons* (1985).

<sup>71</sup> *Id* at para 13.

When the Victorian Law Reform Committee was considering this recommendation it also had before it a draft Bill<sup>72</sup> to amend the *Wills Act 1936 (SA)* by introducing a provision relating to people lacking testamentary capacity, and the New South Wales Law Reform Commission's Report, *Wills for Persons Lacking Will-Making Capacity*.<sup>73</sup>

Clause 6 of the draft *Wills Act 1994 (Vic)* is a product of the consideration of these earlier efforts, and draws upon both the 1993 draft South Australian Bill and the New South Wales Law Reform Commission Report. The *Wills Act 1936 (SA)* was subsequently amended in 1996 to enable the court to make a will for a person lacking testamentary capacity.<sup>74</sup>

In New South Wales, South Australia and Victoria, two stages are envisaged: the seeking of leave to make an application, and the making of an application once leave has been obtained. However, the draft Victorian provision places more emphasis on the application for leave in that it requires that at that stage the court should acquaint itself with the matters set out in the lengthy clause 6(6). In South Australia, the equivalent provision in section 7(4) applies to the making of the application *after* the granting of leave.

The reason for the difference is two-fold:

- It seems that much of, if not all, the information required should be available to the court when granting leave to apply; the court would be unlikely to grant leave without most of the information even if, perhaps, at application stage, rather more information might be called for.
- The draft Victorian provision envisages in clause 6(7)(f) that in a simple case the court may, upon application for leave, allow the application to proceed immediately as an application for authorisation of the making of the statutory will. This is not provided for in South Australia, but would save costs and could make the procedure available to a larger number of applicants. It would not be possible to enable an application for leave to be treated as an application for authorisation unless the information set out in clause 6(6) (section 7(4) in South Australia) was before the court. In any case, in an efficiently prepared application for leave, the applicant should have done most, if not all, of the work required for an application for authorisation.

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72 Draft *Wills (Miscellaneous) Amendment Bill 1993 (SA)*. Although a South Australian *Wills (Miscellaneous) Amendment Act* was enacted in 1994 in substantially the same terms as the 1993 draft Bill, it did not include a provision relating to people lacking testamentary capacity.

73 New South Wales Law Reform Commission, *Wills for Persons Lacking Will-Making Capacity* (LRC 68, February 1992).

74 *Wills (Wills for Persons Lacking Testamentary Capacity) Amendment Act 1996 (SA)*.

The difference between the information required for leave and that required for making an application for which leave has been granted is a procedural matter, as is the provision allowing an application for leave to be treated as an application for authorisation. Nevertheless, for the reasons stated, it is the view of the National Committee that the draft Victorian provision, developed as it is from the South Australian and New South Wales precedents, is to be preferred.

**(d) The National Committee's decision**

The National Committee generally accepted clause 6 of the draft *Wills Act 1994* (Vic), although it was of the view that some refinements should be made to the model provisions taking into account section 7 of the *Wills Act 1936* (SA). The following issues were specifically considered by the National Committee.

**(e) Subsidiary issues**

**(i) Should it be possible to make an application within a certain period after the death of the incapacitated person?**

Clause 6(3) of the draft *Wills Act 1994* (Vic) would enable an application to be made after the death of the incapacitated person, within certain time limits. The South Australian legislation does not contain such a provision.

In some cases there may be reluctance on the part of the spouse or relatives of an incapacitated person to seek out the court's jurisdiction to make a will for that person, or they may be ignorant of the effect of the intestacy rules until after the death of the person. Costs might well be an inhibiting factor, as well as the possibility of the incapacitated person surviving for many more years. To give the court jurisdiction to authorise the making of a will for a brief period after the death of the person might well make the jurisdiction more viable.

However, the National Committee has now completed its work on the second stage of the Uniform Succession Laws Project, namely, family provision. In that context, the National Committee has made recommendations for reform that would significantly liberalise the range of persons eligible to apply for family provision. If the range of persons eligible to apply for family provision is expanded, the need for this jurisdiction to be available after the death of a person is significantly diminished.

The advantage of excluding applications made after the death of a person is that all applications to adjust how the person's estate will otherwise be distributed (whether by will or by the relevant intestacy rules) will be subject to a single legislative regime, namely, family provision legislation. This avoids the possible

conflict that might arise if two different types of applications could be made after the death of a person.

The National Committee considered the possibility that a testator might make a will, and then lose capacity to make a new will, with the result that the old will, depending on the testator's circumstances, becomes inappropriate. For example, a testator might make a will leaving all his or her estate to a spouse, and then receive a brain injury in a car accident resulting in a substantial award of damages. If the spouse separated from the testator soon after the accident, and the testator was cared for by some other person, it would be arguable that it would no longer be appropriate for the estranged spouse to receive the whole of the estate.

The National Committee considered, in relation to such a situation, the effect of excluding applications after the death of a person lacking testamentary capacity. Before death, the court could, under a provision such as clause 6 of the draft *Wills Act 1994* (Vic), revoke a disposition in a previous will of a person lacking testamentary capacity if the disposition was no longer considered to be appropriate. However, the court would not, after the death of the person, be able to revoke such a disposition under family provision legislation.

While acknowledging this theoretical limitation of the court's powers under family provision legislation, the National Committee was of the view that the result in practice would be that a successful application for family provision by a meritorious applicant would necessarily displace a disposition in favour of an unmeritorious beneficiary, given that there is only the one estate out of which any distributions can be made.

**(ii) Date at which death of person should be relevant**

Although the National Committee was of the view that this jurisdiction should not be invoked after the death of a person, it gave specific consideration to the date on which the death of the person should exclude the court's jurisdiction. The following possibilities were considered:

- that the court may make an order for a statutory will only if the person is alive when the order is made;
- that the court may make an order if the application was heard when the person was alive;
- that the court may make an order if the application for leave was heard when the person was alive;
- that the court may make an order if the application for leave was filed when the person was alive.

The National Committee was of the view that, if an application for a statutory will is not to be brought after a person has died, it is consistent with the reasons for that recommendation that the court should not be able to make an order if the person is not alive when the order is made. Once a person has died, any claims for provision out of the estate should be brought under family provision legislation. It would be inconsistent to permit orders to be made for a statutory will in a deceased estate merely because the application was filed or heard at a time when the person was alive.

If it were otherwise, the provision would need to address the priorities as between an order conferring a benefit under a statutory will and an order for family provision. That problem does not arise in relation to a disposition in a statutory will made before the death of a person, as that disposition is subject to the possibility of being affected by a family provision claim, in the same way that a disposition in any other will may be subject to such a claim.

**(iii) Should the jurisdiction be available to a minor?**

Section 7(5) of the *Wills Act 1936* (SA) makes it clear that the jurisdiction is available in the case of a minor. However, this is not clear in clause 6 of the draft *Wills Act 1994* (Vic). The draft Victorian provision refers only to "a person who lacks testamentary capacity", which could be construed restrictively to refuse jurisdiction to authorise the making of a will for a minor.

There is no reason why the jurisdiction should be denied merely because the person is a minor. A minor may have been incapacitated as a result of negligence and may have been awarded a large sum of damages. One parent of that minor may have deserted the family; but if the minor were to die both parents would inherit the estate, including the award of damages, in equal shares. There is every reason to allow the court to authorise the making of a will for a minor - whether the minor lacks testamentary capacity because of a particular incapacity or merely through immaturity. To the extent that this jurisdiction applied to a minor, it would complement the jurisdiction that the National Committee has recommended that the court have under the model provision based on subclauses 5(3) to (6) of the draft *Wills Act 1994* (Vic).<sup>75</sup>

Moreover, since the model provision based on clause 5 of the draft *Wills Act 1994* (Vic) would confer jurisdiction on the court to approve the making of a will by a competent minor,<sup>76</sup> it seems proper to allow the court to make a statutory

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<sup>75</sup> See the National Committee's recommendation (discussed at pages 40-43 of this Report) that a provision to the effect of cl 5(3) to (6) of the draft *Wills Act 1994* (Vic) be adopted. Such a provision would enable a court to make an order authorising a minor to make, alter, or revoke a will where the court is satisfied, among other things, that "the minor *understands the nature and effect* of the proposed will, alteration or revocation and the extent of the property disposed of by it".

<sup>76</sup> See cl 5(3), which is discussed at pages 40-43 of this Report.



will for a minor who is not competent to have a will approved under that provision.

The National Committee is of the view that the provision should be available to a minor.

**(iv) Should the authorised will be retained by the registrar?**

Subsections 7(9) and (10) of the *Wills Act 1936 (SA)* provide that an authorised will must be signed by the registrar, sealed with the seal of the court and retained by the registrar. Section 7(11) makes provision for the removal of the authorised will from the depository.<sup>77</sup>

In view of the possibly controversial nature of the jurisdiction it is desirable that the will should be kept in the registry as this gives the court continuing control over the will created under its jurisdiction.

Although this is a procedural matter, it is nevertheless recommended because it allows the court to oversee the authorised will. It has, however, been suggested by a member of the National Committee that a failure to retain the will in the registry should not result in the will's invalidity. The National Committee agrees with that suggestion.

**(v) Should a statutory will made in one jurisdiction be accepted for probate in another jurisdiction?**

Section 25D of the *Wills Act 1936 (SA)* provides for the recognition of a statutory will made according to the law of the place where the deceased person was resident at the time of execution. Section 25D provides:

(1) A statutory will made according to the law of the place where the deceased was resident at the time of execution will be regarded as a valid will of the deceased.

(2) In this section -

“statutory will” means a will executed by virtue of a statutory provision on behalf of a person who, at the time of execution, lacked testamentary capacity.

Thus a statutory will made in another jurisdiction would be accepted in an application for probate in South Australia.

There is no similar provision in the draft *Wills Act 1994 (Vic)*. However, it is clearly a desirable provision in the context of a uniformity project and is therefore

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<sup>77</sup>

Those subsections are set out at page 48 of this Report.

recommended. The inclusion of such a provision should avoid arguments about whether a statutory will constitutes a "will" for the purpose of being admitted to probate in another jurisdiction.<sup>78</sup>

#### (vi) Possible orders

The Committee considered the possibility that a person for whom a statutory will was made might regain capacity, and whether, in anticipation of that possibility, the court should make an order as to how the person should be informed that such a will had been made. For example, a statutory will could be made for a person in a coma, who subsequently regains consciousness, but is not aware of the existence of the statutory will.

Although the National Committee saw some merit in a provision of this kind, it was conscious that in many cases such a provision might be impractical, as the person given the duty to inform the person for whom the will had been made would be required to monitor the capacity of that person. The National Committee also anticipated difficulties with enforcing such a duty. For these reasons, the National Committee does not propose to make a specific recommendation that the court should make such an order, but will leave the question to the court's general discretion.

#### (vii) Registrar's jurisdiction

The National Committee has considered whether a registrar should be able to screen applications before they are heard by the court, hear applications in relation to "small estates", and authorise the making or alteration of a will in those cases. It also considered whether, rather than attempt to develop a uniform definition of "small estate", a registrar should be able to hear matters referred to him or her by the Chief Justice or the court.

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It should be noted that the Law Reform Commission of Western Australia in its *Report on Recognition of Interstate and Foreign Grants of Probate and Administration* (1984) recommended that in certain circumstances grants of probate and administration made by the jurisdiction of domicile should be automatically recognised throughout Australia, and that in all other cases they should be resealed according to a uniform resealing procedure. It recommended that these rules should apply not only to grants of probate and administration, but also to elections and orders to administer granted to a Public Trustee or Curator, or any other person or body. It would obviously be consistent with the spirit of this proposal to treat statutory wills in exactly the same way.

However, the present proposal goes further in that it contemplates that a statutory will made in one jurisdiction should be accepted for probate in another. Adopting the general principle that a statutory will should be treated for all purposes as the same as any other will, it must be right to say that such a will made in one jurisdiction should be accepted for probate in another. In the case of an ordinary will, the only limitation on such a principle operating under the present law is that some jurisdictions will not make a grant of probate or administration where the deceased had no property within that jurisdiction. However, the Law Reform Commission of Western Australia in the report referred to above recommended that all jurisdictions should follow the lead of Queensland, the Australian Capital Territory and the Northern Territory and abolish the property requirement.

