PARLIAMENT OF VICTORIA

LAW REFORM COMMITTEE

REFORMING THE LAW OF WILLS

REPORT UPON
AN INQUIRY INTO
THE 1991 DRAFT WILLS BILL

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LAW REFORM COMMITTEE

MEMBERSHIP

MEMBERSHIP OF THE LAW REFORM COMMITTEE FOR THIS REPORT

- ° Hon James Guest, MLC, Chairman
- ° Mr Neil Cole, MP, Deputy Chair
- ° Dr Robert Dean, MP
- ° Hon Bill Forwood, MLC†
- Mr Peter Loney, MP
- Hon Jean McLean, MLC
- Mr Peter Ryan, MP
- ° Dr Gerard Vaughan, MP
- ° Mr Kim Wells, MP†

° Membership of the Wills Sub-Committee

† Mr Kim Wells served on the Wills Sub-Committee until 7 April 1994
Hon Bill Forwood joined the Wills Sub-Committee on 7 April 1994

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CONTENTS

APPENDICES

FUNCTIONS OF THE COMMITTEE

PARLIAMENTARY COMMITTEES ACT 1968

4E. The functions of the Law Reform Committee are—

(a) to inquire into, consider and report to the Parliament where required or permitted so to do by or under this Act, on any proposal, matter or thing concerned with legal, constitutional or Parliamentary reform or with the administration of justice but excluding any proposal, matter or thing concerned with the joint standing orders of the Parliament or the standing orders of a House of the Parliament or the rules of practice of a House of the Parliament;

(b) to examine, report and make recommendations to the Parliament in respect of any proposal or matter relating to law reform in Victoria where required so to do by or under this Act, in accordance with the terms of reference under which the proposal or matter is referred to the Committee.

TERMS OF REFERENCE

Under the powers found in section 4F (1) (*a*) (ii) of the *Parliamentary Committees Act* 1968, the Governor in Council refers the following matter to the Law Reform Committee:

To enquire into and report to Parliament on the Draft Bill prepared in July 1991 in response to the recommendations of the Wills Working Party and in particular—

(a) the adequacy of the solutions it proposes to problems in the existing law relating to wills;

(b) its effect on wills made before it comes into operation if it is enacted; and

(c) the need for changes to the draft Bill to account for any developments in the law relating to wills since the Bill was prepared.

Under Section 4F (3) of the *Parliamentary Committees Act* 1968, the Governor in Council specifies the last day of the Autumn 1994 Parliamentary session as the date by which the Committee is required to make its final report to the Parliament on the matter.

Victoria Government Gazette, G1, 7 January 1993, page 52 (original terms of reference)
Victoria Government Gazette, G25, 1 July 1993, page 1772 (amendment of reference to Draft Bill)
Victoria Government Gazette, G47, 2 December 1993, page 3240 (extension of time to Autumn 1994 session)

CHAIRMAN'S FOREWORD

Statute law has been relevant to wills, and succession generally, for centuries. Since 1837 it has been of the first importance. The current Victorian *Wills Act* is part of the 1958 consolidation of Victorian statutes, with some later amendments.

The Law Reform Committee was not asked to rewrite the *Wills Act,* but to build on the work begun in 1984 by the Wills Working Party[1] and culminating in the eighth draft in 1991 of a rewritten Wills Act. We have not started afresh with a comprehensive plain English version which removes all trace of antiquated niceties of property and succession law. We have kept to our terms of reference and attempted to bring up to date and improve on the earlier work, which involved elements of modernisation and changes in style as well as the resolution of particular problems. We have also sought to facilitate the national Uniform Succession Law project by avoiding unnecessary departures from formulations most likely to be generally accepted.

Within these constraints the Committee has produced a report which embodies the most comprehensive proposals for reform of the law of wills in Victoria ever published.

The Law of Succession has moved far from the rigidity and complexity of the technical rules which prevailed early in the 19th Century. In retrospect it can be seen as a change towards applying the broad principles of law and policy which have come to govern everyday transactions, while recognising the special factors created by the necessary absence of the testator and the traditional, and persistent, view that a testator's wishes should be upheld. Most changes in the law have been statutory, because courts have been reluctant to risk destabilising settled law or to disregard those special factors The changes recommended by the Committee, none of them

1 See Appendix IV and paragraphs 1.6–8 below.

radical innovations of its own invention, continue that course of development, at the same time relying very strongly on a tradition in our courts which will treat with the most searching scepticism opportunistic evidence which is given in the absence of the testator and which might not be consistent with the testator's real intentions or true obligations.

Where the powers of the Court to effect change have been amplified, reliance on the Courts underlies the Committee's decision not to recommend proof beyond reasonable doubt for dispensing with formalities (s.9), rectification (s.37) or the making of a will for a minor (s.5) or a person who is under a disability (s.5A), and to recommend a slight liberalisation of the use of extrinsic evidence (s.23). Dixon J.'s remarks on the civil standard of proof in *Briginshaw v Briginshaw* quoted at paragraphs s.9.28–29 are presupposed by the Committee.

The modest attitude which the Committee has attempted to maintain, and would recommend to others, when attempting improvements to an old and complex branch of the law, has been encouraged by the history of previous attempts. Not only have common problems resulted in very different answers, some of them productive of new problems, but even the 1991 Eighth Draft Bill, which is part of the Committee's amended terms of reference, contains misconceived departures from both statutory precedent and the Wills Working Party's report for which no explanation of history or logic has been offered.

My task as Chairman responsible for laying a draft report before the committee would have been impossible without the months of careful research, analysis, organisation, writing and editing by successive secretaries, Sturt Glacken in 1993, and Jamie Gardiner in the critical last five months. The Committee has been very grateful for the honorary assistance of its Wills Advisory Group, and for the scholarly and detailed commentary on the 1991 Draft Wills Bill provided by its Consultant, Mr W A Lee.

I give my personal thanks to all the members of the Committee for their constructive participation, especially Robert Dean and Bill Forwood who made detailed notes on a very substantial and demanding manuscript, and also to Rhonda MacMahon, our office manager, who has done whatever has been needed to smooth the work of our Committee.

Hon. James Guest, MLC
Chairman
May 1994

SUMMARY OF RECOMMENDATIONS

SCOPE OF INQUIRY

Recommendation 1

The Committee recommends that the intestacy and family maintenance provisions of the *Administration and Probate Act* 1958 be reviewed.

(Paragraph 1.19—p 6)

DRAFT WILLS BILL 1991—PART 1—PRELIMINARY

S.1—Purpose

Recommendation 2

The Committee recommends that the proposed Wills Act state its purpose to be the reform of the law relating to the making, alteration and revocation of wills, and to make particular provision for—

- the formalities required, and the dispensation of those requirements in appropriate cases
- the making of wills by minors and persons lacking testamentary capacity
- the effects of marriage and divorce on a will
- the construction and rectification of wills.

(Paragraph S.1.1—p 14)

S.3—Definitions

Definition of alteration

Recommendation 3

The Committee recommends that the definition of "alteration" in the 1991 Draft Wills Bill be omitted.

(Paragraph S.3.2—p 15)

Definition of court

Recommendation 4

The Committee recommends that the County Court should have probate jurisdiction within its jurisdictional limits; and that the definition of "Court" in the 1991 Draft Wills Bill be adopted.

(Paragraph S.3.3—p 15)

Definitions of de facto partner and relationship

Recommendation 5

The Committee recommends that the definitions of "de facto partner" and "de facto relationship" in the 1991 Draft Wills Bill be omitted.

(Paragraph S.3.4—p 16)

Definition of disposition

Recommendation 6

The Committee recommends that the 1991 Draft Wills Bill's definition of "disposition" be adopted, with the inclusion of a reference to the meaning of "dispose of", and minor textual changes.

(Paragraph S.3.16—p 19)

Definition of document

Recommendation 7

The Committee recommends that a definition of "document" be included that excludes the possibility that a will may take the form of electronically stored material.

(Paragraph S.3.20—p 20)

Definition of property

Recommendation 8

The Committee recommends that no definition of "property" be included in s.3.

(Paragraph S.3.25—p 22)

DRAFT WILLS BILL 1991—PART 2—FORMAL REQUIREMENTS

Division 1—Capacity to make a will

S.4—What property may be disposed of by will?

Recommendation 9

The Committee recommends that it should be stated in the most general terms that a testator may include in a will any property to which he or she is entitled at death, or which accrues to his or her personal representative after death.

(Paragraph S.4.4—p 24)

Recommendation 10

The Committee recommends that sub-section 4(3) of the 1991 Draft Wills Bill be omitted.

(Paragraph S.4.7—p 25)

Recommendation 11

The Committee recommends that the statute clearly restate the law that a testator cannot by will dispose of property of which he or she is trustee.

(Paragraph S.4.10—p 26)

Draft s.4—What property may be disposed of by will?

Recommendation 12

The Committee recommends—

- that s.4 (What property may be disposed of by will?) should appear in Part 1—Preliminary; and
- that the heading to Part 2 should read "Capacity and Formal Requirements".

(Paragraph S.4.12—p 27)

S.5—Minimum age for making a will

Recommendation 13

The Committee recommends that it should remain the general rule that a minor cannot make a will.

(Paragraph S.5.1—p 27)

Recommendation 14

The Committee recommends—

- that the Supreme Court should have power to approve the making of a will by a minor;
- that the Court should be satisfied of the propriety of the minor's will, as well as of the minor's testamentary desires.

(Paragraph S.5.11—p 30)

Exception in the case of minors who are or who have been married

Recommendation 15

The Committee recommends—

- that married minors ought to be accorded testamentary capacity; and
- that a minor testator who has lost his or her spouse should be able to revoke the will made during marriage, either in whole or in part; but should not otherwise retain testamentary capacity.

(Paragraph S.5.13—p 32)

Draft s.5—Minimum age for making a will

S.5A—Statutory wills for persons lacking testamentary capacity

Recommendation 16

The Committee recommends that the Court be empowered to authorise the making of a will for a person lacking testamentary capacity.

(Paragraph S.5A.6—p 35)

Recommendation 17

The Committee recommends that an application to the Court for the making of a will for a person without testamentary capacity, or the alteration of a will, be able to be made after the death of the person.

(Paragraph S.5A.8—p 35)

On whose behalf should jurisdiction to make a statutory will be exercised?

Recommendation 18

The Committee recommends that the jurisdiction to make a statutory will for a person lacking testamentary capacity should not be confined to adults.

(Paragraph S.5A.25—p 41)

Recommendation 19

The Committee recommends that whether a person is capable of making a will should be considered to be a question of fact and the reason for the incapacity should be irrelevant to the exercise of the jurisdiction to make a statutory will.

(Paragraph S.5A.26—p 41)

Division 2—Executing a will

S.6—How should a will be executed?

Recommendation 20

The Committee recommends, for a will to be valid—

- that the will must be signed by the testator or by some other person in the presence of and at the direction of the testator
- that the signature of the testator must be made with the intention of executing the will
- that there be no requirement that the intention of the testator in signing the will be "apparent from the document"
- that the signature must be made or acknowledged by the testator in the presence of two or more witnesses present at the same time

- that 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)
- that it be made clear that it is not essential that the signature be made "at the foot of" the will.

(Paragraph s.6.15—p 58)

Attestation and attestation clauses

Recommendation 21

The Committee recommends—

- that s.6(2) of the 1991 Draft Wills Bill be omitted;
- that s.6 contain a statement that it is not essential for a will to contain an attestation clause; and
- that solicitors should continue as a matter of correct practice to include attestation clauses in wills.

(Paragraph s.6.22—p 60)

Exercise of powers of appointment by will

Recommendation 22

The Committee recommends that the rule that valid execution of a will validly exercises a power of appointment should not be altered.

(Paragraph s.6.24—p 61)

S.7—Wills of members of the armed forces

Recommendation 23

The Committee recommends—

- that no class of persons should have the status of privileged testators;
- that s.10 of the *Wills Act* 1958 should be repealed; and
- that s.7 of the 1991 Draft Wills Bill be omitted.

(Paragraph s.7.12—p 66)

S.8—Must witnesses know the contents of what they are signing?

Recommendation 24

The Committee recommends that no change be made to the rule that a witness need not know the instrument signed is a will, and that s.8 of the 1991 Draft Wills Bill be adopted.

(Paragraph S.8.2—p 66)

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

Recommendation 25

The Committee recommends that—

- there should be a dispensing power;
- the standard of proof should be the civil standard;
- the Registrar should be able to deal with cases where the parties consent, or cases involving small estates; and
- the Registrar's power should be governed by Rules of Court, for which the *Wills Act* should make provision.

(Paragraph S.9.34—p 78)

S.10—What persons cannot act as witnesses to wills

Recommendation 26

The Committee recommends making it clear that anyone may witness a will, other than a person who is unable to see and attest its signing; but that the words "in his or her presence" which appear in the 1991 Draft Wills Bill be omitted.

(Paragraph S.10.6—p 81)

S.11—Can an interested witness benefit from a disposition under a will?

Recommendation 27

The Committee recommends that the interested witness rule be abolished.

(Paragraph S.11.25—p 93)

Recommendation 27.1

The Committee recommends that, if the interested witness rule is not abolished, it be restricted to the witness alone, and the disqualification of the spouse be removed.

(Paragraph S.11.26.4—p 94)

Recommendation 27.2

The Committee recommends, if the interested witness rule is not abolished, removing the provision which enables a witness to take either the disposition or a hypothetical intestacy benefit, whichever is of the less value.

(Paragraph S.11.26.9—p 96)

Recommendation 27.3

The Committee recommends, if the interested witness rule is not abolished, repealing Part V of the *Administration and Probate Act* 1958 and inserting in s.11(2)(c) an abridged version of s.13(2)(c) of the New South Wales Act.

(Paragraph S.11.26.13—p 97)

S.12—What is the effect of marriage on a will?

Recommendation 28

The Committee recommends that a disposition to the person to whom the testator is married at the time of the testator's death not be revoked by the marriage to that person.

(Paragraph S.12.15—p 102)

Recommendation 29

The Committee recommends that appointments of the person to whom the testator is married at the time of the testator's death as trustee, guardian &c not be revoked by the marriage to that person.

(Paragraph S.12.16—p 103)

S.13—How may a will be revoked?

Recommendation 30

The Committee recommends that the dispensing power apply to acts of revocation, that a statutory will be able to effect revocation, and that otherwise the law relating to revocation remain unchanged.

(Paragraph S.13.1—p 107)

S.14—What is the effect of divorce on a will?

Recommendation 31

The Committee recommends that divorce should effect a partial revocation of a will, with dispositions to the former spouse treated as if he or she had predeceased the testator, the rest of the will to remain on foot.

(Paragraph S.14.10—p 110)

Recommendation 32

The Committee recommends that the revocation of dispositions to the former spouse not apply to the exercise by the spouse of a power of appointment in favour of the spouse's children, where the power is not exercisable in favour of any persons other than those children, and that the drafting be clarified accordingly.

(Paragraph S.14.11—p 111)

S.15—Can a will be altered?

Recommendation 33

The Committee recommends that the dispensing power apply to the alteration of wills, that a statutory will be able to effect an alteration, and that otherwise the law relating to alteration remain unchanged.

(Paragraph S.15.1—p 117)

S.16—Can a revoked will be revived?

Recommendation 34

The Committee recommends that there be no change to the law relating to the revival of revoked wills or parts of wills, and that the revised draft of s.16 be adopted, subject to reconsideration by Parliamentary Counsel of sub-section (3).

(Paragraph S.16.4—p 119)

Division 6—Wills to which foreign laws apply.

Recommendation 35

The Committee recommends that there be no change to the law as to the applicability of foreign law to the execution of wills, and that s.17 of the 1991 Draft Wills Bill be adopted, but that in s.17(2) the opening words should read: "The following wills are also to be taken to be properly executed."

(Paragraph S.17.8 – p 121)

Recommendation 36

The Committee recommends that there be no change to the law as to the determination of the system of law applicable to a will, nor to the law as to the construction of that law, and that ss 18 and 19 of the 1991 Draft Wills Bill be adopted.

(Paragraph S.18.1 – p 123)

DRAFT WILLS BILL 1991—PART 3—CONSTRUCTION OF WILLS

Recommendation 37

The Committee recommends that Parliamentary Counsel give consideration to including a single all-embracing "contrary intention" provision rather than repeating such a provision throughout Part 3 of the Act.

(Paragraph S.20.1 – p 124)

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

Recommendation 38

The Committee recommends that it continue to be the law that a will disposing of property disposes of whatever interest the testator has in that property at death, and that s.20 of the 1991 Draft Wills Bill be adopted.

(Paragraph S.20.4 – p 125)

S.21—When does a will take effect?

Recommendation 39

The Committee recommends that, as in s.21 of the Draft Wills Bill 1991, it should continue to be the law that 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.

(Paragraph S.21.1—p 126)

Recommendation 40

The Committee recommends that sub-section 21(3) of the 1991 Draft Wills Bill be omitted.

(Paragraph S.21.2—p 126)

S.22—What is the effect of the failure of a disposition?

Recommendation 41

The Committee recommends, as in the 1991 Draft Wills Bill, that there be no change in the law which provides that a failed disposition, other than the exercise of a power of appointment, should form part of the residuary estate unless the will otherwise provides.

(Paragraph S.22.2—p 127)

Recommendation 42

The Committee recommends that the law relating to powers of appointment that allow the donee of the power to appoint to himself or his legal personal representatives be reviewed in the context of a review of the *Administration and Probate Act* 1958 or the *Property Law Act* 1958.

(Paragraph S.22.8—p 128)

S.23—Is extrinsic evidence admissible to clarify a will?

Recommendation 43

The Committee recommends that the common law rules as to the admissibility of extrinsic evidence in the construction of a will be liberalised, and that the narrower effect of s.21 of the English *Administration of Justice Act* 1982 should be preferred to that of s.23 of the 1991 Draft Wills Bill.

(Paragraph S.23.13—p 132)

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

Recommendation 44

The Committee recommends that it continue to be the law that the construction of a will is not altered by a change in the testator's domicile, and that the word order of s.20D of the *Wills Act* 1958 is to be preferred to s.24 of the 1991 Draft Wills Bill.

(Paragraph S.24.4 — p 134)

S.25—Income on contingent and future dispositions

Recommendation 45

The Committee recommends that there should be no change to the rule that contingent and future dispositions carry the intermediate income, that this rule should also apply to deferred dispositions, and that s.25 of the 1991 Draft Wills Bill be adopted.

(Paragraph S.25.6 — p 135)

S.26—Beneficiaries must survive testator by thirty days

Recommendation 46

The Committee recommends that in the absence of a contrary intention in the will the death of a beneficiary within 30 days of the testator's death should give the will the effect it would have had had that beneficiary predeceased the testator, and that s.26 of the 1991 Draft Wills Bill, with redundant words omitted and a grammatical change in sub-section (3), be adopted.

(Paragraph S.26.13 — p 139)

S.27—What does a general disposition of land include?

Recommendation 47

The Committee recommends that a general disposition of land should continue to include both leasehold and freehold land unless the will indicates otherwise, and that s.27 of the 1991 Draft Wills Bill be adopted.

(Paragraph S.27.3 — p 140)

S.28—What does a general disposition of property include?

Recommendation 48

The Committee recommends—

- that a general disposition of property should continue to include property the subject of a general power of appointment (whether the power arises before or after the date of the will) and to operate as an exercise of the power,
- that the same rule should apply to a gift of residue,
- that the rule apply to property by "description" rather than by "kind",
- that the rule should cover property the subject of a power arising after the date of the will, and
- that s.28 of the 1991 Draft Wills Bill , with these amendments, be adopted.

(Paragraph S.28.2—p 141)

S.29—What interest in real property does a disposition without limitation apply to?

Recommendation 49

The Committee recommends that it continue to be the law that words of limitation are not required to pass the whole of the testator's interest in real property, and that s.29 of the 1991 Draft Wills Bill be adopted, with a change of heading to read: "What is the effect of a devise of real property without words of limitation?".

(Paragraph S.29.2—p 143)

S.30—How are dispositions to issue to operate?

Recommendation 50

The Committee recommends that the law should ensure that a disposition of property amongst issue of the testator is (unless otherwise intended in the will) distributed to them in the same way as if the testator had died intestate leaving only issue surviving, and that s.30 of the 1991 Draft Wills Bill as modified be adopted.

(Paragraph S.30.5—p 144)

S.31—How are requirements to survive with issue construed?

Recommendation 51

The Committee recommends that the current law as to the construction of a reference to want or failure of issue not be changed, and that s.31 of the 1991 Draft Wills Bill, with the omission of redundant words, be adopted.

(Paragraph S.31.1—p 145)

S.32—Dispositions not to fail because issue have died before testator

Recommendation 52

The Committee recommends that the statutory substitutional provision should ensure that the substituted issue take the disposition in the same shares as if there were an intestacy.

(Paragraph S.32.4—p 147)

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.

(Paragraph S.32.6—p 147)

Recommendation 54

The Committee recommends that s.32(4) of the 1991 Draft Wills Bill be redrafted, following the Queensland provision, so as to ensure that, for issue not to take, a contrary intention must be in more than general words.

(Paragraph S.32.11—p 149)

S.33—Construction of residuary dispositions

Recommendation 55

The Committee recommends, as in the 1991 Draft Wills Bill, that a disposition of residue which does not differentiate between realty and personalty should be construed as including both, although only one of these categories is mentioned.

(Paragraph S.33.5—p 152)

Recommendation 56

The Committee recommends that, where there is a partial failure of a disposition in fractional parts, the statute should provide, as in the 1991 Draft Wills Bill, for a substitutional gift to give effect to a residuary intention and to prevent a presumably unintended partial intestacy.

