

THE LAW OF WILLS

Report No 52

Queensland Law Reform Commission
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THE LAW OF WILLS

Report No 52

To: The Honourable Denver Beanland MLA
Attorney-General and Minister for Justice

In accordance with section 15 of the *Law Reform Commission Act 1968*, the Commission is pleased to present its report on *The Law of Wills*.



The Honourable Justice P de Jersey
Chairman



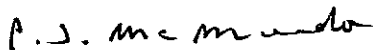
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Deputy Chairman



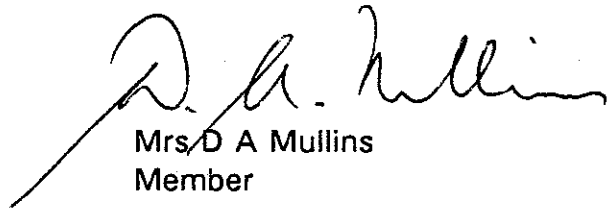
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Previous Queensland Law Reform Commission publications on this reference:

Issues Paper No 1	<i>The Law of Wills</i> (WP 46, July 1994, reprinted June 1995)
Miscellaneous Paper	<i>Uniform Succession Laws: Wills</i> (MP 15, February 1996)
Miscellaneous Paper	National Committee Report to the Standing Committee of Attorneys General, <i>The Law of Wills</i> (MP 19, October 1996)
Miscellaneous Paper	<i>The Law of Wills, Outstanding Issues</i> (MP 20, March 1997)

PREFACE

(a) Background

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

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

(b) This reference

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

(c) Progress of the reference

In 1995 the Attorney-General of each Australian State and Territory nominated a person to represent that jurisdiction on a committee to steer this project. The National Committee for Uniform Succession Laws for the Australian States and Territories held its first meeting in September 1995, at which it was agreed that the first stage of the project should be the law of wills.

In May 1996 the National Committee met to consider issues relating to the law of wills. The Committee used as the basis for its deliberations the draft *Wills Act 1994* (Vic), which was annexed to a Report published by the Victorian Law Reform Committee in May 1994. That Report, *The Law of Wills*, represented the most recent and comprehensive review of the law of wills.

In October 1996, the National Committee presented a report to the Standing Committee of Attorneys General on *The Law of Wills* (MP 19). That report discussed the provisions of the draft *Wills Act 1994* (Vic) and presented the National Committee's views on that draft legislation. It also included, broadly, the amendments that would be required in each jurisdiction to achieve legislation that was consistent. The report also identified those further issues that had been discussed by the National Committee, but on which no final decision had been made.

Those outstanding issues (together with a number of provisions relating to the second stage of this project, family provision) were considered by the National Committee at a meeting in Sydney in April 1997 and at a further meeting in Melbourne in September 1997.

At the April 1997 meeting, it was agreed that a Consolidated Report on the Law of Wills should be prepared for the Standing Committee of Attorneys General. It was agreed that the Consolidated Report should address all the issues canvassed in the October 1996 Report, as well as all the further issues that had been resolved after that time. It was also agreed that the Consolidated Report should contain draft model wills legislation, which would reflect the National Committee's decisions in relation to the law of wills.

This Commission has co-ordinated the preparation of draft legislation by the New South Wales Office of Parliamentary Counsel (through the New South Wales Law Reform Commission).

The National Committee has completed the Consolidated Report on the Law of Wills (including the draft model wills legislation) for presentation to the Standing Committee of Attorneys General in December 1997.

(d) This Report

The focus of the two reports to the Standing Committee of Attorneys General on *The Law of Wills* (October 1996 and December 1997) has, primarily, been the various provisions of the draft *Wills Act 1994* (Vic) that were used as the basis for the National Committee's deliberations.

This Report, however, focuses on the specific provisions of the *Succession Act 1981* (Qld) that relate to the law of wills (as to opposed other matters that are included in the Act). In particular, the Commission has:

- compared the relevant sections of the *Succession Act 1981* (Qld) with their counterparts in the draft *Wills Act 1994* (Vic);
- recommended whether the model provisions recommended by the National Committee should be adopted in the *Succession Act 1981* (Qld) - either totally or with some modifications - in lieu of the current provisions; and
- in relation to the three sections of the *Succession Act 1981* (Qld) that do not have counterparts in the draft model wills legislation (namely, sections 15A, 16 and 19) - recommended whether those sections should be retained, repealed, or amended.

(e) Future steps

The presentation to the Standing Committee of Attorneys General of the Consolidated Report on *The Law of Wills* completes the first stage of this project. The second stage, the law of family provision, has also been finalised. Consideration of the third stage of the project, the administration of estates, has already commenced. The fourth and final major stage of this project, intestacy, will commence in 1998 and is expected to be completed in 1999.

(f) Summary of recommendations

On virtually all issues, the Commission endorses, and recommends the adoption of, the model provisions recommended by the National Committee in its Consolidated Report on the *Law of Wills*. There are two issues on which the Commission departs slightly from the recommendations of the National Committee, and a further three issues on which the Commission has made recommendations on matters not included in the National Committee's Report to the Standing Committee of Attorneys General.

Powers of personal representatives (pages 107-110 of this Report)

The Commission endorses the model provision (clause 53). However, if the provision is incorporated into the *Succession Act 1981* (Qld), rather than into a new *Wills Act*, the Commission recommends two changes to the model provision so that it will continue to apply in the case of an intestacy, as well as where the estate is disposed of entirely by will.

Deposit of wills with registrar and delivery of wills by registrar (pages 121-122 of this Report)

In addition to the recommendations that statutory wills for minors and for persons lacking testamentary capacity be retained by the registrar, the National Committee has recommended that any testator should be able to deposit his or her will voluntarily with the registrar. The Commission supports the recommendation in so far as it relates to statutory wills, but does not support the broader recommendation.

Gifts to interpreters (pages 32-34 of this Report)

The Commission recommends that section 15A of the *Succession Act 1981* (Qld), which does not have a counterpart in the draft model wills legislation, be retained, but in a modified form, so that it is consistent with the National Committee's recommendation in relation to the interested witness rule (clause 12 of the draft model wills legislation).

Privileged wills (pages 34-36 of this Report)

The Commission recommends that section 16 of the *Succession Act 1981* (Qld), which does not have a counterpart in the draft model wills legislation, be repealed.

No will to be revoked by presumption (pages 43-44 of this Report)

As the National Committee has recommended a provision that is exhaustive as to the means by which a will may be revoked (clause 13), this provision is no longer necessary, and should be repealed.

A more detailed summary of recommendations is set out in Appendix 1 to this Report. Draft model wills legislation is set out in Appendix 2 to this Report.

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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.

The *Succession Act 1981* (Qld) no longer contains a commencement provision.

(b) The National Committee's decision

The National Committee (including this Commission) accepted clause 2.

(c) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 2 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld).

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:

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.

The *Succession Act 1981* (Qld) does not contain a purposes section.

(b) The National Committee's decision

The National Committee (including this Commission) accepted clause 1.

(c) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 3 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld).

3. DEFINITIONS

(a) Queensland provision

Section 5 of the *Succession Act 1981* (Qld) contains the definitions of many of the terms used in that Act. The definitions in section 5 that are relevant to the recommendations made in this Report are:

"court" means the Supreme Court or a judge thereof.

"disposition" includes any gift, devise, bequest or appointment of or affecting property contained in a will.

"will" includes codicil.

(b) 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.

(c) The National Committee’s decision

The National Committee (including this Commission) accepted clause 3, save that it was of the view that:

- each jurisdiction should define “court” according to its own requirements;
- a definition of “registrar” should be included, which 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 of the draft *Wills Act 1994* (Vic) 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.¹

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See page 15 of this Report.

In the National Committee's view, it is preferable to have a narrow general definition of "document"² and a general requirement that a will be in writing 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.

The Commission agrees with this approach in relation to the definition of "document".

(d) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 4 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the definitions in the model provision be adopted in the *Succession Act 1981* (Qld) in lieu of such of those terms as appear in section 5 of that Act.

² 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]

³ See the discussion of cl 7(1)-(3) of the draft *Wills Act 1994* (Vic) and cl 8(1)-(3) of the draft model wills legislation at pages 9-12 of this Report.

CHAPTER 2

THE MAKING OF WILLS

1. WHAT PROPERTY MAY BE DISPOSED OF BY WILL

(a) Queensland provision

Section 7 of the *Succession Act 1981* (Qld) provides:

- (1) A person may, by will, devise, bequeath or dispose of any property to which the person is entitled at the time of the person's death, not being property of which the person is trustee and in respect of which the person has no power of disposition by will, whether the person became entitled to the property before or after the execution of the will.
- (2) Without limiting the generality of subsection (1), a person may, by will, dispose of -
 - (a) property that, if not disposed of by will, would devolve on the executor of the person's will or the administrator of the person's estate; and
 - (b) a contingent, executory or future interest in property, whether the person becomes entitled to the interest by virtue of the instrument by virtue of which the interest was created or by virtue of a disposition of the interest by deed or will and whether the person has or has not been ascertained as the person or 1 of the persons in whom the interest may become vested; and
 - (c) a right of entry for condition broken and any other right of entry.

(b) 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.

(c) The National Committee's decision

The National Committee (including this Commission) accepted clause 4, but was of the view that the definition of "property" in clause 4(4) should be relocated to the definitions provision in the draft model wills legislation.⁴

(d) Discussion

Section 7 of the *Succession Act 1981* (Qld) is in similar terms to clause 4 of the draft *Wills Act 1994* (Vic). In the 1996 Report to the Standing Committee of Attorneys General,⁵ the Commission did not recommend a change to section 7, unless it was desirable to achieve word for word uniformity.⁶ However, on further consideration, the Commission is of the view that clause 4 of the draft *Wills Act 1994* (Vic) is better drafted than section 7 of the *Succession Act 1981* (Qld).

(e) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 6 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld) in lieu of section 7 of that Act.

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

⁵ 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).

⁶ Id, Attachment 1 at 5.

2. LEGAL AGE FOR MAKING A WILL

(a) Queensland provision

Section 8 of the *Succession Act 1981* (Qld) provides:

- (1) A person who has attained the age of 18 may make a valid will and may also validly revoke a will with or without making a new will.
- (2) A married person may make a valid will and may also validly revoke a will with or without making a new will irrespective of age.
- (3) A person who has made a will while under the age of 18 and married may, if the person is subsequently unmarried and under the age of 18, revoke such will by any manner of revocation provided in this Act other than by the making of a later will.
- (4) Nothing in this section affects the law with respect to the mental capacity required of a person for the making of a will.

(b) 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.

Section 8 is similar to subclauses 5(1) and (2) of the draft *Wills Act 1994* (Vic), except that it does not enable a minor to make a will in contemplation of marriage.

(c) The National Committee's decision

The National Committee (including this Commission) generally accepted subclauses 5(1) and (2). The National Committee 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.

(d) 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 subclause would not enable a minor who had been, but was no longer, married to make a new will. This is consistent with the current law in Queensland.⁷ Under clause 5 of the draft *Wills Act 1994* (Vic), a minor who was no longer married would require court authorisation to make a new will.

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.⁸

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.⁹ The National Committee regards that recommendation as sufficient to cater for those circumstances.

The Commission agrees with this approach.

(ii) Will by a minor 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 Commission agrees with this approach.

⁷ *Succession Act 1981* (Qld) s 8(3).

⁸ *Wills Act 1936* (SA) s 5(2).

⁹ See pages 55-58 of this Report.

(e) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 7 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld) in lieu of section 8 of that Act.