Note, also, the National Committee's forthcoming Report to the Standing Committee of Attorneys General on *Administration of Estates*.

Clause 6(9) of the draft *Wills Act 1994 (Vic)* provides that the registrar may hear and determine certain applications.

This issue is one of procedure, rather than of substance. It is not significant for the uniformity process to insist on uniformity of procedure. The National Committee is of the view, therefore, that subclause (9) should be omitted from the draft model provision.

**(f) Recommendation**

The National Committee recommends that provisions to the effect of clause 6 of the draft *Wills Act 1994 (Vic)* be included in the draft model wills legislation, save that:

- the model provisions should not permit the making of a statutory will for a person unless the person is alive when the order is made;
- it should be made clear that the provisions would apply to a minor for whom the court could not, because the minor lacked the requisite degree of understanding, make an order authorising the minor to make, alter or revoke a will under the model provision;
- an authorised will should be required to be retained by the registrar (as it is by subsections 7(9) and (10) of the *Wills Act 1936 (SA)*), but a failure to do so should not result in the will's invalidity;
- subclause (9) should be omitted from the model provision, as it relates to procedural matters; and
- a statutory will made under an equivalent provision in another jurisdiction should be accepted for probate.

**(g) Model provisions: clauses 19 to 26 and 51**

**19 Court may make certain orders**

- (1) The Court may, on application by any person, make an order authorising the making or alteration of a will in specific terms approved by the Court, or the revocation of the whole or any part of a will, on behalf of a person who lacks testamentary capacity.**
- (2) The Court may authorise the making or alteration of a will that deals with the whole of the property of a person, the making or alteration of a will that deals with part only of the property of a person or the alteration of part only of any will.**

(3) The Court is not to make an order under this Division unless the person on whose behalf approval for the making of a will is sought is alive when the order is made.

(4) The Court may make an order under this Division in respect of a minor.

**20 Leave of Court is required to make an application**

(1) The leave of the Court must be obtained before an application for an order under this Division is made.

(2) In applying for leave to make an application for an order under this Division the applicant for leave must, subject to the Court's discretion, furnish to the Court:

(a) a written statement of the general nature of the application and the reasons for making it, and

(b) an estimate, so far as the applicant is aware of it, of the size and character of the estate of the person on whose behalf approval for the making of a will or of any alteration or revocation is sought (the *proposed testator*), and

(c) an initial draft of the proposed will, alteration or revocation for which the applicant is seeking the Court's approval, and

(d) any evidence, so far as it is available, relating to the wishes of the proposed testator, and

(e) evidence of the likelihood of the proposed testator acquiring or regaining capacity to make a will at any future time, and

(f) any will, or any copy of any will, in the possession of the applicant, or details known to the applicant of any will, of the proposed testator, and

(g) any evidence of the interests, so far as they are known to the applicant, or can be discovered with reasonable diligence, of any person who would be entitled to receive any part of the estate of the proposed testator if the proposed testator were to die intestate, and

(h) any evidence of any facts indicating the likelihood, so far as they are known to the applicant, or can be discovered with reasonable diligence, of an application being made, under the [*insert the short title of the relevant Act of the jurisdiction that deals with family provision*], and

(i) any evidence of the circumstances, so far as they are known to the applicant, or can be discovered with reasonable diligence, of any person for whom the proposed testator might reasonably be expected to make provision under a will, and

(j) a reference to any gift for a body, whether charitable or not, or for a charitable purpose that the proposed testator might reasonably be expected to give or make by will, and

- (k) any other facts that the applicant considers to be relevant to the application.

**21** *Court must be satisfied as to certain matters*

The Court must refuse leave to make an application for an order under this Division unless the Court is satisfied that:

- (a) there is reason to believe that the proposed testator is or may be incapable of making a will, and
- (b) the proposed will, alteration or revocation is or might be one that would have been made by the proposed testator if he or she had testamentary capacity, and
- (c) it is or may be appropriate for an order authorising the making, alteration or revocation of a will to be made for the proposed testator, and
- (d) the applicant is an appropriate person to make an application, and
- (e) adequate steps have been taken to allow representation of all persons with a legitimate interest in the application, including persons who have reason to expect a gift or benefit from the estate of the proposed testator.

**22** *Application for leave: the orders of the Court*

On hearing an application for leave, the Court may:

- (a) refuse the application, or
- (b) adjourn the application, or
- (c) give directions, including directions about the attendance of any person as a witness and, if it thinks fit, the attendance of the proposed testator, or
- (d) revise the terms of any initial draft of the proposed will, alteration or revocation for which the Court's approval is sought, or
- (e) grant the application on such terms as it thinks fit, or
- (f) if it is satisfied of the propriety of the application, allow the application for leave to proceed as an application to authorise the making, alteration or revocation of a will, and allow the application.

**23** *Application for authorisation of making, alteration or revocation of a will*

- (1) In considering an application for an order authorising the making, alteration or revocation of a will, the Court:
  - (a) may have regard to any information given to the Court in support of an application for leave, and

- (b) may inform itself of any other matter in any manner it sees fit, and
- (c) is not bound by the rules of evidence.

(2) On hearing an application for an order authorising the making, alteration or revocation of a will in specific terms, the Court may, after considering the course of the application for leave to make the application, and any further material or evidence it requires:

- (a) refuse the application, or
- (b) grant the application on such terms and conditions, if any, as it thinks fit.

#### **24** *Execution of a will*

A will, or instrument altering or revoking a will, made pursuant to an order under this Division, must be signed by the Registrar and must be sealed with the seal of the Court.

#### **25** *Retention of a will or instrument*

- (1) A will, or instrument altering or revoking a will, made pursuant to an order under this Division, must be retained by the Registrar and, when so retained, is taken to have been deposited with the Registrar in accordance with Part 6.
- (2) Despite section 50, the will may not be withdrawn from deposit with the Registrar by or on behalf of the person on whose behalf it was made unless the Court has made an order under this Division authorising the revocation of the will (in which case the Registrar must withdraw it on presentation of a copy of the order) or the person has acquired or regained testamentary capacity.

#### **26** *Recognition of statutory wills*

- (1) A statutory will made according to the law of the place where the deceased was resident at the time of execution is to be regarded as a valid will of the deceased.
- (2) In this section:

*statutory will* means a will executed by virtue of a statutory provision on behalf of a person who, at the time of execution, lacked testamentary capacity.

#### **51** *Retention of wills*

Any failure by the Registrar to retain a will as required by this Act does not affect the validity of the will.

### 3. COURT MAY RECTIFY A WILL

#### (a) Basis for the model provision

The basis for the model provision was clause 37 of the draft *Wills Act 1994 (Vic)*. Clause 37 provides:

- (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.

#### (b) Background

Within Australia, there is a diversity of approaches in relation to rectification; some jurisdictions have not legislated at all, while Queensland has legislated in a narrow manner by section 31 of the *Succession Act 1981*. Other States, including Victoria, have legislated in a relatively substantial manner and the Australian Capital Territory in a manner that might be considered to be revolutionary. Section 12A of the *Wills Act 1968 (ACT)* provides in part:

- (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.

The National Committee briefly considered the broad rectification provision in the *Wills Act 1968* (ACT), and the consequences that such a broad power to rectify a will would have on the construction of wills. The National Committee also briefly considered whether such a broad power of rectification should take into account matters and events that take place at or after the death of the testator.

Clause 37 of the draft *Wills Act 1994* (Vic) is broader than section 31 of the *Succession Act 1981* (Qld) in that it also covers the case where the will does not give effect to the testator's instructions. However, it is not as broad as section 12A of the *Wills Act 1968* (ACT), which is not confined to giving effect to the testator's intention, but would permit the court to rectify a will to give effect to the "probable intention" of the testator, in light of circumstances not even known by the testator and even occurring after the testator's death.

### (c) The National Committee's decision

The National Committee generally agreed to adopt clause 37 of the draft *Wills Act 1994* (Vic) as representing the middle ground on this issue, but agreed that:

- the references in subclauses 37(2) and (4)(b)(ii) to "the grant of probate" and "after the grant of probate" should be references to "the date of death". With the greater occurrence of informal administrations, a grant of probate will often not be sought, thereby making the period within which to bring an application to rectify a will uncertain; and
- the period prescribed in clause 37(4)(b)(ii) should also be six months from the date of the testator's death.



**(d) Recommendation**

The National Committee recommends that a provision to the effect of clause 37 of the draft *Wills Act 1994* (Vic) be included in the draft model wills legislation, save that:

- the references in subclauses (2) and (4)(b)(ii) to “the grant of probate” and “after the grant of probate” should be references to “the date of death”; and
- the period prescribed in subclause (4)(b)(ii) should be six months from the date of the testator’s death.

**(e) Model provision: clause 27****27 Court may rectify a will**

- (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 make an application for an order under this section must apply to the Court within 6 months after the date of the death of the testator.**
- (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) A personal representative who makes a distribution to a beneficiary is not liable if:**
- (a) the distribution is made under section 53, or**
  - (b) the distribution is made:**
    - (i) at a time when the personal representative was not aware of any application for rectification or any application having been made under the [insert the name of the Act of the jurisdiction that deals with family provision], and**
    - (ii) at least 6 months after the death of the testator.**
- (5) The Court may direct that a certified copy of an order made under this section be attached to a will to which it applies and must, if it so directs, retain the will until the copy of the order is attached.**

## CHAPTER 6

### CONSTRUCTION OF WILLS

#### 1. GENERAL RULES FOR THE CONSTRUCTION OF WILLS

##### (a) Background

Clauses 21, 22, 27, 28 and 29 of the draft *Wills Act 1994 (Vic)*<sup>79</sup> deal separately with a number of matters, the purpose of which is to avoid partial intestacies. Each of those clauses is expressed to be subject to a contrary intention that appears by the will.

The National Committee considered whether clauses 21, 22, 27, 28 and 29 of the draft *Wills Act 1994 (Vic)* should be displaced only by a contrary intention shown in a will, or whether it should also be possible to establish a contrary intention by extrinsic evidence, that is, by evidence outside the terms of the will.

The National Committee is of the view that, in matters of construction of this type, the intention of the testator should be the primary consideration. For that reason, the establishment of a contrary intention should not be confined to one that can be shown in a will.

However, there are a number of other provisions in the draft *Wills Act 1994 (Vic)* that are not so much concerned with avoiding partial intestacies, as with establishing general statutory presumptions as to how property is to pass. These are clauses 26, 30, 31, 32 and 33.

For example, clause 32 of the draft *Wills Act 1994 (Vic)*<sup>80</sup> provides that where a disposition is made by will to issue of the testator and that issue predeceases the testator or does not survive the testator by thirty days, the issue of that issue take the share that the deceased issue would otherwise have taken. This provision is subject to a contrary intention that appears by the will. It would, therefore, be possible for a testator to disinherit a grandchild, but the will would need to provide expressly that, if the testator's child predeceased him or her, that child's share was not to pass to his or her child (the testator's grandchild). It would not be possible for the grandchild to be disinherited on the basis of evidence outside the terms of the will.

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<sup>79</sup> The National Committee's decisions in respect of these clauses are reflected in cls 29, 30, 35, 36 and 37 of the draft model wills legislation.

<sup>80</sup> See pages 83-90 of this Report for a detailed discussion of this provision.

**(b) The National Committee's decision**

If a provision like clause 32 could be displaced by a contrary intention wherever found, that would invite evidence, not about what kind of property a testator was referring to when using a particular form of words, but direct evidence of the testator's dispositive intention, that is, how the testator wanted his or her property to pass. It would seem undesirable to invite that type of evidence to rebut statutory presumptions as to how property is to pass in certain circumstances.

Accordingly, the National Committee does not recommend permitting the contrary intention to which clauses 26, 30, 31, 32 and 33 are subject to be established other than by the will.

**(c) Recommendation**

To the extent that the National Committee recommends that provisions to the effect of clauses 21, 22, 27, 28 and 29 of the draft *Wills Act 1994 (Vic)* be included in the draft model wills legislation, it recommends that those provisions should not apply if a contrary intention appears, whether in the will or elsewhere.

To the extent that the National Committee recommends that provisions to the effect of clauses 26, 30, 31, 32 and 33 of the draft *Wills Act 1994 (Vic)* be included in the draft model wills legislation, it recommends that the operation of those provisions should be displaced only if a contrary intention is found in the will.