(Paragraph S.33.7—p 152)

Recommendation 57

The Committee recommends that, where there is a partial failure of a disposition expressed in fractional parts, the statutory substitutional gift apply not only to a fractional disposition of the residue, as in the 1991 Draft Wills Bill, but also to a fractional disposition of the whole estate.

(Paragraph S.33.10—p 153)

S.34—Dispositions to unincorporated associations of persons

Recommendation 58

The Committee recommends that the law should facilitate the giving of effect to a testator's desire to make a gift to an unincorporated association, and that s.34 of the 1991 Draft Wills Bill be adopted, with the addition in sub-section (5) of the words "or that the members of the association have no power to divide assets of the association beneficially amongst themselves".

(Paragraph S.34.12—p 157)

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

Recommendation 59

The Committee recommends that a testator should be able by will to create a power or trust to dispose of property if the same power or trust would be valid if made by the testator by instrument during his or her lifetime, and that s.35 of the 1991 Draft Wills Bill be adopted.

(Paragraph S.35.4—p 159)

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

Recommendation 60

The Committee recommends that, unless a law of Victoria or another jurisdiction requires some other method, or the will otherwise provides, an express or implied reference in a will to a valuation is to be taken as referring to a valuation made by a competent valuer, and that the time of valuation is as at the testator's death.

(Paragraph S.36.3—p 160)

S.37—Can a will be rectified?

Recommendation 61

The Committee recommends that the Court be given jurisdiction to rectify a will where it is satisfied that the will does not carry out the testator's intentions because of a clerical error or an error by the solicitor or other person preparing the document in carrying out the testator's instructions.

(Paragraph S.37.11—p 164)

Distribution before rectification

Recommendation 62

The Committee recommends that the personal representative not be protected against liability for making distributions from the estate (other than maintenance distributions) until six months after the taking out of representation, rather than the 30 days after the death provided for in the 1991 Draft Wills Bill; and that the provision in sub-section 37(5) preventing recovery from a beneficiary not be proceeded with; and that, with these amendments, s.37 of the 1991 Draft Wills Bill be adopted.

(Paragraph S.37.17—p 165)

S.38—Transitional provisions

Recommendation 63

The Committee recommends that sections 9 (dispensing power), 13 (divorce), 23 (extrinsic evidence), 34 (dispositions to unincorporated associations), 35 (delegation) and 37 (rectification) be given effect with respect to wills made before the commencement of the Act (where the death occurs after the commencement of the Act).

(Paragraph S.38.2—p 167)

Recommendation 64

The Committee recommends that sections 6 (formalities), 15 (alteration), 25 (income on deferred dispositions) and 33 (residuary dispositions) be given effect with respect to wills made before the commencement of the Act (where the death occurs after the commencement of the Act).

(Paragraph S.38.4—p 168)

Recommendation 65

The Committee recommends that s.11 (abolition of interested witness rule) be given effect with respect to wills made before the commencement of the Act (where the death occurs after the commencement of the Act).

(Paragraph S.38.8—p 169)

Recommendation 66

The Committee recommends that sections 4 (property disposable), 8 (witnesses' need to know), 10 (who can witness), 12 (effect of marriage), 16 (revival), 20–22 (construction), 24 (change of domicile), 27–29 (construction of references to land and real property) and 36 (valuation) be given effect with respect to wills made before the commencement of the Act (where the death occurs after the commencement of the Act).

(Paragraph S.38.9—p 170)

S.39—Consequential amendments to the Administration and Probate Act *1958*

Recommendation 67

The Committee recommends

- that distributions may be made for the maintenance, support or education of a spouse or child whose entitlement under a will does not become absolute until 30 days after the testator's death,
- that the personal representative not be liable for such distributions made in good faith, even if a rectification or family provision action is known to be pending,
- that if the person to whom such distribution is made does not survive the testator by 30 days it be treated as an administration expense, as in s.49(3) of the Queensland *Succession Act* 1981, but only to the extent that it cannot be recovered from the person's estate, and

- that, with the addition of a provision to this latter effect, the insertion of the proposed s.99B of the *Administration and Probate Act* 1958 by s.39 of the 1991 Draft Wills Bill be adopted.

(Paragraph S.39.4—p 172)

Duty to produce will—A further amendment

Recommendation 68

The Committee recommends that persons having possession or control of a purported will of a deceased testator be required to produce it in certain cases, and that the proposed s.66A be adopted for insertion in the *Administration and Probate Act* 1958.

(Paragraph S.39.10—p 175)

S.40—Amendment to Property Law Act *1958*

Recommendation 69

The Committee recommends that s.40 of the 1991 Draft Wills Bill should not be proceeded with.

(Paragraph S.40.6—p 177)

RECOMMENDATION: WILLS ACT 1994

The Committee's policy recommendations set out in the preceding section are implemented in a final recommendation, gathering together all the individual sections proposed in the body of the report.

Recommendation 70

The Committee recommends the repeal of the *Wills Act* 1958 and the substitution of the following Act, subject to the consideration of Parliamentary Counsel in the light of the foregoing recommendations and the Committee's reasoning as set out in this report.

PART 1—PRELIMINARY

1. *Purpose*

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.

2. *Commencement*

This Act comes into operation on a day to be proclaimed.[2]

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

3. *Definitions*

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.

4. *What property may be disposed of by will?*

(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.

PART 2—CAPACITY AND FORMAL REQUIREMENTS

Division 1—Capacity to make a will

5. *Minimum age for making a will*

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

(2) Despite sub-section (1)—

(a) a minor may make a will in contemplation of marriage (and may alter or revoke such a will) but the will is of no effect if the marriage contemplated does not take place;

(b) a minor who is married may make, alter or revoke a will;

(c) a minor who has been married may revoke the whole or a part of a will made whilst the minor was married or in contemplation of that marriage.

(3) The Court may, on application by or on behalf of a minor, make an order authorising the minor to make or alter a will in specific terms approved by the Court, or to revoke a will or a part of a will.

(4) An authorisation under this section may be granted on such conditions as the Court thinks fit.

(5) Before making an order under this section, the Court must be satisfied that—

(a) the minor understands the nature and effect of the proposed will, alteration or revocation and the extent of the property disposed of by it; and

(b) the proposed will, alteration or revocation accurately reflects the intentions of the minor; and

(c) it is reasonable in all the circumstances that the order should be made.

(6) A will or instrument making or altering a will made pursuant to an order under this section—

(a) must be executed as required by law and one of the attesting witnesses must be the Registrar; and

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

6. *Wills for persons without testamentary capacity*[3]

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

(2) The Court is not bound to authorise the making of an entire will for the person who lacks testamentary capacity: it may authorise the making of a particular, specific testamentary provision.

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

Leave of Court

(4) The leave of the Court must be obtained before the application for an order is made.

(5) The Court must refuse to give leave if it is not satisfied that:

(a) there is reason to believe that the person for whom the statutory will is to be made under the order is or may be incapable of making a will; or

(b) the proposed will, alteration of a will, or revocation of a will, is or might be one which would have been made by the person if he or she had testamentary capacity; or

(c) it is or may be appropriate for a statutory will to be made for the person; or

(d) the applicant is an appropriate person to make an application; or

(e) adequate steps have been taken to allow representation of all persons with a legitimate interest in the application, including persons who have reason to expect a gift or benefit from the estate of the person for whom the statutory will is to be made.

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

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.

Division 2—Executing a will

7. *How should a will be executed?*[4]

(1) A will is not valid unless—

(a) it is in writing and signed by the testator or by some other person in the presence of and at the direction of the testator; and

(b) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and

(c) at least two of those witnesses attest and sign the will in the presence of the testator (but not necessarily in the presence of each other).

(2) The signature of the testator must be made with the intention of executing the will; but it is not essential that the signature be made at the foot of the will.

(3) It is not essential for a will to have an attestation clause.

(4) Where a testator purports to make an appointment by his or her will in the exercise of a power of appointment by will, the appointment is not valid unless the will is executed in accordance with this section.

(5) Where a power is conferred on a person to make an appointment by a will that is to be executed in some particular manner or with some particular solemnity, the person may exercise the power by a will that is executed in accordance with this section, but is not executed in that manner or with that solemnity.

8. *Must witnesses know the contents of what they are signing?*

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

9. *When may a Court dispense with the requirements for execution of wills?*

(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.

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4 See previous note. This section corresponds to s.6 of the 1991 Draft Wills Bill.

(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.

10. *What persons 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.

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

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

12. *What is the effect of marriage on a will?*

(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.

13. *What is the effect of divorce on a will?*[5]

(1) Termination of the marriage or the annulment of the marriage of a testator revokes—

(a) any disposition by the testator in favour of his or her spouse other than a power of appointment exercisable by the spouse exclusively in favour of the spouse's children; and

(b) any appointment made by the testator of his or her spouse as executor, trustee, advisory trustee or guardian other than an appointment of the spouse as guardian of the spouse's children, or as trustee of property left by the will to trustees upon trust for beneficiaries including the spouse's children

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

(2) If a disposition or appointment is revoked by sub-section (1), that disposition or appointment takes effect as if the spouse had predeceased the testator.

(3) For the purposes of this section, the termination or annulment of a marriage occurs, or shall be taken to occur—

(a) when a decree of dissolution of the marriage pursuant to the *Family Law Act* becomes absolute; or

(b) on the making of a decree of nullity pursuant to the *Family Law Act* in respect of a purported marriage which is void; or

(c) on the termination or annulment of the marriage, in accordance with the law of a place outside Australia if the termination or annulment is recognised in Australia in accordance with the *Family Law Act*.

(4) In this section—

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

"**spouse**", in relation to a testator, means the person who, immediately before the termination of the testator's marriage, was the testator's spouse, or, in the case of a

5 As explained in the report at paragraph S.13.2 and S.14.26, this section corresponds to s.14 of the 1991 Draft Wills Bill.

purported marriage of the testator which is void, was the other party to the purported marriage.

14. *How may a will be revoked?*[6]

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

(a) under section 5, 6 or 9 or by the operation of section 12 or 13; or

(b) by a later will; or

(c) by some writing declaring an intention to revoke it, executed in the manner in which a will is required to be executed by this Act; or

(d) by the testator, or some person in his or her presence and by his or her direction, burning, tearing or otherwise destroying it with the intention of revoking it.

15. *Can a will 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 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.

16. *Can a revoked will be revived?*

(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.

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6 As explained in the report at paragraph S.13.2, this section corresponds to s.13 of the 1991 Draft Wills Bill.

(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.

Division 6—Wills to which foreign laws apply.

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.

PART 3—CONSTRUCTION OF WILLS

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

If—

(a) a testator has made a will disposing of property; and

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

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

21. *When does a will take effect?*

(1) A will takes effect, with respect to the property disposed of by the will, as if it had been executed immediately before the death of the testator.

(2) Sub-section (1) does not apply if a contrary intention is shown in the will.

22. *What is the effect of a failure of a disposition?*

(1) If any disposition of property, other than the exercise of a power of appointment, is ineffective, the will takes effect as if the property were part of the residuary estate of the testator.

(2) Sub-section (1) does not apply if a contrary intention is shown in the will.

23. *Is extrinsic evidence admissible to clarify a will?*

(1) If—

(a) any part of a will is meaningless; or

(b) any of the language used in a will is ambiguous on the face of it; or

(c) evidence, which is not, or to the extent that it is not, evidence of the testator's intention, shows that any of the language used in a will is ambiguous in the light of surrounding circumstances—

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

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

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

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

25. *Income on contingent and future dispositions*

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

26. *Beneficiaries must survive testator by 30 days*

(1) If a disposition is made to a person who dies within 30 days after the death of the testator, the will is to take effect as if the person had died before the testator.

(2) Sub-section (1) does not apply if a contrary intention appears in the will.

(3) A general requirement or condition that a beneficiary survive the testator does not indicate a contrary intention for the purpose of this section.

27. *What does a general disposition of land include?*

(1) A general disposition of land or of the land in a particular area includes leasehold land whether or not the testator owns freehold land.

(2) Sub-section (1) does not apply if a contrary intention appears in the will.

28. *What does a general disposition of property include?*

(1) A general disposition of all or the residue of the testator's property, or of all or the residue of his or her property of a particular description, includes all the property of the relevant description over which he or she has a general power of appointment exercisable by will and operates as an exercise of the power.

(2) Sub-section (1) does not apply if a contrary intention appears in the will.

29. *What is the effect of a devise of real property without words of limitation?*

(1) A disposition of real property to a person without words of limitation is to be construed as passing the whole estate or interest of the testator in that property to that person.

(2) Sub-section (1) does not apply if a contrary intention appears in the will.

30. *How are dispositions to issue to operate?*

(1) A disposition to a person's issue without limitation as to remoteness must be distributed to that person's issue in the same way as if that person had died intestate leaving only issue surviving.

(2) Sub-section (1) does not apply if a contrary intention appears in the will.

31. *How are requirements to survive with issue construed?*

(1) If there is a disposition to a person in a will which is expressed to fail if there is either—

(a) a want or a failure of issue of that person either in his or her lifetime or at his or her death; or

(b) an indefinite failure of issue of that person—

those words must be construed to mean a want or failure of issue in the person's lifetime or at the person's death and not an indefinite failure of his or her issue.

(2) Sub-section (1) does not apply if a contrary intention appears in the will.

32. *Dispositions not to fail because issue have died before the testator*

(1) If a person makes a disposition to any of his or her issue, where the disposition is not a disposition to which section 30 applies, and where the interest in the property disposed is not determinable at or before the death of the issue, and the issue does not survive the testator for thirty days, the issue of that issue who survive the testator for thirty days take that disposition in the shares they would have taken of the residuary estate of the testator if the testator had died intestate leaving only issue surviving.

(2) Sub-section (1) applies so that issue who attain the age of 18 years or who marry take in the shares they would have taken if issue who neither attain the age of 18 years nor marry under that age had predeceased the testator.

(3) Sub-section (1) applies to dispositions to issue either as individuals or as members of a class.

(4) This section is subject to any contrary intention appearing in the will; but a general requirement or condition that issue survive the testator or attain a specified age is not a contrary intention for the purpose of this section.

33. *Construction of residuary dispositions*

(1) A disposition of the whole or of the residue of the estate of a testator which refers only to the real estate of the testator or only to the personal estate of the testator is to be construed to include both the real and personal estate of the testator.

(2) If any part of a disposition in fractional parts of the whole or of the residue of the estate of a testator fails, the part that fails passes to the part which does not fail, and, if there is more than one part which does not fail, to all those parts proportionately.

(3) This section does not apply if a contrary intention appears in the will.

34. *Dispositions to unincorporated associations of persons*

(1) A disposition—

(a) to an unincorporated association of persons, which is not a charity; or

(b) to or upon trust for the aims, objects or purposes 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.

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

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

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

Except to the extent that a method of valuation is at the relevant time required under a law 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.

37. *Can a will be rectified?*

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

(a) a clerical error was made; or

(b) the will does not give effect to the testator's instructions.

(2) A person who wishes to claim the benefit of sub-section (1) must apply to the Court within six months from the date of the grant of probate.

(3) The Court may extend the period of time for making the application if the Court thinks this is necessary, even if the original period of time has expired, but not if the final distribution of the estate has been made.

(4) If a personal representative makes a distribution to a beneficiary, the personal representative is not liable if—

(a) the distribution has been made under section 99B of the *Administration and Probate Act* 1958; or

(b) the distribution has been made—

(i) at a time when the personal representative has not been aware of any application for rectification or any application under Part IV of the *Administration and Probate Act* 1958 having been made; and

(ii) at least six months after the grant of probate.

PART 4—TRANSITIONAL AND CONSEQUENTIAL PROVISIONS

38. *Transitional provisions*

(1) This Act, other than section 13 and the sections specified in sub-section (4), applies only to wills made on or after the commencement of the Act.

(2) The **Wills Act 1958,** as in force immediately before the commencement of this Act, continues to apply to wills made before the commencement of this Act, in so far as those wills do not come under the operation of sub-section (3) or under the operation of the sections specified in sub-section (4).

(3) Section 13 applies to a will made 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 has taken place after the commencement of this Act.

(4) Sections 4, 7, 8, 9, 10, 11, 12, 14, 15, 16, 20, 21, 22, 23, 24, 25, 27, 28, 29, 33, 34, 35, 36 and 37 apply to wills whether or not they are executed before, on or after the commencement of this Act, where the testator dies on or after that commencement.

39. *Consequential and further amendments to the* Administration and Probate Act *1958*

(1) In section 99A of the *Administration and Probate Act* 1958—

(a) in sub-section (1), after "Part" insert "or under section 37 of the *Wills Act* 1994"; and

(b) in sub-section (2), after "Part" insert "or under section 37 of the *Wills Act* 1994"; and

(c) in sub-section (3), after "Part" insert "or under section 37 of the *Wills Act* 1994"; and

(d) in sub-section (4), after "Part" insert "or under section 37 of the *Wills Act* 1994".

(2) After section 99A of the *Administration and Probate Act* 1958 insert—

"99B. *Personal representatives may make maintenance distributions within 30 days*

(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.".

(3) After section 66 of the *Administration and Probate Act* 1958 insert—

"66A—*Who may see a will?*

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

(a) produce it in Court if required to do so;

(b) allow the following persons to inspect and, at their own expense, take copies of it, namely—

(i) any person named or referred to in it, whether as beneficiary or not;

(ii) the surviving spouse, any parent or guardian and any issue of the testator;

(iii) any person who would be entitled to a share of the estate of the testator if the testator had died intestate; and

(iv) any creditor or other person having any claim at law or in equity against the estate of the deceased.".

(4) Part V of the *Administration and Probate Act* 1958 is repealed.

PART V—REPEAL OF THE *WILLS ACT* 1958.

40. *Repeal of the* Wills Act *1958*

The *Wills Act* 1958 is repealed.

1. INTRODUCTION

1.1 This report concerns the law of wills.[7] It reviews some previous work in Victoria ten years ago, and more recent reports and legislation in other States and Territories. In it the Committee presents a detailed discussion of contemporary and historical aspects of the law, with proposals for reform. Some of these proposals confirm the recommendations of previous reports, others vary or add to them.

1.2 This chapter sets out the nature, method and background of the inquiry, and explains the development of the Terms of Reference. It concludes with an outline of succession law and the history of the *Wills Act* 1958. The following chapter works sequentially through the sections of the 1991 Draft Wills Bill, noting also the corresponding section of the *Wills Act* 1958 as currently in force. The discussion of each section contains recommendations of a policy nature, and concludes with the text of the proposed draft of the section, modified or not as the case may be. In some cases the draft is followed by some brief comments on the drafting, not of a policy nature.

1.3 A summary of the Committee's recommendations together with its recommended Bill for a *Wills Act* 1994 appear on coloured paper at the front of the report.

1.4 For the reader's convenience the principal documents referred to in this report, the 1991 Draft Wills Bill and the *Wills Act* 1958, are included on coloured paper as Appendices I and II. The Report of the Wills Working Party, which was reproduced in the Committee's Interim Report of April 1993, is repeated here in Appendix IV.

BACKGROUND

1.5 The terms of reference require the Committee to consider the provisions of a Draft Wills Bill designed to restate and reform the provisions of the *Wills Act* 1958.

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7 A brief outline of Succession Law and the *Wills Act* 1958 is set out at paragraphs 1.28–37.

1.6 The Committee understands that the eighth and final draft of that bill was prepared in July 1991 by Parliamentary Counsel on instruction of the then Attorney General in response to recommendations made by the Wills Working Party in its Interim Report of 1984, which was adopted in 1986 without amendment as its Final Report. In some respects the provisions of the bill depart from those recommendations.

1.7 The terms of reference originally referred to the 1991 bill as having been drafted by the Wills Working Party in 1990, which was not correct. At the Committee's suggestion the terms of reference were clarified on 1 July 1993.

1.8 The Committee understands that after the presentation of the Wills Working Party's Report to the then Attorney General, no further publication of the Report took place, nor was there any formal consultation about its recommendations. The members of the Wills Working Party put considerable effort into the compilation of their Report. It is important that proper recognition be given to their work. For that reason, and to aid the Committee's inquiry, the Committee tabled the Working Party's Report and the 1991 Draft Wills Bill as an appendix to its Interim Report made to Parliament in April 1993; as noted above, they are also annexed to the present report.

1.9 Members of Parliament and others were invited to circulate these documents in order to encourage submissions to the Committee.

TERMS OF REFERENCE

1.10 The terms of reference require the Committee to examine the provisions of the Draft Bill of July 1991 with a view to ascertaining:

(a) the adequacy of the solutions it proposes to problems in the existing law relating to wills;

(b) its effect on wills made or executed before it comes into operation, if it is enacted;

(c) the need for changes to the 1991 Draft Bill to account for any developments in the law relating to wills since it was prepared.

The issues raised by the terms of reference are discussed below.

A Problems in the Existing Law Relating to Wills

1.11 The Committee has considered in particular whether the provisions of the 1991 Draft Bill provide adequate solutions to the following problems.

Formal Requirements

1.11.1 The rules relating to the witnessing and signing of a valid will were developed in order to minimise the risk of any fraud taking place. It has become clear, however, that it is possible to relax the stringency of those formal requirements while still preserving that policy objective. The Committee has considered how these formal requirements can be relaxed without increasing the risk of fraud.

Dispensing Power

1.11.2 Where a will fails to comply with the formal requirements needed for its witnessing and signing the Court may decide that the will is invalid and inoperative. Thus, in some cases, the true intentions of a deceased person are defeated for what can often be seen as merely technical deficiencies to do with the drafting and execution of the relevant document. In other Australian States, two models have been developed to overcome such problems. In Queensland the Court can hold that a will is valid if it is satisfied that there has been "substantial compliance" with the formal requirements. In New South Wales, Western Australia, South Australia and the Northern Territory, the Court can hold that a will is valid notwithstanding non-compliance with the formal requirements, if it is satisfied, at varying standards of proof, that the relevant document truly reflects the testamentary intentions of the deceased person. The Committee has therefore considered which model ought to be followed in Victoria and what the relevant standard of proof should be, if the Court is to be empowered to dispense with any formal requirement.