3. EXECUTION REQUIREMENTS

(a) Queensland provisions

Sections 9 and 10 of the *Succession Act 1981* (Qld) provide:¹⁰

9. A will shall not be valid unless it is in writing and executed in manner hereinafter mentioned and required (that is to say) it shall be signed at the foot or end thereof by the testator or by some other person in the testator's presence and by the testator's direction and such signature shall be made or acknowledged by the testator in the presence of 2 or more witnesses present at the same time and such witnesses shall attest and shall subscribe the will in the presence of the testator but no form of attestation shall be necessary provided that -
- (a) the court may admit to probate a testamentary instrument executed in substantial compliance with the formalities prescribed by this section if the court is satisfied that the instrument expresses the testamentary intention of the testator; and
 - (b) the court may admit extrinsic evidence including evidence of statements made at any time by the testator as to the manner of execution of a testamentary instrument.
- 10.(1) A will, so far only as regards the position of the signature of the testator on the will, is not invalid if the signature is so placed at, after, following, under, beside or opposite to the end of the will that it is apparent on the face of the will that the testator intended to give effect by that signature to the writing signed as the testator's will.
- (2) Without limiting the generality of subsection (1), the validity of a will is not affected by reason of the fact -
- (a) that the signature of the testator does not follow, or is not immediately after, the foot or end of the will; or

¹⁰

See the discussion of the proviso to s 9 at pages 12-16 of this Report.

- (b) that a blank space intervenes between the concluding word of the will and the signature; or
 - (c) that the signature -
 - (i) is placed among the words of the testimonium clause or of the clause of attestation; or
 - (ii) follows, or is after or under, the clause of attestation, whether or not a blank space intervenes between the concluding word of that clause and the signature; or
 - (iii) follows, or is after, under or beside, the names, or 1 of the names, of the subscribing witnesses; or
 - (d) that the signature is on a side, page or other portion of the paper or papers containing the will on which no clause, paragraph or disposing part of the will is written above the signature; or
 - (e) that there appears to be sufficient space for the signature on or at the bottom of the side, page or other portion of the paper on which the will is written preceding that on which the signature is.
- (3) The signature of the testator on a will does not operate to give effect to a disposition or direction that is underneath or follows that signature, or that is inserted in the will after that signature is made.
 - (4) In this section, references to the signature of the testator shall, in relation to a will signed by a person by the direction of the testator, be read as references to the signature of that person.

(b) Basis for the model provision

Subclauses 7(1) to (3) of the draft *Wills Act 1994* (Vic) were the basis for the model provision. Those subclauses provide:

- (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.

Unlike section 9 of the *Succession Act 1981* (Qld), clause 7 of the draft *Wills Act 1994* (Vic) does not require the will to be signed "at the foot or end thereof". Under clause 7(1)(b) the required number of witnesses must be present when the testator signs or acknowledges the will. Clause 7(1)(c) makes it clear that, although the witnesses must attest and sign the will in the presence of the testator, it is not necessary for them to do so in the presence of each other.

(c) The National Committee's decision

The National Committee (including this Commission) was of the view that there should no longer be a requirement that a will be signed "at the foot or end thereof".¹¹

(d) Discussion

As clause 7 makes no reference to a will being signed "at the foot or end thereof", the present section 10 of the *Succession Act 1981* (Qld), which gives meaning to the use of those words in section 9, can be repealed.

The Commission has received strong representations from a group concerned with, among other things, the execution requirements of wills.¹² This group has suggested that there should be some very specific requirements in relation to the execution of wills:

All Wills should be written on a Will form with the back page reserved for formalities. This page should have the word WILL written in big heavy letters above where the signing is to take place.

One of the reasons for favouring this proposal seemed to be that it would be more obvious to a person witnessing the testator's signature that the document was in fact a will.

Of course, there is nothing to prevent a testator who wishes to adopt such a practice from doing so. However, the Commission is concerned that to make such a matter a formal requirement for the proper execution of a will could have disastrous consequences.

If this were to be a mandatory requirement for a valid will, it could operate very harshly with respect to the many wills that would no doubt be prepared in a manner that did not comply with this very strict requirement. This could result in many unintended

¹¹ For a discussion of this issue, see Queensland Law Reform Commission, *Uniform Succession Laws: Wills* (MP 15, February 1996) at 17-18.

¹² Letter to the Commission dated 23 July 1997 and meeting held on 24 July 1997.

intestacies, and a consequential and significant increase in the number of applications for family provision by applicants for whom the intestacy rules do not, in their particular circumstances, make proper provision.

Even if a model provision based on clause 9 of the draft *Wills Act 1994* (Vic) were to be adopted,¹³ thereby conferring a dispensing power on the court, it would still necessitate an application to court, with all the attendant costs, in each case where a will was not executed in accordance with this suggestion.

For these reasons, the Commission is of the view that any possible advantages that could be thought to derive from a requirement of this kind are significantly outweighed by the harsh and expensive consequences that such a requirement would undoubtedly cause. Accordingly, the Commission has not adopted this suggestion.

(e) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (subclauses 8(1) to (3) of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provisions be adopted in the *Succession Act 1981* (Qld) in lieu of sections 9 and 10 of that Act.

4. SUBSTANTIAL COMPLIANCE / A GENERAL DISPENSING POWER

(a) Queensland provision

The execution requirements for wills are found in section 9 of the *Succession Act 1981* (Qld). Under that section the court has a limited power to admit to probate a testamentary instrument that does not comply with the requirements of that section as to execution. The proviso to section 9 is in the following terms:

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

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See the discussion of this provision at pages 13-16 of this Report.

- (b) the court may admit extrinsic evidence including evidence of statements made at any time by the testator as to the manner of execution of a testamentary instrument. [emphasis added]

(b) 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.

(c) Background

Unlike section 9 of the *Succession Act 1981* (Qld), clause 9 of the draft *Wills Act 1994* (Vic) does not refer to "substantial compliance" with the execution requirements. Rather, clause 9 confers a general power on the court to dispense with the formal requirements for execution of a will if the court is satisfied that the deceased person intended the document to constitute his or her will.

The Issues Paper, *The Law of Wills*,¹⁴ 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.

¹⁴

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.

There has been strong support expressed for the adoption by all jurisdictions of the South Australian provision, which forms 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,¹⁵ 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 intention¹⁶ (as in the New South Wales provision¹⁷ and clause 9 of the draft *Wills Act 1994* (Vic)).

The Queensland requirement that there must be "substantial compliance"¹⁸ has proven to be so great a stumbling block that the provision has had poor success, and cases 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.¹⁹

(d) The National Committee's decision

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

(e) 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. The Commission agrees with this approach.

¹⁵ *Wills Act 1992* (Tas) s 26; *Wills Act 1970* (WA) s 34.

¹⁶ *Wills Act 1936* (SA) s 12(2).

¹⁷ *Wills, Probate and Administration Act 1898* (NSW) s 18A.

¹⁸ *Succession Act 1981* (Qld) s 9(a).

¹⁹ 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.

(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:²⁰

“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.²¹ The Commission agrees with this approach.

(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 -

²⁰ 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).

²¹ See the definition of “document” in cl 4 of the draft model wills legislation in Appendix 2 to this Report.

- (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.

The Commission agrees with this approach.

(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.²² The Commission agrees with this approach.

(f) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 10 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld) in lieu of section 9 of that Act.

Once the dispensing power found in the model provision has been in operation for three years, the provision should be reviewed, including whether it would be appropriate to confer that power on a registrar. In the meantime, it would be desirable for the registrar to keep records of applications brought under this provision.

5. APPOINTMENTS BY WILL TO BE EXECUTED LIKE OTHER WILLS

(a) Queensland provision

Section 11 of the *Succession Act 1981* (Qld) provides:

- (1) Where a testator purports to make an appointment by will in exercise of a power of appointment by will, the appointment is not valid unless the will is executed in accordance with this part.
- (2) Where power is conferred on a person to make an appointment by a will that is 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 part but is not executed in that manner or with that solemnity.

(b) Basis for the model provision

Subclauses 7(4) and (5) of the draft *Wills Act 1994* (Vic) were the basis for the model provision. Those subclauses provide:

- (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.

Subclauses 7(4) and (5) are virtually the same as section 11 of the *Succession Act 1981* (Qld).

(c) The National Committee's decision

The National Committee (including this Commission) accepted subclauses 7(4) and (5).

(d) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (subclauses 8(4) and (5) of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provisions be adopted in the *Succession Act 1981* (Qld) in lieu of section 11 of that Act.

6. ALTERATIONS TO BE EXECUTED AS A WILL

(a) Queensland provision

Section 12 of the *Succession Act 1981* (Qld) provides:

- (1) No alteration made in any will after the execution thereof shall be valid or have any effect unless such alteration is executed in like manner to that required by this Act for the execution of the will.
- (2) Each alteration made in any will after the execution thereof shall be deemed to be executed in the manner referred to in subsection (1) if the signature of the testator and the subscription of the witnesses be made -
 - (a) in the margin or on some other part of the will opposite or near or otherwise relating to such alteration; or
 - (b) at the foot or end of or opposite to a memorandum referring to such alteration and written at the end or some other part of the will.
- (3) An alteration that is invalid and of no effect made in any will shall be disregarded if the words or effect of the will before the alteration was made be apparent.
- (4) In this section -

"alteration" includes obliteration and interlineation.

(b) 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.

(c) The National Committee's decision

The National Committee (including this Commission) accepted clause 15.

(d) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 16 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld) in lieu of section 12 of that Act.

7. PUBLICATION OF WILL UNNECESSARY

(a) Queensland provision

Section 13 of the *Succession Act 1981* (Qld) provides:

The validity of a will that has been executed in accordance with the provisions of this part is not affected by reason that a person who subscribed the will as a witness was unaware that the document was a will.

(b) 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.

(c) The National Committee's decision

The National Committee (including this Commission) accepted clause 8.

(d) Discussion

The Commission has received strong representations from a group concerned with the execution requirements of wills.²³ This group has suggested that a witness should have to know that what the witness is witnessing is a will.

The reasons for the suggestion appeared to be:

- that some people would prefer not to witness the execution of a will; and
- that a witness might decline to witness the execution of a will if the witness did not consider the testator to have the capacity to execute a will.

As to the first of these concerns, a person who, by nature, was very cautious about witnessing documents would seem to the Commission to be less likely to be willing to execute a document of an unknown nature, than to witness a document known to be a will.

As to the second of these concerns, it has never been the role of a witness to determine the capacity of the testator. That is the function of the court, on the basis of evidence before it. This seems to the Commission to be properly the role of the court. It could operate very harshly on testators if they were, in effect, required to satisfy witnesses of their testamentary capacity before being able to make a will.

More importantly, however, is the very significant intrusion on the privacy of a testator that this suggestion would constitute. If a witness had to know that a document was a will in order to witness a will validly, "it would be necessary to allow witnesses to see, and read, the contents of the document, in order to ensure that the document was a will".²⁴

This would be so, even if the testator told the witness that a document was a will and even if the document was marked "WILL", as personal knowledge that the document was, in fact, a will could not be established by either of these matters.

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 Commission sees no valid reason for its re-introduction. In the Commission'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.

²³ Letter to the Commission dated 23 July 1997 and meeting held on 24 July 1997.

²⁴ Victorian Law Reform Committee, *Reforming the Law of Wills* (Final Report, May 1994) at 66.

The Commission is also of the view that the re-introduction of such a requirement, after its abolition for so long, would most likely result in an increase in the number of persons dying intestate as a result of their wills being held to be invalid. In this regard, the Commission considers it likely that the consequences would be similar to those that would result if there were to be a requirement that wills be executed only on special forms.²⁵

Accordingly, the Commission remains of the view that it should not be necessary, in order for a will to be validly executed, for a witness to know that it is a will.

(e) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 9 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld) in lieu of section 13 of that Act.

8. COMPETENCE OF WITNESSES

(a) Queensland provision

Section 14 of the *Succession Act 1981* (Qld) provides:

Any person competent to be a witness in civil proceedings in court, other than a blind person, may act as a witness to a will.

(b) 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.

²⁵

See the discussion of these consequences at pages 11-12 of this Report.

(c) Background

Section 14 of the *Succession Act 1981* (Qld) is in similar terms to clause 10 of the draft *Wills Act 1994* (Vic), although it uses the term "blind" whereas the draft Victorian provision uses the expression "unable to see".