**2. WHAT INTEREST IN PROPERTY DOES A WILL DISPOSE OF?****(a) Basis for the model provision**

The basis for the model provision was clause 20 of the draft *Wills Act 1994 (Vic)*. Clause 20 provides:

If -

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

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

**(b) The National Committee's decision**

The National Committee accepted clause 20.

**(c) Recommendation**

The National Committee recommends that a provision to the effect of clause 20 of the draft *Wills Act 1994* (Vic) be included in the draft model wills legislation.

**(d) Model provision: clause 28**

**28** *What interest in property does a will dispose of?*

**if:**

**(a)** a testator has made a will disposing of property, and

**(b)** after the making of the will and before his or her death, the testator disposes of an interest in that property,

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

**3. WHEN A WILL TAKES EFFECT**

**(a) Basis for the model provision**

The basis for the model provision was clause 21 of the draft *Wills Act 1994* (Vic). Clause 21 provides:

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

**(b) Background**

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

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

**(c) The National Committee's decision**

The National Committee accepted clause 21, although it was of the view that it should be subject to a contrary intention, whether in the will or elsewhere.<sup>81</sup>

**(d) Recommendation**

The National Committee recommends that a provision to the effect of clause 21 of the draft *Wills Act 1994* (Vic) be included in the draft model wills legislation, save that the model provision should be subject to a contrary intention, whether in the will or elsewhere.

**(e) Model provision: clause 29**

**29 When a will takes effect**

- (1) A will takes effect, with respect to the property disposed of by the will, as if it had been executed immediately before the death of the testator.**
- (2) This section does not apply if a contrary intention appears (whether in the will or elsewhere).**

**4. EFFECT OF FAILURE OF A DISPOSITION**

**(a) Basis for the model provision**

The basis for the model provision was clause 22 of the draft *Wills Act 1994* (Vic). Clause 22 provides:

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<sup>81</sup>

See the National Committee's general recommendation about establishing a contrary intention at page 63 of this Report.

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

### (b) Background

This provision ensures that property that is not effectively disposed of by will passes to the residuary estate of the testator. It expresses a policy of avoiding partial intestacies.

The exception from the provision of property that is the subject of an exercise of a power of appointment is not controversial, although it is not found in section 25 of the *Wills Act 1837* (UK).<sup>82</sup> If the exercise of a power of appointment fails, the property that is the subject of the power passes in accordance with the provisions of any gift over contained in the instrument creating the power. The drafter of the *Wills Act 1837* (UK) might well have thought it unnecessary to mention this.

### (c) The National Committee's decision

The National Committee initially accepted clause 22 of the draft *Wills Act 1994* (Vic).<sup>83</sup> However, a concern was subsequently raised that clause 22 would not distinguish between a disposition that was wholly ineffective and one that was only ineffective in part. The concern was that a disposition that *partially* disposed of property might not be held to be ineffective (because it has *some* effect) and might, therefore, be outside the operation of the provision. The National Committee noted that the equivalent Queensland provision, section 28(b) of the *Succession Act 1981* (Qld), refers to "a disposition that is void or fails *wholly or in part* to take effect".

The National Committee agreed that it was desirable to include the words "wholly or in part" in the model provision and agreed that subclause (1) should be redrafted in the following terms:

To the extent that any disposition of property, other than the exercise of a power of appointment, is ineffective wholly or in part, the will takes effect as if the property or the undisposed part thereof were part of the residuary estate of the testator.

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<sup>82</sup> Wills legislation in all Australian States and Territories has its origins in the *Wills Act 1837* (UK).

<sup>83</sup> National Committee for Uniform Succession Laws, *Uniform Succession Laws for the Australian States and Territories, Report to the Standing Committee of Attorneys General, The Law of Wills* (MP 19, October 1996), Attachment 1 at 41.

The National Committee was also of the view that the model provision should be subject to a contrary intention, whether in the will or elsewhere.<sup>84</sup>

**(d) Recommendation**

The National Committee recommends that a provision to the effect of clause 22 of the draft *Wills Act 1994* (Vic) be included in the draft model wills legislation, save that:

- subclause (1) should be redrafted to read:

To the extent that any disposition of property, other than the exercise of a power of appointment, is ineffective wholly or in part, the will takes effect as if the property or the undisposed part thereof were part of the residuary estate of the testator; and

- the provision should be subject to a contrary intention, whether in the will or elsewhere.

**(e) Model provision: clause 30**

**30**     *Effect of failure of a disposition*

**(1)**     To the extent that any disposition of property, other than the exercise of a power of appointment, is ineffective wholly or in part, the will takes effect as if the property or the undisposed part of the property were part of the residuary estate of the testator.

**(2)**     This section does not apply if a contrary intention appears (whether in the will or elsewhere).

**5. USE OF EXTRINSIC EVIDENCE TO CLARIFY A WILL**

**(a) Background**

Apart from the statutory provisions that have been introduced in some jurisdictions,<sup>85</sup> the law of wills allows the admission of extrinsic evidence in the construction of wills in only three cases:

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<sup>84</sup> See the National Committee's general recommendation about establishing a contrary intention at page 63 of this Report.

<sup>85</sup> These are discussed at pages 68-71 of this Report.

- The law of wills recognises the “armchair” principle. The armchair principle permits the admission of evidence of the circumstances in which a testator made a will, including the testator’s language habits, to assist in the construction of a will.<sup>86</sup>
- Evidence of the testator’s actual intention, while 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, which may show that yet another person was intended by the testator, is then admissible.<sup>87</sup>
- 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.<sup>88</sup>

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

The introduction of a statutory provision that permits a court to admit extrinsic evidence in the construction of a will is a matter that 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.

## (b) Possible bases for a model provision

### (i) English provision

A starting point for a uniform provision is section 21 of the *Administration of Justice Act 1982* (UK). That provision allows extrinsic evidence, including evidence of the testator’s intention, to be admitted to assist in the interpretation of a will only:

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<sup>86</sup> This principle is examined in detail in Hardingham LJ, Neave MA and Ford HAJ, *Wills and Intestacy in Australia and New Zealand* (2nd ed 1989) at para 1103.

<sup>87</sup> *McNamara v Fleming* [1963] VR 17 is a remarkable illustration of this rule.

<sup>88</sup> *Re Tussaud’s Estate* (1878) 9 Ch D 363 at 373-375.



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

## (ii) Victorian provision and draft proposal

In Victoria, there is a provision about the admissibility of extrinsic evidence in the construction of wills, namely, section 22A of the *Wills Act 1958 (Vic)*.<sup>89</sup> Section 22A(1) provides:

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.

Section 22A of the *Wills Act 1958 (Vic)* was inserted in 1981 following a review by the Victorian Chief Justice's Law Reform Committee, which took place before the English legislation was adopted.<sup>90</sup> In its 1994 Report, *Reforming the Law of Wills*, the Victorian Law Reform Committee observed that this provision may not unfairly be described as a statutory rendition of the "armchair" rule,<sup>91</sup> which, briefly, allows evidence of the testator's verbal habits to be admitted.

The Victorian Law Reform Committee recommended that the common law rules as to the admissibility of extrinsic evidence in the construction of a will be liberalised. It also recommended that a provision based on section 21 of the *Administration of Justice Act 1982 (UK)*, namely, clause 23 of the draft *Wills Act 1994 (Vic)*, should replace section 22A of the *Wills Act 1958 (Vic)*.<sup>92</sup> Clause 23 of the draft *Wills Act 1994 (Vic)*, provides:

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<sup>89</sup> The *Wills Act 1958 (Vic)* will be repealed when the *Wills Act 1997 (Vic)* commences. The 1997 Act contains a provision about the use of extrinsic evidence to clarify a will: see s 36.

<sup>90</sup> Chief Justice's Law Reform Committee (Vic), *First Report Concerning the Construction of Wills* (1978).

<sup>91</sup> Victorian Law Reform Committee, *Reforming the Law of Wills* (Final Report, May 1994) at 131.

<sup>92</sup> *Id* at 132-133.

- (1) If -
- (a) any part of a will is meaningless; or
  - (b) any of the language used in a will is ambiguous on the face of it; or
  - (c) evidence, which is not, or to the extent that it is not, evidence of the testator's intention, shows that any of the language used in a will is ambiguous in the light of surrounding circumstances -
- extrinsic evidence may be admitted to assist in the interpretation of that part of the will or that language in the will, as the case may be.
- (2) Extrinsic evidence which may be admitted under sub-section (1)(b) includes evidence of the testator's intention.

### (iii) Tasmanian provision

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

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

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

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

### (iv) Australian Capital Territory provision

In 1991 the Australian Capital Territory inserted a provision dealing with the admissibility of extrinsic evidence into its *Wills Act 1968 (ACT)*.<sup>93</sup> Section 12B provides:

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;

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*Wills Act 1968 (ACT)* s 12B, inserted by the *Wills (Amendment) Act 1991 (ACT)* (No 67 of 1991).

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

### (c) Object of the provisions

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

"Equivocal" literally means referring equally to two or more possible persons or pieces of property, and that is the way in which it has been applied by the courts.<sup>94</sup> It is the narrowness of the equivocation doctrine that is being relaxed.

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

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

Where the words of a will are uncertain, however, there can be no possibility of (a) or (b) or anything else. Moreover, the words cannot be rendered certain by the application of the "armchair" principle. That is, it could not be shown that "when the testator said that he meant so and so". But it does mean that evidence of the testator's intention is admissible even though nothing in the will itself or in the circumstances in which it was made can throw light on that intention.

### (d) The National Committee's decision

A majority of the National Committee preferred section 12B of the *Wills Act 1968* (ACT) except for the words "or uncertain" in paragraphs (b) and (c). The majority view<sup>95</sup> was that the terms "meaningless" and "ambiguous" were sufficient, and that the addition of the words "or uncertain" in those paragraphs was likely to lead to an increase in legal argument as to the scope of the provision, without providing any significant benefit.

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<sup>94</sup> See Hardingham IJ, Neave MA and Ford HAJ, *Wills and Intestacy in Australia and New Zealand* (2nd ed 1989) at para 1113.

<sup>95</sup> The representative for the Australian Capital Territory was of the view that the words "or uncertain" should be retained in the draft model provision.

**(e) Preservation of admissibility of extrinsic evidence otherwise admissible by law**

The National Committee is of the view that words to the following effect should be included in the model provision:

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

This could foreclose possible argument that the provision is a comprehensive code. It cannot, of course, be a code because it does not address the question of admissibility of extrinsic evidence of the testator's intention to fortify or rebut equitable presumptions of intention; nor does it, for that matter, refer to the case of equivocation.

The National Committee is nevertheless of the view that, for reasons of certainty, it is desirable to include these words.

**(f) Recommendation**

The National Committee recommends that a provision to the effect of section 12B of the *Wills Act 1968* (ACT) be included in the draft model wills legislation, save that:

- the words "or uncertain" should be deleted from the model provision; and
- the model provision should contain words to the effect of the following:

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

**(g) Model provision: clause 31**

**31 Use of extrinsic evidence to clarify a will**

**(1) In proceedings to construe a will, evidence, including evidence of the testator's intention, is admissible to the extent that the language used in the will renders the will, or any part of the will:**

- (a) meaningless, or**
- (b) ambiguous on the face of the will, or**
- (c) ambiguous in the light of the surrounding circumstances.**

**(2) Evidence of a testator's intention is not admissible to establish any of the circumstances referred to in subsection (1)(c).**

**(3) Nothing in this section prevents evidence that is otherwise admissible at law from being admissible in proceedings to construe a will.**

## **6. EFFECT OF A CHANGE IN TESTATOR'S DOMICILE**

### **(a) Basis for the model provision**

The basis for the model provision was clause 24 of the draft *Wills Act 1994 (Vic)*. Clause 24 provides:

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

### **(b) The National Committee's decision**

The National Committee accepted clause 24.

### **(c) Recommendation**

The National Committee recommends that a provision to the effect of clause 24 of the draft *Wills Act 1994 (Vic)* be included in the draft model wills legislation.

### **(d) Model provision: clause 32**

**32** *Effect of a change in testator's domicile*

The construction of a will is not altered because of any change in the testator's domicile after executing the will.