Rectification

1.11.3 At present the ability of the Court to rectify any technical drafting deficiencies in a will is severely circumscribed. The question therefore arises whether the Court's powers to rectify technical deficiencies in wills should be broadened and, if so, to what extent.

Interested Witnesses

1.11.4 Under the present law in Victoria, a person who, or whose spouse, witnesses a will and stands to gain some benefit under the will, no matter how small, may lose that benefit. The rule established by the *Wills Act* 1958 is modified by the provisions of Part V of the *Administration and Probate Act* 1958 which allow interested witness–beneficiaries to apply to the Court to be granted a benefit from the estate of the deceased person. The Committee has considered carefully whether the rule as to interested witnesses should be retained, abolished or otherwise modified.

Marriage and Divorce

1.11.5 The *Wills Act* 1958 provides that no alteration in a will shall be presumed from an alteration in the testator's circumstances. It also provides that the significant alteration in circumstances occasioned by marriage *does* have an effect on a will. The Committee has considered the adequacy of the 1991 Draft Wills Bill's provisions as to the effect of marriage.

1.11.6 Divorce, a similarly significant alteration in circumstances, has had until very recently no such effect in Victoria.[8] The Committee has considered whether, upon divorce taking place, a will which confers benefits upon the former spouse should, in the absence of any contrary intention, be revoked automatically. In particular, the Committee has considered whether such revocation should be total, in the sense that the will is no longer valid, or alternatively partial, in the sense that the will is invalid only to the extent that it purports to confer benefits upon the former spouse.

Statutory Wills

1.11.7 A will may only be made by a person who is capable of understanding the nature and effect of the act of executing a will. Whether provision ought be made to enable persons suffering mental disability to have wills made for them has been canvassed by the Chief Justice's Law Reform Committee in 1985 and more recently by the New South Wales Law Reform Commission. This issue was not dealt with by the 1984 Wills Working Party nor by the provisions of the 1991 Draft Wills Bill, but is one which the Committee considers worthy of resolution.

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8 For the text of s.16A of the *Wills Act* 1958, inserted by the *Administration and Probate (Amendment) Act* 1994 as this Inquiry was concluding, see Appendix III.

1.12 There are, of course, other issues which the Committee has considered in the context of the provisions of the 1991 Bill, but the ones highlighted above were, from the beginning, the major issues requiring the Committee's attention.

B Transitional Provisions

1.13 The terms of reference specifically require the Committee to consider the effect of the proposed changes on wills made before the changes commence.

1.14 Clause 38 of the 1991 Draft Wills Bill provides that with some exceptions the changes to be made will only apply to wills made or executed after the commencement of those changes. The provisions relating to the dispensing power, revocation on divorce, the admissibility of extrinsic evidence, disposition of certain kinds of property and the rectification of wills, however, are to take effect immediately. These changes will thus act retrospectively, and apply to wills made before their commencement. The Committee has considered carefully which of the proposed reforms should have such an effect.

C Recent Developments in the Law Relating to Wills

1.15 One of the major issues that the Committee has been concerned with under this part of the terms of reference concerns the experience in other Australian States as to the operation of the Court's power to dispense with the formalities required for the execution of wills. In particular, since the Wills Working Party did its work, other States have examined this issue and made or plan to make reforms. The Committee has therefore looked at the experience of other States.

1.16 The Committee has also examined other developments, in particular the work being carried out on Uniform Succession Laws under the auspices of the Queensland Law Reform Commission. This involves an examination of the rules of intestacy (the distribution of the estate of a deceased person who fails to make a will), family provision legislation (dealing with claims on the estate by certain persons not named in a will, or not adequately provided for), and rules relating to the making of wills.

RELATED ISSUES: SCOPE OF INQUIRY

1.17 It became apparent to the Committee that it was anomalous to proceed with a rewrite of the *Wills Act* 1958 without making significant amendments to various

provisions of the *Administration and Probate Act* 1958. Some of those provisions come within the scope of the Committee's inquiry by virtue of provisions of the 1991 Draft Wills Bill that seek to amend sections of the *Administration and Probate Act* 1958.

1.18 Accordingly, the Committee was concerned whether it was appropriate to proceed with a rewrite of the *Wills Act* 1958 without, at the same time, addressing the need for substantial amendment to the *Administration and Probate Act* 1958 to take place, given the overlap between the two pieces of legislation. An example of the interaction between the two Acts concerns the position of interested witness–beneficiaries, as mentioned above.

1.19 There have been significant reforms in other States concerning intestacy and family provision which have not, as yet, been picked up in Victoria. Family provision legislation, which is found in Part IV of the *Administration and Probate Act* 1958, has the practical effect of giving the Court jurisdiction to rewrite a will, in that it empowers the Court to make provision out of the testator's estate in ways other than those intended by the testator. The Committee considers that these reforms in other States are important "developments in the law relating to wills", in the language of the Committee's terms of reference, but is of the view that while the Victorian provisions should be reviewed in the light of such developments they do not fall within the scope of the current inquiry.

Recommendation 1

The Committee recommends that the intestacy and family maintenance provisions of the *Administration and Probate Act* 1958 be reviewed.

INQUIRY PROGRAM

1.20 The starting point for the Committee's inquiry is the 1984 Report of the Wills Working Party. The Working Party's report can be treated, in effect, as an Explanatory Memorandum to the changes proposed to the *Wills Act* 1958 in the 1991 Draft Wills Bill, notwithstanding that it departs in some respects from the Report.

1.21 The Committee was pleased with the initial interest shown in the inquiry, particularly from members of the legal profession, largely in response to advertisements in the daily press in February 1993.

Interim Report

1.22 The Committee tabled an Interim Report, *Progress and Future Directions*, in April 1993. This report covered the establishment of the Committee, and its three inquiries, of which the present inquiry into the law relating to wills was one. It set out some background to the inquiry and the issues the Committee expected to consider; the background in the paragraphs above is drawn from this material.

1.23 As noted above, the interim report reproduced the 1984 Report of the Wills Working Party, and the Draft Wills Bill of 29 July 1991. These are again included in the present report at Appendix I (the Bill) and Appendix V (the Report).

Method of Inquiry

1.24 The Committee sought input into its deliberations in three ways, in addition to the contributions of its staff.

1.25 Submissions and evidence from the public, including experts in the field, are the staple of any Parliamentary inquiry, and were the Committee's first recourse. In response to advertisements in the daily press the Committee received a total of 16 submissions, some of them of great length and detail, and clearly involving considerable effort, for which the Committee is very grateful. The Committee received evidence at six hearings over the course of the inquiry, from a total of 11 witnesses. The Committee thanks them all for their valuable contribution to its work; their names are listed in appendices VI and VII.

1.26 The Committee was also fortunate in securing the honorary services of a group of senior practitioners and academics who formed the "Wills Advisory Group". Members of this group, whose names are set out at the beginning of this report, gave willingly of their time to attend thirteen meetings over many months to provide the Committee with the fruits of their knowledge and expertise.

1.27 Thirdly the Committee engaged the services of an expert consultant, Mr W A Lee of the Queensland Law Reform Commission, who is also the Commissioner in charge of the Uniform Succession Laws project of the Standing

Committee of Attorneys-General. Mr Lee worked in conjunction with the Wills Advisory Group, meeting with them on two occasions, and attended three meetings of the Committee. The Committee is very grateful to Mr Lee for his scholarship and hard work, and its report is based on the extensive and detailed commentary on the 1991 Draft Wills Bill and recent developments in the law of wills that he provided to the Committee.

SUCCESSION LAW

1.28 Before presenting the Committee's commentary and recommendations on the 1991 Draft Wills Bill, it is appropriate to set out some background to Succession Law and the history of the *Wills Act* 1958.

1.29 There are three aspects of Succession Law which govern the distribution of a person's property on death. They are:

- First, property may be distributed in accordance with the deceased person's wishes as set out in a valid will, which will appoint someone to carry out the testator's wishes and specify the disposition of property to persons.
- Secondly, where a person dies without a valid will, property is distributed on intestacy according to the priorities set out in Part I of the *Administration and Probate Act* 1958.
- Thirdly, the distribution of property either in accordance with the will or on intestacy will be subject to the powers of the courts to make provision for dependants of the deceased under the testator family maintenance provisions of Part IV of the *Administration and Probate Act* 1958.

1.30 Some commonly used technical words or phrases in the law of wills are:

Attestation — The act of witnessing the execution of a will by seeing the testator's act of signing or of acknowledging his or her signature.

Beneficiary — A person who receives a gift or other benefit under a will.

Codicil — A written supplement to a will intended to add to or modify its provisions.

Executor — A person appointed by the will to carry out the testator's directions contained in the will.

Intestacy — The situation where a person dies without leaving a valid will.

Power of Appointment — A power given by a will or other instrument to select (or "appoint"), by will or other means specified, the person or persons (called the "objects of the power") who is or are to take an interest in the property the subject of the power. The person to whom the power is given is called the donee of the power, and when exercising it is called the appointor. A general power of appointment is one whose donee can appoint to anyone including him or herself; a special power is one where the donee can appoint only in favour of specified objects.

Probate — The certification by the court of the validity of a will. Includes, where the context allows, the grant of letters of administration.

Subscribe — Sign; as when a witness signs a will.

Testator — A man or woman[9] who makes a will.

9 The use of *testatrix* for a woman who makes a will is obsolescent: see, e.g., Lee, W A, *Manual of Queensland Succession Law* (3rd edition, 1991), at paragraph [101] note 1.

THE WILLS ACT 1958

1.31 The *Wills Act* 1958 prescribes certain rules for the making, alteration and revocation of wills. The primary purpose of those rules is to set out the requirements that must be satisfied in order for a document containing testamentary wishes to be valid at law. The object of the legislation is therefore concerned with giving effect to a person's freedom to direct how his or her property is to be dealt with after death. An important question is the extent to which the Court should be restricted to the words of the will when seeking to give effect to the testator's intention.

1.32 The *Wills Act* 1958 is based on the *Wills Act* 1837 (UK). The United Kingdom Act came about as a result of a detailed review of the then state of the law by the Real Property Commissioners and the Ecclesiastical Commission. The UK Act consolidated and reformed the law relating to the making, alteration and revocation of wills; it is photographically reproduced for the reader's interest at Appendix IV.

1.33 Since the adoption of the United Kingdom statute the major changes to Victoria's legislation have been:

- The widening of the categories of privileged testators by the *Wills (War Service) Act* 1939, the *Wills (Amendment) Act* 1947 and the *Statutes Amendment Act* 1954.
- The creation of exceptions to the interested witness rule found in section 13 of the *Wills Act* 1958 by the *Wills (Interested Witnesses) Act* 1977.
- The creation of exceptions to the rule as to revocation on marriage found in section 16 of the *Wills Act* 1958 by the *Wills (Interested Witnesses) Act* 1977.
- The insertion into the *Wills Act* 1958 of sections 20A to 20D dealing with the formal validity of wills when foreign laws apply by the *Wills (Formal Validity) Act* 1964.
- The insertion of section 22A of the *Wills Act* 1958 allowing for the admissibility of extrinsic evidence in the construction of wills by the *Wills Act* 1981 and the insertion by the same Act of section 22B dealing with valuations of property.

- The lowering of the age of majority from 21 years to 18 years by the *Wills (Minors) Act* 1965.

1.34 The most recent change to the *Wills Act* 1958 was the insertion of s.16A, dealing with the effect of divorce on a will, by the *Administration and Probate (Amendment) Act* 1994. The amendment anticipates and is in conformity with the Committee's recommendation on this issue.

1.35 Other Australian jurisdictions have made or are considering significant legislative reforms with respect to:

- The formalities required for the making, alteration and revocation of wills.
- Dispensing with the formal requirements in appropriate cases.
- The making of wills by minors.
- The making of "statutory wills" for persons lacking testamentary capacity.
- The effects that the events of marriage and divorce may have on a will.
- The construction and rectification of wills.

1.36 The subject of the Committee's inquiry, the 1991 Draft Wills Bill, seeks to make provision for these matters[10] so as to bring Victoria's legislation into line with other Australian jurisdictions. This was the main objective of the Wills Working Party, whose 1984 recommendations led to the drafting of that bill.

1.37 The Committee has also conducted its Inquiry in the light of the Uniform Succession Laws Project instigated by the Standing Committee of Attorneys-General and coordinated by the Queensland Law Reform Commission. The Committee has borne in mind that it has an opportunity to recommend legislation that can be a template for uniformity for other jurisdictions to follow.

10 Save for statutory wills.

2. THE DRAFT WILLS BILL 1991

2.1 In the following paragraphs the Committee sets out the results of its inquiry into the 1991 Draft Wills Bill,[11] including a discussion of the underlying historical doctrine and observations on developments in the law of wills in other jurisdictions in Australia and elsewhere. Its conclusions are summarised in the form both of recommendations as to policy, and of a proposed Bill for a new Wills Act.[12]

2.2 The Committee's suggested draft is proffered not in an attempt to usurp the function of Parliamentary Counsel but to focus policy decisions in legislative terms. Many of the draft sections derive from existing precedents or suggested drafts; a few are new.

DRAFT WILLS BILL 1991—PART 1—PRELIMINARY

S.1—Purpose

Wills Act 1958—Long title

s.1.1 This clause is largely for Parliamentary Counsel; but the Committee observes that although the substratum of historical doctrine is not intended to be compromised, the proposed legislation is more concerned with reform than restatement, and a more comprehensive draft than that of the 1991 Draft Wills Bill is therefore appropriate.

11 Reproduced in Appendix I

12 A summary of recommendations is located at the beginning of this report and the Committee's draft bill for a Wills Act 1994 follows it, both on coloured paper.

Recommendation 2

The Committee recommends that the proposed Wills Act state its purpose to be the reform of the law relating to the making, alteration and revocation of wills, and to make particular provision for—

- the formalities required, and the dispensation of those requirements in appropriate cases
- the making of wills by minors and persons lacking testamentary capacity
- the effects of marriage and divorce on a will
- the construction and rectification of wills.

s.1.2 The Committee therefore proposes the following draft:

> 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.

S.2—Commencement

Wills Act 1958, s.1—Short title, commencement and division

s.2.1 These matters are largely for Parliamentary Counsel.

S.3—Definitions

Wills Act 1958, s.3—Interpretation

s.3.1 The Committee considers that some of the definitions contained in s.3 of the 1991 Draft Wills Bill should be amended or omitted, and that there should be some additional definitions.

Definition of alteration

s.3.2 The Committee considers that this definition is not only unnecessary but incorrect. In s.15 (Can a will be altered?) it is provided by sub-section (2) that 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. In other words an obliteration is not effective as an alteration. If one reduces the definition of alteration to include only an interlineation, there is not much point in it. It is not defined in any other Australian wills legislation.

Recommendation 3

The Committee recommends that the definition of "alteration" in the 1991 Draft Wills Bill be omitted.

Definition of court

s.3.3 The definition of "Court" in the 1991 Draft Wills Bill indicates that it is also intended that the County Court shall have probate jurisdiction within its jurisdictional limits. The Committee considers this is appropriate.

Recommendation 4

The Committee recommends that the County Court should have probate jurisdiction within its jurisdictional limits; and that the definition of "Court" in the 1991 Draft Wills Bill be adopted.

> "**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.

Definitions of de facto partner and relationship

s.3.4 The only reference to de facto partners in the 1991 Draft Wills Bill is in s.11 (Can an interested witness benefit from a disposition under a will?) The existing rule that the spouse of a witness cannot take a benefit under the will is extended, by s.11 of the Draft Wills Bill, to the de facto spouse of the witness. This is a novel

extension of the rule. The question of whether the interested witness rule should be abolished altogether or retained, and if so, whether it should be extended to the de facto spouse of a witness, or whether the disqualification should only apply to the actual witness, is considered in relation to s.11. If either of the Committee's recommendations is accepted, this definition can be omitted.

Recommendation 5

The Committee recommends that the definitions of "de facto partner" and "de facto relationship" in the 1991 Draft Wills Bill be omitted.

s.3.5 If, contrary to its recommendation, such a definition is required to remain, the Committee observes that the definition of de facto partner must always be treated with some caution because it necessarily draws upon current thinking of a political nature. In some jurisdictions there have been proposals that the definition should include couples of the same gender. In view of this the only comment which it is appropriate to make in this context is that the suitability of the definition should be kept under review. The probable need that the definition may be repeated in other legislation, including succession legislation in such contexts as new intestacy rules or revised family provision rules, also underlines the need for a flexible approach.

Definition of disposition

s.3.6 The definition of disposition as proposed in s.3 of the 1991 Draft Wills Bill performs more than one function. Its most superficial function is to make it possible to reduce the number of times certain expressions have to be used in the body of the Bill, for instance the phrase "A disposition of a beneficial interest in property" as found in ss.26, 30 and 32. The drafter of the 1991 Bill did not in fact make use of the definition in this fashion, an omission which the Committee proposes to remedy in its draft.

s.3.7 The inclusion in the definition of the creation and more particularly the exercise of a power of appointment is of greater significance.

s.3.8 The power of appointment is by no means obsolete. It is a normal ingredient of the discretionary trust and its exercise by will is as much a part of the process of

disposing of property as the will itself. There is no particular reason why, most of the time, rules previously applicable to direct dispositions of property should not apply also to the exercise of powers of appointment. This is not to say that in all the cases that follow it is being proposed that the law be changed. In some cases the law is merely being clarified.

S.3.9 Thus in s.12 (Effect of marriage on will) there is no reason why, if a testator exercises a power of appointment in favour of a person to whom the testator happens to be married at the time of his or her death, that exercise should be revoked by the marriage of the testator to that person.

S.3.10 In s.21 (When does a will take effect?) there is no reason why it should not be made clear that the exercise of a testamentary power of appointment is considered to have been made immediately before the death of the testator.

S.3.11 In s.26 (Beneficiary must survive testator by 30 days) there is no reason why the same rule should not affect the case of the exercise of a power of appointment. If the object in whose favour a power of appointment is exercised fails to survive the death of the person exercising the appointment by 30 days, the property the subject of the power should pass as otherwise provided for by the will, or, failing that, in accordance with the gift over of the property in default of appointment.

S.3.12 Even in s.30 (How are dispositions to issue to operate?), if a testator happens to exercise a power in favour of "issue", there is no reason why, in the absence of any expression of particular intention, the issue should not take in accordance with this section.

S.3.13 In s.32 (Dispositions not to fail because issue have died before the testator) if a testator happens to exercise a power of appointment in favour of his or her issue, there is no reason why the subject matter of the power should not be distributed in accordance with the provisions of this section.

S.3.14 The definition of "disposition" and "dispose of", by including reference to the exercise of a power of appointment, takes care of all these questions and in effect assimilates the law about the exercise of powers of appointment to that of the law about the disposition of property directly. In all cases a contrary intention may be expressed by the testator.

s.3.15 In one section this comprehensive definition will not work, however. This is s.22 (What is the effect of a failure of a disposition?). The rule of the law of wills is that property the subject of a direct disposition which fails passes to the residuary estate and is distributed according to any residuary disposition contained in the will or, if there is no effective residuary provision, under intestacy. This rule cannot apply in the case of the exercise of a power of appointment where, as it almost invariably does, the document conferring the power to be exercised by the testator contains a provision with respect to the disposition of the property in the event of the failure of the exercise of the power—a "gift over in default of appointment". It would be quite inconsistent with the law of powers of appointment to provide that the failure to exercise the power would have the effect that the subject matter of the power would pass to the donee of the power's residuary estate. In this section, therefore, the reference to "disposition" must exclude the exercise of a power of appointment.[13]

s.3.16 In the 1991 Draft Wills Bill the drafter has put the words "or" after (a) and (b). In a definition which seeks only to include certain matters within the term defined the Committee suggests that the words "or" can be omitted. This is for Parliamentary Counsel. The Committee also suggests that a definition of "dispose of" be included.

Recommendation 6

The Committee recommends that the 1991 Draft Wills Bill's definition of "disposition" be adopted, with the inclusion of a reference to the meaning of "dispose of", and minor textual changes.

s.3.17 The resulting definition is therefore:

> "**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;

13 See, however, paragraphs s.22.4–8 below.

and "dispose of" has a corresponding meaning.

Definition of document

s.3.18 Although no submissions urged the Committee to permit the making of "video wills" or other electronic documents, the Committee notes that the word "document", which is used in proposed s.9 (Dispensing power) and s.10 (Who may witness), is defined in the *Interpretation of Legislation Act* 1984 in a way which might permit an argument that a videotaped "will" was valid. In s.38 of that Act "document" includes

> in addition to a document in writing –
>
> (d) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom… .

s.3.19 In the absence of any detailed or compelling justification for allowing such a departure from the requirement that a will be in writing on a document as traditionally understood, being made of paper, parchment or the like, the Committee considers that a definition of "document" should be added, and proposes the following:

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

s.3.20 The definition, by limiting the meaning of that word, in the context of the law of wills, to paper or material upon which there is writing (see paragraphs s.3.27–8 below), excludes the possibility that a will may take the form of electronically stored material. This does not exclude the possibility that a will might make reference to a videotape or computer disc, already in existence, as an extrinsic fact, just as a list of chattels can be referred to in a will.

Recommendation 7

The Committee recommends that a definition of "document" be included that excludes the possibility that a will may take the form of electronically stored material.

Definition of minor

S.3.21 In order to simplify the language of s.5 (Minimum age for making a will) it is convenient to include a definition of "minor":

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

Definition of probate

S.3.22 In certain circumstances, for example in relation to time limits on the bringing of proceedings, such as for rectification under proposed s.37, or for family provision under Part IV of the *Administration and Probate Act* 1958, it is necessary to refer both to probate and the grant of letters of administration, whether or not with the will annexed. The Committee therefore considers it convenient to include the grant of letters of administration within the term "probate", when the context allows.