In its Report, *Reforming the Law of Wills*,²⁶ the Victorian Law Reform Committee preferred the expression "unable to see" to "blind". 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.²⁷ The Commission agrees with that criticism of section 14 of the *Succession Act 1981* (Qld), and for that reason also prefers the drafting of clause 10 of the draft *Wills Act 1994* (Vic).

(d) The National Committee's decision

The National Committee (including this Commission) accepted clause 10.

(e) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 11 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld) in lieu of section 14 of that Act.

9. GIFTS TO ATTESTING WITNESSES

(a) Queensland provision

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

- (1) Where any disposition of property (other than a charge or direction for the payment of any debt or for the payment of proper remuneration to any person,

²⁶ Victorian Law Reform Committee, *Reforming the Law of Wills* (Final Report, May 1994).

²⁷ *Id* at 81.

whether executor, administrator, solicitor or conveyancer, for acting in or about the administration of the estate of the testator) is, by will, made in favour of a person who attested the signing of the will, or the spouse of such person, to be held by that person or, as the case may be, that spouse beneficially, the disposition is null and void to the extent that it entitles that person, the spouse of that person or another person claiming under that person or that spouse to take property under it.

- (2) 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.

The relevant provision of the draft *Wills Act 1994* (Vic), clause 11, would abolish the interested witness rule altogether.²⁸ That clause provides:

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

(b) Background to the interested witness rule²⁹

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)³⁰ 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.

28 When the *Wills Act 1997* (Vic) commences, the interested witness rule will be abolished in that State: see s 11 of that Act.

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

30 25 Geo II c 6.

(c) 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:³¹

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.

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. 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.³² In New South Wales there is a provision that allows the witness to approach the court for relief.³³ 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.³⁴

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

³¹ *Uniform Probate Code* (ULA) section 2-505.

³² *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.

³³ *Wills, Probate and Administration Act 1898* (NSW) s 13(2)(c).

³⁴ *Wills Act 1992* (Tas) ss 45 and 46.

according to the will.³⁵ 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,³⁶ and have been easily satisfied, where they are permitted to consider it, of the propriety of the witness's conduct.³⁷

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 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.³⁸ 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

³⁵ *Wills, Probate and Administration Act 1898* (NSW) s 13(2)(b).

³⁶ See *Will of Mills* [1968] 2 NSWLR 393. Cf *Estate of Brian* [1974] 2 NSWLR 231.

³⁷ *Re Emanuel* [1981] VR 113.

³⁸ *Wintle v Nye* [1959] 1 WLR 284 per Viscount Simmonds at 291.

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*.³⁹

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.⁴⁰ 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,⁴¹ room is given for the suspicious circumstances doctrine to occupy the space left by the repeal.

It is a fine balance whether the rule should be retained (but with a general exception allowing the witness to take the benefit upon satisfying the court that there are no suspicious circumstances 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).

(d) The National Committee's decision

The National Committee (including this Commission) 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 drafted to place the onus on the interested witness to satisfy the court that it was appropriate to take the benefit.

³⁹ [1995] 2 SCR 876.

⁴⁰ Victorian Law Reform Committee, *Reforming the Law of Wills* (Final Report, May 1994) at 92.

⁴¹ See note 32 of this Report.

Three options for the rule were considered by the National Committee (the differences are between subclause (2) of each version):⁴²

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.

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 (including this Commission) preferred Version C, based in part on the current New South Wales provision, to the other two suggested versions. 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.

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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 29-30 of this Report as to that decision.

(e) Subsidiary issues

The National Committee 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.

This Commission was of the view that there was merit in this suggestion: if the interested witness rule has substance to it, it is logical to extend it to all persons who are in fact witnesses to the execution, and not confine 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. On this issue, the Commission is of the view that the interests of uniformity should prevail. 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. It is understandable why other jurisdictions would be reluctant, in the light of a general trend to abolish the rule, to expand the scope of the rule. The Commission is, therefore, of the view that, in the interests of uniformity, the application of the rule should not be extended to non-attesting witnesses.

(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.⁴³ The Commission 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.⁴⁴ The reasons cited by the Victorian Law Reform Committee were:⁴⁵

[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.⁴⁶ 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.

However, given the trend towards abolishing the interested witness rule altogether,⁴⁷ there seems little point to 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.

⁴³ Section 15 of the *Succession Act 1981* (Qld) would not currently apply to a *de facto* partner, but only to a lawful spouse.

⁴⁴ Victorian Law Reform Committee, *Reforming the Law of Wills* (Final Report, May 1994) at 94.

⁴⁵ Ibid.

⁴⁶ See *Married Women's Property Act 1870* (Vic).

⁴⁷ See pages 24-26 of this Report.

Consistent with its view on whether the rule should be expanded to cover all witnesses, rather than merely attesting witnesses,⁴⁸ 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 approach is to remove the disqualification of the witness's spouse altogether.

The Commission agrees with this approach.

(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 Commission 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 Commission 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.

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

The Commission agrees with this approach.

(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 pages 29-30 above.

The Commission agrees with this approach.

(v) Family members

The Commission has received strong representations from a group concerned with the execution requirements of wills⁴⁹ to the effect that a will should not be able to be witnessed validly by a member of the testator's family.

The Commission has recognised the importance of having impartial witnesses in its recommendation that the interested witness rule be retained. However, in the Commission's view, it is the fact that a person stands to benefit from a will,

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Letter to the Commission dated 23 July 1997 and meeting held on 24 July 1997.

rather than that the person is related to the testator, that makes a person unsuitable to be a witness. For that reason, the Commission does not adopt the suggestion that a member of the testator's family should not be able to witness the testator's will.

(f) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 12 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that:

- the model provision be adopted in the *Succession Act 1981* (Qld) in lieu of section 15 of that Act; and
- the *Stamp Act 1894* (Qld) should be amended 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 subclause 2(a) of the model provision will not be liable to stamp duty.

10. GIFTS TO INTERPRETERS

(a) Queensland provision

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

- (1) Where in connection with the making of a will the services of an interpreter are used to interpret or translate from or to a language understood by the testator and a disposition of property (other than a charge or direction for the payment of any debt or for payment of proper remuneration to any person, whether executor, administrator, solicitor or conveyancer, for acting in or about the administration of the estate of the testator) is, by the will, made in favour of the person who acted as interpreter or the spouse of that person to be held by that person or, as the case may be, that spouse beneficially, the disposition is null and void to the extent that it entitles that person, the spouse of that person or any person claiming under that person or that spouse to take property under it.
- (2) This section applies only in respect of wills made after the commencement of the *Succession Act Amendment Act 1983*.

To some extent, the need for a provision of this kind would have been overtaken by the initial suggestion that section 15 of the *Succession Act 1981* (Qld) be extended to apply to all witnesses to the execution of a will.⁵⁰ If an interpreter were to be present when a will was signed, or when a testator acknowledged his or her signature, then section 15, had it been amended in accordance with that suggestion, would have saved a beneficial gift to an interpreter who was present during the execution of a will only if the court were satisfied that the testator knew and approved of the gift, and that the gift was given or made freely and voluntarily by the testator.

However, even if the amendment initially suggested in relation to section 15 were made, it would affect a disposition to an interpreter only if the interpreter had been present when the will was signed or when the testator's signature was acknowledged. An interpreter who left the room before either of those events occurred would still, in the absence of a specific provision, have been unaffected by the amendment initially suggested in relation to section 15.

The other Australian jurisdictions do not have a provision that is the equivalent of section 15A of the *Succession Act 1981* (Qld). Notwithstanding that, the Commission is of the view that there should continue to be a specific provision in relation to gifts to interpreters. The Commission considers it important that there be confidence that an interpreter of a will is, in the performance of his or her duties, uninfluenced by any potential to benefit under the will.

For that reason, the Commission is of the view that an interpreter should continue to be disqualified from taking a benefit under a will if the interpreter's services have been used in the making of the will. However, consistent with the Commission's view in relation to the interested witness rule, the disqualification should not be absolute. Section 15A should be amended to be consistent with the amendments recommended in relation to section 15.

(b) The Commission's recommendation

The Commission recommends that section 15A of the *Succession Act 1981* (Qld) be amended so that a gift to an interpreter will not be void absolutely. In particular, the Commission recommends that:

- **subsection (1), which is presently expressed in quite unwieldy terms, be redrafted;**

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That suggestion was ultimately rejected by the National Committee. See page 28 of this Report.

- that the current reference in subsection (1) to the spouse of the interpreter be omitted from the redrafted provision;
- that subsection (1) be made subject to a new subsection (2), which should be consistent with the recommendations proposed in relation to section 15, so that the disqualification on the interpreter taking a benefit under a will is not absolute.

A suggested draft of subsection (2) is:

- (2) A beneficial gift given or made by will is not made void by this section if -
 - (a) 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 *Stamp Act 1894* (Qld) should be amended 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 subclause 2(a) of the amended provision will not be liable to stamp duty;
- the current section 15A(2) should be renumbered as section 15A(3).

11. PRIVILEGED WILLS

(a) Queensland provision

Section 16 of the *Succession Act 1981* (Qld) provides:

A will made by a person having the legal capacity to make a will being -

- (a) any person, whether as a member or not, serving with the armed forces of the Commonwealth or its allies while in actual military, naval or air service in connection with operations that are or have been taking place, or are believed to

be imminent in relation to a war declared or undeclared or other armed conflict in which members of such armed forces are, or have been or are likely to be engaged; or

(b) any mariner or sailor being at sea; or

(c) any person who is a prisoner of war or internee in an enemy or neutral country;

need not be executed in the manner prescribed by section 9 but may be made without any formality by any form of words, whether written or spoken, if it is clear that that person thereby intended to dispose of his or her property after his or her death.

(b) Background

Historically, the law has exempted from both the requirements of form and the disqualification of minority "any soldier being in actual military service or any mariner or sailor being at sea". In Queensland, however, the existing privilege does not exempt a person from the disqualification of minority. Section 16 applies only to "a person having the legal capacity to make a will". This would permit a person under the age of eighteen who was married to make a will (under section 8 of the *Succession Act 1981* (Qld)), but not any other minor.

The legislatures of the Australian States have tended to enlarge the classes of persons given this "privilege". For example, section 16 of the *Succession Act 1981* (Qld) applies to "any person, whether as a member or not, serving with the armed forces of the Commonwealth or its allies ...".

The "privilege" enabling soldiers and sailors to make wills without any formality and at any age may have been justifiable in the eighteenth century when such persons had no recourse to legal advice. But it is arguable that, in light of the policy of the Commonwealth Department of Defence to encourage all members of the armed forces to make wills, and to provide free legal advice to enable them to do so, it is no longer appropriate.

The privilege has been abolished in New South Wales,⁵¹ and its abolition has been recommended by the Victorian Law Reform Committee.⁵² There is, therefore, no equivalent provision in the draft *Wills Act 1994* (Vic).

The Commission is of the view that the privilege should no longer be maintained in Queensland.

⁵¹ Section 10 of the *Wills, Probate and Administration Act 1898* (NSW) was repealed by the *Wills, Probate and Administration (Amendment) Act 1989* (NSW) Schedule 1(4).

⁵² Victorian Law Reform Committee, *Reforming the Law of Wills* (Final Report, May 1994) at 66.

(c) The Commission's recommendation

In view of the policy of the Commonwealth Department of Defence to encourage members of the armed forces to make wills, the Commission is of the view that section 16 of the *Succession Act 1981* (Qld) is no longer required and should be repealed.

The Commission recommends, however, that the Standing Committee of Attorneys General should review the need for legislation at a Commonwealth level to deal with the issue of the will-making capacity of members of the armed forces.

CHAPTER 3

THE REVOCATION AND REVIVAL OF WILLS

1. REVOCATION OF WILL BY MARRIAGE

(a) Queensland provision

Section 17 of the *Succession Act 1981* (Qld) provides:

- (1) Subject to subsection (2), where a person marries after making a will, the will is revoked by the marriage unless it contains an expression of contemplation of that marriage; and extrinsic evidence, including evidence of statements made by the testator, is admissible to establish that an expression contained in the will is an expression of contemplation of that marriage.
- (2) Where a testator marries after the testator has made a will by which the testator has exercised a power of appointing 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.