## **7. INCOME ON CONTINGENT, FUTURE OR DEFERRED DISPOSITIONS**

### **(a) Basis for the model provision**

The basis for the model provision was clause 25 of the draft *Wills Act 1994 (Vic)*. Clause 25 provides:

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

### (b) Background

Clause 25 was based on, and is almost identical to, section 62 of the *Succession Act 1981* (Qld).

Under case law, the beneficiary of a deferred residuary gift did not take the income arising before the gift vested.<sup>96</sup> 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,<sup>97</sup> unless a fund was set aside for the purpose of answering the bequest.<sup>98</sup> 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.<sup>99</sup> Section 62 of the *Succession Act 1981* (Qld) gave effect to this recommendation. It clears up a difficult part of the law and avoids the occasional partial intestacy of income.

It is arguable that this is a provision that belongs in property law, rather than in the law of wills; however, most of the problems associated with income on contingent and future dispositions arise from testamentary dispositions.

### (c) The National Committee's decision

The National Committee accepted clause 25.

### (d) Recommendation

The National Committee recommends that a provision to the effect of clause 25 of the draft *Wills Act 1994* (Vic) be included in the draft model wills legislation.

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<sup>96</sup> *Re Gillett's Will Trusts* [1950] Ch 102; *Re Geering* [1964] Ch 136.

<sup>97</sup> *Guthrie v Walrond* (1883) 22 Ch D 573.

<sup>98</sup> *Re Woodin* [1895] 2 Ch 309.

<sup>99</sup> Queensland Law Reform Commission, *Report of the Law Reform Commission on the Law Relating to Succession* (R 22, 1978) at 44–46.

(e) **Model provision: clause 33**

**33** *Income on contingent, future or deferred dispositions*

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

**8. BENEFICIARIES MUST SURVIVE TESTATOR BY 30 DAYS**

(a) **Basis for the model provision**

The basis for the model provision was clause 26 of the draft *Wills Act 1994 (Vic)*. Clause 26 provides:

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

(b) **Background**

This provision extends the operation of the doctrine of lapse, a doctrine which has not been subject to criticism, by a month from the date of death of the testator. Wills made in England were often found to include a similar provision, driven by the desire to minimise the accumulation of death duties where the beneficiary survived the testator for a short period of time, usually in the context of a common calamity such as a car crash.

The rule also simplifies problems of proof where it is not clear whether a beneficiary survived the testator by a few minutes or even a few days. Where the beneficiary is issue of the testator any surviving issue of that issue will take as long as they survive for a period of thirty days.<sup>100</sup> It is not unreasonable to argue that this would probably represent the wishes of the testator.

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See the discussion of cl 32 of the draft *Wills Act 1994 (Vic)* at pages 83-90 of this Report.

**(c) The National Committee's decision**

Although there is some opinion that thirty days is too long to wait to find out whether a beneficiary under a will or intestacy is or is not to be entitled to a benefit, the National Committee is of the view that, in the administration of a deceased estate, the period of one month after the death is not long, particularly having regard to the fact that, if there is any possibility of a family provision claim, the distribution of the estate cannot be made until after the period within which such a claim must be brought. The National Committee has, however, recommended a provision to enable a personal representative to maintain certain dependants of a testator during the thirty day period.<sup>101</sup>

**(d) Recommendation**

The National Committee recommends that a provision to the effect of clause 26 of the draft *Wills Act 1994* (Vic) be included in the draft model wills legislation.

**(e) Model provision: clause 34**

**34 Beneficiaries must survive testator by 30 days**

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

**9. WHAT DOES A GENERAL DISPOSITION OF PROPERTY INCLUDE?**

**(a) Basis for the model provision**

The basis for the model provision was clause 28 of the draft *Wills Act 1994* (Vic). Clause 28 provides:

<sup>101</sup>

See the discussion of a model provision based on a new s 99B of the *Administration and Probate Act 1958* (Vic), proposed by the draft *Wills Act 1994* (Vic), at pages 115-117 of this Report. See also the National Committee's Report to the Standing Committee of Attorneys General, *Family Provision* (December 1997) at Chapter 7.



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

## (b) Background

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

It corresponds to the provision that where a power is exercised by will, it has only to comply with the execution formalities prescribed for wills, without, in addition, having to comply with any additional forms required for the execution of the power by the instrument creating it.<sup>102</sup>

In its Report, *Reforming the Law of Wills*, the Victorian Law Reform Committee acknowledged that section 28(d) of the *Succession Act 1981* (Qld) had been used as a precedent for clause 28 of the draft *Wills Act 1994* (Vic). It recommended a change to the Queensland provision, however, because of a concern that the reference in the Queensland provision to property of "a particular kind" was too restrictive. The Victorian Law Reform Committee was of the view that the Queensland provision omitted, on the face of it, a gift of residue, which was not well defined by the words "property of a particular kind". For that reason, the Victorian Law Reform Committee considered that it was preferable for the rule to apply to property of a particular description:<sup>103</sup>

A reference to "all my shares" or "all my farming lands" is clearly a reference to "property of a particular kind", and would therefore exercise a power over property of that kind; but a "gift of residue", such as a reference to "everything else" or "what remains after the above gifts" might not do so, although it would be encompassed in the phrase "property of a particular description".

## (c) The National Committee's decision

The National Committee accepted clause 28, although it was of the view that it should be subject to a contrary intention, whether in the will or elsewhere.<sup>104</sup>

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<sup>102</sup> See the discussion of cl 7(5) of the draft *Wills Act 1994* (Vic) at pages 10-11 of this Report.

<sup>103</sup> Victorian Law Reform Committee, *Reforming the Law of Wills* (Final Report, May 1994) at 141.

<sup>104</sup> See the National Committee's general recommendation about establishing a contrary intention at page 63 of this Report.

**(d) Recommendation**

The National Committee recommends that a provision to the effect of clause 28 of the draft *Wills Act 1994* (Vic) be included in the draft model wills legislation, save that it should be subject to a contrary intention, whether in the will or elsewhere.

**(e) Model provision: clause 35**

**35** *What does a general disposition of property include?*

**(1)** A general disposition of all or the residue of the testator's property, or of all or the residue of his or her property of a particular description, includes all the property of the relevant description over which he or she has a general power of appointment exercisable by will and operates as an exercise of the power.

**(2)** This section does not apply if a contrary intention appears (whether in the will or elsewhere).

**10. WHAT DOES A GENERAL DISPOSITION OF LAND INCLUDE?**

**(a) Basis for the model provision**

The basis for the model provision was clause 27 of the draft *Wills Act 1994* (Vic). Clause 27 provides:

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

**(b) Background**

This provision is the product of the fact that land might be either realty (for instance, the fee simple) or personalty (leaseholds), and that the wording of the will might lead to a construction that a disposition of land could not include a leasehold interest in land.

**(c) The National Committee's decision**

The National Committee accepted clause 27, although it was of the view that it should be subject to a contrary intention, whether in the will or elsewhere.<sup>105</sup>

**(d) Recommendation**

The National Committee recommends that a provision to the effect of clause 27 of the draft *Wills Act 1994* (Vic) be included in the draft model wills legislation, save that the model provision should be subject to a contrary intention, whether in the will or elsewhere.

**(e) Model provision: clause 36**

<p><b>36</b>    <b><i>What does a general disposition of land include?</i></b></p> <p><b>(1)</b>    <b>A general disposition of land or of land in a particular area includes leasehold land whether or not the testator owns freehold land.</b></p> <p><b>(2)</b>    <b>This section does not apply if a contrary intention appears (whether in the will or elsewhere).</b></p>
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**11. EFFECT OF DEVISE OF REAL PROPERTY WITHOUT WORDS OF LIMITATION**

**(a) Basis for the model provision**

The basis for the model provision was clause 29 of the draft *Wills Act 1994* (Vic). Clause 29 provides:

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

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<sup>105</sup>

See the National Committee's general recommendation about establishing a contrary intention at page 63 of this Report.

**(b) The National Committee's decision**

The National Committee accepted clause 29, although it was of the view that it should be subject to a contrary intention, whether in the will or elsewhere.<sup>106</sup>

**(c) Recommendation**

The National Committee recommends that a provision to the effect of clause 29 of the draft *Wills Act 1994* (Vic) be included in the draft model wills legislation, save that the model provision should be subject to a contrary intention, whether in the will or elsewhere.

**(d) Model provision: clause 37****37 Effect of devise of real property without words of limitation**

- (1) A disposition of real property to a person without words of limitation is to be construed as passing the whole estate or interest of the testator in that property to that person.**
- (2) This section does not apply if a contrary intention appears (whether in the will or elsewhere).**

**12. HOW DISPOSITIONS TO ISSUE OPERATE****(a) Basis for the model provision**

The basis for the model provision was clause 30 of the draft *Wills Act 1994* (Vic). Clause 30 provides:

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

**(b) The National Committee's decision**

The National Committee accepted clause 30, although it was of the view that it should be redrafted as follows:

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

This provision has the effect that, if a jurisdiction's intestacy rules are changed, this provision will apply automatically to the changed rules, and further amendment will not be necessary.

**(c) Recommendation**

The National Committee recommends that a provision to the effect of clause 30 of the draft *Wills Act 1994* (Vic), as redrafted, be included in the draft model wills legislation.

**(d) Model provision: clause 38**

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

**13. HOW REQUIREMENTS TO SURVIVE WITH ISSUE ARE CONSTRUED****(a) Basis for the model provision**

The basis for the model provision was clause 31 of the draft *Wills Act 1994* (Vic). Clause 31 provides:

- (1) If there is a disposition to a person in a will which is expressed to fail if there is either -
  - (a) a want or a failure of issue of that person either in his or her lifetime or at his or her death; or

(b) an indefinite failure of issue of that person -

those words must be construed to mean a want or failure of issue in the person's lifetime or at the person's death and not an indefinite failure of his or her issue.

(2) Sub-section (1) does not apply if a contrary intention appears in the will.

## (b) Background

Clause 31 updates the language of section 29 of the *Wills Act 1837* (UK).<sup>107</sup>

## (c) The National Committee's decision

The National Committee initially accepted clause 31. However, a concern was subsequently raised that clause 31(2) of the draft *Wills Act 1994* (Vic) might leave it open for gifts to be made for indefinite future issue - which might be contrary to the rule against perpetuities. However, the purpose of clause 31 is to prevent the failure of a gift on the basis of a presumably unintended breach of that rule.

The following question was put to the National Committee:

*In subclause 31(2) of the draft Victorian legislation:*

- (i) *should the words "if the result of fulfilling the contrary intention would be to cause a failure of the disposition" be added; or*
- (ii) *might clause 31(2) be omitted, thereby retaining the original functions of the provision in the Wills Act 1837 (UK) and ensuring early distribution of the estate?*

The National Committee agreed that the words "unless the result would be to cause a failure of the disposition" should be added to subclause (2) of the model provision.

## (d) Recommendation

The National Committee recommends that a provision to the effect of clause 31 of the draft *Wills Act 1994* (Vic) be included in the draft model wills legislation, save that words to the effect of "unless the result would be to cause a failure of the disposition" should be added to subclause (2) of the model provision.

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<sup>107</sup>

Wills legislation in all Australian States and Territories has its origins in the *Wills Act 1837* (UK).

(e) **Model provision: clause 39**

**39** *How requirements to survive with issue are construed*

(1) **If there is a disposition to a person in a will that is expressed to fail if there is either:**

(a) **a want or a failure of issue of that person either in his or her lifetime or at his or her death, or**

(b) **an indefinite failure of issue of that person,**

**those words must be construed to mean a want or failure of issue in the person's lifetime or at the person's death and not an indefinite failure of his or her issue.**

(2) **This section does not apply if a contrary intention appears in the will except where the result would be to cause a failure of the disposition.**

**14. DISPOSITIONS NOT TO FAIL BECAUSE ISSUE HAVE DIED BEFORE TESTATOR**

(a) **Basis for the model provision**

The basis for the model provision was clause 32 of the draft *Wills Act 1994* (Vic). Clause 32 provides:

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

## (b) Background to the anti-lapse rule

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

The *Wills Act 1837* (UK) provided that in that case the will should take effect as if the death of the issue had happened immediately after the death of the testator. That provision was found to be defective because if the deceased issue, deemed to have survived the testator, had made a will leaving his or her estate away from his or her issue, for example, to a spouse, the surviving issue would take nothing. This was seen as failing to give effect to the testator's presumed intention to benefit, for example, the testator's grandchildren, rather than a son-in-law or a daughter-in-law.