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

S.3.23 The Committee acknowledges that this extended definition would have application in proposed s.37(2) only. In the context of proposals for a Uniform Succession Law, however, and in the context of any future review of the *Administration and Probate Act* 1958, perhaps with a view to a single Victorian statute dealing with succession law, the Committee believes that such a definition could prove economical. The equivalent UK legislation[14] refers to the "taking out of representation," rather than the "grant of probate," which may provide another route to a compendious expression. The Committee observes that in a similar context in Part IV of the *Administration and Probate Act* 1958 the two possibilities of grant of probate and grant of letters of administration are referred to expressly in s.99 and s.99A(3); yet in Part I the word "representation" is defined in s.5 to include both.

Definition of property

S.3.24 There does not seem to be much point in this definition at all. It merely says that property does not include a power of appointment. The references in the 1991 Draft Wills Bill and indeed in the existing legislation to powers of appointment are express, and therefore a definitional attempt elsewhere is redundant. Moreover there is apparent discontinuity between this definition and the definition of "disposition", paragraph (c) of which includes "the exercise by will of a power of

14 *Administration of Justice Act* 1982 (UK), s.20(2).

appointment affecting property"; and s.4(3) which says: "In this section—'property' includes a power of appointment". The Committee considers that it would be preferable to leave undisturbed by definitional attempts these expressions, all well known to the law, and particularly well known in the general context of succession law and the law of wills.

s.3.25 Following a suggestion of the Wills Advisory Group[15] the Committee considered whether an extended definition of "property" could be drafted which might replace s.4 of the 1991 Draft Wills Bill (What property may be disposed of by will?). The Committee has concluded that it would be better to keep Draft s.4 as it is (with amendments as suggested below), leaving the word "property" to have its present wide meaning and any future change to that meaning which the law may generate. This is because in s.4 reference is made not only to existing property but also to property which may accrue to the estate of the testator after the death of the testator. To define "property" to include future property of this nature could compromise the usually understood meaning of the word. The question addressed by s.4 is very particular and is not about the definition of "property" in any usual sense.

Recommendation 8

The Committee recommends that no definition of "property" be included in s.3.

Definition of will

s.3.26 The 1991 Draft Wills Bill includes a definition of "will", which is a simplified version of the definition contained in the *Wills Act* 1958. The Committee considers that this definition should be adopted.

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

Definition of writing

s.3.27 Given the central importance of writing as a formal requirement for a valid will, the Committee considered whether it would be appropriate to include a definition.

15 *Minutes*, 4 August 1993, Item 3 and 18 August 1993, Item 2.

s.3.28 This is not necessary, however, as the *Interpretation of Legislation Act* 1984 already contains an adequate definition, from which the Committee sees no need to derogate. It states, in s.38:

> "**writing**" includes all modes of representing or reproducing words, figures or symbols in a visible form and expressions referring to writing shall be construed accordingly.

DRAFT WILLS BILL 1991—PART 2—FORMAL REQUIREMENTS

Division 1—Capacity to make a will

S.4—What property may be disposed of by will?

Wills Act 1958, s.5 – All property may be disposed of by will.

s.4.1 In 1984 the Wills Working Party recommended[16] that section 5 of the 1958 Act be replaced with a provision based on section 7 of the *Succession Act* 1981 (Qld). Section 4 of the 1991 Draft Wills Bill attempts to rewrite existing precedent, without departing from it.

s.4.2 No Australian legislation has attempted to reconsider the detail of the original English *Wills Act* 1837 provision, s.3, although references to contingent, executory and future interests in property and rights of entry for condition broken or any other right of entry have historical connotations. The basic rule, that a person may dispose of any property to which the person is entitled at the time of death, was introduced by the 1837 Act to overcome limitations in the law relating to what type of property could be disposed of by will.[17] The principal limitation was that a person could only dispose of property in the form to which he or she was entitled at the time of the making of the will. For example, if X owned Blackacre in fee simple and made a gift of that to Y in his will, and at a subsequent time X converted his interest to a leasehold interest, that latter interest would not pass to Y on the death of X.[18]

s.4.3 The difficulty about attempting to draft a similar provision in more generalised language is that someone may argue that pre-1837 rules about the

16 *Recommendation 2.*

17 *Fourth Report of the Real Property Commissioners* (1833), page 23.

18 *House of Lords Debates*, 28 February 1837, column 994.

disposable nature of future interests have been revived. Nevertheless an attempt is made in the 1991 Draft Wills Bill to express this section in more contemporary language.

S.4.4 The Committee considers it desirable to make it clear that a testator may by will dispose of any property, including that to which he or she was not entitled either at the date of the making of the will or even at the date of his or her death. Thus an award of damages may perhaps not be finalised until after the death of the testator; or another person may by will leave property to the deceased but that gift may not be effective during the lifetime of the beneficiary but accrues, by virtue of his or her office, to the personal representative of the beneficiary–testator subsequently. The existing legislation does not make this clear.

Recommendation 9

The Committee recommends that it should be stated in the most general terms that a testator may include in a will any property to which he or she is entitled at death, or which accrues to his or her personal representative after death.

S.4.5 The Committee is of the view that sub-section (3) of the 1991 Draft Wills Bill, which states that "property" includes a power of appointment, should be reconsidered; the Advisory Group also suggested[19] that it be deleted. There is debate as to whether a power of appointment is "property"; but the Committee considers that that debate is best avoided. In any case the provision is novel. If it is desired to refer to powers of appointment in this section, perhaps a better solution might be to redraft sub-section (1) as follows:

> A person may, by will, dispose of any property to which the person is entitled at the time of his or her death; and may by will exercise any power of appointment exercisable by will.

S.4.6 Even the added words are hardly necessary because of the particular reference to the execution of powers of appointment by will in s.6(3) of the 1991 Draft Wills Bill and corresponding previous statutory provisions; and because there

19 *Minutes*, 4 August 1993, Item 3 and 18 August 1993, Item 2. The Advisory Group also suggested the insertion of the definition of "property" from the *Bankruptcy Act* 1966 (Cth), but for the reasons above the Committee does not agree.

is an element of tautology in the added words. The power to exercise a power of appointment by will derives not from the law of wills but from the instrument creating the power of appointment. It is not generally considered to be part of the law of wills that a power of appointment may be exercised by will; that is part of the law about powers of appointment. The donor of the power may provide that the power may only be exercised *inter vivos*. One regulative function of wills legislation, with respect to the exercise by will of a power of appointment (and see further the comments above[20] on the definition of "disposition"), is the provision that if exercised in the manner prescribed for the execution of wills, the power of appointment is duly exercised, although additional requirements for execution may have been stipulated by the donor of the power. This is the purpose of s.6(4) and (5) of the Committee's revised Wills Bill 1994.

S.4.7 It would therefore be entirely appropriate simply to delete sub-section 4(3) of the 1991 Draft Wills Bill.

Recommendation 10

The Committee recommends that sub-section 4(3) of the 1991 Draft Wills Bill be omitted.

S.4.8 For the reasons given in the consideration of s.3,[21] which concluded with the recommendation that no definition of "property" should be included in that section, reference to future property is necessary for the particular purposes of s.4. A main objective of this more generalised approach to the description of future property is that the earlier precedents had probably been influenced by old law that there could be no devise of realty unless the realty was vested in the testator at the date of the will.

S.4.9 The Committee considers that it is appropriate not only to include references to future property found in the existing legislation but also to broaden them. Thus the notion of "rights of entry for conditions broken and other rights of entry" should be enlarged to include any right of entry and any right to call for the transfer of title of property. Such a right may arise in equity, or as a result of litigation.

20 Paragraphs S.3.6–17.

21 See paragraphs S.3.24–25

s.4.10 The 1991 Draft Wills Bill repeats the proposition that a person cannot by will dispose of property of which he or she is trustee. This rule should be retained and stated clearly in the statute, as in sub-section (5) of the proposed draft below.

Recommendation 11

The Committee recommends that the statute clearly restate the law that a testator cannot by will dispose of property of which he or she is trustee.

s.4.11 The Committee therefore proposes the following draft:

Draft s.4—What property may be disposed of by will?

(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.

Drafting note

s.4.12 The Committee considers it anomalous that this section should appear in a Part about "Formal Requirements" and in a Division entitled "Capacity to make a will".

Recommendation 12

The Committee recommends—

- that s.4 (What property may be disposed of by will?) should appear in Part 1—Preliminary; and
- that the heading to Part 2 should read "Capacity and Formal Requirements".

S.5—Minimum age for making a will

Wills Act 1958, s.6—No will of a person under the age of eighteen years to be valid

s.5.1 One reason why minors are not allowed to make wills is that although they may know exactly what the function of a will is, and exactly what will they wish to make, they may nevertheless lack the *discretion* to make a responsible will. A minor may adulate a person whom he or she adopts as a role model, for instance a football or cricket idol, a movie or pop star, or the leader of a religious sect; although he or she might never have met that person. Even in an adult questions of capacity might arise if the adult left all his or her estate to such a person. Another reason why minors are not allowed to make wills is that they are at an age where they may be more easily subjected to undue influence by a relative or close friend than an adult might be.

Recommendation 13

The Committee recommends that it should remain the general rule that a minor cannot make a will.

s.5.2 On the other hand, there can be legitimate occasions when it is highly desirable to allow a minor to make a will, particularly if the minor has assets, is in ill health, and circumstances exist where it would be unfair to allow the intestacy rules to take their course; and perhaps a family provision application is not available, for instance in the case of the parents of a minor. The most likely occasion is where one or both of the parents of the minor has abandoned the minor and the minor wishes to leave his or her property to one parent rather than to both of them, or even to neither of them.

s.5.3 In its Report the Wills Working Party recommended that:[22]

(1) The age of majority should be retained as the general age of testamentary capacity.

(2) The Supreme Court should have power to approve the making of a will by a minor.

(3) Married minors ought to be accorded testamentary capacity and minors who were married, but are no longer married, should retain their testamentary capacity.

s.5.4 With respect to the power of the Court to approve of a will made by a minor, sub-section (4) of s.5 of the 1991 Draft Wills Bill provides only that the Court must be satisfied that that person understands the effect of the will.

s.5.5 The Committee considers that this is not sufficient because it does not enable the Court to satisfy itself that the will is in appropriate terms. It is the Committee's view that the Court should also have the power to influence the unreasonable exercise of discretion by a minor.

s.5.6 It may well be that it is implicit in the granting of the power to the court that the court is to satisfy itself that the minor's discretion has not been unreasonably exercised; but the Committee considers that it should be made explicit. In New South Wales s.6A of the *Wills, Probate and Administration Act* 1898 provides:

(1) The Court may grant a minor leave to make a will the terms of which have been disclosed to the Court.

(2) Leave may be granted subject to such conditions (if any) as the Court thinks fit.

(3) A will made by a minor pursuant to leave granted under this section is valid.

s.5.7 This provision leaves practically everything unsaid. Presumably the Court will make sure that the minor wishes to make the will brought before it. Presumably, too, if the Court takes the view that the will is lacking in discretion it can insist upon a condition that the minor change his or her intention. But this is not said.

22 *Recommendation 3*

S.5.8 There is a more comprehensive provision in s.8A of the *Wills (Amendment) Act*, N° 67 of 1991 (ACT). That section reads as follows:

> ***8A. Supreme Court enabling will by minor***
>
> (1) A minor may apply to the Supreme Court for an order declaring that the minor is entitled to make a will in the terms of a proposed will attached to the application.
>
> (2) On an application made by a minor under sub-section (1), the Supreme Court may, if it is satisfied that—
>
> (a) the minor understands the nature and effect of the proposed will;
>
> (b) the proposed will accurately reflects the intentions of the minor; and
>
> (c) it is reasonable in all the circumstances that the minor should be able to make the proposed will;
>
> make an order declaring that the minor is entitled to make a valid will in the specific terms of the proposed will attached to the application.

S.5.9 This provision makes it clear that the Court must be satisfied that the will proffered is reasonable. But it gives the Court no power to suggest or insist upon amendments to a proposed will, if the will is in some or even most respects reasonable but in any respect unreasonable. There seems to be no room for adjustment. The general approach of the 1991 Draft Wills Bill is preferable, in the Committee's view, because it does not insist that the will be attached to the application and is the only document which can be approved.

S.5.10 South Australia has recently adopted a similar provision. Section 6 of the *Wills Act* 1936, inserted by s.4 of the *Wills (Miscellaneous) Amendment Act* 1994 provides:[23]

> (1) The Court may, on application by 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.
>
> (2) An authorisation under this section may be granted on such conditions as the Court thinks fit.

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23 The 1993 draft Wills (Miscellaneous) Amendment Bill had also contained fairly similar provisions respecting the making of a will for an incompetent (s.7), an issue which is discussed below at paragraphs S.5A.1–50. The 1994 Act did not proceed with those provisions.

(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

(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 altering or revoking 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 or the Public Trustee; and

(b) must be deposited for safe custody with the Registrar under s.13 of the *Administration and Probate Act 1919*.

(5) The will may not be withdrawn from deposit with the Registrar by the minor unless the Court has made an order authorising the minor to revoke the will or the minor has attained the age of 18 years or is married.

S.5.11 All these considerations lead the Committee to the following recommendation. The Committee's draft is at paragraph S.5.14 below.

Recommendation 14

The Committee recommends—

- that the Supreme Court should have power to approve the making of a will by a minor;
- that the Court should be satisfied of the propriety of the minor's will, as well as of the minor's testamentary desires.

Exception in the case of minors who are or who have been married

S.5.12 In the 1991 Draft Wills Bill the rule that a minor may not make a valid will is relaxed where the minor is married; and it is further suggested[24] that it may be relaxed to allow a minor to make a will in contemplation of marriage. The reason for

24 Wills Advisory Group, *Minutes*, 1 September 1993, Item 2 and 27 October 1993, Item 2.

this exception is obvious: when a person marries he or she undertakes wholly new obligations to the married partner. Those obligations should be capable of expression in a testamentary instrument. During the course of the marriage the spouse should, it is argued, have full testamentary capacity. Since in Australia a person may marry at the age of 16, testamentary capacity should either be extended to all persons of the age of 16, or an exception should be made for married minors. It is not impossible that a person under the age of 16 can be married, either because that person may have married in another jurisdiction where marriage under the age of 16 is allowable, or where marriage under the age of 16 is allowed under Australian law. It has been suggested to the Committee that persons under the age of 16 should not be given testamentary capacity and that the Court should approve of a will which the parties to such a marriage might wish to make. Alternatively it has been suggested that the number of cases in which persons under the age of 16 will be married is so rare that no mischief would be done if they were given testamentary capacity anyway. In its Report the Wills Working Party recommended[25] that married minors ought to be accorded testamentary capacity and minors who were married, but are no longer married, should retain their testamentary capacity. Nevertheless the Committee is concerned that if a minor lost his or her spouse, whether by reason of death or divorce, a continuing capacity to make a will might be subject to the forces of indiscretion or undue influence mentioned above.

S.5.13 The Committee accepts that a will should be allowed to be kept on foot at least in part, if the minor wishes that. The loss of a spouse by death might cause the surviving spouse to wish to delete certain provisions from the will. As the Committee does not consider that a general testamentary power should be given, a power to revoke the will in whole or in part is desirable.

25 *Recommendation 3.* (See paragraph S.5.3 above.)

Recommendation 15

The Committee recommends –

- that married minors ought to be accorded testamentary capacity; and
- that a minor testator who has lost his or her spouse should be able to revoke the will made during marriage, either in whole or in part; but should not otherwise retain testamentary capacity.

s.5.14 The Committee therefore proposes the following draft in place of s.5 of the 1991 Draft Wills Bill:

Draft s.5—Minimum age for making a will

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

(2) Despite sub-section (1) –

(a) a minor may make a will in contemplation of marriage (and may alter or revoke such a will) but the will is of no effect if the marriage contemplated does not take place;

(b) a minor who is married may make, alter or revoke a will;

(c) a minor who has been married may revoke the whole or a part of a will made whilst the minor was married or in contemplation of that marriage.

(3) The Court may, on application by or on behalf of a minor, make an order authorising the minor to make or alter a will in specific terms approved by the Court, or to revoke a will or a part of a will.

(4) An authorisation under this section may be granted on such conditions as the Court thinks fit.

(5) Before making an order under this section, the Court must be satisfied that –

(a) the minor understands the nature and effect of the proposed will, alteration or revocation and the extent of the property disposed of by it; and

(b) the proposed will, alteration or revocation accurately reflects the intentions of the minor; and

(c) it is reasonable in all the circumstances that the order should be made.

(6) A will or instrument making or altering a will made pursuant to an order under this section—

(a) must be executed as required by law and one of the attesting witnesses must be the Registrar; and

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

Drafting notes

S.5.15 The drafting of sub-section (3), which enables an application to be made by or on behalf of a minor to the Court for approval of a will in specific terms, is taken from s.6 of the South Australian *Wills Act* 1936 as amended by the *Wills (Miscellaneous) Amendment Act* 1994. The precedent has been slightly amended by the addition in paragraph (a) of the words "and the extent of the property disposed of by it". This is part of the standard vocabulary of the law relating to testamentary capacity.

S.5.16 In South Australia the will must be deposited for safe custody with the Registrar under s.13 of the *Administration and Probate Act* 1919. The Committee considered the option of providing that the will be handed over to the person whom the Court has approved to be the executor of the will; but since the Victorian *Administration and Probate Act* 1958 has recently been amended to provide in s.5A for the deposit of wills with the Registrar of Probates, and since that Act as amended provides in s.5C for the Registrar[26] to give a will to prescribed persons and to make and keep an accurate copy of such a will, it seems better to follow the South Australian precedent, and leave the question of access to copies of the will to the *Administration and Probate Act* 1958.

26 "The registrar" includes an assistant registrar: *Administration and Probate Act* 1958, s.3

S.5A—Statutory wills for persons lacking testamentary capacity

(Not in 1991 Draft Wills Bill)

Wills Act 1958—No counterpart

History

S.5A.1 On 10 October 1985 the Chief Justice of Victoria's Law Reform Committee adopted the Report of a sub-committee on *Wills for Mentally Disordered Persons* and recommended that power be conferred on a Judge to direct or authorise that a will be made for a person of full age if the Judge has reason to believe that the person is by reason of injury, disease, senility, illness or physical or mental infirmity incapable of making a valid will.

S.5A.2 In 1983 in the United Kingdom the Mental Health Act by ss. 96 and 97 conferred power on the court to make a will for persons coming within the terms of that Act.

S.5A.3 In 1992 the Nineteenth Report of the New South Wales Law Reform Commission entitled *Wills of Persons Lacking Will-Making Capacity* recommended that there should be conferred on the Court power to enable a statutory will to be made for a person lacking will-making capacity. A lengthy draft of recommended legislation is appended to the Report. That Report has not been acted upon.

S.5A.4 In 1993 in South Australia the draft Wills (Miscellaneous) Amendment Bill 1993 included provisions for the same purpose. The Bill has been enacted, but without the provision for the making of wills for incapable persons.

Desirability of legislation in Victoria

S.5A.5 In paragraph 13 of the Report of the Chief Justice of Victoria's Law Reform Committee the committee expressed the opinion that legislation along the lines of that in the United Kingdom for the making of wills was desirable in Victoria; but that the system should be slightly different.

S.5A.6 The Committee considers that Victoria should act upon the Reports of the Chief Justice's Committee and of the New South Wales Law Reform Commission,

taking into account the detailed recommendations of those Reports and the draft legislation proposed for South Australia.

Recommendation 16

The Committee recommends that the Court be empowered to authorise the making of a will for a person lacking testamentary capacity.

S.5A.7 The problem with such a will is that the testator might well survive for a number of years and the will might become out of date. A principal beneficiary under such a will might predecease the testator. The Court cannot act as watchdog in such cases. The Committee considers it desirable that there be provision for the Court to make such a will after the death of the incapacitated person at a time when the extent of the estate available for distribution and the claims of persons for provision or better provision can all be before the court. It sees no reason, however, to prevent the making of a will in the testator's lifetime when better evidence of relevant matters may be available. It has been suggested that this approach conflicts with family provision legislation. The Committee considers, however, that that legislation has a different function and purpose.

S.5A.8 The Committee acknowledges that the Court's power under this provision to alter after death the dispositions of a person who may once have had testamentary capacity will, in some respects, create greater uncertainty for a testator than the law relating to family provision. There is, however, no new principle being established in conferring on the court such a power.

Recommendation 17

The Committee recommends that an application to the Court for the making of a will for a person without testamentary capacity, or the alteration of a will, be able to be made after the death of the person.

Examples of the need for the legislation

S.5A.9 Paragraph 5 of the Report of the Chief Justice's Committee mentions the types of case which had attracted the jurisdiction in the United Kingdom. Briefly these are described as follows:

1. Applications to substitute as beneficiaries issue of existing beneficiaries, whether under will or intestacy. These applications were tax driven.

2. Applications to make provision for a housekeeper or some other employee of a patient to whom the patient is under an obligation.

3. Applications to ensure that a patient's moneys derived from the patient's family are returned to the patient's side of the family.

4. Applications on behalf of a child born to the patient after the making of a will of the patient's which did not provide for the child; and on behalf of illegitimate or adopted children not otherwise provided for.

5. Applications designed to avoid a potential probate action.

S.5A.10 To these examples the Chief Justice's Report added, at paragraph 14, the following:

6. Where the person's family situation or the extent of his estate has changed since the making of an earlier will;

7. Where the person has been divorced since the making of an earlier will;

8. Where the person who has no will has lived all his life with a de facto spouse who would take nothing on intestacy;

9. Where the moral claim of some members of the deceased's family is such that the distribution on intestacy would be unjust; and

10. Where the moral claim of some person would not be met by distribution on intestacy or distribution under an existing will.