(b) 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.

(c) The National Committee's decision

The National Committee (including this Commission) 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.

(d) 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.

Section 17 of the *Succession Act 1981* (Qld) provides that a will is revoked by marriage unless it contains an expression of contemplation of that marriage, and that extrinsic evidence, including evidence of statements made by the testator,

is admissible to establish that an expression contained in the will is in fact an expression of contemplation of that marriage. This is different from section 15(3) of the New South Wales legislation, which permits the contemplation of marriage to be expressed in the will or *outside* the will.

The New South Wales and Queensland provisions are both 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). This Commission agrees with that approach.

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.

(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 that 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, as is this Commission, that the provision should have an expansive operation and that the words “after the commencement of this subsection” in subsection 15(3) and “made after the commencement of subsection (3)” in subsection 15(4) should be omitted from the model provision.

(e) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 14 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld) in lieu of section 17 of that Act.

2. EFFECT OF DIVORCE ON WILL

(a) Queensland provision

Section 18 of the *Succession Act 1981* (Qld) provides:

- (1) The dissolution or annulment of the marriage of a testator revokes -
 - (a) any beneficial disposition of property made by will by the testator in favour of the testator's spouse; and
 - (b) any appointment made by will by the testator of the testator's spouse as executrix, trustee, advisory trustee or guardian.
- (2) So far as any beneficial disposition of property which is revoked by the operation of subsection (1) is concerned the will shall take effect as if the spouse had predeceased the testator.

(b) Basis for the model provision

The basis for the model provision was section 16A of the *Wills Act 1958* (Vic). Section 16A provides:⁵³

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Section 16A was inserted by s 14 of the *Administration and Probate (Amendment) Act 1994* (Vic) (No 10 of 1994). The original provision included in the draft *Wills Act 1994* (Vic), cl 13, provided:

- (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.

- (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.

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

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

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

Section 16A of the *Wills Act 1958* (Vic) will itself be repealed when the *Wills Act 1997* (Vic) commences.

- (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.

(c) The National Committee’s decision

The National Committee (including this Commission) 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.⁵⁴

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.⁵⁵

- 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

⁵⁴ 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.

⁵⁵ *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).

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.

The National Committee is of the view that the equivalent subclause 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.

(d) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 15 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld) in lieu of section 18 of that Act.

3. NO WILL TO BE REVOKED BY PRESUMPTION

(a) Queensland provision

Section 19 of the *Succession Act 1981* (Qld) provides:

Subject to this Act no will shall be revoked by any presumption of an intention on the ground of an alteration of circumstance.

There is no equivalent provision in the draft *Wills Act 1994* (Vic), which contains a comprehensive provision (clause 14) about how a will may be revoked.

Because the Commission has made a recommendation as to the only circumstances in which a will may be revoked,⁵⁶ it is unnecessary to retain this provision.

(b) The Commission's recommendation

The Commission recommends that section 19 of the *Succession Act 1981* (Qld) be repealed.

4. REVOCATION BY INSTRUMENT OR DESTRUCTION

(a) Queensland provision

Section 20 of the *Succession Act 1981* (Qld) provides:

- (1) No will or codicil or any part thereof shall be revoked otherwise than -
 - (a) as provided by section 17 or 18; or
 - (b) by another will or codicil executed in manner hereinbefore required or, if not so executed, admitted to probate under section 9; or
 - (c) by some writing declaring an intention to revoke the same and executed in the manner in which a will is hereinbefore required to be executed; or
 - (d) by the burning, tearing or otherwise destroying the same by the testator, or by some person in the testator's presence and by the testator's direction, with the intention of revoking the same.
- (2) Notwithstanding the provisions of subsection (1) a person included in a class of persons specified in section 16 may revoke a will in the same manner as the person may make a will under the provisions of that section.

(b) 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

⁵⁶

See the Commission's recommendation at pages 45-46 of this Report.

- (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.

(c) The National Committee's decision

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

However, the Commission is of the view (with which the National Committee agrees) that the introductory words to the model provision should make it clear that the provision is exhaustive as to the means by which a will may be revoked. This is

important, as the draft model wills legislation does not include a provision to the effect of section 19 of the *Succession Act 1981* (Qld). Section 19 provides that no will shall be revoked by any presumption of an intention on the ground of an alteration of circumstance.

For this reason, it was agreed that the original introductory words to clause 14 of the draft *Wills Act 1994* (Vic) should be substituted for the introductory words in the redrafted version of clause 14.

(d) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 13 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld) in lieu of section 20 of that Act.

5. REVIVAL OF REVOKED WILLS

(a) Queensland provision

Section 21 of the *Succession Act 1981* (Qld) provides:

- (1) A will or a part of a will that has been revoked is not revived unless -
 - (a) the testator re-executes it in the manner in which a valid will is required to be executed by this part; or
 - (b) the testator executes, in the manner in which a valid will is required to be executed by this part, a valid codicil showing an intention to revive the will.
- (2) Where a will that has been partly revoked and afterwards wholly revoked is revived the revival operates, unless a contrary intention appears, to revive only so much of the will as was last revoked.
- (3) A will that is revoked and subsequently revived shall, for the purpose of this Act, be deemed to have been made at the time when it is revived.

(b) 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.

(c) The National Committee's decision

The National Committee (including this Commission) 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.

(d) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 17 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld) in lieu of section 21 of that Act.

CHAPTER 4

FORMAL VALIDITY OF WILLS

1. QUEENSLAND PROVISIONS

Sections 22 to 25 of the *Succession Act 1981* (Qld) provide:

- 22. The provisions of this division take effect notwithstanding any other provisions of this Act.
- 23. A will shall be treated as properly executed if its execution conformed to the internal law in force in the place where it was executed, or in the place where, at the time of its execution or of the testator's death, the testator was domiciled or had his or her habitual residence, or in a country of which, at either of those times, the testator was a national.
- 24. Without prejudice to the provisions of section 23 the following wills shall be treated as properly executed -
 - (a) a will executed on board a vessel or aircraft of any description, if the execution of the will conformed to the internal law in force in the place with which, having regard to its registration (if any) and other relevant circumstances, the vessel or aircraft may be taken to have been most closely connected;
 - (b) a will so far as it disposes of immovable property, if its execution conformed to the internal law in force in the place where the property was situated;
 - (c) a will so far as it revokes a will which under this division would be treated as properly executed or revokes a provision which under this division would be treated as comprised in a properly executed will, if the execution of the later will conformed to any law by reference to which the revoked will or provision would be so treated;
 - (d) a will so far as it exercises a power of appointment if the execution of the will conformed to the law governing the essential validity of the power.
- 25.(1) Where, under this division, the internal law in force in any country or place is to be applied in the case of a will, but there are in the country or place 2 or more systems of internal law relating to the formal validity of wills, the system to be applied shall be ascertained as follows -
 - (a) if there is in force throughout the country or place a rule indicating which of those systems can properly be applied in the case in question - that rule shall be followed;
 - (b) if there is no such rule - the system shall be that with which the testator was most closely connected at the relevant time and for this purpose the relevant time is the time of the testator's death where the matter is to be determined by reference to circumstances prevailing at the testator's death and at the time of execution of the will in any other case.

- (2) In determining for the purpose of this division whether or not the execution of a will conformed to a particular law, regard shall be had to the formal requirements of that law at the time of the execution of the will, but this does not prevent account being taken of an alteration of law affecting wills executed at that time, if the alteration enables the will to be treated as properly executed.
- (3) Where a law in force outside the State falls, whether in pursuance of this division or not, to be applied in relation to a will, any requirement of that law whereby special formalities are to be observed by testators answering a particular description or witnesses to the execution of a will are to possess certain qualifications, shall be treated, notwithstanding any rule of that law to the contrary, as a formal requirement only.

The following terms used in sections 23 to 25 are defined in section 5 of the *Succession Act 1981* (Qld) as follows:

“country” means any place or group of places having its own law of nationality, including Australia and its Territories.

“internal law” in relation to any country or place means the law that would apply in a case where no question of the law in force in any other country arose.

2. BASIS FOR THE MODEL PROVISIONS

Clauses 17 to 19 of the draft *Wills Act 1994* (Vic) were the basis for the model provisions. Those clauses 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.

3. 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.⁵⁷

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; other jurisdictions have merged provisions.

4. DIFFERENCES BETWEEN CLAUSES 17 TO 19 OF THE DRAFT *WILLS ACT 1994* (VIC) AND THE EQUIVALENT PROVISIONS IN 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:

- (i) 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.

Sections 23, 24(a) and (b) and 25 of the *Succession Act 1981* (Qld) refer to "the internal law in force" in a particular place. Similarly, wills legislation in all Australian jurisdictions qualifies the references to "law in force" in the various Acts with the word "internal".

- (ii) The omission of definitions of "internal law", "country" and "place".

Most jurisdictions (including Queensland) have the following definitions⁵⁸ (or ones that are virtually identical in language or effect).⁵⁹

⁵⁷ Note, however, that s 24(d) of the *Succession Act 1981* (Qld) and its counterpart in the draft *Wills Act 1994* (Vic), cl 17(2)(d), 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)).

⁵⁸ 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 latter Act omits these definitions, it still uses the term "internal law" in ss 17 and 18.

⁵⁹ 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 58 of this Report in relation to the Victorian position.

"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.

- (iii) 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 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.⁶⁰ 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.⁶¹ 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.⁶²

5. THE NATIONAL COMMITTEE'S DECISION

The National Committee generally accepted clauses 17, 18 and 19 of the draft *Wills Act 1994* (Vic).

⁶⁰ 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. Section 17(2)(d) of the 1997 Act omits the reference to "essential".

⁶¹ 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.

⁶² Victorian Law Reform Committee, *Reforming the Law of Wills* (Final Report, May 1994) at 121.

However, the National Committee was of the view (which this Commission shares) 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”.

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).⁶³ 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.⁶⁴

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 was, therefore, of the view that it is desirable to insert “essential” before “validity” in the model provision based on clause 17(2)(d).

The Commission agrees with this approach. The result of these decisions is that the model provisions recommended by the National Committee are consistent with the current law in Queensland about the formal validity of wills.

⁶³ See note 57 of this Report as to the origins of this provision.

⁶⁴ 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. THE COMMISSION'S RECOMMENDATION

The Commission endorses the model provisions that have been recommended by the National Committee (clauses 45-48 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provisions be adopted in the *Succession Act 1981* (Qld) in lieu of sections 22 to 25 of that Act.

CHAPTER 5

WILLS MADE WITH COURT AUTHORISATION

1. WILLS BY MINORS

(a) Queensland position

Under the *Succession Act 1981* (Qld), a married person (including a married minor) may make or revoke a will.⁶⁵ However, neither an unmarried minor nor a minor who has been, but is no longer, married has capacity to make a will.⁶⁶ Queensland does not have any legislation that would enable the court to approve the making of a will by such a minor.

(b) Basis for the model provision

Subclauses 5(3) to (6) of the draft *Wills Act 1994* (Vic) 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

⁶⁵ See the discussion of s 8 of the *Succession Act 1981* (Qld) at pages 7-9 of this Report.

⁶⁶ A minor who is no longer married may revoke a will that was made while he or she was married: *Succession Act 1981* (Qld) s 8(3).

- (b) must be deposited with the Registrar under section 5A of the *Administration and Probate Act 1958*.

(c) The National Committee's decision

The National Committee (including this Commission) 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. That is, the minor may wish his or her estate to go to one parent rather than both, or, where the minor is estranged from both parents or has no parent, to another person or persons, for example, a *de facto* spouse, a particular sibling or a carer.

(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 depository.⁶⁷

The National Committee is of the view that the same considerations apply in the case of a court-authorised 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.

⁶⁷

Those subsections are set out at page 63 of this Report.