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

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

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

Secondly, an anti-lapse rule ensures that grandchildren take the share intended for their parent. Submissions received in connection with this project and other succession law projects, suggest that nothing causes greater disharmony within the family than a will which, as far as those disappointed by it are concerned, gives some family members an unfairly large share of the estate and others an unfairly small share.

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

For example, suppose that a testator makes a will leaving the estate to "such of my children as survive me and if more than one in equal shares". The testator dies leaving one surviving child, A, and four grandchildren, A1 (A's child), B1 (the child of B, a predeceased child of the testator's), and C1 and C2 (the children of C, another predeceased child of the testator's). If there were no anti-lapse rule, A would take the entire estate, which would presumably pass to A1 on A's death. B1, C1 and C2 would



take nothing. Under the anti-lapse rule, however, B1 will take the share the testator intended for B, and C1 and C2 will take between them the share intended for C. The fairness of that outcome scarcely needs justification. Moreover, it is matched by the *per stirpes* rule which applies in the case of intestacy. If the policy of the law were that surviving issue must be preferred to the issue of predeceased issue there would be no *per stirpes* rule.

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

**(c) The National Committee's decision**

The National Committee accepted clause 32 of the draft *Wills Act 1994 (Vic)*, subject to considering the subsidiary issues below.

**(d) Subsidiary issues**

**(i) Gift to issue as "joint tenants"**

The issue was raised whether subclause (4) of the model provision should include words to the following effect:

and a gift of a joint tenancy shall not be conclusive evidence of a contrary intention unless the intention is made clear by the other terms of the will, or if such other terms do not make it clear, by extrinsic evidence, including evidence of the testator's intention;

or whether there should be no automatic exclusion from the anti-lapse provision of gifts to persons as joint tenants.

This question was raised because one respondent<sup>108</sup> to the wills memoranda circulated by the Queensland Law Reform Commission<sup>109</sup> suggested in relation to clause 32 of the draft *Wills Act 1994 (Vic)* that the provision should not apply where a testator leaves the estate to children "as joint tenants". That is, if a testator provides for the estate to be divided "amongst my children as joint tenants" and at the testator's death a child has died leaving children surviving, those grandchildren should not take their deceased parent's share; it should be given only to the surviving children.

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<sup>108</sup> Submission 1.

<sup>109</sup> Queensland Law Reform Commission, *Uniform Succession Laws: Wills* (MP 15, February 1996).

The object of the statutory provision is, and always has been, the opposite. It is to ensure that issue of deceased issue *do* take their deceased parent's share. In the history of the provision, which dates back to the *Wills Act 1837* (UK), one of the later refinements, found in Victoria and other States, was to extend the provision to gifts to members of a class.

The policy of the legislation is subject to the testator's contrary intention. But in the development of the provision to its logical conclusion, it is provided that a general requirement or condition that issue survive the testator is not a contrary intention for the purposes of the section.<sup>110</sup> So a gift "to such of my children as survive me and if more than one in equal shares" will not prevent the issue of a deceased child from taking their deceased parent's share; nor is a provision that the deceased should have attained a certain age a sufficient contrary intention.

That means that to establish a contrary intention beyond doubt, the testator must address his or her mind to the question. The best way of showing a contrary intention is to state expressly to whom the share of a predeceasing child or issue is to go: "to my children in equal shares; but if any child predeceases me that child's share is to be divided amongst the children who survive me and is not to go to any issue of such child who survive me".

The larger purpose of the section is to ensure that a gift to children or remoter issue of the testator is divided stirpitably amongst surviving issue of the deceased. It is not seen as desirable that only surviving children should share a gift to children to the exclusion of issue of a child who predeceases the testator. In other words, the policy of the law is to make testators think twice before they disinherit the issue of a deceased child.

A gift to "my children as joint tenants" raises pertinently the question of contrary intention. Survivorship is the characteristic incident of every joint tenancy. So if a testator makes a gift to a class "as joint tenants" it is arguable that there cannot be a gift to any member of the class who predeceases the testator - it has already, in a sense, passed, and can only pass to the survivors of the "joint tenancy": that any member of the class left issue who survived the testator is irrelevant.

The difficulty with this argument, however, is that the courts of construction have always leaned in favour of construing a gift to joint tenants as a gift to them as tenants in common. This policy has even been carried into statute. Section 35(1) of the *Property Law Act 1974* (Qld) provides:

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Draft *Wills Act 1994* (Vic) cl 32(4).

A disposition of the beneficial interest in any property, whether with or without the legal interest, to or for 2 or more persons together beneficially shall be construed as made to or for them as tenants in common, and not as joint tenants.

When combined with the policy of the statutory anti-lapse provision in relation to issue of the deceased person, it would be difficult to overcome this statutory provision.

Even before the statute was enacted the courts had habitually resisted construing a gift of a joint tenancy technically so as to prevent the survivors of a deceased "joint tenant" from taking.<sup>111</sup>

The other argument against construing the expression "as joint tenants" technically when found in a will is that in all probability the testator does not intend the consequences of such a technical construction. The phrase is used in conveyances *inter vivos* for obvious reasons. When found in a will it is likely that the will is home made.

Particularly in the context of a gift to the children of a testator, the policy of the law - which is to ensure that the issue of a predeceased child should not be left without - has the weight of history and statute behind it.

The National Committee agrees that subclause (4) of the model provision should contain the words:

and a gift of a joint tenancy shall not on its own indicate a contrary intention.

**(ii) Effect of non-fulfilment of a contingency required by the will**

The National Committee considered whether clause 32 of the draft *Wills Act 1994* (Vic) should include a provision along the following lines:

Where a condition is imposed on an original beneficiary and that beneficiary fails to survive the testator for thirty days, the issue of that beneficiary may not take under this section unless the original beneficiary has fulfilled the condition.

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

The National Committee agrees that such a provision should be incorporated into the model provision.

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There is a summary of the occasions when the courts have found a tenancy in common, in preference to a joint tenancy, in Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at para 1629.

### (iii) The position of unmarried minor issue

The Victorian Law Reform Committee in its Report, *Reforming the Law of Wills*, commented in relation to clause 32(2):<sup>112</sup>

... 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.

#### Recommendation 53

The Committee recommends that the statutory substitutional gift to issue of deceased issue be contingent on attaining the age of 18 years, or marrying sooner.

Although the National Committee initially accepted clause 32,<sup>113</sup> concern was subsequently raised about the effect of clause 32(2).

The National Committee is of the view that subclause (2) is not concerned with anti-lapse, as the effect of subclause (1) is that issue would take, as members of a class, their deceased's parent's share as substitutional beneficiaries. The situation that the provision is directed at is how any share held under subsection (1) should pass in the event of the death of that issue before attaining 18 or marrying. In the absence of subsection (2), the ordinary intestacy rules would apply to the estate of the minor substitutional beneficiary. The effect of subsection (2) would be to displace the usual intestacy rules, so that in these specific circumstances, the deceased minor's share would pass to any other issue as if the minor had died before, rather than after, the testator.

The National Committee agrees that subsection (2) is not concerned with the anti-lapse rule, but, in effect, constitutes a specific intestacy provision for minors. As such, it should be deleted from clause 32, and reconsidered by the National Committee when it embarks on the intestacy stage of this project.

### (iv) Maintenance and advancement of minor substitutionary beneficiary

Clause 32(1) provides for a statutory substitutionary provision where a testator leaves property to issue who predecease the testator leaving issue who survive the testator. The policy of the provision is strong and has a long history; as

<sup>112</sup> Victorian Law Reform Committee, *Reforming the Law of Wills* (Final Report, May 1994) at 147.

<sup>113</sup> National Committee for Uniform Succession Laws, *Uniform Succession Laws for the Australian States and Territories, Report to the Standing Committee of Attorneys General, The Law of Wills* (MP 19, October 1996), Attachment 1 at 56.

subclause (4) indicates, although the provision is subject to a contrary intention, a contrary intention is not indicated by a general requirement or condition that issue survive the testator or attain a specified age.

There is, however, a matter that should be made clear, but which is perhaps not clear, on the face of clause 32. Issue under the age of 18 must be entitled to be maintained, advanced and educated from the disposition. That is the usual law about trusts for minors. It would not do if the draft Victorian provision left it unclear whether the executors of the estate could maintain, advance and educate a minor who was a beneficiary as a result of the operation of this provision.

The question, therefore, is whether the maintenance and advancement provisions of State and Territory trustee legislation will undoubtedly apply.<sup>114</sup> This issue is not about rendering uniform the various statutory powers of maintenance, education and advancement; it is about making it clear that the statutory powers that already exist will apply to a substitutionary beneficiary under this provision who happens to be a minor.

The policy of the law to make provision for minors is so strong that there is probably no doubt about this. However, the various statutes provide that the disposition be one held "on trust" for the beneficiaries. It is difficult to see how it could be argued that a benefit under a statutory substitutional provision was not one held upon trust; nevertheless, it would be desirable to place it beyond doubt.

The National Committee is, therefore, of the view that subclause (1) of the model provision should be amended to read as follows:

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 disposition is to be held upon trust for the issue of that issue who survive the testator for thirty days in the shares they would have taken of the residuary estate of the testator if the testator had died intestate leaving only issue surviving.**

#### (e) Recommendation

The National Committee recommends that a provision to the effect of clause 32 of the draft *Wills Act 1994* (Vic) be included in the draft model wills legislation, save that:

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See *Trustee Act 1925* (NSW) ss 43-45; *Trustee Act 1958* (Vic) ss 37-39; *Trusts Act 1973* (Qld) ss 61-64; *Trustee Act 1936* (SA) ss 33-33A; *Trustees Act 1962* (WA) ss 58-61; *Trustee Act 1925* (ACT) ss 43-45; and *Trustee Act* (NT) ss 24-24A. There are no comprehensive corresponding provisions in the Tasmanian legislation, but see *Trustee Act 1898* (Tas) s 29.

- subclause (1) of the model provision should be amended as indicated immediately above;
- subclause (2) of the model provision should be deleted and the subsequent subclauses renumbered;
- the model provision should contain a provision to the following effect:
  - and a gift of a joint tenancy shall not on its own indicate a contrary intention;
- the model provision should contain a provision to the following effect:
  - Where a condition is imposed on an original beneficiary and that beneficiary fails to survive the testator for thirty days, the issue of that beneficiary may not take under this section unless the original beneficiary has fulfilled the condition.

**(f) Model provision: clause 40**

**40 Dispositions not to fail because issue have died before testator**

- (1) If a person makes a disposition to any of his or her issue and:**
- (a) the disposition is not a disposition to which section 38 applies, and**
  - (b) the interest in the property disposed is not determinable at or before the death of the issue, and**
  - (c) the issue does not survive the testator for 30 days,**
- the disposition is held on trust for the issue of that issue who survive the testator for 30 days in the shares they would have taken of the residuary estate of the testator if the testator had died intestate leaving only issue surviving.**
- (2) Subsection (1) applies to dispositions to issue either as individuals or as members of a class.**
- (3) This section does not apply if a contrary intention appears in the will.**
- (4) A general requirement or condition that issue survive the testator or attain a specified age does not indicate a contrary intention for the purposes of this section and a gift of a joint tenancy will not on its own indicate a contrary intention.**
- (5) If a condition is imposed on an original beneficiary and that beneficiary fails to survive the testator for 30 days, the issue of that beneficiary may not take under this section unless the original beneficiary has fulfilled the condition.**

## 15. CONSTRUCTION OF DISPOSITIONS

### (a) Basis for the model provision

The basis for the model provision was clause 33 of the draft *Wills Act 1994* (Vic). Clause 33 provides:

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

### (b) Background

The first part of the provision is designed to remedy the problem that might be caused if a testator makes a will with a residuary provision that says something like: "I leave the residue of my real property to Z". Under traditional principles of construction the testator would die intestate as to all property not realty. Similarly, if the testator were to leave "the residue of my personal property" to Z, any realty undisposed of by will would pass on intestacy.

The statutory provision ensures that a partial intestacy does not occur in these fact situations. The rule is subject to a contrary intention. Accordingly, if a testator left "the residue of my personalty" to Z and "the residue of my estate to Y", Z would take the residue of the personalty and Y would take the residue of any realty.