S.5A.11 To these examples may be added the general proposition that there will inevitably be occasions where a person would wish to make provision by will for a person or persons who could not benefit under the terms of an existing will, under intestacy provisions, or under existing family provision legislation. The type

of person for whom a testator would wish to make provision would probably be either persons dependent upon the making of such provision or deserving of such provision. If a will cannot be made for the benefit of such dependent or deserving person because of the incapacity of the person who would, if of full capacity, wish to make such provision, it is just that there should be some mechanism to make such testamentary provision.

S.5A.12 The fact that neither New South Wales nor South Australia has legislated, despite detailed consideration leading as far as the drafting stage, indicates that there are reservations concerning the desirability of the proposed legislation.

S.5A.13 It is worth observing that a power such as that proposed does impinge on existing succession law. It enables provision to be made for a person who could not otherwise claim under any will, or upon the intestacy of a person, or under family provision legislation. It may be seen as remarkable that such a person can be provided for only from the estate of a person who lacks testamentary capacity. Such a person could not be provided for from the estate of a competent testator.

Property Law Act

S.5A.14 Under s.171 of the *Property Law Act* 1958 there is a limited jurisdiction in the Court to make (and revoke) settlements of the property of a represented patient, being a patient within the meaning of the *Mental Health Act* 1986 who is a represented person within the meaning of the *Guardianship and Administration Board Act* 1986. One of the grounds for the exercise of the jurisdiction is if "any person might suffer an injustice if the property were allowed to devolve as undisposed of on the death intestate of the represented patient or under any testamentary disposition executed by" that patient. Such settlements may be made notwithstanding the existence of a will, and may at any time during the life of the represented patient be varied "on account of any substantial change in circumstances", or if "any material fact was not disclosed to the Court when the settlement was made". The Court must also allow "for the possibility of the represented patient recovering full capacity".

S.5A.15 One of the possible disadvantages of using s.171 to effect a settlement of property rather than make it subject to a will is that the tax advantages of some

testamentary trusts where no person is at present beneficially entitled would not be available.

S.5A.16 The Chief Justice of Victoria's Law Reform Committee remarked in its 1985 report at paragraph 37 that s.171 has been described as comprising "long and complicated provisions", and recommended replacing them with less complicated and less restricted provisions.[27]

Conferring the jurisdiction

S.5A.17 In England jurisdiction is conferred on the Court. The recommendation of the New South Wales Law Reform Commission is that the power should be conferred on the Court. The South Australian draft legislation is to the same effect, as is the Report of the Victorian Chief Justice's Law Reform Committee. The Court is not empowered to make a will as such but to approve the making, alteration or revocation of a will. That is, the intention is that a will should be brought to the Court to be authorised. A general power to authorise such a will is therefore the first provision to appear.

Suggested draft

(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.

27 Paragraph 38, recommending s.96(1)(d) and (k) of the *Mental Health Act* 1983 (UK).

Drafting notes

"any person"

S.5A.18 This provision is taken from the draft South Australian Wills (Miscellaneous) Amendment Bill 1993. The Chief Justice of Victoria's Committee, in paragraph 23, contemplated that most applications under the proposed legislation would be made by the Public Trustee; but recommended in paragraphs 23 and 53 (b) that any person should be entitled to make an application. In Victoria no doubt the Public Advocate would make some applications, in performance of the duties conferred on him or her by the *Guardianship and Administration Board Act* 1986; but valuable though the Public Advocate's role is, the Committee considers that any person should be able to make the application.

"made with leave"

S.5A.19 In the New South Wales recommended legislation there is a requirement in s.32FF that leave of the Court must first be obtained before an application for an order for the making of a statutory will may proceed. There was a similar requirement in the South Australian draft bill. The argument in favour of this is that it allows the screening of applications and ensures that only adequately founded applications will proceed, that the applicant is an appropriate person and that potential parties are notified; the application for leave can function as a directions hearing. There is no such requirement in England and no such requirement was considered or recommended by the Victorian Chief Justice's Committee.

S.5A.20 The disadvantage of having a leave requirement is that the applicant has to appear twice, once to seek leave and again to make the application. In the case of a small estate the cost of two applications might be prohibitive. Again the interposition of a requirement of leave might give the impression that although applicants for leave might be allowed to be considered by the Registrar, applications to authorise the making of the will should be considered only by a Judge. This might be unnecessary in the case of a very clear application in a small estate, which is unlikely to be contested, for instance an application by a person who has cared without remuneration for a long time for an incapacitated person who is estranged from his or her family.

S.5A.21 Nevertheless the Committee considers that the leave procedure should be adopted as a screening device; but that it should be possible for the Court to allow an application for leave to proceed immediately in a very clear case to an application authorising the making of a will. That is, a leave procedure could be utilised as a "fast track" procedure.

S.5A.22 The draft embraces both the South Australian proposal and sections 32FC and 32FE of the draft legislation appended to the Report of the New South Wales Law Reform Commission.

Subsection (2)

S.5A.23 As it is the Committee's view that neither dispositions made in a will nor the statutory policy on intestacy should lightly be set aside, it considers that it should be made clear that the Court is not bound to make an entire will for an incapable person. The applicant may be satisfied with a specific bequest or devise, for instance a life interest in a house in which the applicant may be living with the incapable person whom he or she is caring for on a gratuitous basis. The rest of the estate can be distributed according to an existing will or the intestacy rules, or be left to a family provision claim. The jurisdiction should be capable of being exercised only to meet the need at hand. If every time the court were to consider that it must authorise an entire will that could be an occasion for expensive enquiries and hearings.

On whose behalf should jurisdiction to make a statutory will be exercised?

S.5A.24 Paragraph 18 of the Report of the Chief Justice's Law Reform Committee recommends (emphasis added):

> We recommend that there be legislation in Victoria which gives a Judge power to direct or authorise that a will be made for any person *of full age* where the Judge has reason to believe that the person is *by reason of injury, disease, senility, illness or physical or mental infirmity incapable of making a valid will for himself.*

S.5A.25 The recommendation that the Court's power to make a will for an incapable person should be restricted to persons of full age was made in the context of consideration that there should be a separate provision enabling the Court to make a will for a minor. In New South Wales there is a separate provision enabling

the Court to make a will for a minor; and in the South Australian *Wills (Miscellaneous) Amendment Act* 1994 there is a separate provision enabling the court to make a will on behalf of a minor; but the provision in the South Australian 1993 draft Wills (Miscellaneous) Amendment Bill enabling the Court to make a will for an incapable person expressly provided that the court may make a will for an incapable minor. Perhaps the recommendation of the Chief Justice's Law Reform Committee that the jurisdiction should be confined to adults was made without consideration of the possibility that a minor may be incapable. There is no reason why, if a minor is incapable, a provision should not be made for him or her. Provisions for the making of wills for a minor stress the need for the minor to understand the nature and effect of the proposed testamentary instrument. That requirement is inapposite in the case of a minor who lacks mental capacity.

Recommendation 18

The Committee recommends that the jurisdiction to make a statutory will for a person lacking testamentary capacity should not be confined to adults.

S.5A.26 The Committee also considers that it would be better not to attempt to enumerate the possible causes of incapacity in the person on whose behalf a statutory will may be made, by references to disease, senility, injury, mental infirmity, etc. That would involve an applicant having to show which kind of incapacity the person on whose behalf a statutory will was being sought was suffering from. Some of these terms relating to mental incapacity are not clear of meaning and are demeaning to the sufferer.

Recommendation 19

The Committee recommends that whether a person is capable of making a will should be considered to be a question of fact and the reason for the incapacity should be irrelevant to the exercise of the jurisdiction to make a statutory will.

S.5A.27 The existing legislation insists upon the requirement of incapacity not only by specifying it as a ground for jurisdiction but also by requiring that leave to

make an application must be refused unless the Judge is satisfied of the existence of the incapacity. Subsection (4) of s.96 of the *Mental Health Act* 1983 of the United Kingdom says:

> The power of the judge to make or give an order, direction or authority for the execution of a will for a patient—
>
> (a) shall not be exercisable at any time when the patient is a minor, and
>
> (b) shall not be exercised unless the judge has reason to believe that the patient is incapable of making a valid will for himself.

S.5A.28 In New South Wales s.32FC of the draft legislation appended to the report of the New South Wales Law Reform Commission reads:

> **32FC. *Statutory wills valid***
>
> (1) A will made for a person who, at the time the will is made, lacks will-making capacity is valid if made in accordance with this part.
>
> (2) A person lacks will-making capacity if for any reason the person does not have the capacity to make a valid will.
>
> (3) Without limiting subsection (2), a person may lack will-making capacity if the person is mentally ill or mentally disordered or is unable to communicate because of physical or other disability.
>
> (4) For the purposes of this Part, a person does not lack will-making capacity merely because the person is a minor.

S.5A.29 In s.32FF it is provided that the Court must give leave before an application for the making of an order for the execution of a statutory will can proceed and:

> (2) The Court must refuse to give leave:
>
> (a) if it is not satisfied that there are reasonable grounds to believe that the person for whom the statutory will is to be made under the order may be incapable of making a valid will.

S.5A.30 In South Australia the draft *Wills (Miscellaneous) Amendment Bill* 1993 provided by s.7 (3) that:

> Before making an order under this section, the Court must be satisfied that—
>
> (a) the person lacks testamentary capacity…

There was no definition of capacity.

S.5A.31 The Committee does not find the definition of capacity in the New South Wales provision at all illuminating. It believes it would be preferable not to attempt to define testamentary capacity. The law of wills has addressed itself to defining testamentary capacity—"sound mind, memory and understanding"—in many cases and an attempt to overlay or gloss it by statute could be misinterpreted.

S.5A.32 The Chief Justice of Victoria's Law Reform Committee's Report recommended in paragraph 18 that the Judge dealing with an application should "have reason to believe" that the person concerned should be incapable of making a valid will for himself.

Suggested draft

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

(2) The Court must refuse to give leave if it is not satisfied that:

(a) there is reason to believe that the person for whom the statutory will is to be made under the order is or may be incapable of making a will; or

(b) the proposed will, alteration of a will, or revocation of a will, is or might be one which would have been made by the person if he or she had testamentary capacity; or

(c) it is or may be appropriate for a statutory will to be made for the person; or

(d) the applicant is an appropriate person to make an application; or

(e) adequate steps have been taken to allow representation of all persons with a legitimate interest in the application, including persons who have reason to expect a gift or benefit from the estate of the person for whom the statutory will is to be made.

Drafting notes

S.5A.33 The requirement for leave performs a screening function. The draft is taken from the South Australian and New South Wales precedents. The words in

(2) (a) "is *or may be* incapable" are used. It would be unfortunate if there were a dispute as to whether a person lacked capacity and evidence of capacity were inconclusive. The requirement in s.32FG of the New South Wales Law Reform Commission's recommended legislation that the person for whom it is sought to make a statutory will is entitled to be heard indicates that there can be some question of that person having at least capacity to make a statement relevant to the proceedings. The words "or may be" enable the court to proceed in the case of doubt as to incapacity. Obviously this does not preclude the subsequent making of a will, unaided by the Court, if the testator in fact has, or acquires or regains, testamentary capacity.

S.5A.34 The reference in (2) (b) to a "proposed will" is taken from South Australia. In New South Wales there is no such reference and the recommended legislation seems to suggest that the Court itself should have the duty of drafting the proposed will. The Committee considers that this may not be the most efficient way to proceed. The South Australian draft legislation suggests that the applicant for leave proposes a draft will; and the Committee considers that this is preferable because the existence of a draft will, proffered by the person making the application, will have the effect of immediately focussing the attention of the proceedings for leave on the ultimate objective, which is to authorise a testamentary instrument. On the other hand the words in (2) (b) requiring the Court to be satisfied that the proposed will is one which would have been made by the person if he or she had testamentary capacity is taken from the New South Wales suggested 32FH.

Example

S.5A.35 Sally and Hermione were both mildly intellectually retarded. After being discharged from a mental hospital where they had both been patients for a number of years Sally and Hermione decided to live together in rented accommodation, sharing their assets and expenses. Hermione was capable of making financial decisions but temperamentally incapable of preforming any tasks in the house. Sally was incapable of planning ahead or making financial decisions; but she could clean and cook and drive a car. They have lived together for twelve years but recently Sally's health has been failing. It is very doubtful whether she could collect her thoughts together sufficiently to make a will. She owns some shares, worth $12,000, which she inherited from her father some thirty years before, a car worth $3,500 purchased by Hermione

with Sally's money, $5,000 in a bank account and furniture, worth perhaps $2,000, in the shared accommodation. Sally's only relative is a nephew who has not communicated with her for over fifteen years. Hermione makes application for a will to be made leaving her all of Sally's estate. She argues that she will be able to remain in the rented accommodation if she can afford to pay for some home care, and that she has a friend who would be able to drive her if she can keep the car; but she will be able to afford this only if she inherits Sally's property.

Comment

S.5A.36 This is an estate of less than $20,000. If Sally had been capable and morally responsive to legitimate claims upon her it is likely that she would wish to make substantial if not exclusive provision for Hermione. The nephew would be entitled to all her estate upon intestacy. It could be disastrous to Hermione to lose the car and furniture. The jurisdiction which it is proposed should be conferred on the court should enable a case like this to be dealt with quickly and cheaply. It could be counter-productive to establish procedures which would necessarily be very costly in terms of legal fees. It is arguable that upon Hermione's bringing an application for leave a Registrar should be empowered, if the Registrar is satisfied that what she proposes is clearly the only justifiable course, to allow the application for leave and to move immediately to the application authorising the making of the will and to make the order.

S.5A.37 A requirement for leave can both screen out improper applications and be a mechanism for cheap resolution in the case of small estates where the only proper outcome is quite clear.

S.5A.38 A possible criticism of the proposed South Australian, recommended New South Wales and existing English legislation is that they give no guidance to persons seeking leave. In the Committee's view it is desirable that an application for leave should amount to a summary of the application which would follow if leave is granted; and that an application for leave should be *capable* of proceeding immediately to an application authorising the making of the will, in a clear case. It is therefore desirable that there should be some guidance in the legislation indicating to an applicant for leave what information should be placed before the court.

S.5A.39 The Committee considers, therefore, that the legislation should indicate what the applicant for leave should bring to court. What should be brought can most appropriately and economically be based on the requirements the Court will have with respect to applications for which leave has been given.

Suggested draft

Applications for leave: making the application

(1) 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.

Drafting notes

S.5A.40 This provision is largely taken from s.32FJ of the New South Wales recommended legislation, although that provision is about the application to the Court, not the seeking of leave to apply. Nevertheless, in seeking leave to apply it will be necessary for the court to have most if not all the information mentioned, although perhaps in less detail than the court might require, in a substantial case, upon application. Nevertheless there may be cases where there is not much information known. For instance in the Sally and Hermione example neither Sally nor Hermione may know where Sally's nephew now lives, or, if Sally had ever made a will, where it may be and what it contained. It might be unfair and could be unrealistic to insist on the production, at the leave stage at any rate, of a great deal of information, some of which might be either unobtainable or obtainable only at considerable expense and which would be unnecessary in the case of a small estate and clear cut case. It is for this reason that words such as "so far as they are known to the applicant" are used.

S.5A.41 The Committee makes no specific reference to evidentiary requirements as it considers that a Court is not going to be satisfied of any significant matter without affidavit or other sworn evidence, and that this is a matter for the Court's discretion and the Rules of Court.

S.5A.42 Another advantage of the leave requirement is that it can give the court an opportunity to give appropriate directions concerning the bringing of an application where leave is granted, such as directions respecting what further particulars will be required, the joining of parties and so on.

S.5A.43 The Committee therefore considers that it is desirable to include in legislation the function and powers of the Court in relation to an application for leave.

Suggested draft

Applications for leave: the orders of the court

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.

Drafting note

S.5A.44 By ensuring that the basic work of the application is done at the leave stage, and by giving the court hearing the leave application the ability to monitor the entire course of the application this provision will enable the Court in many cases to deal with the application at low cost; and in any case, by enabling it to give appropriate directions, it will permit the jurisdiction to be exercised efficiently. On hearing the application for leave the Court may require further particulars, the attendance of witnesses and even the attendance of the person on whose behalf the application is being made. It may scrutinise and alter the terms of the will, alteration or revocation which has been placed before it. It may assess the appropriateness of the applicant, and the adequacy of the steps taken to notify all interested parties. If it is satisfied of the propriety of the application it should be able to move immediately to the application for authorisation and allow it, so saving the costs of a second application and appearances before the Court.

Registrar's powers

S.5A.45 In appropriate cases, involving very small estates or where there is no doubt as to the consent of all who might be affected, the Committee considers that the functions of the Court should be exercisable by the Registrar, and Rules of Court should be able to be made to govern this procedure.

Rules of Court

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.

The application for authorisation

S.5A.46 After the Court has granted leave to apply for authorisation for the making, alteration or revocation of a will in specific terms, the Court before which the application for authorisation is made (which may be differently constituted) must consider the application. In doing so, however, that Court should not have to undertake an entire rehearing of the matter. It should be able to depend to a great extent on the work that has already been done by the Court that granted leave to apply. It should therefore be allowed to consider the course of the proceedings in the application for leave and given broad powers.

Suggested draft

(1) 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.

Comment

S.5A.47 It has already been said that leave to apply cannot be given unless the Court is satisfied that the person on whose behalf the application is made is or may be incapable of making a will; and that the proposed will, alteration or revocation is one which would have been made by the person if he or she had testamentary capacity. The requirement that the Court must consider the course of the application for leave involves its considering these matters, and the requirement that it may consider any further material or evidence it requires, and to resolve doubts, also gives it ample opportunity to ensure that the application is in order, but without necessarily requiring it to rehear the entire matter *de novo*.

Concluding comment

S.5A.48 The Committee believes that legislation along the lines proposed, subject to scrutiny by Parliamentary Counsel, is justifiable. It observes, however, that if such legislation is passed it will give to applicants under it a better right to testamentary provision than they might have in the case of a person of full testamentary capacity. For those with claims against an ordinary testator, only the law of wills, intestacy and family provision are available.

S.5A.49 In the long term, serious reconsideration of the basis of family provision law will become crucial, mainly because the underlying philosophy of family provision legislation comes from the early years of this century when there was no such thing as divorce and *de facto* marriages were frowned upon. It would be a pity if the existence of a limited jurisdiction enabling the Court to authorise the making of wills for incapable persons were to be seen as justifying procrastination on this more important issue of law reform.

S.5A.50 In summary, therefore, the Committee proposes the following draft:

5A. ***Statutory Wills for incapacitated persons***

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

(2) The Court is not bound to authorise the making of an entire will for the person who lacks testamentary capacity: it may authorise the making of a particular, specific testamentary provision.

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

Leave of Court

(4) The leave of the Court must be obtained before the application for an order is made.

(5) The Court must refuse to give leave if it is not satisfied that:

(a) there is reason to believe that the person for whom the statutory will is to be made under the order is or may be incapable of making a will; or

(b) the proposed will, alteration of a will, or revocation of a will, is or might be one which would have been made by the person if he or she had testamentary capacity; or

(c) it is or may be appropriate for a statutory will to be made for the person; or

(d) the applicant is an appropriate person to make an application; or

(e) adequate steps have been taken to allow representation of all persons with a legitimate interest in the application, including persons who have reason to expect a gift or benefit from the estate of the person for whom the statutory will is to be made.

Applications for leave: making the application

(6) In applying for leave to make an application under this section the applicant for leave must, subject to the Court's discretion, furnish to the Court—

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

(b) an estimate, so far as the applicant is aware of it, of the size and character of the estate of the person on whose behalf approval of the making of a will is sought;

(c) a proposed initial draft of the will or testamentary provision for which the applicant is seeking the court's approval;

(d) any evidence, so far as it is available, relating to the wishes of the person on whose behalf approval for the making of the will is sought;

(e) evidence of the likelihood of the person on whose behalf approval for the making of the will is sought acquiring or regaining capacity to make a will at any future time;

(f) any testamentary instrument or copy of any testamentary instrument in the possession of the applicant, or details known to the applicant of any testamentary instrument, of the person on whose behalf approval for the making of a will is sought;

(g) evidence of the interests, so far as they are known to the applicant, or can be discovered with reasonable diligence, of any person who would be entitled to receive any part of the estate of the person on whose behalf approval for the making of the will is sought if the person were to die intestate;

(h) evidence of any facts indicating the likelihood, so far as they are known to the applicant, or can be discovered with reasonable diligence, of an application being made under Part IV—Family Provision of the *Administration and Probate Act* 1958 for or on behalf of a person entitled to make an application under that Part in respect of the property of the person on whose behalf approval for the making of a will is sought;

(i) evidence of the circumstances, so far as they are known to the applicant, or can be discovered with reasonable diligence, of any person for whom the person on whose behalf approval for the making of the will is sought might reasonably be expected to make provision under will;

(j) a reference to any gift for a body, whether charitable or not, or charitable purpose which the person on whose behalf approval for the making of the will is sought might reasonably be expected to give or make by will;

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

Application for leave: the orders of the court

(7) On hearing an application for leave the Court may—

(a) refuse the application;

(b) adjourn the application;

(c) give directions, including directions about the attendance of any person as witness and, if it thinks fit, the attendance of the person on whose behalf approval for the making of a will is sought;

(d) revise the terms of any proposed will, alteration or revocation;

(e) grant the application on such terms as it thinks fit; and

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

Application for authorisation of making of statutory will

(8) Where leave has been granted to a person to apply for an order authorising the making, alteration or revocation of a will in specific terms, upon hearing the application for authorisation the Court may, after considering the course of the application for leave, and any further material or evidence it requires, and resolving any doubts—

(a) refuse the application; or

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

Rules of Court

(9) Rules of Court may authorise the Registrar to exercise the powers of the Court—

(a) without limit as to the value of the interests affected, in all cases in which all persons with a legitimate interest in the application, including persons who have reason to expect a gift or benefit from the estate of the person for whom the statutory will is to be made, consent; and

(b) even if there is no consent, in all cases in which the value of the interests affected does not exceed a sum specified in the Rules.