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 (including this Commission) agrees with this suggestion.

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

In relation to wills made for persons lacking testamentary capacity, there is a specific provision in South Australia for the recognition of a statutory will that is made according to the law of the place where the deceased person was resident at the time of execution. Section 25D of the *Wills Act 1936* (SA) 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.

The National Committee is of the view that the same considerations apply in the case of a court-authorised will for a minor. It is clearly a desirable provision in the context of a uniformity project. The Commission agrees with this approach.

(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. It also considered whether the court should have the power to authorise a registrar to deal with certain matters.

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 Commission agrees that 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.

In the 1996 Report to the Standing Committee of Attorneys General, this Commission expressed the view that it would be appropriate for a registrar to be authorised to exercise this jurisdiction in relation to a "small estate".⁶⁸

While the Commission is of the view that it may be desirable for a registrar to be able to exercise this jurisdiction in relation to small estates, it agrees that, for the purposes of uniformity, it is more important to reach unanimity on matters of substance.

Further, given that the power to approve the terms of a will for a minor will be a novel one in Queensland, the Commission is now of the view that consideration of the question of conferring this jurisdiction on registrars should be deferred until after the provision has been in operation for, say, three years. By that time, any decision about the appropriateness of conferring this jurisdiction on a registrar could take into account how the operation of the provision has developed in practice.

(d) The Commission's recommendation

The Commission endorses the model provisions that have been recommended by the National Committee (clauses 18 and 51 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provisions be adopted in the *Succession Act 1981* (Qld).

While it may ultimately be appropriate for a registrar to exercise this power in relation to a small estate, the Commission recommends that any decision about conferring jurisdiction under this provision on a registrar should be deferred until after the provision has been in operation for three years. At that time the operation of this provision should be reviewed, including whether it would be appropriate to confer jurisdiction under this provision on a registrar. It would be desirable, in the meantime, for the registrar to keep records of applications brought under this provision.

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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 7.

2. WILLS FOR PERSONS WITHOUT TESTAMENTARY CAPACITY

(a) Basis for the model provisions

In Queensland, there is no provision for a court to make, alter, or revoke a will on behalf of a person who lacks testamentary capacity. However, there are models for such a provision in clause 6 of the draft *Wills Act 1994* (Vic) and in section 7 of the *Wills Act 1936* (SA).⁶⁹

Clause 6 of the draft *Wills Act 1994* (Vic) 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

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This amendment was made by the *Wills (Wills for Persons Lacking Testamentary Capacity) Amendment Act 1996* (SA).

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.

Section 7 of the *Wills Act 1936* (SA) 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 will¹.
- ^{1.} The cause of incapacity to make a will may arise from mental incapacity or from physical incapacity to communicate testamentary intentions.

(b) Background to clause 6 of the draft *Wills Act 1994* (Vic)⁷⁰

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.

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

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*,⁷¹ 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.⁷²

When the Victorian Law Reform Committee was considering this recommendation, it also had before it a draft Bill⁷³ 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*.⁷⁴

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.⁷⁵

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

⁷¹ Chief Justice's Law Reform Committee (Vic), *Wills for Mentally Disordered Persons* (1985).

⁷² *Id* at para 13.

⁷³ 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.

⁷⁴ New South Wales Law Reform Commission, *Wills for Persons Lacking Will-Making Capacity* (LRC 68, February 1992).

⁷⁵ *Wills (Wills for Persons Lacking Testamentary Capacity) Amendment Act 1996* (SA).

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.

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 this Commission that the draft Victorian provision, developed as it is from the South Australian and New South Wales precedents, is to be preferred.

(c) The National Committee's decision

The National Committee (including this Commission) 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.

(d) 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.

For these reasons, the Commission initially favoured permitting an application to be made within a relatively short period, say, six months, of the death of a person.⁷⁶

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. To a significant extent, those recommendations meet the Commission's concerns that had previously been an important factor in the Commission's preliminary view that it should be possible to make an application for a statutory will after the death of a person. The Commission is now of the view that, 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. While 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, 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

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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 11.

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.

Having regard to the National Committee's recommendations concerning family provision, the simplicity of having only one regime apply to the adjustment of distributions after death, and the benefits of achieving uniformity on this issue, the Commission endorses the position of the National Committee on this point. The Commission is, therefore, of the view that this provision should be confined to applications made before the death of a person.

(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 unless the person is 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 Commission has recommended that the court have under the model provision based on subclauses 5(3) to (6) of the draft *Wills Act 1994* (Vic).⁷⁷

Moreover, since the model provision based on subclauses 5(3) to (6) of the draft *Wills Act 1994* (Vic) would confer jurisdiction on the court to approve the making of a will by a competent minor,⁷⁸ it seems proper to allow the court to make a statutory will for a minor who is not competent to have a will approved under that provision.

The National Committee (including this Commission) 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.⁷⁹

⁷⁷ See the Commission's recommendation (discussed at pages 55-58 of this Report) that a model provision based on 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".

⁷⁸ See cl 5(3) of the draft *Wills Act 1994* (Vic), which is discussed at pages 55-58 of this Report.

⁷⁹ These subsections are set out at page 63 of this Report.

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 (including this Commission) 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 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.⁸⁰

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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.

(vi) Possible orders

The National 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 did not make a specific recommendation that the court should make such an order, but left the question to the court's general discretion. The Commission agrees with that approach.

(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.

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

This, too, is a matter of procedure, rather than of substance. It is not significant for the uniformity process to insist on uniformity of procedure. Initially, the Commission favoured permitting a registrar to exercise this power in relation to small estates.⁸¹ However, consistent with its view in relation to approving the terms of a will for a minor,⁸² the Commission is now of the view that the question of authorising a registrar to exercise this power should be deferred until after this provision has been in operation for, say, three years. At that time, the decision could be made in light of how this jurisdiction develops. The Commission

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

⁸¹ 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 12.

⁸² See pages 57-58 of this Report.

agrees that clause 6(9) should therefore be omitted from the model provision.

(e) The Commission's recommendation

The Commission endorses the model provisions that have been recommended by the National Committee (clauses 19 to 26, and 51 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provisions be adopted in the *Succession Act 1981* (Qld).

While it may ultimately be appropriate to confer these powers on a registrar in relation to a small estate, the Commission recommends that any decision about conferring jurisdiction under these provisions on a registrar should be deferred until after the provisions have been in operation for, say, three years. At that time, the operation of these provisions should be reviewed, including whether it would be appropriate to confer jurisdiction under these provisions on a registrar. It would be desirable, in the meantime, for the registrar to keep records of applications brought under these provisions.

CHAPTER 6

THE CONSTRUCTION AND RECTIFICATION OF WILLS

1. CHANGE OF DOMICILE

(a) Queensland provision

Section 26 of the *Succession Act 1981* (Qld) 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) 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.

(c) The National Committee's decision

The National Committee (including this Commission) accepted clause 24, which is in identical terms to section 26 of the *Succession Act 1981* (Qld).

(d) The Commission's recommendation

The Commission makes no recommendation for amendment of section 26 of the *Succession Act 1981* (Qld). That section, however, appears as a re-numbered provision (clause 32) in the draft *Wills Bill 1997* in Appendix 2 to this Report.

2. EFFECT OF SUBSEQUENT CONVEYANCE ON OPERATION OF WILL

(a) Queensland provision

Section 27 of the *Succession Act 1981* (Qld) provides:

No conveyance or other act made or done subsequently to the execution of a will of or relating to any property therein comprised except an act by which such will is revoked as provided in this Act shall prevent the operation of the will with respect to such estate or interest in such property as the testator shall have power to dispose of by will at the time of the testator's death.

(b) 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.

(c) The National Committee's decision

The National Committee (including this Commission) accepted clause 20.

(d) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 28 of the draft *Wills Bill 1997* in Appendix 2 to this Report). The Commission considers the drafting of clause 20 of the draft *Wills Act 1994* (Vic) to be clearer than section 27 of the *Succession Act 1981* (Qld).

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld) in lieu of section 27 of that Act.

3. USE OF EXTRINSIC EVIDENCE TO CLARIFY A WILL

(a) Background

Apart from the statutory provisions that have been introduced in some jurisdictions,⁸³ the law of wills allows the admission of extrinsic evidence in the construction of wills in only three cases:

- 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.⁸⁴
- 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.⁸⁵
- 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.⁸⁶

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.

In Queensland, however, there is no statutory provision that permits a court to admit extrinsic evidence in the construction of a will. This 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.

⁸³ These are discussed at pages 75-77 of this Report.

⁸⁴ 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.

⁸⁵ *McNamara v Fleming* [1963] VR 17 is a remarkable illustration of this rule.

⁸⁶ *Re Tussaud's Estate* (1878) 9 Ch D 363 at 373-375.

(b) Possible bases for a model provision

(i) English provision

A starting point for a model 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:

- (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).⁸⁷ 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.⁸⁸ 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,⁸⁹ 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

⁸⁷ 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.

⁸⁸ Chief Justice's Law Reform Committee (Vic), *First Report Concerning the Construction of Wills* (1978).

⁸⁹ Victorian Law Reform Committee, *Reforming the Law of Wills* (Final Report, May 1994) at 131.

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).⁹⁰ Clause 23 of the draft *Wills Act 1994* (Vic) provides:

- (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).⁹¹ Section 12B provides:

⁹⁰ Id at 132-133.

⁹¹ *Wills Act 1968* (ACT) s 12B, inserted by the *Wills (Amendment) Act 1991* (ACT) (No 67 of 1991).

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

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

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

(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.⁹² 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.

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

(d) The National Committee's decision

A majority of the National Committee (which included this Commission) preferred section 12B of the *Wills Act 1968* (ACT) except for the words "or uncertain" as highlighted below:

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

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

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

The majority view⁹³ was that the terms "meaningless" and "ambiguous" were sufficient, and that the addition of the words "or uncertain" in paragraphs (b) and (c) was likely to lead to an increase in legal argument as to the scope of the section, without providing any significant benefit.

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

This National Committee is of the view that words of the following import 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. The Commission agrees with this approach.

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

(f) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 31 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld).

4. GENERAL RULES FOR THE CONSTRUCTION OF WILLS

(a) Background

Clauses 21, 22, 27, 28 and 29 of the draft *Wills Act 1994* (Vic) deal separately with a number of matters which, in Queensland, are conflated into section 28 of the *Succession Act 1981* (Qld).

The purpose of section 28 (and clauses 21, 22, 27, 28 and 29 of the draft *Wills Act 1994* (Vic)) is to avoid partial intestacies. Section 28 is expressed to be subject to a contrary intention that appears by the will, as is each of clauses 21, 22, 27, 28 and 29 of the draft *Wills Act 1994* (Vic).

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 admissible extrinsic evidence, that is by evidence outside the terms of the will.

The National Committee is of the view (with which this Commission agrees), 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 *Succession Act 1981* (Qld) 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 sections 29, 30, 32 and 33. Their counterparts in the draft *Wills Act 1994* (Vic) are clauses 33 (equivalent to section 29), 30 (equivalent to section 30(2)), 31 (equivalent to section 30(1)), 26 (equivalent to section 32) and 32 (equivalent to section 33).

For example, section 33 of the *Succession Act 1981* (Qld) (clause 32 of the draft *Wills Act 1994* (Vic))⁹⁴ provides that where a gift 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.

(b) The National Committee's decision

If a provision like section 33 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 did 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) The Commission's recommendation

The Commission endorses the dichotomy recommended by the National Committee in relation to the construction of wills, namely, that:

- **model provisions based on clauses 21, 22, 27, 28 and 29 of the draft *Wills Act 1991* (Vic) should not apply if a contrary intention appears, whether in the will or elsewhere; and**
- **model provisions based on clauses 26, 30, 31, 32 and 33 of the draft *Wills Act 1994* (Vic) should be displaced only if a contrary intention appears in the will.**

5. WHEN A WILL TAKES EFFECT

(a) Queensland provision

Section 28(a) of the *Succession Act 1981* (Qld) provides:

Unless a contrary intention appears by the will -

- (a) the will is to be construed, with reference to the property comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator;

(b) 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.