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

Importantly, the wording of subclause 33(2) would apply to a disposition, whether of the whole of the estate or only the residue.

Until recently, the equivalent provision in Queensland, section 29(b) of the *Succession Act 1981* (Qld), was expressed to apply only to "a residuary disposition".<sup>115</sup> Prior to the amendment of section 29 in 1997, that provision had been construed narrowly.

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Section 29 of the *Succession Act 1981* (Qld) was amended by the *Justice and Other Legislation (Miscellaneous Provisions) Act 1997* (Qld).

In *Re Harvey*<sup>116</sup> it was held that a residuary disposition was a general disposition of the balance of an estate following a prior disposition; accordingly, a gift of “all the estate” was not a gift of residue, and section 29 could not apply to it.

That was seen by the Victorian Law Reform Committee as placing an undue restriction on the efficacy of section 29.<sup>117</sup> For that reason, clause 33(2) was specifically drafted so that it would apply to a disposition in fractional parts of the whole, or the residue, of the estate of a testator, and avoid the construction that had been placed on section 29 in *Re Harvey*. It is now consistent with section 29 of the *Succession Act 1981* (Qld), as recently amended.

**(c) The National Committee’s decision**

The National Committee accepted clause 33.

**(d) Recommendation**

The National Committee recommends that a provision to the effect of clause 33 of the draft *Wills Act 1994* (Vic) be included in the draft model wills legislation. The National Committee is of the view that subclause (1) might be clearer if it were to be redrafted slightly.

The reference in the section heading to “residuary” should be deleted, as the provision applies not only to dispositions of the residue of an estate, but also to dispositions of the whole of an estate.

**(e) Model provision: clause 41**

**41 Construction of dispositions**

- (1) A disposition of the residue of the estate of a testator, or of the whole of the estate of a testator, that refers only to the real estate of the testator, or only to the personal estate of the testator, is to be construed to include both the real and personal estate of the testator.**

<sup>116</sup> [1990] 2 Qd R 508.

<sup>117</sup> Victorian Law Reform Committee, *Reforming the Law of Wills* (Final Report, May 1994) at 153.



- (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 that does not fail, and, if there is more than one part that does not fail, to all those parts proportionately.**
- (3) **This section does not apply if a contrary intention appears in the will.**

## 16. LEGACIES TO UNINCORPORATED ASSOCIATIONS OF PERSONS

### (a) Basis for the model provision

The basis for the model provision was clause 34 of the draft *Wills Act 1994* (Vic). Clause 34 provides:

- (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.
- (2) Property which is or which is to be taken to be a disposition in augmentation of the general funds of an unincorporated association must be -
- (a) paid into the general fund of the association; or
  - (b) transferred to the association; or
  - (c) sold or otherwise disposed of on behalf of the association and the proceeds paid into the general fund of the association.
- (3) If -
- (a) the personal representative pays money to an association under a disposition, the receipt of the Treasurer or a like officer, if the officer is not so named, of the association is an absolute discharge for that payment; or
  - (b) the personal representative transfers property to an association under a disposition, the transfer of that property to a person or persons designated in writing by any two persons holding the offices of President, Chairman, Treasurer or Secretary or like officers, if those officers are not so named, is an absolute discharge to the personal representative for the transfer of that property.

- (4) Sub-section (3) does not apply if a contrary intention appears in the will.
- (5) It is not an objection to the validity of a disposition to an unincorporated association of persons that a list of persons who were members of the association at the time the testator died cannot be compiled, or that the members of the association have no power to divide assets of the association beneficially amongst themselves.

## (b) Background

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

Section 63 of the *Succession Act 1981* (Qld) was the model for clause 34 of the draft *Wills Act 1994* (Vic). However, clause 34 is an improvement on section 63 in two respects:

- Clause 34 expressly excludes dispositions to associations that are charities. This is because the grounds of invalidity mentioned above do not apply to charities. 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 purposes,<sup>118</sup> then the law relating to charities should govern not only the validity, but also the administration, of any gift to such an association.
- Clause 34(5) provides that “[i]t is not an objection to the validity of a disposition ... that the members of the association have no power to divide assets of the association beneficially amongst themselves”. These words do not appear in the Queensland provision. The reason for including the words is that some unincorporated associations of persons are unable, because of a specific provision in their constitutions, to divide assets among members in the event of the winding up of the association. Such a provision is to be expected where the association has been in receipt of fiscal benefits and the Australian Tax Office requires that surplus moneys, in the event of a winding up, be transferred to a similar association, enjoying similar fiscal benefits.

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For example, *Charitable Trusts Act* (NSW) s 23; *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.

To the extent that the idea of a legacy or devise to an unincorporated association of persons is intended as a gift to the members personally, a provision in the constitution preventing the members from sharing the assets of the association might seem to be counter to a testator's wishes to benefit members as persons in making the disposition by will. The same argument has already been addressed in the earlier words of clause 34(5), which also saves the disposition even though a list of the members cannot be compiled - ordinarily a requirement for the validity of a strict gift or trust for persons.

**(c) The National Committee's decision**

The National Committee accepted clause 34.

**(d) Recommendation**

The National Committee recommends that a provision to the effect of clause 34 of the draft *Wills Act 1994* (Vic) be included in the draft model wills legislation.

**(e) Model provision: clause 42**

**42 Legacies to unincorporated associations of persons**

**(1) A disposition:**

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

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

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

- (a) paid into the general fund of the association, or**
- (b) transferred to the association, or**
- (c) sold or otherwise disposed of on behalf of the association and the proceeds paid into the general fund of the association.**

- (3) If the personal representative pays money to an association under a disposition, the receipt of the Treasurer or a like officer, if the officer is not so named, of the association is an absolute discharge for that payment.
- (4) If the personal representative transfers property to an association under a disposition, the transfer of that property to a person or persons designated in writing by any two persons holding the offices of President, Chairperson, Treasurer or Secretary or like officers, if those officers are not so named, is an absolute discharge to the personal representative for the transfer of that property.
- (5) Subsections (3) and (4) do not apply if a contrary intention appears in the will.
- (6) It is not an objection to the validity of a disposition to an unincorporated association of persons that a list of persons who were members of the association at the time the testator died cannot be compiled, or that the members of the association have no power to divide assets of the association beneficially among themselves.

## 17. CAN A PERSON, BY WILL, DELEGATE THE POWER TO DISPOSE OF PROPERTY?

### (a) Basis for the model provision

The basis for the model provision was clause 35 of the draft *Wills Act 1994* (Vic). Clause 35 provides:

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

### (b) Background

Clause 35 is intended to prevent argument that a power of appointment contained in a will might constitute an unacceptable delegation of the testator's power to make a will. It is perhaps unfortunate that it is mainly in Australia that credence has been given to such an argument.<sup>119</sup>

Although the original arguments that the creation of a power of appointment by will constitutes a delegation of the testator's will-making power have been discredited, it seems to be desirable to include a provision of this kind in legislation to ensure that

<sup>119</sup>

See Queensland Law Reform Commission, *Uniform Succession Laws for Australian States and Territories, Issues Paper No 1, The Law of Wills* (WP 46, July 1994, reprinted June 1995) at para 7.6.

such arguments are not advanced again. To omit the provision might be seen as a signal that there is merit in these arguments.

**(c) The National Committee's decision**

The National Committee accepted clause 35.

**(d) Recommendation**

The National Committee recommends that a provision to the effect of clause 35 of the draft *Wills Act 1994* (Vic) be included in the draft model wills legislation.

**(e) Model provision: clause 43**

**43 Can a person, by will, delegate the power to dispose of property?**

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

**18. EFFECT OF REFERRING TO VALUATION IN A WILL**

**(a) Basis for the model provision**

The basis for the model provision was clause 36 of the draft *Wills Act 1994* (Vic). Clause 36 provides:

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

**(b) Background**

The purpose of this provision is "to provide a method of valuation in case the statutory

sources in death duty legislation are not available".<sup>120</sup> The provision is the result of cases in which a specific reference to a valuation that it is not possible to make has been found to cause difficulty in giving effect to the testator's intention.

**(c) The National Committee's decision**

The National Committee accepted clause 36.

**(d) Recommendation**

The National Committee recommends that a provision to the effect of clause 36 of the draft *Wills Act 1994* (Vic) be included in the draft model wills legislation, save that the provision should be subject to a contrary intention that appears in the will.

**(e) Model provision: clause 44**

**44 Effect of referring to valuation in a will**

- (1) Except to the extent that a method of valuation is at the relevant time required under a law of [insert name of jurisdiction] or any other place, or is provided for in the will, an express or implied requirement in a will that a valuation of property be made or accepted for any purpose is to be construed as if it were a reference to a valuation of the property as at the date of the testator's death made by a competent valuer.**
- (2) This section does not apply if a contrary intention appears in the will.**

## CHAPTER 7

### WILLS UNDER FOREIGN LAW

#### 1. BASIS FOR THE MODEL PROVISIONS

The provisions that formed the basis for the model provisions were clauses 17, 18 and 19 of the draft *Wills Act 1994* (Vic). Clauses 17, 18 and 19 provide:

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

- (a) If there is a rule in force throughout the place which indicates which system applies to the will, that rule must be followed; or
- (b) If there is no rule, the system must be that with which the testator was most closely connected either -
  - (i) at the time of his or her death, if the matter is to be determined by reference to circumstances prevailing at his or her death; or
  - (ii) in any other case, at the time of execution of the will.

19. *Construction of the law applying to these wills*

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

## 2. BACKGROUND

These provisions deal with the recognition of wills made in other jurisdictions. They are concerned with the requirements 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 to the 1961 *Hague Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions*.

The Hague Convention of 1961 has been adopted in most Australian jurisdictions by legislation based on the *Wills Act 1963* (UK), which was enacted to comply with the Convention.<sup>121</sup>

Understandably, all the jurisdictions used their own drafting styles when adopting the Convention; some jurisdictions did not adopt every part of the English complying legislation, and others merged provisions.

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Note, however, that cl 17(2)(d) of the draft *Wills Act 1994* (Vic) and its counterparts in other jurisdictions are based on s 2(1)(d) of the *Wills Act 1963* (UK). That provision was not based on the Hague Convention, but, rather, on a recommendation made in a Report by the Wynn Parry Committee: see Private International Law Committee (UK), *Fourth Report (Formal Validity of Wills)* (Cmnd 491, July 1958) at 8 (Proposal 11(c)).



### 3. DIFFERENCES BETWEEN CLAUSES 17 TO 19 OF THE DRAFT *WILLS ACT 1994* (VIC) AND THE EQUIVALENT PROVISIONS IN OTHER AUSTRALIAN JURISDICTIONS

The National Committee has considered the differences between the draft Victorian provisions and the equivalent provisions in other Australian jurisdictions. The main differences are:

- The omission from clauses 17(1), 17(2)(a), 17(2)(b) and 18 of the draft *Wills Act 1994* (Vic) of the word "internal" before the words "law in force" wherever they appear. Wills legislation in all Australian States and Territories presently qualifies the references to "law in force" in the various Acts with the word "internal".
- The omission of definitions of "internal law", "country" and "place". Most jurisdictions include the following definitions<sup>122</sup> (or ones that are virtually identical in language or effect):<sup>123</sup>

"internal law" in relation to any country or place means the law which would apply in a case where no question of the law in force in any other country or place arose;

"country" means any place or group of places having its own law of nationality (including the Commonwealth of Australia and its territories);

"place" means any territory (including a State or territory of the Commonwealth of Australia).

The purpose of the references to the "internal law" in force in a place is to make it clear that it is a reference to the domestic law of that place. The jurisdiction's rules of private international law (which might have the effect of applying the domestic law of another jurisdiction) are thereby excluded.

- The omission of the word "essential" before the word "validity" in clause 17(2)(d).

With the exception of the *Wills Act 1968* (ACT), which does not include a

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<sup>122</sup> These definitions are taken from s 20A(1) of the *Wills Act 1958* (Vic). The *Wills Act 1958* (Vic) will be repealed when the *Wills Act 1997* (Vic) commences. Although the 1997 Act omits these definitions, it still uses the term "internal law" in ss 17 and 18.