Division 2—Executing a will

S.6—How should a will be executed?

Wills Act 1958, ss.7 and 8

S.6.1 Prior to the *Wills Act* 1837 (UK) there were ten different sets of rules for the formal requirements that needed to be satisfied for property to pass under a will.

Which set of rules applied depended on the type of property involved. In 1833 the Real Property Commissioners recommended the rationalisation of these rules into one single set of rules, regardless of the property the subject of the testamentary disposition.[28]

s.6.2 Section 7 of the *Wills Act* 1958 sets out the formalities with which wills must now be executed. The section reads:

> No will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned (that is to say):—it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

s.6.3 From the very beginning the section caused difficulties. At first there were considerable difficulties regarding the meaning of the phrase "at the foot or end thereof" and s.8 of the *Wills Act* 1958, deriving from s.1 of the English *Wills Act Amendment Act* 1852, attempted to explain it. Nevertheless, many cases and authors demonstrate that the Courts have insisted upon meticulous compliance with these requirements.[29]

s.6.4 One of the worst of the more recent cases is *Re Colling* [1972] 1 W.L.R. 1440, where a witness to a will, a nurse in a hospital, had to leave the room in which the testator was executing his will, whilst he was signing his name, but before he had finished. The will was held not to have been duly executed (cf *Re White* [1990] 3 W.L.R. 187 and *Wood v. Smith* [1991] 3 W.L.R. 514 where meticulous compliance was again exacted).

Reforming the execution requirements

s.6.5 The functions or underlying purposes of the formal requirements for the execution of wills are said to include:

- an evidentiary function in that their satisfaction provides probative safeguards;

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28 *Fourth Report of the Real Property Commissioners* (1833), pages 12–16.

29 *Hansard*, 24 March 1993, page 39; and see, for instance, Chapter 2 of Hardingham, Neave and Ford's *Wills and Intestacy in Australia and New Zealand* (Law Book Co., 2nd ed, 1989).

- a "channelling" function as their satisfaction provides for standard expressions of testamentary intention;
- a "cautionary" function in that they encourage deliberation on the part of testators;
- a protective function in that they are designed to protect testators from the imposition of undue influence or coercion.[30]

S.6.6 The Chief Justice's Law Reform Committee (CJLRC) recommended, in its report on the Execution of Wills (1984), that the requirements of sections 7 and 8 be liberalised consistently with their underlying purpose and with the report of the Lord Chancellor's Law Reform Committee on the Making and Revocation of Wills (1980). The Report of the Wills Working Party (1984) referred to the CJLRC Report, accepting it in substance, but making additional suggestions.[31] As a result section 6 of the 1991 Draft Wills Bill provides:

> (1) A will is not valid unless—
>
> (a) it is in writing, and signed by the testator or by some other person, in the presence of, and at the direction of the testator; and
>
> (b) it is apparent from the document that the testator intended by the signature to give effect as his or her will to the writing so signed; and
>
> (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
>
> (d) each witness, in the presence of the testator (but not necessarily in the presence of any other witness) attests, and either signs the will or acknowledges his or her signature.
>
> (2) A statement in a will that the will has been executed in accordance with this section is not necessary for the will to be valid.
>
> (3) Where a testator purports to make an appointment by his or her will in exercise of a power of appointment by will, the appointment is not valid unless the will is executed in accordance with this section.
>
> (4) 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

30 See Lee, W.A., *Manual of Queensland Succession Law,* 3rd Edition, 1991 at paragraph 402.

31 *WWP Recommendation 4*.

> 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.

s.6.7 Sub-section (1) liberalises the formal requirements for the execution of wills in that it does not insist, as the existing law does, that the testator's signature be made "at the foot or end" of the will. Paragraph (a) merely requires that the will be signed.

s.6.8 Section 6(1)(b) has already given rise to doubt. Perhaps it does not quite express what the drafter had in mind. It is hard to see how the *intention* of a testator, respecting his or her signature, can be "apparent from the document". The document must be signed and the testator must sign it with the intention of giving effect to it by the signature. A signature made without that intention, for instance a signature made on every page of a will in the belief that the law requires that, or with the intention of preventing interpolations, cannot be effective for the purpose of executing a will (*Will of Vergers* [1956] V.L.R. 94).

s.6.9 The Committee considers that this paragraph is unnecessary. All that is needed is that the testator sign with the requisite intention. The existing law already covers the case.

s.6.10 In order to make the point expressly, however, a clearer form of words for s.6(1)(b) might be as follows:

> 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.

s.6.11 The advantage of this form of words is that it lays to rest any ghost of the past requiring the signature to be at the "foot" of the will; but it affirms the rule that the testator must have the requisite intention of executing the will when making the relevant signature.

s.6.12 The introduction in s.6(1)(d) of the notion that a witness may *acknowledge* his or her own signature is novel, and likely, in the Committee's view, to lead to unnecessary complications. It suggests that a witness might sign the will in the absence of the testator and then return later to acknowledge it in the presence of the testator. The suggestion may have arisen as a result of contemplation of a case (*Re Colling* [1972] 1 W.L.R. 1440) where, if such acknowledgment had been permitted, a will might have been saved from invalidity. But one bad case is not a sufficient argument to reform a law where simple standardisation is necessary. Such fact situations will be covered by a dispensing power (see s.9).

Execution: interstate precedents

s.6.13 The 1991 Draft Wills Bill follows, though with differences of drafting, the revised s.7 of the New South Wales *Wills, Probate and Administration Act* 1898 which provides:

> (1) A will is not valid unless—
>
> (a) it is in writing; and
>
> (b) it is signed by the testator; and
>
> (c) it appears, on the face of the will or otherwise, that the testator intended by the signature to give effect to the will; and
>
> (d) the signature is made by the testator in the presence of 2 or more witnesses present at the same time or the signature is acknowledged by the testator in the presence of 2 or more witnesses present at the same time; and
>
> (e) at least 2 of those witnesses attest and sign the will in the presence of the testator (but not necessarily in the presence of each other or of any other witness).

s.6.14 Unlike s.6(1) of the 1991 Draft Wills Bill and s.7 of the *Wills Act* 1958, the NSW s.7(1) does not allow a testator to direct another to sign his or her will. The Committee considers that it is wrong to omit this power to direct another to sign, and it should be restated in clear terms to maintain continuity with the past.

s.6.15 The *Wills (Miscellaneous) Amendment Act* 1994 of South Australia takes up the New South Wales precedent. It substitutes for section 8 of its *Wills Act* 1936 a new section 8 whose paragraph (b) is in essentially the same terms as s.7(1)(c) above. As explained at paragraphs s.6.8–11 above in relation to s.6(1)(b) of the 1991 Draft Wills Bill, the Committee considers that this provision should be omitted or amended.

Recommendation 20

The Committee recommends, for a will to be valid—

- that the will must be signed by the testator or by some other person in the presence of and at the direction of the testator
- that the signature of the testator must be made with the intention of executing the will
- that there be no requirement that the intention of the testator in signing the will be "apparent from the document"
- that the signature must be made or acknowledged by the testator in the presence of two or more witnesses present at the same time
- that 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)
- that it be made clear that it is not essential that the signature be made "at the foot of" the will.

Attestation and attestation clauses

S.6.16 As part of the process of proving the execution of a will witnesses can be called upon to give evidence of the fact that they saw the making or acknowledgment of the signature. To avoid that costly exercise, forms of attestation are commonly used when the will is executed by which the witnesses state in writing that they have observed the making of the signature. A typical "attestation clause" might read as follows:

> Signed by the above named testator as his [her] will in the presence of us, both present at the same time, who at his [her] request and in his [her] presence have hereunto subscribed our names as witnesses.

S.6.17 Such forms sometimes exceed what is necessary to prove execution, but the point about them is that they are probative and will ordinarily be acceptable to the Registrar when admission of the will to probate is sought. Without such a clause the Registrar may require an Affidavit of Due Execution to be executed by the witnesses or either of them. While it is therefore of considerable practical value to include an attestation clause in a will it is not essential to do so, and the *Wills Act* 1837

provided, in relation to the execution formalities, that "no form of attestation shall be necessary." Those words were found in all legislation in Australia deriving from the *Wills Act*. The question is whether such a provision should continue to be included in modern legislation.

s.6.18 On the one hand it is arguable that the provision only says what is *not* necessary, and that it is therefore confusing. On the other hand it is arguable that it is desirable to ensure continuity of the practice which lawyers always follow, when making a professional will, of including a suitable attestation clause to save any difficulty which might otherwise be encountered with the Registrar. If the words are omitted perhaps some practitioners might assume that the old law has gone altogether.

s.6.19 The Committee considers that ordinarily it is better for a statute not to say what is *not* necessary. It is therefore of the view that no harm would be done if the provision were omitted, unless its omission were taken to indicate that the existing practice of including attestation clauses as a means of providing credible proof of due execution of wills could be discontinued. It will always be correct practice for solicitors to include such a clause in a properly drafted will.

s.6.20 In the 1991 Draft Wills Bill s.6(2) the following words are found:

> A statement in a will that the will has been executed in accordance with this section is not necessary for the will to be valid.

s.6.21 This provision is intended to continue the 1837 provision expressed by the words "but no form of attestation shall be necessary". Apart from the question of whether it is desirable to retain such a provision at all, the Committee considers it should not be changed to the extent of the 1991 Draft Wills Bill. The difficulty with the draft is that it may suggest to practitioners that existing forms of attestation clause are no longer sufficient. The Registrar might consider it to be his or her duty to insist that any attestation clause should in future state that the provisions of the section have been complied with.[32]

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32 Hence the Wills Advisory Group suggested deleting the words "in accordance with this section" and substituting the words "a statement of due execution is not necessary": *Minutes*, 4 August 1993, Item 5 and 29 September 1993, Item 2.

s.6.22 The Committee considers therefore that if such a provision is retained it should follow existing word patterns, so that the existing practices and forms of attestation clause are not compromised, and therefore proposes a form of words:

> It is not essential for a will to contain an attestation clause.

Recommendation 21

The Committee recommends—

- that s.6(2) of the 1991 Draft Wills Bill be omitted;
- that s.6 contain a statement that it is not essential for a will to contain an attestation clause; and
- that solicitors should continue as a matter of correct practice to include attestation clauses in wills.

Exercise of powers of appointment by will

s.6.23 Sub-sections (3) and (4) of the 1991 Draft Wills Bill include provisions about the form of execution of powers of appointment exercised by will. A power of appointment is conferred on a person by an instrument, often the will of a former spouse, and enables the donee of the power to decide who shall take certain property which formerly belonged to the person who conferred the power on the donee. When the power is exercised it is not the property of the person exercising the power which is affected but the property of the person who conferred the power on the donee. If the power is exercisable by will, these provisions say that it is sufficient if the power is executed in the manner required for the execution of wills. It does not matter if, when the power was conferred, the donor of the power required the donee to exercise the power with some additional formality or solemnisation. Thus if the donor of the power requires the donee to exercise the power in writing in the presence of *three* witnesses, it will be sufficient if the power is exercised by will in the presence of two witnesses since the requirements of form for the execution of wills require only two witnesses. The rule has always been accepted and saves a testator who exercises a power, perhaps without realising it, from having to seek out and comply with the terms of an instrument conferring the power.

s.6.24 These sub-sections of the 1991 Draft Wills Bill, now sub-sections (4) and (5), represent a redrafting of s.9 of the Victorian *Wills Act* 1958, which suffers from a somewhat old fashioned drafting style, and are recommended.[33]

Recommendation 22

The Committee recommends that the rule that valid execution of a will validly exercises a power of appointment should not be altered.

s.6.25 In conclusion, the Committee proposes in place of s.6 of the 1991 Draft Wills Bill the following provisions:

Draft s.6—How should a will 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) 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.

33 The Wills Advisory Group suggested they be relocated into a separate section dealing only with powers of appointment: *ibid*.

S.7—Wills of members of the armed forces

Wills Act 1958, s.10—Soldiers' and mariners' wills

S.7.1 There is a strong case for repealing s.10 of the *Wills Act* and not replacing it.

S.7.2 Before the *Statute of Frauds* of 1677 wills of personalty could be made by simple oral declaration, no verbal form being required. The statute set out elaborate requirements for the form of wills thereafter, but by s.22 it was provided that "any soldier being in actual military service or any mariner or sailor being at sea, may dispose of his personal estate as he might have done before the making of this Act".

S.7.3 This "soldiers' privilege" was retained in s.9 of the *Wills Act* 1837. The privilege extended not only to the form which the will might take, but also to the age of the testator, that is, a minor within the description could make a will.

S.7.4 All the Australian States copied the 1837 *Wills Act,* but as time went by the wording of the States' statutes diverged as some States were persuaded to extend the class of privileged persons to, for instance, persons "engaged outside Victoria on any work of any Red Cross society or ambulance association or any other body with similar objects (*Wills Act* 1958, s.10(2)(ii)) or a person "who was a prisoner of war in the enemy's country or interned in the country of a neutral power" (s.10(2)(iii)).

S.7.5 For over two hundred years after the *Statute of Frauds* the ecclesiastical courts and after them the probate court entertained the notion that the *Statute* had conferred on soldiers and mariners the privileges accorded them by Roman Law, the draftsman of the *Statute of Frauds*, Sir Leoline Jenkins, having been a Civilian. But that fallacy was finally exposed in *Re Booth* [1926] P. 120.

S.7.6 In an article in (1949) 12 *Modern Law Review* 183 entitled "Soldiers' Wills" the distinguished legal historian D C Potter traced the attitude of the courts towards soldiers' wills during the nineteenth century, which began with the ecclesiastical court restricting the privilege, but ended with the probate court greatly extending it.

S.7.7 A leading Australian textbook on the law of wills (Hardingham, Neave & Ford, *Wills and Intestacy in Australia and New Zealand*, 2nd edition 1989) Chapter 4, entitled Privileged Wills, begins as follows:

> Several criticisms have been made of the doctrine of privileged wills under which certain categories of testators are exempted from the necessity to comply with s.9 of the *Wills Act* 1837. They are all justified.

S.7.8 There is a detailed examination of this topic in Chapter 11 of the New South Wales Law Reform Commission's Eighth Report (1986) in its Community Law Reform Project entitled *Wills – Execution and Revocation*. After a lengthy review the Commission recommended in paragraph 11.36:

> For the reasons discussed in Part IV we recommend that no class of persons should have the status of privileged testators.

S.7.9 In consequence the New South Wales legislature abolished the privilege in 1988.

S.7.10 The American *Uniform Probate Code* abolished the privilege in 1969.

Arguments for abolishing soldiers' "privilege".

S.7.11 Cogent arguments for abolishing soldiers' privilege have been advanced by several authors. A bibliography is to be found in Hardingham, Neave and Ford, *supra*, at page 92, note 1. Criticisms of the rule may be summarised as follows.

S.7.11.1 If the doctrine was founded upon the proposition that soldiers in time of war and mariners at sea did not have the benefit of appropriate legal advice in the making of their wills, that is no longer the case. All branches of the Australian armed forces ensure that those in service and those joining the service, as well as reserves, are encouraged to make wills, and free legal assistance is provided to enable them to do so.

S.7.11.2 In any case, is it a privilege to be exempted from provisions the intention of which is to protect testators? The formalities prescribed for the making and execution of wills perform a variety of specific functions. First, they perform an evidentiary function. All formalities serve as probative safeguards. Writing ensures that evidence of testamentary intent is cast in a reliable and permanent form; and signing is evidence of genuineness. The requirement of attestation ensures that the signing is witnessed. Rules of form also perform a channelling function, particularly valuable in the context of military service. They standardise testamentary activity, a valuable guarantee of uniformity where administrative routine is desirable. A testator furnished

with appropriate legal assistance is absolved from problems of communicating testamentary intention. Prescriptions of form also perform a cautionary function, also of particular value in the military context, because they impress on the testator what is being done.

Persons denied these benefits can hardly be considered to be privileged. As Jeremy Bentham said (quoted in Hardingham *et al*, *supra*, at 93):

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

s.7.11.3 The "privilege" undermines the orderliness and integrity of the mechanisms which exist within the Australian Defence Force to ensure that members of the Forces execute wills in a proper environment with appropriate legal advice. The "privilege" in fact undermines the laudable policy of the Defence Force. The New South Wales Law Reform Commission sought the view of the Australian Defence Force with respect to its recommendation that the privilege be abolished in connection with the preparation of its Eighth Report (1986) entitled *Wills – Execution and Revocation*. The Military Law Sub-Committee of the Department of Defence considered the recommendation. Paragraph 11.35 of the Report in part reads as follows:

> The final response from that Sub-Committee was that, while there were some reservations concerning the level of legal assistance available to defence members in time of active service, there was general agreement with the views of the Commission. That agreement was expressly subject to the general dispensing power similar to the South Australian model recommended in Chapter 6; to our proposal that the civil onus apply (paragraph 6.34); and to our proposal that the rules of evidence be amended so as to allow hearsay evidence of the testator's statements and other extrinsic evidence to be admissible (paras. 6.35–6.36).

s.7.11.4 The battlefield or a place of danger or stress such as imprisonment is not a proper place for the making of a will or for the alteration or revocation of a will made with proper legal advice. Pain, stress, anxiety or depression and the personal politics of trench warfare or incarceration are not conducive to the formation of responsible testamentary intentions. Where a testator has a clear intention to make a will but lacks appropriate legal assistance regarding the formalities of execution, the proposed dispensing power (see s.9) should suffice to make good any deficiency of form.

s.7.11.5 Even if a member of the defence forces dies intestate, that is not, perhaps, as serious a matter as it once was because family provision statutes can mitigate the injustice that can sometimes be a consequence of the application of intestacy rules.

s.7.11.6 Problems of obtaining reliable, admissible evidence of the making of a "privileged" will are very considerable. The circumstances of the making of the will, the state of mind of the testator, recollections of what the testator said, and the interpretation of perhaps confused or intermittent declarations of intention, mean that difficult and expensive litigation may attend the proof of most informal wills.

s.7.11.7 The statutes themselves have been found to cause problems of interpretation. Chapter 4—Privileged Wills of Hardingham, Neave and Ford, *supra*, is over seventeen pages of detailed text, supported by 117 footnotes. The subject is a morass of difficulties—for instance, who is a "soldier on actual military service or a mariner or sailor at sea"? The extension of the list to others deserving of this dubious privilege makes the interpretation of the legislation even more complex and anachronistic.

s.7.11.8 In the context of attempts to render Australian succession laws uniform the sections on privilege might be particularly difficult to bring together because amendments which have been introduced in different States might be seen as defensible, once the assumption of the soundness of the principle is taken for granted. Furthermore, New South Wales, having abolished the "privilege", is unlikely to be persuaded to reintroduce it when there are such strong reasons against it.

s.7.12 The Advisory Group has recommended that the provisions dealing with privileged testators be repealed.[34]

Recommendation 23

The Committee recommends—

- that no class of persons should have the status of privileged testators;

34 *Minutes*, 1 September 1993, Item 3.

- that s.10 of the *Wills Act* 1958 should be repealed; and
- that s.7 of the 1991 Draft Wills Bill be omitted.

S.8—Must witnesses know the contents of what they are signing?

Wills Act 1958, s.11—Publication not to be requisite

S.8.1 Before 1837 certain wills had to be "published" when made. That usually meant that the witnesses were aware that the instrument they were witnessing was a will and what its contents were. This rule was abolished in 1837 in terminology which was comprehensible then but is no longer so. The old terminology still exists in s.11 of the *Wills Act* 1958 and reads:

> Every will executed in manner hereinbefore required shall be valid without any other publication thereof.

S.8.2 It is desirable to provide in clear terms that it is not required that a witness to the signature should know that the document being signed is a will; otherwise 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.

Recommendation 24

The Committee recommends that no change be made to the rule that a witness need not know the instrument signed is a will, and that s.8 of the 1991 Draft Wills Bill be adopted.

S.8.3 Section 8 of the 1991 Draft Wills Bill provides the requisite clarity:

Draft s.8—Must witnesses know the contents of what they are signing?

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

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

Wills Act 1958—No counterpart

S.9.1 A failure to make a will in conformity with the formal requirements, no matter how slight, will result in the will being invalidated. The New South Wales Law Reform Commission identified the following examples of cases involving inequitable results brought about by the need for there to be strict compliance with the execution formalities, namely where:[35]

- The testator inadvertently forgot to sign the will.
- Witnesses inadvertently forgot to sign the will.
- A husband or wife inadvertently signed the will prepared for the other (so-called "mirror wills").
- The testator was too sick to turn his head and watch the witness sign, although they were in the same room.
- The attesting witnesses were not present at the same time when the testator signed or acknowledged the will.

S.9.2 For some time there has been opinion that there should be some mechanism to enable the court to admit to probate a will which has not been executed in compliance with the requirements as to form of the *Wills Act*. South Australia legislated in 1972 to give the Court a dispensing power, allowing it to admit to probate a will not duly executed. That legislation has recently been amended by the *Wills (Miscellaneous) Amendment Act* 1994. In 1975 the distinguished American Professor John Langbein wrote an article "Substantial Compliance with the *Wills Act*"[36] in which it was argued that if there was substantial compliance with the requirements for execution of wills the court should be able to admit the document to probate. The Queensland Law Reform Commission took this suggestion up in its *Succession Act* 1981, s.9. A description of that legislation follows.[37] In 1990 the

35 NSWLRC Report at paragraph 6.4. See also *Hansard*, 24 March 1993, page 3, 26 July 1993, pages 39–44, and 17 September 1993, pages 69–71.