(c) 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.

(d) The National Committee's decision

The National Committee (including this Commission) accepted clause 21, although it was of the view that it should be subject to a contrary intention, whether in the will or elsewhere.⁹⁵

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See the Commission's general recommendation about establishing a contrary intention at page 80 of this Report.

(e) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 29 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld) in lieu of section 28(a) of that Act.

6. EFFECT OF A FAILURE OF A DISPOSITION

(a) Queensland provision

Section 28(b) of the *Succession Act 1981* (Qld) provides:

Unless a contrary intention appears by the will -

...

- (b) property that is the subject of a disposition that is void or fails wholly or in part to take effect is to be included so far as the disposition is void or fails to take effect in any residuary disposition contained in the will;

(b) Basis for the model provision

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

- (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.

(c) 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).⁹⁶ 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.

(d) The National Committee's decision

The National Committee (including this Commission) initially accepted clause 22 of the draft *Wills Act 1994* (Vic).⁹⁷ However, a concern was subsequently raised that the draft Victorian provision 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.

The National Committee also agreed that the model provision should be subject to a contrary intention, whether in the will or elsewhere.⁹⁸ The Commission agrees with this approach.

⁹⁶ Wills legislation in all Australian States and Territories has its origins in the *Wills Act 1837* (UK).

⁹⁷ 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.

⁹⁸ See the Commission's general recommendation about establishing a contrary intention at page 80 of this Report.

(e) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 30 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld) in lieu of section 28(b) of that Act.

7. EFFECT OF A GENERAL DISPOSITION OF LAND

(a) Queensland provision

Section 28(c) of the *Succession Act 1981* (Qld) provides:

Unless a contrary intention appears by the will -

...

- (c) a general disposition of land or of land in a particular area includes leasehold land whether or not the testator owns freehold land;

(b) 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.

(c) 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.

Section 28(c) of the *Succession Act 1981* (Qld) is virtually identical to clause 27 of the draft *Wills Act 1994* (Vic).

(d) The National Committee's decision

The National Committee (including this Commission) accepted clause 27, although it was of the view that it should be subject to a contrary intention, whether in the will or elsewhere.⁹⁹

(e) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 36 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld) in lieu of section 28(c) of that Act.

8. EFFECT OF A GENERAL DISPOSITION OF PROPERTY

(a) Queensland provision

Section 28(d) of the *Succession Act 1981* (Qld) provides:

Unless a contrary intention appears by the will -

...

- (d) a general disposition of all the testator's property or of all the testator's property of a particular kind includes property or that kind of property over which the testator had a general power of appointment exercisable by will and operates as an execution of the power;

(b) Basis for the model provision

The basis for the model provision was clause 28 of the draft *Wills Act 1994* (Vic). Clause 28 provides:

- (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

⁹⁹

Ibid.

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.

(c) Background

The effect of these provisions 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.

They correspond to the provisions 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.¹⁰⁰

(d) The National Committee's decision

The National Committee (including this Commission) accepted clause 28, although it was of the view that it should be subject to a contrary intention, whether in the will or elsewhere.¹⁰¹

(e) Discussion

Section 28(d) of the *Succession Act 1981* (Qld) is in almost identical terms to clause 28 of the draft *Wills Act 1994* (Vic). The main difference between the two provisions is that the Queensland provision refers to property of "a particular kind", whereas the draft Victorian provision refers to property "of a particular description".

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.¹⁰² 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

¹⁰⁰ See the discussion of s 11 of the *Succession Act 1981* (Qld) and of cl 7(5) of the draft *Wills Act 1994* (Vic) at pages 17-18 of this Report.

¹⁰¹ See the Commission's general recommendation about establishing a contrary intention at page 80 of this Report.

¹⁰² Victorian Law Reform Committee, *Reforming the Law of Wills* (Final Report, May 1994) at 141.

considered that it was preferable for the rule to apply to property of a particular description.¹⁰³

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".

Although this Commission's position in the October 1996 Report to the Standing Committee of Attorneys General¹⁰⁴ was that no change was required to section 28(d) unless it was desirable to achieve word for word uniformity, the Commission accepts the Victorian Law Reform Committee's criticism of section 28(d). The Commission agrees that clause 28 of the draft *Wills Act 1994* (Vic) is more comprehensive in its terms. For that reason, the Commission prefers the drafting of clause 28 to section 28(d).

(f) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 35 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld) in lieu of section 28(d) of that Act.

9. EFFECT OF A DEVISE OF REAL PROPERTY WITHOUT WORDS OF LIMITATION

(a) Queensland provision

Section 28(e) of the *Succession Act 1981* (Qld) provides:

Unless a contrary intention appears by the will -

¹⁰³ Ibid.

¹⁰⁴ 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 51.

...

- (e) a disposition of property without words of limitation whether to a person beneficially or as executor or trustee is to be construed as passing the whole estate or interest of the testator therein.

(b) 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.

Section 28(e) of the *Succession Act 1981* (Qld) is in similar terms to clause 29 of the draft *Wills Act 1994* (Vic).

(c) The National Committee's decision

The National Committee (including this Commission) accepted clause 29, although it was of the view that it should be subject to a contrary intention, whether in the will or elsewhere.¹⁰⁵

(d) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 37 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld) in lieu of section 28(e) of that Act.

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See the Commission's general recommendation about establishing a contrary intention at page 80 of this Report.

10. CONSTRUCTION OF DISPOSITIONS

(a) Queensland provision

Section 29 of the *Succession Act 1981* (Qld) provides:¹⁰⁶

- (1) Unless a contrary intention appears by the will -
 - (a) a residuary disposition referring only to the real estate of the testator or only to the personal estate of the testator shall be construed to include all the residuary estate of the testator both real and personal; and
 - (b) subject to this Act, if a disposition in fractional parts fails as to any of such parts for any reason that part shall pass to that part of the disposition which does not fail and if there is more than 1 part which does not fail to all those parts proportionately.
- (2) In subsection (1)(b) -

“disposition” means a disposition of all property or a residuary disposition.

(b) 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.

(c) 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

¹⁰⁶

This section was recently amended by s 77 of the *Justice and Other Legislation (Miscellaneous Provisions) Act 1997* (Qld), which also changed the heading of the section from “Construction of residuary dispositions” to “Construction of particular dispositions”.

to leave "the residue of my personal property" to Z, any realty undisposed of by will would pass on intestacy.

The statutory provision ensures that a partial intestacy does not occur in these fact situations. The rule is subject to a contrary intention, so if the testator leaves "the residue of my personalty" to Z and "the residue of my estate to Y", Z would take the residue of the personalty and Y the residue of any realty.

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 clause 33(2) is similar to section 29(1). Both would apply to a disposition, whether of the whole of the estate or only the residue of the estate.

Until recently, this was not the case in Queensland. Section 29(b) was expressed to apply only to "a residuary disposition".¹⁰⁷ Prior to the amendment of section 29 in 1997,¹⁰⁸ this provision had been construed narrowly.

In *Re Harvey*¹⁰⁹ 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 29.¹¹⁰ 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, as recently amended.

(d) The National Committee's decision

The National Committee (including this Commission) accepted clause 33, although it was of the view that subsection (1) of the model provision 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.

¹⁰⁷ See note 106 of this Report.

¹⁰⁸ *Justice and Other Legislation (Miscellaneous Provisions) Act 1997* (Qld) s 77.

¹⁰⁹ [1990] 2 Qd R 508.

¹¹⁰ Victorian Law Reform Committee, *Reforming the Law of Wills* (Final Report, May 1994) at 153.

(e) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 41 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld) in lieu of section 29 of that Act.

11. EFFECT OF A REQUIREMENT TO SURVIVE WITH ISSUE

(a) Queensland provision

Section 30(1) of the *Succession Act 1981* (Qld) provides:

Any disposition or appointment of property using the words 'die without issue', or 'died without leaving issue', or 'having no issue', or any words which may import either a want or failure of issue of any person in the person's lifetime or at the time of the person's death, or an indefinite failure of the person's issue shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person and not an indefinite failure of the person's issue.

(b) 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.

Clause 31 updates the language of the *Wills Act 1837* (UK).¹¹¹ Section 30(1) of the *Succession Act 1981* (Qld) is in similar terms to clause 31 of the draft *Wills Act 1994* (Vic), although section 30(1) is not subject to a contrary intention that appears in the will.

(c) The National Committee's decision

The National Committee (including this Commission) 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 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.

For that reason, the National Committee (including this Commission) 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) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 39 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld) in lieu of section 30(1) of that Act.

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Wills legislation in all Australian States and Territories has its origins in the *Wills Act 1837* (UK).

12. EFFECT OF DISPOSITIONS TO ISSUE

(a) Queensland provision

Section 30(2) of the *Succession Act 1981* (Qld) provides:

Unless a contrary intention appears by the will, a beneficial disposition of property to the issue of a person shall be distributed to the nearest issue of that person and if there be more than 1 such nearest issue, among them in equal shares and by representation among the remoter issue of that person.

(b) 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.

Section 30(2) of the *Succession Act 1981* (Qld) is in similar terms to clause 30 of the draft *Wills Act 1994* (Vic).

(c) The National Committee's decision

The National Committee (including this Commission) accepted clause 30, but 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.

(d) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 38 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld) in lieu of section 30(2) of that Act.

13. POWER OF COURT TO RECTIFY WILLS

(a) Queensland provision

Section 31 of the *Succession Act 1981* (Qld) provides:

- (1) As from the commencement of this Act the court shall have the same jurisdiction to insert in the probate copy of a will material which was accidentally or inadvertently omitted from the will when it was made as it has hitherto exercised to omit from the probate copy of a will material which was accidentally or inadvertently inserted in the will when it was made.
- (2) Unless the court otherwise directs, no application shall be heard by the court to have inserted in or omitted from the probate copy of a will material which was accidentally or inadvertently omitted from or inserted in the will when it was made unless proceedings for such application are instituted before or within 6 months after the date of the grant in Queensland.

(b) 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.

(c) 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.

(d) The National Committee's decision

The National Committee (including this Commission) 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 (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 subclause (4)(b)(ii) should also be six months from the date of the testator's death.

In Queensland this would be consistent with the time prescribed for a personal representative to distribute an estate without incurring liability, if no notice of intention to bring a family provision application has been given to the personal representative.¹¹²

(e) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 27 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that:

- the model provision be adopted in the *Succession Act 1981* (Qld) in lieu of section 31 of that Act; and

- consequential upon making this amendment, that section 44(3)¹¹³ of the *Succession Act 1981* (Qld) be amended to include a reference to what will become the new rectification section, in addition to the current references in that section to sections 41(1) and 42.

14. LAPSE OF BENEFIT WHERE BENEFICIARY DOES NOT SURVIVE TESTATOR BY 30 DAYS

(a) Queensland provision

Section 32 of the *Succession Act 1981* (Qld) provides:

- (1) Unless a contrary intention appears by the will, where any beneficial disposition of property is made to a person who does not survive the testator for a period of 30 days the disposition shall be treated as if that person had died before the testator and, subject to this Act, shall lapse.
- (2) A general requirement or condition that a beneficiary survive the testator is not a contrary intention for the purpose of this section.

(b) 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.

(c) Background

Section 32 of the *Succession Act 1981* (Qld) is in very similar terms to clause 26 of the draft *Wills Act 1994* (Vic). These provisions extend the operation of the doctrine of lapse, a doctrine which has not been subject to criticism, by a month from the date of

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Note that this subsection (which deals with the protection of personal representatives) was recently amended by s 80 of the *Justice and Other Legislation (Miscellaneous Provisions) Act 1997* (Qld).

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.¹¹⁴ It is not unreasonable to argue that this would probably represent the wishes of the testator.

(d) 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 will or will not be entitled to a benefit, the National Committee is of the view (with which this Commission agrees) 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.¹¹⁵

(e) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 34 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld) in lieu of section 32 of that Act.