<sup>123</sup> See, for example, the definitions of "internal law" in the *Wills, Probate and Administration Act 1898* (NSW) s 32A; *Wills Act 1936* (SA) s 25A; *Wills Act 1958* (Vic) s 20A; *Wills Act 1968* (ACT) s 15A; *Wills Act 1970* (WA) s 4; *Succession Act 1981* (Qld) s 5; *Wills Act 1990* (NT) s 15A; and *Wills Act 1992* (Tas) s 3. See note 122 of this Report in relation to the Victorian position.

provision that is equivalent to clause 17(2)(d), all Australian States and Territories refer to the “essential validity” of the power of appointment in the comparable provisions of their wills legislation.<sup>124</sup> That term is also used in section 2(1)(d) of the *Wills Act 1963* (UK).

It does not appear that the omission of the relevant words in the draft Victorian provisions was intended to effect a change to the law.<sup>125</sup> On the contrary, the Victorian Law Reform Committee recommended that there be no change to the law as to the applicability of foreign law to the execution of wills.<sup>126</sup>

#### 4. THE NATIONAL COMMITTEE’S DECISION

The National Committee generally accepted clauses 17, 18 and 19 of the draft *Wills Act 1994* (Vic).

However, the National Committee was of the view that it is desirable for the model provisions based on clauses 17 and 18 to make it clear that a reference to the law of another jurisdiction is a reference to the domestic law of that jurisdiction, and not to its rules of private international law. For that reason, the National Committee was of the view that the following changes should be made to the model provisions:

- the references in clauses 17 and 18 to “the law in force” should be references to “the internal law in force”; and
- “internal law” should be defined as follows:

“internal law” in relation to a place means the law that would apply in a case where no question of the law in force in any other place arose.

Clauses 17, 18 and 19 do not use the term “country”. Accordingly, no definition of “country” is required. The National Committee did not consider it necessary to include a definition of “place”.

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<sup>124</sup> See the references to “essential validity” in the *Wills, Probate and Administration Act 1898* (NSW) s 32D(1)(d); *Wills Act 1936* (SA) s 25C(d); *Wills Act 1958* (Vic) s 20C(1)(d); *Wills Act 1970* (WA) s 22(d); *Succession Act 1981* (Qld) s 24(d); *Wills Act 1990* (NT) s 15C(d); and *Wills Act 1992* (Tas) s 30(1). The *Wills Act 1958* (Vic) will be repealed when the *Wills Act 1997* (Vic) commences. The word “essential” is omitted in s 17(2)(d) of the 1997 Act.

<sup>125</sup> Neither the Victorian Law Reform Committee, nor the Victorian Wills Working Party, whose recommendations that Committee was considering, recommended the omission of these words: see Victorian Law Reform Committee, *Reforming the Law of Wills* (Final Report, May 1994) at 119-123.

<sup>126</sup> Victorian Law Reform Committee, *Reforming the Law of Wills* (Final Report, May 1994) at 121.

The National Committee also considered the effect of the proposed deletion of the word “essential” from the model provision based on clause 17(2)(d).<sup>127</sup> If a power of appointment is exercised by a will that is taken to be properly executed under subclauses 17(1) or 17(2)(a), (b) or (c), the power of appointment is validly exercised. However, it is possible that a will purporting to exercise a power of appointment will not be taken to have been validly executed, even having regard to those provisions. It is in those circumstances that clause 17(2)(d) has particular importance. It provides a further basis for upholding the validity of the exercise of the power of appointment. To the extent only that the will exercises the power of appointment, it is taken to be properly executed if it is executed in accordance with the law of the place that governs the validity of the power.<sup>128</sup>

The insertion of the word “essential” is to make it clear that this is a reference to the law of the jurisdiction that governs the essential validity of the original instrument, rather than to the law governing the formal validity of that instrument (where the two are different).

The National Committee is, therefore, of the view that it is desirable to insert “essential” before “validity” in the model provision based on clause 17(2)(d).

## 5. RECOMMENDATION

The National Committee recommends that provisions to the effect of clauses 17, 18 and 19 of the draft *Wills Act 1994* (Vic) be included in the draft model wills legislation, save that:

- the references in clauses 17 and 18 to “law in force” should be changed to references to “internal law in force”; and
- the model provision should contain a definition of “internal law” based on section 20A(1) of the *Wills Act 1958* (Vic), but without the reference to “country”; and
- the model provision based on clause 17(2)(d) should refer to the “essential validity” of the power, rather than merely to the “validity” of the power.

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<sup>127</sup> See note 121 of this Report as to the origins of this provision.

<sup>128</sup> A power of appointment may be created by a will or by an *inter vivos* settlement. The reference in this provision to “the power” is a reference to the original instrument conferring the power of appointment: see Private International Law Committee (UK), *Fourth Report (Formal Validity of Wills)* (Cmnd 491, July 1958) at 8.

## 6. MODEL PROVISIONS: CLAUSES 45 TO 48

### **45** *Definition of "internal law"*

**In this Part:**

***Internal law*, in relation to a place, means the law that would apply in a case where no question of the law in force in any other place arose.**

### **46** *General rule as to formal validity*

**(1)** A will is taken to be properly executed if its execution conforms to the internal law in force in the place:

- (a)** where it was executed, or
- (b)** that was the testator's domicile or habitual residence, either at the time the will was executed, or at the testator's death, or
- (c)** of which the testator was a national, either at the date of execution of the will, or at the testator's death.

**(2)** The following wills are also taken to be properly executed:

- (a)** a will executed on board a vessel or aircraft, if the will has been executed in conformity with the internal law in force in the place with which the vessel or aircraft may be taken to have been most closely connected having regard to its registration and other relevant circumstances,
- (b)** a will, so far as it disposes of immovable property, if it has been executed in conformity with the internal law in force in the place where the property is situated,
- (c)** a will, so far as it revokes a will or a provision of a will that has been executed in accordance with this Act, or that is taken to have been properly executed by this Act, if the later will has been executed in conformity with any law by which the earlier will or provision would be taken to have been validly executed,
- (d)** a will, so far as it exercises a power of appointment, if the will has been executed in conformity with the law governing the essential validity of the power.

**(3)** A will to which this section applies, so far as it exercises a power of appointment, is not taken to have been improperly executed because it has not been executed in accordance with the formalities required by the instrument creating the power.

**47** *Ascertainment of system of internal law*

If the internal law in force in a place is to be applied to a will, but there is more than one system of internal law in force in the place that relates to the formal validity of wills, the system to be applied is determined as follows:

- (a) if there is a rule in force throughout the place that indicates which system of internal law applies to the will, that rule must be followed,
- (b) if there is no rule, the system of internal law is that with which the testator was most closely connected either:
  - (i) at the time of his or her death, if the matter is to be determined by reference to circumstances prevailing at his or her death, or
  - (ii) in any other case, at the time of execution of the will.

**48** *Construction of the law applying to wills under foreign law*

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

## CHAPTER 8

### DEPOSIT OF WILLS WITH REGISTRAR

#### 1. WILL MAY BE DEPOSITED WITH REGISTRAR

##### (a) Background

The National Committee has made recommendations about court-authorized wills for competent minors<sup>129</sup> and for persons lacking testamentary capacity.<sup>130</sup> In both cases, the National Committee has recommended that the wills made pursuant to those recommended provisions be retained by the registrar.

In addition, the majority of the National Committee is of the view that generally it is desirable to have a central registry for wills. For this reason, the National Committee is of the view that it should be possible to deposit any will with the registrar.

##### (b) Recommendation

The National Committee recommends that there should be a mechanism for the retention by the registrar of court-authorized wills and for the voluntary deposit of other wills.

##### (c) Model provision: clause 49

- 49 Will may be deposited with Registrar**
- (1) Any person may deposit a will in the office of the Registrar.**
- (2) Any will deposited in the office of the Registrar under this Act must be in a sealed envelope that has written on it:**
- (a) the testator's name and address (as they appear in the will), and**
  - (b) the name and address (as they appear in the will) of any executor, and**
  - (c) the date of the will, and**
  - (d) the name of the person depositing the will,**

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<sup>129</sup> See pages 42-43 of this Report.

<sup>130</sup> See pages 55-58 of this Report.

and must be accompanied by the fee prescribed by the regulations.

- (3) A fee is not payable in respect of any will deposited with the Registrar if the deposit is made:
- (a) in accordance with Part 3, or
  - (b) because a legal practitioner has died, or has ceased, or is about to cease, practising in [Insert name of jurisdiction].
- (4) The regulations may prescribe fees for the purposes of this section.
- (5) Any regulations made under this section:
- (a) may prescribe fees in respect of a particular class or classes of wills or will makers, and
  - (b) may prescribe different fees in respect of different classes of wills or will makers, and
  - (c) may authorise the Registrar to waive fees in particular cases or classes of cases.

## 2. DELIVERY OF WILLS BY REGISTRAR

### (a) Recommendation

If it is to be possible for a will to be deposited voluntarily with the registrar, it is necessary to make provision for the withdrawal of that will. However, in relation to court-authorized wills, the National Committee is of the view that it should be possible for the testator to withdraw the will only if he or she is of full age and capacity.

### (b) Model provision: clause 50

#### **50 Delivery of wills by Registrar**

- (1) If a will has been deposited with the Registrar under this Act, the testator may at any time apply in writing to the Registrar to be given the will or to have the will given to a person as directed by the testator.
- (2) On receiving the application, the Registrar must give the will to the testator or to any person nominated by the testator, but only if the testator is, at the time of making the application, not a minor and not a person who lacks testamentary capacity.

- (3) If a will has been deposited with the Registrar under this Act and the testator has died, any executor named in the will or any person entitled to apply for letters of administration with the will annexed may apply in writing to the Registrar to be given the will.**
- (4) On receiving the application, the Registrar must give the will to the executor or other person or to any legal practitioner or trustee company nominated by that executor or person.**
- (5) The Registrar may examine any will to enable the Registrar to comply with this Part.**
- (6) The Registrar must ensure that an accurate copy of every will given to a person under this section is made and retained by the Registrar.**
- (7) If there is any doubt as to whom a will should be given, the Registrar, or any other person, may apply to the Court for directions as to whom the Registrar should give the will.**



# CHAPTER 9

## MISCELLANEOUS

### 1. PERSONS ENTITLED TO SEE WILL

#### (a) Basis for the model provision

The basis for the model provision was a new section 66A of the *Administration and Probate Act 1958* (Vic), proposed in the draft *Wills Act 1994* (Vic). The proposed section 66A provides:

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

- (a) produce it in Court if required to do so;
- (b) allow the following persons to inspect and, at their own expense, take copies of it, namely -
  - (i) any person named or referred to in it, whether as beneficiary or not;
  - (ii) the surviving spouse, any parent or guardian and any issue of the testator;
  - (iii) any person who would be entitled to a share of the estate of the testator if the testator had died intestate; and
  - (iv) any creditor or other person having any claim at law or in equity against the estate of the deceased.<sup>131</sup>

#### (b) Need for the provision

A major reason for the proposed provision is that sometimes a person who has the 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, or it may be out of a desire to keep the person who is seeking to see the will in ignorance of its contents.

When a will is admitted to probate, it becomes a public document. However, not all wills are brought to court for probate, particularly where the estate is small and not worth the expense involved. Possible beneficiaries and other claimants can be placed in an invidious position if they do not know anything about the contents of the will.

A person who is eligible to apply for family provision may not be able to discover whether the testator has made provision for him or her by will, and so will not be able

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The National Committee is of the view that subparagraph (iv) would be wide enough to cover a person with a claim for family provision.

to begin to consider whether to make a claim. An intestacy beneficiary may need to know whether the will lacks a valid residuary provision. Equally, a creditor may wish to know whether the testator had particular assets. This information may be discoverable to a certain extent from a will.

The proposed provision does not allow a person without a proper interest - for example, a member of the press - to see the will. If a personal representative does not want a creditor to be able to see the will, the creditor can always be paid, thereby removing the entitlement to see the will. 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. The proposed provision is simply intended to ensure the same result prior to a will's admission to probate, or in the event that no application is made for probate.

### **(c) The National Committee's decision**

The National Committee generally accepted the proposed section 66A of the *Administration and Probate Act 1958* (Vic), subject to consideration of the following matters:

#### **(i) Eligible persons**

The National Committee was of the view that, in addition to the four categories of people listed in paragraph (b), the following people should also be entitled to see a will:

- beneficiaries of prior wills; and
- a parent or guardian of a minor referred to in the will or who would be entitled to a share of the estate of the testator if the testator had died intestate.