36 (1975) 88 *Harvard Law Review* 489

37 See paragraph 2.9.13ff.

American *Uniform Probate Code* took the matter further with a comprehensive provision. New South Wales by s.18A of its *Wills Act*, and Western Australia by Part X of its *Wills Act*, inserted by the *Wills Amendment Act* 1987, have also legislated. The Wills Working Party recommended the introduction of similar legislation in its 1984 report,[38] and a provision is included in the 1991 Draft Wills Bill, s.9. The Law Reform Commission of Tasmania recommended in its Report N° 35 on the *Reform of the Law of Wills*, 1983, legislation along the same lines as Queensland, embracing a doctrine of "substantial compliance". In the context of a drive towards uniform succession laws for Australia the Australian precedents must be scrutinised and evaluated and any experience gained from them carefully considered.

Case History

s.9.3 There has been a recent, authoritative survey of the cases in which the dispensing power has been exercised, in South Australia, the state with the longest history of the jurisdiction, and in New South Wales, the state with the shortest experience of it. The survey is by Powell J. of the New South Wales Supreme Court and is published in the January 1993 issue of the *Australian Law Journal*.[39] It is entitled "Recent Developments in New South Wales in the Law Relating to Wills". The article lists, in an Appendix, 41 South Australian and New South Wales cases in which the dispensing power has been invoked. The article and the Appendix of cases give a clear picture as to the sorts of cases in which the dispensing power can be expected to be exercised in favour of probate and those in which the power is unlikely to be exercised. Of 43 cases, the 41 included in the Appendix and two other cases, namely *Re Kolodnicky* (1981) 27 S.A.S.R. 374 and *Re Ryan* (1986) 40 S.A.S.R. 305, 20 were admitted to probate under the jurisdiction. These are numbered 1, 4, 9, 12, 16, 18, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33, 36, 38, 39, *Kolodnicky* and *Ryan*. Ten cases were refused admission to probate, all of which were concerned with draft wills, notes and instructions for wills, wills engrossed but not executed and lists of legacies or amendments. They are numbered 1, 5, 6, 15, 19, 20, 22, 26, 34, 37, 40 and 41 in the Appendix. "Mirror" wills have been admitted (numbers 3 and 11). Unsigned wills are not usually admitted but can be if the failure to sign is accidental but the intention is present (numbers 36, 38 and 39).

38 *WWP Recommendation 5*.

39 (1993) 67 *Australian Law Journal* 25

s.9.4 Many of the refusals mentioned in Powell J.'s article occurred in the early stages of the exercise of the jurisdiction, when the boundaries of the jurisdiction were being tested. They indicate a policy which distinguishes between instruments which the testator intends to be a will and drafts, letters of instruction, even engrossments of wills which were not intended to be the will at the time they were under consideration.[40] The advantage for Victoria, if it adopts wording similar to that found in South Australia and New South Wales, is that it will have a substantial body of persuasive precedent to enable the judiciary to establish the jurisdiction in a functional manner, and the legal profession will be able to predict likely outcomes in individual fact situations.[41]

s.9.5 Further literature on the subject has been generated in the United States partly as a result of the South Australian initiative. In particular there is Professor Langbein's article "Excusing Harmless Errors in the Execution of Wills: a Report on Australia's Tranquil Revolution in Probate Law".[42]

The existing legislation

South Australia—s.12—Validity of will

s.9.6 The section read:

> 12.(1) A will is valid if executed in accordance with this Act, notwithstanding that the will is not otherwise published.
>
> (2) A document purporting to embody the testamentary intentions of a deceased person will, notwithstanding that it has not been executed with the formalities required by this Act, be taken to be a will of the deceased person if the Supreme Court, upon application for admission of the document to probate as the last will of the deceased, is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his or her will.

s.9.7 But by the *Wills (Miscellaneous) Amendment Act* 1994 sub-section (2) has recently been amended and added to as follows:

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40 Cf *Written Submission 6.*

41 For a recent illustration of the use of the New South Wales provision, concerning Brett Whiteley's will, see Atherton, R., "The Dispensing Power and Missing Wills" (1993) 67 *Australian Law Journal* 859.

42 (1987) 87 *Columbia Law Review* 87

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

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

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

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

S.9.8 What is highly significant about the South Australian amendment is that it lowers the standard of proof required in cases of this kind. Under the original legislation the Court had to be satisfied that there could be "no reasonable doubt" as to the intention of the testator. By the 1994 amendment, the Court has only to be "satisfied" of the testator's intention. The express reference to the power to authorise the Registrar to exercise the powers of the Court is of particular significance. The Committee understands that previously, because of the proof requirement, it was felt that the jurisdiction should be exercised only by the judiciary; and the Registrar has not hitherto been permitted to exercise the jurisdiction even in uncontested cases.

Northern Territory

S.9.9 Section 12 of the Northern Territory *Wills Act* 1990 is in the same terms as the South Australian legislation before its 1994 amendment. It requires proof that there can be "no reasonable doubt".

New South Wales

S.9.10 Section 18A of the New South Wales *Wills, Probate and Administration Act* 1898 reads as follows:

18A. Certain documents to constitute wills etc.

(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, an amendment of such a will or the revocation of such a will if the Court is satisfied that the deceased person intended the document to constitute his or her will, an amendment of his or her will or the revocation of his or her will.

(2) In forming its view, the Court may have regard (in addition to the document) to any other evidence relating to the manner of execution or testamentary intentions of the deceased person, including evidence (whether admissible before the commencement of this section of otherwise) of statements made by the deceased person.

S.9.11 It is to be noted that the ordinary standard of proof in civil cases is required, namely that the Court be satisfied of the testator's intention.

Australian Capital Territory

S.9.12 Section 11A of the Australian Capital Territory *Wills Act* 1968, as amended by the *Wills (Amendment) Act,* N° 67 of 1991, is in terms not dissimilar to those of the New South Wales provision. It sets the civil standard of proof, namely that the Court must be satisfied of the testator's intention.

Queensland

S.9.13 Sections 9(a) and (b) of the Queensland *Succession Act* 1981 read as follows:

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

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

S.9.14 Although the standard of proof required is that the Court is satisfied of the testator's intention, the requirement that there be "substantial compliance" has proved so great a stumbling block that the jurisdiction has had poor success, and cases which would almost certainly have been admitted to probate in South Australia or New South Wales have failed in Queensland. In the following cases substantial compliance was *not* found.

Re Grosert [1985] 1 Qd. R. 513: there were signatures of two witnesses on the will, but one self-interested witness swore that only she had been present when the will was executed and the other witness could not be traced.

Re Johnson [1985] 1 Qd. R. 516: one witness subscribed a folded document, the testator's signature not being visible. A second witness attested at a different time, the testator's signature then being visible.

Re Henderson (Unreported) Q.S.C., Case Nº 231, 1985: only one witness attested, a Justice of the Peace, who informed the testator that his attestation would suffice.

Will of Eagles [1990] 2 Qd. R. 501: a codicil was witnessed by two witnesses, but there was evidence that they were not present at the same time and there was no evidence as to who attested first or of the interval between the first and second attestations.

s.9.15 On the other hand substantial compliance has been found on a few occasions.

Re McIlroy (Unreported) Q.S.C., Case Nº E375, 1984: one witness testified that the other witness was not present when the will was executed. The other witness testified that both witnesses were present.

Re Matthews [1989] 1 Qd.R. 300: the first witness attested and signed in the presence of the testator; then, at the testator's request, took the will to another person to witness, which was done in the absence of the testator.

Re Gaffney (Unreported) Q.S.C., Case Nº 1653, 1987: the will was executed but not at the foot or end.

s.9.16 The difficulty with *McIlroy* and *Gaffney* is that they both could have been decided in favour of probate under existing law, without the need to plead the "substantial compliance" doctrine. In *McIlroy* the judge could have found for the will by believing the witness who maintained that both witnesses were present at the same time. In *Gaffney* there are precedents which show that the courts can admit to probate wills which have been signed by the testator in an unconventional place.

s.9.17 The legal profession in Queensland has found the jurisdiction difficult to predict, and it is rarely used. As the cases above indicate, far more is required than is required either in New South Wales or South Australia. The Wills Advisory Group does not recommend the Queensland precedent. The Committee therefore considers that it would be a retrograde step to follow the Queensland provision and reject a precedent which clearly works effectively in other Australian States.

Tasmania

s.9.18 In its Report on *Reform of the Law of Wills* (Report N^{o} 35, 1983) the Law Reform Commission of Tasmania compared the South Australian and Queensland precedents, saying (at 10):

> Two solutions were canvassed:
>
> - A general dispensing power in the Court to pronounce a will valid if the Court was satisfied that it represented a genuine attempt to express the testator's wishes, notwithstanding the absence of some formality required under Section 9: and irrespective of whether the deceased had attempted to comply with the formalities or not (W.P.6); and
> - A general dispensing power in the court to pronounce a will valid only where the deceased has at least attempted to comply with Section 9 requirements; but where the defect is so inconsequential and harmless to the purpose of the formalities that the court is satisfied that it can give effect to the true intentions of the testator without defeating the purpose of Section 9 (a doctrine of "substantial compliance"). (W.P.8)
>
> This Commission, however, considers that the second solution would be more appropriate. The first solution has given rise to some uncertain litigation in South Australia. The alternative is regarded as more acceptable to the courts since it preserves the spirit of the formalities, if not the letter. Dealing with uncertain evidence of intention would seem to be less a problem under the second solution.
>
> The Commission accordingly recommends that the Court should be granted a general power to declare an otherwise defectively executed will to be valid, if it can be shown that the defects are inconsequential and do not detract from the overall purpose of the *Wills Act*, and that the testator had at least attempted to comply with those formalities.
>
> The Commission suggests that the phrase "by mistake, accident or other reasonable cause" should appropriately convey the circumstance in which the testator's defectively executed intentions might be upheld in what is otherwise a purportedly formal will.

s.9.19 In the 11 years since the Tasmanian Report was published the court's jurisdiction to dispense with strict compliance with the *Wills Act* formalities has

been clarified by the many cases which have been decided, as Powell J.'s article shows. The deficiencies of the Queensland precedent have also become abundantly clear. In the light of the experience gained in South Australia and New South Wales, the Committee considers that the Law Reform Commission of Tasmania's view should not be followed.[43]

American Uniform Probate Code

S.9.20 Section 2–503 of the American *Uniform Probate Code* reads as follows:

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

S.9.21 The commentary to this provision refers to the existence of similar legislation in Manitoba and Israel. The Uniform Laws Conference of Canada approved a comparable measure for the Canadian *Uniform Wills Act* in 1987. The commentary also pays considerable attention to the South Australian legislation and the experience derived under it.

The Wills Working Party

S.9.22 In the Report of the Wills Working Party fears were expressed as to the costs which might be incurred if a general dispensing power were introduced. Nevertheless a majority of the Working Party recommended by *Recommendation 5*:

> (a) That a dispensing power, based on the model contained in Section 12(2) of the *Wills Act* 1936–1980 (South Australia) be provided for in the Victorian *Wills Act* and that that power should apply not only to matters relating to the execution of testamentary instruments but also to their alteration and revocation.

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43 Although the substantial compliance approach was recommended by the Tasmanian Law Reform Commission, *Report on Reform in the Law of Wills* (1983), page 10, the subsequent legislation opted for a general dispensing power: see section 26, *Wills Act* 1992 (Tas).

(b) That such a power should apply only to cases where the testamentary instrument has been brought into existence after the commencement of operation of the new provision.

S.9.23 The Committee observes that costs can be curtailed if a "fast track" procedure is made available, that is if the Registrar can be empowered to determine cases where the parties consent, unless they wish to go before a judge, and in cases where the estate is of a relatively small value.[44]

The Draft Wills Bill 1991

S.9.24 Section 9 of the Draft Wills Bill is as follows:

(1) The Supreme Court may admit to probate as the will of a deceased person, a document which has not been executed in the manner in which a will is required to be executed by this Act, if the Court is satisfied beyond reasonable doubt that that person intended the document to be his or her will.

(2) The Supreme Court may refuse to admit a will to probate which the testator has purported to revoke some writing, where the writing has not been executed by this Act, if the Court is satisfied beyond reasonable doubt that the testator intended to revoke the will by that writing.

(3) The Supreme Court may admit to probate a will which has been altered, in its altered form, where the alteration has not been executed in the manner in which an alteration to a will is required to be executed by this Act, if the Court is satisfied beyond reasonable doubt that the testator intended to make the alteration to the will.

S.9.25 The requirement that the Court be satisfied "beyond reasonable doubt" was not canvassed in the Report of the Wills Working Party and is, as noted already, very much to be doubted. Although in South Australia there was a requirement that the Court must be satisfied that there "can be no reasonable doubt" of the testator's intention, it was proposed in 1993 that that standard of proof should not be required in future and the *Wills (Miscellaneous) Amendment Act* 1994 has recently implemented that proposal. It represents the informed opinion of a Court which has the longest practical experience of the exercise of a general dispensing power.

S.9.26 Quite apart from the experience of South Australia, however, the Committee considers that to introduce a criminal standard of proof into a part of the law which

44 See paragraphs S.9.30–32 below.

has always functioned as a civil jurisdiction would be an error. It seems to reflect a great reluctance to introduce a dispensing jurisdiction at all. Certainly the precedents from New South Wales could not be relied on by litigants who had to show proof beyond reasonable doubt. The Victorian Court would have to carve out a new jurisdiction necessarily far more limited than that to which other jurisdictions in Australia are already accustomed.

S.9.27 It would be anomalous, too, that where the capacity of a testator to make a will is concerned, or where undue influence is alleged, the Court has only to be satisfied at the civil standard of proof, whereas where the only question is whether the testator intended a certain document to be a will, an alteration of a will, or a revocation of a will, a far higher standard of proof is required. Indeed it is arguable that the setting of so high a standard of proof shows an intention to emasculate the jurisdiction from the outset. Even in the power of rectification which is proposed by s.37 of the 1991 Draft Wills Bill only the civil standard of proof is required.

S.9.28 The advantage of the civil standard of proof is that it is capable of flexibility. In *Briginshaw v. Briginshaw* (1938) 60 C.L.R. 336 Dixon J., as he then was, said at 360:

> At common law two different standards of persuasion developed. It became gradually settled that in criminal cases an accused person should be acquitted unless the tribunal of fact is satisfied beyond reasonable doubt of the issues the burden of proving which lie upon the prosecution. In civil cases such a degree of certainty is not demanded.

S.9.29 On the standard of proof in civil cases he said (at 361–2):

> Except[362] upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.

S.9.30 Lastly two further difficulties could result from insistence that the criminal standard of proof be adopted. First, additional costs would inevitably be incurred in proving at the higher standard. This has already been experienced in South Australia with the requirement that the Court be satisfied that "there can be no reasonable doubt"—see *Estate of Sutton* (1988) 51 S.A.S.R. 150 at 153. Secondly it

might be difficult to justify enabling simple applications to be "fast tracked", which means, in practice, allowing some applications to be dealt with by the Registrar. Thus in South Australia the Registrar has not been permitted to decide applications, and it is understood that one reason for this is the high standard of proof which has hitherto been demanded. In the context of the 1994 amendments to that requirement there is now express provision to enable Rules of Court to enable the Registrar to decide some applications under this power.

S.9.31 In New South Wales the *Rules of Court* have been amended, with effect from 13 January 1993, so as to provide that the Registrar in Probate and the Deputy Registrars may exercise the power of the Court under s.18A:

> (1) without limit as to the value of the interests affected, in all cases in which those affected consent; and
>
> (2) even if there be no consent, in all cases in which the value of the interests affected does not exceed $20,000.

S.9.32 The advantage of this provision, in terms of accessibility to the jurisdiction and savings on costs, is obvious.

Conclusion: the dispensing power

S.9.33 The dispensing power has been available in South Australia for two decades. It has been adopted in New South Wales and early experience of its exercise has enabled the Court already to indicate its utility and provide some measure of predictability of its exercise. In both jurisdictions sufficient confidence in the practicability of the jurisdiction has resulted in the establishment in New South Wales and in South Australia of a fast track, low cost, procedure, enabling the Registrar to exercise the jurisdiction in certain cases. There is, in the light of this experience, no reason why Victoria should not adopt the same or a very similar dispensing power. On the contrary, in Queensland, where a restricted dispensing power was chosen, the history of the cases has been discouraging.

S.9.34 The Committee therefore considers that the South Australian precedent (including the amendment made by the *Wills (Miscellaneous) Amendment Act* 1994) and the New South Wales precedent should be used, rather than the Queensland precedent or the proposal of the Tasmanian Law Reform Commission, which recommends following the Queensland precedent. The appropriate standard of

proof should be the civil standard—that the Court be "satisfied". There should also be provision to enable a "fast track" procedure to be established enabling the Registrar to deal with cases where the parties consent, or cases involving small estates.[45] The provision could be included in the statute or left to Rules of Court, for which specific provision should be included in the legislation.

Recommendation 25

The Committee recommends that—

- there should be a dispensing power;
- the standard of proof should be the civil standard;
- the Registrar should be able to deal with cases where the parties consent, or cases involving small estates; and
- the Registrar's power should be governed by Rules of Court, for which the *Wills Act* should make provision.

s.9.35 The Committee's recommendations are implemented in the following—

Draft s.9—When may a Court dispense with the requirements for execution of wills?

(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.

45 This is also recommended by the Wills Advisory Group: *Minutes*, 29 September 1993, Item 3 and 13 October 1993, Items 2 and 3. See also *Hansard*, 17 September 1993, pages 69–73 and *Written Submissions 4, 6, 8* and *14*.

(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.

Drafting notes

s.9.36 Sub-sections (1) and (2) follow the wording of the New South Wales precedent contained in s.18A of the *Wills, Probate and Administration Act* 1898, with the addition of the words "the exercise of a power of appointment". This wording is the most up to date of any jurisdiction which has decided to adopt the general South Australian precedent, but without insisting on a standard of proof higher than an appropriate civil standard. The advantage of adopting an existing precedent is that case law from the precedent jurisdiction will be of persuasive value. South Australian case law will also be of value, at least where the jurisdiction has been exercised, because if it has been exercised in circumstances where a higher standard of proof is required, it may be argued that it can be exercised similarly in a similar case where the ordinary civil standard is required.

s.9.37 Sub-section (3) is taken from the South Australian *Wills (Miscellaneous) Amendment Act* 1994. If a testator makes an informal will in one jurisdiction but dies domiciled in Victoria, it will be desirable for the Victorian Court to adjudicate upon the question of whether the dispensing power should be exercised, since general probate jurisdiction will be in Victoria.

s.9.38 Sub-section (4) is taken partly from the South Australian *Wills (Miscellaneous) Amendment Act* 1994 and partly from the *Rules of Court* of New South Wales. It is probably desirable to make it clear that *Rules of Court* can authorise the Registrar to act in certain cases, in case a judicial view is taken, as it was in South Australia, that it was not appropriate for the Registrar to exercise the jurisdiction. The provision is also a signal to the Court that the legislature takes the view that a "fast track" procedure is desirable, and a means is provided to enable that "fast track" to be put in place. While it is clear that the *Rules* should enable the Registrar to act in cases

where the parties consent, in cases where they do not it will be desirable for a jurisdiction limited by the value of the claim to be conferred on the Registrar. Under the existing *Rules of Court* in New South Wales the value is $20,000. A sum of money should not, however, be introduced into a statute, because of the difficulty of amending it from time to time, as may be desirable. Accordingly the amount is left to be decided by the process of introducing or amending the *Rules of Court*.

S.10—What persons cannot act as witnesses to wills

Wills Act, s.12—Will not void by incompetency of witness

S.10.1 Before 1837 certain classes of witness were considered by rules of the law of evidence to be incompetent to act as witnesses. Their attestation was therefore ineffective and the validity of execution of the will was cast in doubt. Those rules passed into history in the nineteenth century; and to a certain extent their operation was limited by a provision in the *Wills Act* 1837, which appears as s.12 of the *Wills Act* 1958 in the following terms:

> If any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

S.10.2 This provision does not need to be retained because the rules which disqualified witnesses as such have all been removed from the law—see the discussion of s.11 below at paragraphs S.11.11–15.

S.10.3 But it is clear that a blind person cannot witness a will because a blind person cannot see the testator making or acknowledging the signature in the presence of at least two witnesses, and that "presence" involves being able to see. To that extent only there is still a rule of incompetence of witnesses, and it remains desirable to mention the rule that a blind person cannot witness a will. Otherwise the rule is that any person who is competent to act as a witness in civil proceedings may be a witness to a will.

S.10.4 The Queensland precedent—s.14 of the *Succession Act* 1981—reads as follows:

> 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.

s.10.5 The Committee notes that the Queensland provision invites questions as to the definition of "blind", and does not deal with the possibility of temporary inability to see, and therefore prefers the draft in the 1991 Draft Wills Bill, which refers expressly to the operative fact, namely that it is a "person who is unable to see and attest" who is barred from witnessing.

s.10.6 The 1991 Bill is expressed in the negative, which is a matter of drafting practice. The words "in his or her presence" which appear in that Bill appear to the Committee to be redundant, however.

Recommendation 26

The Committee recommends making it clear that anyone may witness a will, other than a person who is unable to see and attest its signing; but that the words "in his or her presence" which appear in the 1991 Draft Wills Bill be omitted.

s.10.7 This recommendation is embodied in:

Draft s.10—What persons 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.

S.11—Can an interested witness benefit from a disposition under a will?