¹¹⁴ See the discussion of s 33 of the *Succession Act 1981* (Qld) at pages 99-106 of this Report.

¹¹⁵ See the discussion at pages 106-109 of this Report of s 49(3) of the *Succession Act 1981* (Qld) and of a model provision of similar effect. See also the National Committee's Report to the Standing Committee of Attorneys General, *Family Provision* (December 1997) at Chapter 7.

15. STATUTORY SUBSTITUTIONAL PROVISIONS IN THE EVENT OF LAPSE

(a) Queensland provision

Section 33 of the *Succession Act 1981* (Qld) provides:

- (1) Unless a contrary intention appears by the will, where any beneficial disposition of property is made to any issue of the testator (whether as an individual or as a member of a class) for an estate or interest not determinable at or before the death of that issue and that issue is dead at the time of the execution of the will or does not survive the testator for a period of 30 days, the nearest issue of that issue who survive the testator for a period of 30 days shall take in the place of that issue and if more than 1 nearest issue so survive, shall take in equal shares and the more remote issue of that issue who survive the testator for a period of 30 days shall take by representation.
- (2) A general requirement or condition that such issue survive the testator or attain a specified age is not a contrary intention for the purpose of this section.
- (3) This section applies only to wills executed or republished after the commencement of this Act.

(b) 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.

(c) 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.¹¹⁶

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.

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

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.

(d) The National Committee's decision

The National Committee (including this Commission) accepted clause 32 of the draft *Wills Act 1994* (Vic), subject to considering the subsidiary issues below.

(e) 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 respondent¹¹⁷ to the wills memoranda distributed by the Commission¹¹⁸ suggested generally 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

¹¹⁷ Submission 1.

¹¹⁸ Queensland Law Reform Commission, *Uniform Succession Laws: Wills* (MP 15, February 1996).

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.

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.¹¹⁹ 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 stirpally 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.

119Draft *Wills Act 1994* (Vic) cl 32(4).

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:

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.¹²⁰

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 (including this Commission) agreed 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 the model provision 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.

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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.

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 (including this Commission) agrees that such a provision should be incorporated into the model provision.

(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):¹²¹

... 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 32,¹²² concern was subsequently raised about the effect of clause 32(2).

The National Committee was of the view that subclause (2) was not concerned with anti-lapse, as the effect of subclause (1) was that issue would take, as members of a class, their deceased's parent's share as substitutionary 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 substitutionary 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 agreed that subsection (2) was not concerned with the anti-lapse rule, but, in effect, constituted a specific intestacy provision for

¹²¹ Victorian Law Reform Committee, *Reforming the Law of Wills* (Final Report, May 1994) at 147.

¹²² 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.

minors. As such, the National Committee agreed that it should be deleted from clause 32, and reconsidered by the National Committee when it embarks on the intestacy stage of this project.

The Commission strongly endorses the approach of the National Committee.

(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 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.¹²³ 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 (including this Commission) is, therefore, of the view that subclause (1) of the model provision should be amended to read as follows:

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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.

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.**

(f) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 40 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld) in lieu of section 33 of that Act.

CHAPTER 7

MISCELLANEOUS PROVISIONS OF THE *SUCCESSION ACT 1981 (QLD)*

1. POWERS OF PERSONAL REPRESENTATIVES

(a) Queensland provision

Section 49(3) of the *Succession Act 1981* (Qld) provides:

The personal representatives may, during and after the period of 30 days after the death of a deceased person, make responsible provision out of the estate for the maintenance (including hospital and medical expenses) of any spouse or issue of the deceased who would, if the person survived the deceased for a period of 30 days, be entitled to a share in the estate, and any sum so expended shall be deducted from that share; but if any spouse or issue of the deceased for whom any provision has been so made does not survive the deceased for a period of 30 days any sum expended in making such provision shall be treated as an administration expense.

(b) 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.

(c) Background

Section 49(3) of the *Succession Act 1981* (Qld) is in similar terms to the proposed section 99B of the *Administration and Probate Act 1958* (Vic).

In this Report, the Commission has discussed the effect of, and recommended the adoption of, a provision to the effect of clause 26 of the draft *Wills Act 1994* (Vic).¹²⁴ 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.

(d) The National Committee's decision

The National Committee (including this Commission) 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.

(e) 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.

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See pages 97-98 of this Report. Cl 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.

The Commission generally agrees with this approach.

(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 subsection (4) of the proposed section. 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 who survive 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.

(f) The Commission's recommendation

The Commission generally endorses the model provision that has been recommended by the National Committee (clause 53 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends, subject to the following qualifications, that the model provision be adopted in the *Succession Act 1981* (Qld) in lieu of section 49(3) of that Act.

If the model provision is incorporated into the *Succession Act 1981* (Qld), rather than into a new stand alone *Wills Act*, two changes are necessary so that the provision will continue to apply both in the case of an intestacy, and where there is a will - which is how section 49(3) currently operates. These are:

- the provision should refer to "a deceased person", rather than to "a testator"; and

- the provision should refer to a person who “is entitled to a share in the estate of the deceased person”, rather than who “has an entitlement under a will”.

2. INTERMEDIATE INCOME ON CONTINGENT AND FUTURE BEQUESTS AND DEVISES

(a) Queensland provision

Section 62 of the *Succession Act 1981* (Qld) provides

A contingent, future or deferred bequest or devise of property whether specific or residuary carries the intermediate income of such property except so far as such income or any part thereof is otherwise disposed of by the will.

(b) 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.

(c) 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.¹²⁵ 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,¹²⁶ unless a fund was set aside for the purpose of answering the bequest.¹²⁷ Difficulties in knowing whether a legacy or devise would carry intermediate income from the date of the death

¹²⁵ *Re Gillett's Will Trusts* [1950] Ch 102; *Re Geering* [1964] Ch 136.

¹²⁶ *Guthrie v Walrond* (1883) 22 Ch D 573.

¹²⁷ *Re Woodin* [1895] 2 Ch 309.

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.¹²⁸ 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.

(d) The National Committee's decision

The National Committee (including this Commission) accepted clause 25.

(e) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 33 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld) in lieu of section 62 of that Act.

3. LEGACIES AND DEVISES TO UNINCORPORATED ASSOCIATIONS OF PERSONS

(a) Queensland provision

Section 63 of the *Succession Act 1981* (Qld) provides

- (1) A legacy or devise to an unincorporated association of persons or to or upon trust for the aims, objects or purposes of an unincorporated association of persons or to or upon trust for the present and future members of an unincorporated association of persons shall have effect as a legacy or devise in augmentation of the general funds of the association.

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Queensland Law Reform Commission, *Report of the Law Reform Commission on the Law Relating to Succession* (R 22, 1978) at 44-46.

- (2) Money or property representing a legacy or devise in augmentation of the general funds of an unincorporated association of persons whether expressed by the will or having effect by virtue of subsection (1) shall be paid or transferred to or sold or otherwise disposed of on behalf of the association and the money property or proceeds of sale thereof shall be applied by the association in accordance with the provisions of its constitution from time to time with respect to the application of its general funds.
- (3) Subject to the will -
 - (a) the receipt of the treasurer or like officer for the time being of an unincorporated association of persons is an absolute discharge to the personal representative for the payment of any pecuniary legacy or other moneys to the association; and
 - (b) the transfer of property representing a legacy or devise to a person or persons designated in writing by any 2 persons holding the offices of president, chairperson, treasurer or secretary (or like offices if those offices are not so named) of an unincorporated association of persons is an absolute discharge to the personal representatives for the payment or transfer of money or property representing such legacy or devise; and
 - (c) a transfer of devised property which is land under the provisions of the *Land Title Act 1994* shall be effected in the form prescribed under that Act upon trust for the association and in respect of other land a transfer thereof shall be effected in accordance with the requirements of the registrar of titles or registering officer pursuant to the relevant legislation relating to the registration of such transfer; and a declaration made by those persons claiming to be the officers of the unincorporated association duly authorised to designate the transferee or transferees in relation to such property shall be sufficient evidence of such designation to the registrar of titles or registering officer as the case may be.
- (4) It shall not be an objection to the validity of a legacy or devise to an unincorporated association of persons that a list of all the members of the association at the death of the testator cannot be compiled.

(b) 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.

(c) Background

Section 63 of the *Succession Act 1981* (Qld) first introduced a provision of this kind. The object of the provision is to save legacies and devises to unincorporated associations of persons which would be invalid for certain reasons, in particular, where they might be construed as a trust for non-charitable purposes, or where they might breach the rule against perpetuities. These grounds of invalidity could hardly affect gifts *inter vivos*. The provision is an attempt to bring the law about legacies and devises into line with 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,¹²⁹ 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.

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.

(d) The National Committee's decision

The National Committee (including this Commission) accepted clause 34.

(e) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 42 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld) in lieu of section 63 of that Act.

¹²⁹

For example, *Charitable Trusts Act 1993* (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.

4. CERTAIN POWERS AND TRUSTS NOT INVALID AS DELEGATION OF WILL-MAKING POWER

(a) Queensland provision

Section 64 of the *Succession Act 1981* (Qld) provides:

A power to appoint or a trust to distribute property, created by will, is not void as a delegation of the testator's power to make a will if the same power or trust would be valid if created by an instrument made inter vivos.

(b) 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.

(c) Background

Clause 35 is modelled on section 64 of the *Succession Act 1981* (Qld). It is intended to prevent argument that a power of appointment contained in a will might constitute an unacceptable delegation of the testator's power to make a will. It is perhaps unfortunate that it is mainly in Australia that credence has been given to such an argument.¹³⁰

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 such arguments are not advanced again. To omit the provision might be seen as a signal that there is merit in these arguments.

(d) The National Committee's decision

The National Committee (including this Commission) accepted clause 35.

¹³⁰

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.

(e) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 43 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld) in lieu of section 64 of that Act.

5. PRESUMPTION OF SURVIVORSHIP

(a) Queensland provision

Section 65 of the *Succession Act 1981* (Qld) provides:

Subject to this Act, where 2 or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder for a period of 1 day.

(b) The Commission's recommendation

The Commission recommends that this section be reviewed when the National Committee reviews the law in relation to the administration of estates.¹³¹ The Commission will raise this issue with the National Committee for its consideration at that time.

¹³¹

As the third stage of the Uniform Succession Laws Project, the National Committee will be reviewing the law in relation to the administration of estates. The National Committee has already commenced work on this topic.

6. SURVIVAL OF ACTIONS

(a) Queensland provision

Section 66 of the *Succession Act 1981* (Qld) provides:

- (1) Subject to the provisions of this section and with the exception of causes of action for defamation or seduction, on the death of any person after the 15 October 1940 all causes of action subsisting against or vested in the person shall survive against, or, as the case may be, for the benefit of, the person's estate.
- (2) Where a cause of action survives pursuant to subsection (1) for the benefit of the estate of a deceased person, the damages recoverable in any action brought -
 - (a) shall not include damages for pain and suffering, for any bodily or mental harm or for curtailment of expectation of life;
 - (b) shall not include exemplary damages;
 - (c) in the case of a breach of promise to marry - shall be limited to damages in respect of such damages as flow from the breach of promise to marry;
 - (d) where the death has been caused by the act or omission which gives rise to the cause of action - shall be calculated without reference to -
 - (i) loss or gain to the estate consequent upon the death save that a sum in respect of funeral expenses may be included;
 - (ii) future probable earnings of the deceased had the deceased survived.
- (3) Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this section, to have been subsisting against that person before his or her death such cause of action in respect of that act or omission as would have subsisted if that person had died after the damage was suffered.
- (4) The rights conferred by this section for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the provisions of the *Supreme Court Act 1995*, part 4 and so much of this section as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under those Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1).
- (5) Nothing in this section enables any proceedings to be taken which had ceased to be maintainable before the commencement of this Act.
- (6) An action which survives pursuant to subsection (1) against the estate of a deceased person may be brought against any beneficiary to whom any part of the estate has been distributed as well as against the personal representatives.