#### **(ii) Documents to which access should be available**

The difficulty with the wording of the proposed provision is that it does not necessarily include either testamentary documents that have been revoked, or documents the testamentary nature of which may be disputable. A revoked instrument may well have significance to questions concerning, for example, the capacity of the testator or undue influence. So if there were a question of challenging an existing will on the grounds of incapacity or undue influence, an inspection of a previously revoked will might reveal such substantial consistency of the testator's intention as to preclude or render unprofitable such a challenge.

An executor is not permitted by the probate court to pick and choose which testamentary instruments he or she should bring to court for probate purposes.

For the same reason, the National Committee is of the view that a revoked or doubtful testamentary instrument should be included in this rule.

Obviously the rule can only apply to existing documents, although it might also apply to copies of testamentary instruments. Such documents could be of value in, for example, determining questions of construction.

For these reasons, the National Committee agreed that the following words should be inserted after the first occurrence of the word "will" in the first line of proposed section 66A of the *Administration and Probate Act 1958* (Vic):

including a revoked will, or a copy of any such will and any part of such a will.

**(d) Recommendation**

The National Committee recommends that a provision to the effect of the proposed section 66A of the *Administration and Probate Act 1958* (Vic) be included in the draft model wills legislation, save that:

- the provision should apply to a person having the possession or control of a will, including a revoked will, a copy of any such will, or any part of such a will (including a purported will); and
- the following people should also be entitled to see a will:
  - beneficiaries of prior wills; and
  - a parent or guardian of a minor referred to in the will or who would be entitled to a share of the estate of the testator if the testator had died intestate.

**(e) Model provision: clause 52**

- 52** *Persons entitled to see will*
- (1)** Any person having the possession or control of a will including a revoked will, or a copy of any such will and any part of such a will (including a purported will) of a deceased person must allow any or all of the following persons to inspect and, at their own expense, take copies of it:
- (a)** any person named or referred to in it, whether as beneficiary or not,
  - (b)** the surviving spouse, any parent or guardian and any issue of the testator,

- (c) any person who would be entitled to a share of the estate of the testator if the testator had died intestate,
  - (d) any creditor or other person having any claim at law or in equity against the estate of the deceased,
  - (e) any beneficiaries of prior wills of the deceased,
  - (f) a parent or guardian of a minor referred to in the will or who would be entitled to a share of the estate of the testator if the testator had died intestate.
- (2) Any person having the possession or control of a will, including a revoked will, or a copy of any such will and any part of such a will (including a purported will), of a deceased person must produce it in Court if required to do so.

## 2. ADEPTION

### (a) Background

In the context of considering who may see a will after the death of the testator, the National Committee discussed whether an attorney who was appointed by a testator under an enduring power of attorney should be able to see the testator's will during the testator's lifetime.

The testator may have given a copy of the will to the attorney prior to losing capacity. In some cases the attorney will have access to the will. For example, if the will is kept at the home of the incapacitated person, it might only be a question of the attorney opening a drawer to find it. However, in other situations the attorney might not have access to it, and might seek access from the person having custody of an enduring power of attorney.

In the case of *Re Viertel*,<sup>132</sup> enduring attorneys were managing the property of a person who was residing in a home. The attorneys thought it appropriate to sell the person's residence, and approached the Queensland Public Trustee in order to view the person's will. The Public Trustee refused to show the attorneys the will. The attorneys sold the property, which was in fact devised to them. An issue arose as to whether the sale of the property had resulted in an ademption.<sup>133</sup> The court held that there had been no ademption.

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<sup>132</sup> [1997] 1 Qd R 110.

<sup>133</sup> That is, whether the sale of the property by the attorneys had the effect of revoking the specific gift to them of the property.

If one takes the ademption rule as a starting point, it is not difficult to predict that, if an attorney happens to know that he or she is a specific devisee or legatee under a will and that the devise or legacy would be adeemed if the subject matter were sold, the attorney would be unlikely to sell, even though the sale might be appropriate or highly desirable for good economic reasons. But if the attorney were the residuary beneficiary under the will of the principal, the attorney might be tempted to sell the subject matter of a specific devise or legacy unnecessarily so as to enlarge the value of the residuary estate through the ademption rule and, indeed, deprive the specific devisee or legatee of the benefit intended by the testator. Either way, a strict retention of the ademption rule could compromise the proper management of the principal's estate.

The decision in *Re Viertel* does not help because it did not enunciate a general principle about the applicability of the ademption rule to the sale of the testator's property under an enduring power of attorney. It only found that, in the circumstances of that case, there was an exception to the ademption rule. This might have the effect that in these cases in the future it would always be necessary to go to court to argue for or against the presence of an exception. One issue might be whether the deceased person knew about the sale and its ademptive effect and approved.

It was suggested to the National Committee that the question was not whether an attorney should have the right to see a will of the principal, but whether legislation should be recommended to provide that the sale by the attorney of property that happens to be the subject matter of a specific devise or legacy does not constitute an ademption of the legacy. It was further suggested that there should be a rule excepting such sales from the ademption rule, so that the potential for litigation of such a matter can be minimised. After all, if the principal recovers from his or her incapacity, he or she can make a new will if he or she does not wish the proceeds of the sale to go to the original beneficiary.

**(b) Suggested draft provision**

The following draft provision was suggested to overcome the effects of the ademption rule in the case of a sale of the testator's property by an enduring attorney:

- (1) Where there is a specific devise or legacy contained in a will, the sale of the subject matter of the devise or legacy by a person who has been appointed as an enduring attorney by the testator does not constitute an ademption of that specific devise or legacy.
- (2) Subject to the provisions of any will of the testator made after the sale of any property under (1), after the death of the testator an amount equal to the net proceeds of sale of any property in (1) shall be distributed in the same manner as if it were the subject matter of a specific devise or legacy contained in the will.

The following reasons were put forward to support the wording of the draft provision:

- It would not be sufficient to say that the net proceeds of sale should be considered to be a general legacy under the will, as that would place the beneficiary in a worse position than he or she would have been in had the property not been sold. In any case, the distribution of the sum must be seen as part of the general duties of the personal representatives in the distribution of the estate. One could not provide that the sum must be paid to the devisee, as that might be seen as affording him or her a preference as against other specific devisees or legatees.
- The suggested provision does not contain an exception where it can be shown that the incapacitated person has assented to the sale. The person would have to be competent to consent, and the standard of competence could hardly be less than that required for the execution of a new will or a codicil. It should not be left to oral evidence either, because of the opportunity for self-serving evidence that it could afford.
- The object of the provision is to ensure that an attorney is neither inhibited from selling, not tempted to retain, property belonging to the incapacitated person merely on account of his or her knowledge or ignorance of the terms of a will; and to ensure that the beneficiary intended by the incapacitated person is not prejudiced.
- The provision would also limit recourse to the court. Only a subsequent will of the incapacitated person could change this outcome.

### **(c) Recommendation**

The National Committee agreed that, while there was merit in reviewing the rule about the ademption of dispositions in wills, the rule as a whole should be reviewed.<sup>134</sup> It should not be amended in a piecemeal fashion. For that reason, it was agreed that consideration of the ademption rule should not be considered at this stage of the project, but should be deferred and considered as a discrete project.

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Some jurisdictions have legislation that deals with this problem. See, for example, the *Guardianship and Administration Board Act 1986* (Vic) s 53; the *Guardianship and Administration Act 1993* (SA) s 43; and the *Guardianship and Administration Act 1995* (Tas) s 60. See also the *Powers of Attorney Bill 1997* (Qld) cl 106.

### 3. PERSONAL REPRESENTATIVES MAY MAKE MAINTENANCE DISTRIBUTIONS WITHIN 30 DAYS

#### (a) Basis for the model provision

The basis for the model provision was a new section 99B of the *Administration and Probate Act 1958* (Vic), proposed in the draft *Wills Act 1994* (Vic). The proposed section 99B provides:

- (1) If a surviving spouse or child has an entitlement under a will that does not become absolute until 30 days after the testator's death, the personal representative may make a distribution for the maintenance, support or education of that widow, widower or child within that 30 day period.
- (2) The personal representative is not liable for any such distribution that is made in good faith.
- (3) The personal representative may make such a distribution even though the personal representative knew of a pending application under this Part or under section 37 of the *Wills Act 1994* at the time the distribution was made.
- (4) Any sum distributed shall be deducted from any share of the estate to which the person receiving a distribution becomes entitled; but if any person to whom any distribution has been made does not survive the deceased for 30 days any such distribution shall (to the extent that it cannot be recovered from the estate of that person) be treated as an administration expense.

#### (b) Background

In this Report, the National Committee has already discussed the effect of, and recommended the adoption of, a provision to the effect of clause 26 of the draft *Wills Act 1994* (Vic).<sup>135</sup> However, the proposed section 99B would enable the estate to be used in the thirty day period following the testator's death to maintain the testator's spouse and issue if they would have, if they survived the testator for thirty days, an entitlement under the testator's will.

This provision is seen as a desirable accessory to the rule that a disposition lapses if the beneficiary does not survive the testator for a period of thirty days.

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See page 76 of this Report. Clause 26 provides that a beneficial disposition made by will to a person who does not survive the testator for a period of thirty days lapses.

**(c) The National Committee's decision**

The National Committee initially accepted the proposed section 99B of the *Administration and Probate Act 1958* (Vic). However, two subsidiary issues were subsequently considered by the National Committee.

**(d) Subsidiary issues**

**(i) Persons entitled to be maintained**

The proposed section 99B refers only to a surviving spouse or child who has an entitlement under a will. In the National Committee's view, this may be too narrow. For example, it would not permit a personal representative during the thirty days following a testator's death to maintain the testator's *de facto* partner, notwithstanding that the *de facto* partner was a beneficiary under the will. There could be other people dependent on the testator who would need to be maintained during that period.

The National Committee is therefore of the view that subclause (1) of the model provision should be redrafted so that the provision applies to a person who is wholly or substantially dependent on the testator, rather than being confined to a spouse or child of the testator.

The current limitation that the person must have an entitlement under the will should be retained in the model provision.

**(ii) Recovery from the estate of a person entitled to be maintained**

The National Committee initially agreed to accept the proposed section 99B. However, an issue subsequently arose in relation to the words "(to the extent that it cannot be recovered from the estate of that person)", which appear in the proposed section 99B(4). These words are not found in the equivalent provision in any other jurisdiction, and could be seen as offensive and illogical.

If there were no thirty day rule, those beneficiaries surviving the testator would be entitled to their entire benefit under the will. The thirty day rule takes the benefit away from them, the justification being the same as the justification for the lapse rule generally, namely, that the benefit is intended for them personally and not for others, such as beneficiaries under their wills. However, there is no reason to suppose that, with the importation of a thirty day rule, the intention of the testator is that they should not be benefited even to the extent of hospital expenses or other maintenance during the thirty day period.



Further, the suggestion that a personal representative should have a duty to recover costs of maintenance incurred for the benefit of the spouse or issue of the deceased is oppressive and would lead to unjustified expense.

**(e) Recommendation**

The National Committee recommends that a provision to the effect of the proposed section 99B of the *Administration and Probate Act 1958* (Vic) be included in the draft model wills legislation, save that:

- subclause (1) of the model provision should be redrafted so that it applies to a person who is wholly or substantially dependent on the testator; and
- the words “(to the extent that it cannot be recovered from the estate of that person)” should be omitted from subclause (4) of the model provision.

**(f) Model provision: clause 53**

**53     *Personal representatives may make maintenance distributions within 30 days***

- (1)     If a surviving person who is wholly or substantially dependent on the testator has an entitlement under a will that does not become absolute until 30 days after the testator's death, the personal representative may make a distribution for the maintenance, support or education of that person within that 30 day period.**
- (2)     The personal representative is not liable for any such distribution that is made in good faith.**
- (3)     The personal representative may make such a distribution even though the personal representative knew at the time the distribution was made of a pending application under the *[insert the name of the Act of the jurisdiction that deals with family provision]*.**
- (4)     Any sum distributed is to be deducted from any share of the estate to which the person receiving the distribution becomes entitled, but if any person to whom any distribution has been made does not survive the testator for 30 days any such distribution is to be treated as an administration expense.**