- (7) Where an action is brought against a beneficiary to whom a part of the estate has been distributed that beneficiary is entitled to contribution from any beneficiary to whom a distribution has been made, being a beneficiary ranking in equal degree with himself or herself for the payment of the debts of the deceased, and to an indemnity from any beneficiary to whom a distribution has been made, being a beneficiary ranking in lower degree than himself or herself for the payment of the debts of the deceased, and the beneficiary may join any such beneficiary as a party to the action brought against him or her.
- (8) Where an action is brought against a beneficiary (including a beneficiary who has been joined as aforesaid) whether in respect of an action which has survived against the estate or for contribution or indemnity, the beneficiary may plead equitable defences and if the beneficiary has received the distribution made to the beneficiary in good faith and has so altered the beneficiary's position in reliance on the propriety of the distribution that, in the opinion of the court, it would be inequitable to enforce the action, the court may make such order as it thinks fit.
- (9) In no case may a judgment against a beneficiary exceed the amount of the distribution made to the beneficiary.

(b) The Commission's recommendation

The Commission recommends that this section be reviewed when the National Committee reviews the law in relation to the administration of estates.¹³² The Commission will raise this issue with the National Committee for its consideration at that time.

7. PROVISIONS IN WILLS REFERRING TO VALUES PLACED ON PROPERTY

(a) Queensland provision

Section 67 of the *Succession Act 1981* (Qld) provides:

- (1) Where the effect of a provision in a will of a person who has died, whether before or after the passing of this Act is, by the terms of that will however expressed made to depend upon the value placed upon property -
 - (a) in the assessment of probate duty, succession duty or some other death duty; or

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Ibid.

- (b) in any valuation obtained for the purposes of probate duty, succession duty or some other death duty;

but value is not required to be placed thereon for those purposes the will shall take effect as if it directed the personal representative of the deceased to have a valuation of the property made by a duly qualified person (whether employed by the personal representative or not) and the valuation so made shall be taken to be the value on which the effect of the provision in the will was made to depend.

- (1A) However, where the property is assessed for duty pursuant to the *Estate Duty Assessment Act 1914* (Cwth) (or any other Commonwealth Act providing for the assessment of death duty) the personal representative of the deceased may elect, instead of having a valuation made as aforesaid, that the valuation placed upon the property for the purposes of that assessment shall be taken to be the value on which the effect of the provision in the will was made to depend.

- (2) On the application of the personal representative or of any other person having a proper interest in respect of such provisions in the will, the court may, if it considers it desirable in all circumstances, direct that the provisions of subsection (1) shall not take effect but that the provisions of the will of the deceased in regard to the property shall be varied in such manner as the court considers would give the most nearly practicable effect to the intentions of the deceased and may in addition or in the alternative make any other order that it thinks desirable.

- (3) In this section -

“death duty” means a duty or tax which by the law of any place is or may be payable consequent upon the death of a person in respect of any property.

(b) 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.

(c) 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”.¹³³ The provision is the result of cases in which specific references to valuations that cannot be made have been found to cause difficulty in giving effect to the testator's intention.

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Victorian Law Reform Committee, *Reforming the Law of Wills* (Final Report, May 1994) at 160.

Clause 36 is similar to section 67 of the *Succession Act 1981* (Qld), although the latter provision is far more detailed. The Commission prefers the briefer draft Victorian provision.

(d) The National Committee's decision

The National Committee (including this Commission) accepted clause 36, but was of the view that the model provision should be subject to a contrary intention that appears in the will.

(e) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 44 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld) in lieu of section 67 of that Act.

CHAPTER 8

ADDITIONAL PROVISIONS

1. DEPOSIT OF WILLS WITH REGISTRAR

(a) Background

The National Committee has made recommendations (with which this Commission agrees) about court-authorised wills for competent minors¹³⁴ and for persons lacking testamentary capacity.¹³⁵ In both cases, the National Committee has recommended that the wills made pursuant to those recommended provisions be retained by the registrar.

(b) The National Committee's decision

The majority of the National Committee is of the view that generally it is desirable to have a central registry for all wills - not just those that are authorised by the court.

The National Committee has, therefore, recommended that there should be a mechanism for the retention by the registrar of court-authorised wills and for the voluntary deposit of other wills.

(c) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 49 of the draft *Wills Bill 1997* in Appendix 2 to this Report), in so far as it relates to court-authorised wills for minors or persons lacking testamentary capacity.

However, while the Commission recognises that there would be advantages in having a central registry for the deposit of all wills, the Commission has reservations about recommending at this stage that the court should assume that function. Such a suggestion has obvious resourcing implications for the court. There are also other issues, for example, the registrar's liability in the event of the

¹³⁴ See pages 55-58 of this Report.

¹³⁵ See pages 59-71 of this Report.

loss of such a will, that would need to be investigated before the Commission would be prepared to recommend extending a provision about the retention of certain wills so as to enable all wills to be deposited.

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld), except to the extent that it makes provision for the voluntary deposit of wills other than court-authorised wills. In the Commission's view, the application of this provision should be limited to providing for the retention of court-authorised wills.

2. DELIVERY OF WILLS BY REGISTRAR

(a) The National Committee's decision

The National Committee has made recommendations about the circumstances in which a will held by the registrar should be able to be withdrawn. The National Committee was of the view that it should be possible for the testator to withdraw such a will only if he or she is of full age and capacity.

(b) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 50 of the draft *Wills Bill 1997* in Appendix 2 to this Report), in so far as it relates to court-authorised wills for minors or persons lacking testamentary capacity.

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld), subject to that qualification.

3. 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 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.¹³⁶

(b) Need for the provision

Queensland does not have any legislation governing who is entitled to see a will. A major reason for the proposed provision is that sometimes a person who has 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 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

¹³⁶

The Commission is of the view that subparagraph (iv) would be wide enough to cover a person with a claim for family provision.

to know whether the testator had particular assets. This information may be discoverable to a certain extent from a will.

The proposed provision would 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. This proposed provision is simply intended to ensure the same result in relation to the will of a deceased person prior to the will's admission to probate, or in the event that probate is not sought.

(c) The National Committee's decision

The National Committee (including this Commission) 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.

The Commission agrees with this approach.

(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 might be of value in, for example, determining questions of construction.

For these reasons, the National Committee (including this Commission) 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) The Commission's recommendation

The Commission endorses the model provision that has been recommended by the National Committee (clause 52 of the draft *Wills Bill 1997* in Appendix 2 to this Report).

The Commission recommends that the model provision be adopted in the *Succession Act 1981* (Qld).

4. 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*,¹³⁷ 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.¹³⁸ The court held that there had been no ademption.

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 a testator's property under an enduring power of attorney. It only found that, in the circumstances of the 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.

¹³⁷ [1997] 1 Qd R 110.

¹³⁸ That is, whether the sale of the property by the attorneys had the effect of revoking the specific gift to them of the property.

(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 room for self-serving evidence that it could afford.
- The object of the provision is to ensure that an attorney is neither inhibited from selling, nor 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) The National Committee's decision

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.¹³⁹ 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.

(d) The Commission's recommendation

The Commission agrees with this approach.¹⁴⁰ This issue should not be addressed at this stage, but should be deferred for further consideration.

¹³⁹ 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.

¹⁴⁰ It also notes that the *Powers of Attorney Bill 1997* (Qld), which was introduced on 8 October 1997, would provide a mechanism for a beneficiary whose benefit under a will was adeemed by the act of an attorney to apply to the court for compensation. Cl 106 of the Bill provides:

- (1) This section applies if a person's benefit in a principal's estate under the principal's will, on intestacy, or by another disposition taking effect on the principal's death, is lost because of a sale or other dealing with the principal's property by an attorney of the principal.
- (2) The person, or the person's personal representative, may apply to the Supreme Court for compensation out of the principal's estate.
- (3) The court may order that the person, or the person's estate, be compensated out of the principal's estate as the court considers appropriate but the compensation must not exceed the value of the lost benefit.
- (4) The *Succession Act 1981*, sections 41(2) to (8), (10) and (11) and 44 apply to an application and an order made on it as if the application was an application under part 4 of that Act by a person entitled to make an application.
- (5) In this section -
 "attorney" means an attorney under -
 (a) a general power of attorney made under this Act; or
 (b) an enduring document; or
 (c) a power of attorney made otherwise than under this Act, whether before or after its commencement.

APPENDIX 1

SUMMARY OF RECOMMENDATIONS

Succession Act 1981 (Qld)	Model Wills Bill 1997	Recommendation	Basis for the model provision¹⁴¹
-	2	Adopt model provision.	2
-	3	Adopt model provision.	1
5	4	Adopt model provision.	3
7	6	Adopt model provision.	4
8	7	Adopt model provision.	5(1),(2)
9, 10	8(1)-(3)	Adopt model provision.	7(1)-(3)
9	10	Adopt model provision. Review after three years in operation. In the meantime, keep records.	9
11	8(4),(5)	Adopt model provision.	7(4),(5)
12	16	Adopt model provision.	15
13	9	Adopt model provision.	8
14	11	Adopt model provision.	10
15	12	Adopt model provision. Consequential amendment to the <i>Stamp Act 1894</i> (Qld).	-
15A	-	Retain section 15A, but amend to be consistent with the principles underlying the amendments suggested to the interested witness rule (clause 12 of the model <i>Wills Bill 1997</i>). Consequential amendment to the <i>Stamp Act 1894</i> (Qld).	-
16	-	Repeal section 16. SCAG should review need for legislation in this area.	-
17	14	Adopt model provision.	12
18	15	Adopt model provision.	<i>Wills Act 1958</i> (Vic) s 16A
19	-	Repeal section 19.	-
20	13	Adopt model provision.	14

21	17	Adopt model provision.	16
22-25	45-48	Adopt model provisions.	17-19
-	18	Adopt model provision. Review after three years in operation. In the meantime, keep records.	5(3)-(6)
-	19-26	Adopt model provisions. Review after three years in operation. In the meantime, keep records.	6
26	32	Section 26 and clause 32 are identical.	24
27	28	Adopt model provision.	20
-	31	Adopt model provision.	<i>Wills Act 1968 (ACT) s 12B</i>
28(a)	29	Adopt model provision.	21
28(b)	30	Adopt model provision.	22
28(c)	36	Adopt model provision.	27
28(d)	35	Adopt model provision.	28
28(e)	37	Adopt model provision.	29
29	41	Adopt model provision.	33
30(1)	39	Adopt model provision.	31
30(2)	38	Adopt model provision.	30
31	27	Adopt model provision. Consequential amendment to section 44(3) of the <i>Succession Act 1981</i> (Qld).	37
32	34	Adopt model provision.	26
33	40	Adopt model provision.	32
49(3)	53	Adopt model provision, subject to minor changes if this provision is to be incorporated into the <i>Succession Act 1981</i> (Qld), rather than into a new <i>Wills Act</i> .	New s 99B of the <i>Administration and Probate Act 1958</i> (Vic), proposed in the draft <i>Wills Act 1994</i> (Vic).
62	33	Adopt model provision.	25
63	42	Adopt model provision.	34
64	43	Adopt model provision.	35
65	-	Review as part of the law in relation to the administration of estates.	-
66	-	Review as part of the law in relation to the administration of estates.	-
67	44	Adopt model provision.	36

-	49	Adopt model provision in so far as it relates to court-authorised wills.	-
-	50	Adopt model provision in so far as it relates to court-authorised wills.	-
-	51	Adopt model provision.	-
-	52	Adopt model provision.	New s 66A of the <i>Administration and Probate Act 1958</i> (Vic), proposed in the draft <i>Wills Act 1994</i> (Vic).

APPENDIX 2

DRAFT *WILLS BILL* 1997

DRAFT ONLY

[STATE ARMS]

Wills Bill 1997

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[STATE ARMS]

Wills Bill 1997

No. , 1997

A Bill for

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

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]*

(Section 55)

[Amendments to be inserted here]