Wills Act, s.13—References to the interested witness

s.11.1 The rule that a person who, or whose spouse, has witnessed a will cannot take a benefit under it has a tortuous history. Legal opinion is divided, and it has been abolished in two Australian jurisdictions and by the American *Uniform Probate Code*. Nevertheless those who adhere to the rule are convinced of its propriety. Judges have gone to considerable lengths to counter the harshness of the rule.

s.11.2 Section 13 of the *Wills Act* 1958 provides that an "interested witness", that is, a person to whom or to whose spouse is given by will any property or power (s.13(1)), is not entitled to any property or to exercise any power under the will or partial intestacy; and neither is any person claiming through the interested witness (s.13(3)(c)(iii)).

s.11.3 The section contains several exceptions to this rule. They were introduced by the *Wills (Interested Witnesses) Act* 1977 which followed recommendations made by the Chief Justice's Law Reform Committee[46] and by the Statute Law Revision Committee.[47] The exceptions are:

(1) If there is a sufficiency of other witnesses, the will has the same force and effect as if the interested witness had not attested the will: s.13(3)(c)(i).

(2) If the interested witness or the spouse of the interested witness would be entitled to a share in the estate of the testator if the testator had died wholly intestate and that share is of an amount or value equal to or greater than the amount or value of the witness's entitlement under the will and any partial intestacy "the will has the same force and effect as if the interested witness had not been an interested witness": s.13(3)(ii).

(3) If the interested witness or the spouse of the interested witness would be entitled to a share in the estate of the testator if the testator had died wholly intestate, and that share is of an amount or value less than the amount or value of his entitlement under the will then, in effect, the interested witness is entitled to no more than he or she would have been entitled upon the hypothetical intestacy of the testator: s.13(3)(iv).

s.11.4 A comment on the drafting of this section will be made.

s.11.5 When the Wills Working Party considered the interested witness rule in 1984 it contemplated abolishing it altogether; but eventually recommended by *Recommendation 11* to retain but amend it.

s.11.6 *Recommendation 11* is as follows:

> (a) That, subject to the recommendation set out below, the general rule contained in section 13 be preserved and maintained.
>
> (b) That the section should invalidate dispositions in favour not only of attesting witnesses but also of their spouses.
>
> (c) That the section should not apply where the will has been witnessed by at least two other persons who are disinterested.

46 *Report on Section 13 of the* Wills Act, *1970*.

47 *Report upon the Proposals contained in the Wills (Interested Witnesses) Bill 1971* (1972).

(d) That the section should operate irrespective of whether or not the testamentary beneficiary in question would have received benefits on a total intestacy.

(e) That charges or directions for the payment of debts and for the payment of proper remuneration to any person for acting in or about the administration of the estate should be exempted from the operation of the section.

(f) That the jurisdiction conferred by the Court by Part V of the *Administration and Probate Act* 1958 be retained.

S.11.7 Part V of the *Administration and Probate Act* enables the Court to order that the interested witness rule should not apply where the Court or a judge is satisfied that the testator knew of and approved the entitlement under the will of the witness in question, and that the entitlement was not included in the will as the result of the exercise of any undue influence by any person (ss. 100, 101).

S.11.8 Section 11 of the 1991 Draft Wills Bill extends the rule to "partners" of witnesses.

S.11.9 The retention of the general provision had the consent of a bare majority of the Wills Working Party. Nevertheless the extension of the rule to partners of witnesses by the 1991 Draft Wills Bill is based on the assumption of the majority that the object of the rule is to guard against the possibility of improper or undue influence, and that to allow the partner—that is, a spouse whether married or not—of a witness to take a benefit would enable the rule to be circumvented.

The Draft Wills Bill

S.11.10 The 1991 Draft Wills Bill is better drafted than the existing *Wills Act* 1958. In the existing Act (s.13) the purpose of the section—to disqualify witnesses or their spouses from taking any benefit—is found hidden in sub-section (3)(c)(iii)—before and after which are found exceptions or limitations to the rule. The 1991 Bill sets out the rule in the first sub-section. The Bill goes further than the recommendations of the Wills Working Party, however, because it extends the rule to de facto "partners" of the witness. A definition of "partner" appears in s.3 of the Bill. The word is used only in this provision.[48]

48 See paragraphs S.3.4–5.

History

s.11.11 The history of the witness rule has been described in detail by D E C Yale in "Witnessing Wills and Losing Legacies".[49] The genesis of the rule was s.5 of the *Statute of Frauds* of 1677, which required devises of land to be attested and subscribed in the presence of three or four credible witnesses. The credibility of a witness was governed by common law rules of evidence which ordained that an interested witness was not a credible witness. Unless there were at least three credible witnesses the devise would fail and the land devised would pass to the heir at law. However, the Probate Court adjudged the credibility of the witness not at the time of the making of the will but at the time it was sought to have the will admitted to probate. A witness who disclaimed the interest was allowed as a credible witness. As a result if a witness co-operated, the devise could take effect. This opened the possibility of corruption of witnesses; but worse still it rendered the title to land uncertain.

s.11.12 The problem was tackled by the passage of Lord Hardwicke's *Wills Act* of 1752.[50] That Act provided that a benefit conferred on a witness was "utterly null and void" but that the witness might be admitted as witness to the execution of such will. Further provisions of the Act protected certain creditors of the testator from the provisions of the Act, confirmed certain titles rendered uncertain by the previous law, and extended the Act to those settlements and plantations where the *Statute of Frauds* formed part of the local law.

s.11.13 The article by Yale describes certain difficulties to which the new Act gave rise, and its author then observes (at 461):

> *Lord Hardwicke's Act* had been designed to deal with a particular crisis in security of title: it left certain uncertainties unresolved and also opportunities for harsh and unjust results. In the absence of Lord Hardwicke's penal clause, the voiding of the witness's legacy was not a strong deterrent, e.g. bribery of the witness was quite practicable either for or against the will. The Real Property Commissioners of 1833 shared Lord Mansfield's misgivings, remarking reasonably enough "that persons who undertake the establishment of false wills are usually aware of the law, and therefore it is no protection against them; and it may in some cases operate with great injustice on honest witnesses".

49 (1984) 100 *Law Quarterly Review* 453–467

50 25 Geo. II c. 6

When the Real Property Commissioners came to review the law of wills in their Fourth Report (1833) they declined to propose change, saying:

> "Wills should be required to be attested by such witnesses as would be admitted, unless they subsequently became incompetent, to give evidence respecting the execution of them. We do not feel ourselves at liberty to suggest alterations in the general rules of Evidence, and see no sufficient reason for making the case of Wills an exception to those rules. These reasons induce us to propose, in conformity with the Statute of Frauds, that the witnesses should be required to be credible persons, and that gifts to them should be void."

s.11.14 Yale then points out that the law of evidence, to which the Commissioners referred, was itself about to be reformed, saying (at 462):

> Yet in 1837 the law of evidence was about to fall into the grasp of the Victorian law reformers, and it seems little better than an accident that they grasped the law of wills first. Certainly given the reaffirmation of the rule in 1837 there is no little irony in subsequent events. The *Evidence Act* of 1843 abolished the rule of incompetence through interest except in the case of parties and their spouses. And the parties were made competent soon thereafter, in the new *County Courts Act* 1846 and generally in all proceedings by the *Evidence Act* of 1851; and the *Evidence Amendment Act* of 1853 added the spouses. So the reason for Lord Hardwicke's rule disappeared but the rule lived on. It may be agreed that old rules can acquire new reasons to preserve them from irrationality, and the next question is whether the rule can be so justified.

s.11.15 In other words, the rule that a witness to a will cannot take a benefit under it was originally introduced in 1752 to meet the needs of rules of evidence in probate proceedings, not to protect testators from undue influence.

The *Wills Act* 1837 and the courts

s.11.16 The *Wills Act* 1837 extended the 1752 Act to all wills and disqualified the spouses of witnesses from taking benefit as well as the witnesses themselves. The rule of evidence addressed by the 1752 Act was still the law, so a reconsideration of the rule was not practicable at that time.

s.11.17 Even then, however, when Lord Langdale moved the second reading of the Bill in the House of Lords he said:[51]

> What is proposed by this Bill, is not any alteration of the law of evidence upon any other, or even on this occasion; but that a will attested by a witness who cannot legally be examined by

51 *Hansard*, House of Lords, Feb 23rd 1837 at column 974.

> reason of his interest, or any other cause of incompetency, shall be treated as a will attested by a witness who afterwards died or became insane. It has been suggested, and I believe justly, that this rule if adopted will require some additional provision to secure the testator from fraud, which might be practised by persons filling the characters of witness and legatee, and not subject afterwards to personal examination. The object, your Lordships will see, is if possible to preserve both the will and the legacy, in cases where the legatee is made a witness. I am not sure, that the object can be effected, but it seems worth while to try...

s.11.18 The hope expressed by Lord Langdale was not realised.

s.11.19 The courts nevertheless placed a number of limitations on the rule as it finally appeared in the *Wills Act* 1837.

(1) A disqualification may be removed by the republication of the witnessed will, for instance by a codicil witnessed by persons other than the disqualified witness (*Re Trotter* [1899] 1 Ch. 764). It may be observed that by this means a fraudulent witness could paste over the disqualification.

(2) A gift made to a person on trust is not defeated by reason of the trustee's witnessing the will (*Re Ray* [1936] Ch. 520.

(3) A beneficiary under a secret trust is not disqualified by witnessing the will creating the secret trust (*Re Young* [1951] Ch. 344).

(4) The doctrine of dependent relative revocation has been used creatively to relieve witnesses of the effect of the rule. In *Will of Mills* [1968] 2 N.S.W.R. 393 the residuary clause in a later instrument, repeating the residuary clause in an earlier instrument, was ineffective because the husband of the residuary beneficiary witnessed the execution. The later instrument revoked the earlier instrument. Both instruments were, nevertheless, admitted to probate in full, but with a note on the probate indicating that the revocatory clause in the second instrument did not extend to the residuary clause contained in the earlier instrument. Other cases to the same point include *Re Rich* [1947] S.A.S.R. 98; *Estate of Brian* [1974] 2 N.S.W.L.R. 231 and *Re Finnemore* [1991] 1 W.L.R. 793. These cases indicate that the Courts are willing to use this doctrine creatively to circumvent a rule if it appears to lead to an unjust result.

Should the interested witness rule be retained?

s.11.20 The perceived justification for the witness rule is that it guards against the adoption of the role of witness by a person exerting undue influence or imposition upon a testator. The Wills Working Party had this in mind when it recommended, by a majority, that the rule should be retained. Part V of the *Administration and Probate Act*, which enables the Court to allow the witness to take the benefit if the witness can show that the benefit "was not included in the will as the result of the exercise of any undue influence by any person", directly refers to undue influence as the basis of the rule.

s.11.21 In *Re Royce's Will Trust* [1957] Ch. 633, Lord Evershed M.R. said (at 633) that the object of the rule is:

> to protect a testator who was in extremis, or otherwise weak and not capable of exercising judgment, from being imposed on by someone who came and presented him with a will for execution under which the person in question was himself substantially interested...

s.11.22 The rule is therefore seen as performing a protective purpose and there is no doubt that it does. Nevertheless there are arguments for abolishing the rule.

Arguments for abolishing the rule

s.11.22.1 The original reason for the rule, which was to ensure the credibility of witnesses in probate proceedings, no longer exists and has been lost sight of. The sole purpose of the rule, now, is its protective purpose.

s.11.22.2 The rule is draconian because it applies just as much to innocent as to fraudulent witnesses. The rule does not carry within it any requirement of impropriety: it assumes that every witness–beneficiary is fraudulent. It has been observed that it afflicts the innocent rather than the fraudulent. Thus in *Wyndham v. Chetwynd* (1757) W. Blackstone 95, 1 Burr. 414, quoted by Yale (op. cit. at 460), Lord Mansfield said:

> In all my experience at the court of delegates (and I have heard the same from many learned civilians) I never knew a fraudulent will which was not legally attested.

Yale further says (ibid. at 461):

> The Real Property Commissioners of 1833 shared Lord Mansfield's misgivings, remarking reasonably enough "that persons who undertake the establishment of false

> wills are usually aware of the law, and it is therefore no protection against them; and it may in some cases operate with great injustice on honest witnesses."

The authors of the American Uniform Probate Code make the same point— see S.11.22.5 below.

S.11.22.3 If the rule were abolished it does not mean that the law would fail to provide redress against imposition upon the testator. It would not even be necessary for those objecting to a benefit conferred on a witness to show undue influence. All they would have to show would be that there was a suspicious circumstance, and that the suspicion should be removed before probate should be granted of the suspect provision. This would mean that the court would require the witness to prove "the righteousness of the transaction".[52] Thus Davey L.J. said in *Tyrrell v. Painton*:[53]

> The principle is that wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the court ought not to pronounce in favour of it unless that suspicion is removed.

And A'Beckett J. said in *Re Nickson*:[54]

> A codicil snatched in an interval of intelligence from a woman prostrated and feeble from illness must be received by the court with suspicion.

The suspicious circumstances doctrine has not been applied to witness–beneficiaries only because the rule disqualifying them from benefit denies them the right to show the "righteousness of the transaction". There could be no doubt, however, that if the witness rule were abandoned, the suspicious circumstances doctrine could be invoked. But it could hardly be invoked against a solicitor who has included a proper charging clause in a will which the solicitor or the solicitor's spouse or partner is forced to witness where there is urgency and the client does not have other witnesses available. Neither could it be invoked to deny a creditor the right to a debt, merely because the creditor had witnessed the will.

S.11.22.4 Part V of the *Administration and Probate Act* might be considered to make matters worse for innocent witnesses because it requires them to prove that there was no undue influence exerted *by anyone* in the making of the will.

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52 *Fulton v. Andrews* (1875) L.R. 7 H.L. 448.

53 [1894] P. 151 at 159.

54 [1916] V.L.R. 274 at 285.

This places upon them a higher burden of proof than that required by the "suspicious circumstances" doctrine.

The decision in *Re Emanuel,*[55] however, indicates that the Courts do not, in fact, exact a high degree of proof. In that case the testatrix by her will gave (*inter alia*) half the residuary estate to her son and a pecuniary legacy to his wife. The will was prepared by a firm of solicitors who had received a letter of instructions from the son of the testatrix (the residuary legatee as to half). The son had until retirement been a member of that firm of solicitors. Both the son and his wife were attesting witnesses to the will.

The son died soon after his mother but was entitled to the disposition under s.13(3)(ii) of the *Wills Act* 1958 because it was of a less amount than he would have been entitled to had his mother died intestate. His wife, to whom a legacy of $5000 had been left by the will, applied to the Court under the provisions of Part V of the *Administration and Probate Act*.

Jenkinson J. had no difficulty in being satisfied that the entitlement of the applicant under the will was, to use the language of s.101, "known to and approved by" the testatrix. He said (at page 118):

> The language of s.101(1) of the *Administration and Probate Act* 1958 has been borrowed from courts of probate, and the conceptions with which s.101(3) deal have the same origin. But that circumstance ought not in my opinion to be taken as in itself a sufficient warrant for construing s.101(1) as binding the court, on an application under s.100(1), to apply mechanically and without modification all the principles, other than that which is displaced by s.101(3), in accordance with which a court of probate directs itself to a conclusion whether the contents of a will were known to, and approved by, the testator, and to a conclusion whether undue influence had been exercised over him.

He had earlier said (at page 117):

> That a beneficiary who was a lawyer should have attested the will in April 1977 and should have suffered if he did not procure another beneficiary to attest the will, excites astonishment rather than suspicion of impropriety.

No-one contested the application by the beneficiary; it may have been necessary because some of the beneficiaries of the other half of the residue were infants.

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55 [1981] V.R. 113.

One matter highlighted by *Re Emanuel* is the importance of the provision of s.101(3) respecting the intention of the testator that the beneficiary should take the benefit, relative to the further requirement that the beneficiary should have to satisfy the court that there was no undue influence.

s.11.22.5 The American *Uniform Probate Code* has abolished the rule. Section 2–505—Who may Witness reads:

> (a) An individual generally competent to be a witness may act as a witness to a will.
>
> (b) The signing of a will by an interested witness does not invalidate the will or any provision of it.

The editors of the *Code* comment:

> This section carries forward the position of the pre-1990 *Code*. The position adopted simplifies the law relating to interested witnesses. Interest no longer disqualifies a person as a witness, nor does it invalidate or forfeit a gift under the will. Of course the purpose of this change is not to foster use of interested witnesses, and attorneys will continue to use disinterested witnesses. But the rare and innocent use of a member of the testator's family on a home-drawn will is not penalised.
>
> This approach does not increase appreciably the opportunity for fraud or undue influence. A substantial devise by will to a person who is one of the witnesses to the execution of the will is itself a suspicious circumstance, and the devise might be challenged on grounds of undue influence. The requirement of disinterested witnesses has not succeeded in preventing fraud and undue influence; and in most cases of undue influence, the influencer is careful not to sign as witness, but to procure disinterested witnesses.

s.11.22.6 The interested witness rule was abolished in South Australia in 1972. Section 17 of the South Australian *Wills Act* 1936 reads as follows:

> ***Gifts to an attesting witness***
>
> No will or testamentary provision in a will is void by reason only of the fact that the execution of the will is attested by a person, or the spouse of a person, who has or may acquire, in terms of the will or provision, any interest in property subject to the will or provision.

The same provision was inserted in s.15 of the *Wills Act* 1968 of the Australian Capital Territory, in 1991. So the interested witness rule has been abolished in one State and one Territory in Australia.

The Registrar of Probates of South Australia has commented that the dropping of the interested witness rule has not caused any problems. Testators routinely execute wills in the presence of independent witnesses and only occasionally does an ignorant testator, making a home made will, have an interested witness. The dropping of the rule has not occasioned dispute.

The South Australian provision is, however, arguably unnecessary. It assumes that an interested witness, or the spouse of an interested witness, is not a "credible" witness. That has not been the law since the middle of the nineteenth century, as indicated above. Accordingly, as a legislative precedent, that of the American *Uniform Probate Code* is, the Committee considers, preferable.

s.11.22.7 The witness rule has become increasingly complicated since it was first introduced because of the injustices to which it gave rise; and legislatures and the courts have sought to address these injustices. Section 11 of the 1991 Draft Wills Bill is already long enough, concerned as it is principally with exceptions to the rule; but there must be added to it, and arguably included within it, Part V of the *Administration and Probate Act,* which doubles its length. The abolition of the rule, for which the American and South Australian precedents and the South Australian experience are strong arguments, would simplify the law and remove a trap for the unwary, without excusing any witness–beneficiary from the obligation, if challenged, of justifying the benefit claimed, by way of the doctrine of suspicious circumstance.

Possibly the suspicious circumstance rule could be referred to in the legislation, if the witness rule is abolished.

s.11.23 The Wills Advisory Group has recommended that the rules should remain. The Minutes of the meeting of 27 October 1993 read, in part:

> Ian Hardingham pointed out that, generally speaking, the mental element relating to wills can be divided into three groups:
>
> 1. Knowledge and approval, where the presumption of regularity may operate.
> 2. Sufficient mental capacity.
> 3. Matters relevant to undue influence.

> With respect to categories 1 and 2, a challenger to a will carries an evidentiary burden to raise a suspicious circumstance and the executor has a persuasive burden to prove that the testator had sufficient capacity and knew and approved of the contents of the will. However, in category 3, the persuasive burden rests on the person wishing to challenge the will.

S.11.24 These comments are clearly apposite in the context of a view that a beneficiary–witness should usually be regarded as having exerted some improper influence on the testator. If witness–beneficiaries are more often innocent of wrongdoing, however, the placing of the onus of proof on them in every case is a hard rule. In the case of the suspicious circumstances principle the onus of proof is still placed on the beneficiary–witness, but only if the benefit is challenged. If the witness is innocent of wrongdoing it would presumably be unlikely that anyone would challenge the benefit left to the witness. In other words the Committee considers that it is, in the end, a matter of approach, rather than of a difference between what is clearly right and clearly wrong. As the speech of Lord Langdale in the House of Lords, quoted at paragraph S.11.17 above, indicates, there has always been some difficulty in balancing the need to protect the testator from fraud or imposition and the need not to penalise an innocent witness.

S.11.25 The Committee acknowledges that there must be a chance that persons who might have been deterred by the minor difficulty of procuring disinterested witnesses to a fraudulent will may no longer be deterred if the interested witness rule is abolished, but no-one has suggested to the Committee that this is likely in practice to be more than a theoretical possibility.

Recommendation 27

The Committee recommends that the interested witness rule be abolished.

S.11.26 This recommendation would be accomplished by the following draft, in substitution for s.11 of the 1991 Draft Wills Bill:

Draft s.11—Can an interested witness benefit from a disposition under a will?

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

The Committee observes that if this recommendation is implemented Part V of the *Administration and Probate Act* 1958 will be redundant, and can be repealed.

s..11.26.1 It is the Committee's view that the rule is best abolished; but in view of the opinion of the Wills Advisory Group that it should be retained, the Committee has considered whether the rule can be rendered less difficult. The following possibilities are advanced.

s.11.26.2 The 1991 Draft Wills Bill refers to the "partners" of witnesses, thus extending the disqualification of the witness rule to de facto partners.[56] The Wills Advisory Group recommended that the extension of the rule to de facto partners should be removed. Although, clearly, proving that a beneficiary under a will was in a de facto relationship with a witness might be very difficult, it is nevertheless arguable that a de facto partner is just as likely to exert the sort of pressure upon a testator, which it is the object of the legislation to prevent, as is a spouse of a witness. Moreover, to 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.

s.11.26.3 A better solution might be to remove the disqualification of the spouse.[57] When the rule was originally legislated husband and wife were one at law.[58] 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.[59] 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.

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56 The definition proposed is different from that found in sections 275 and 281 of the *Property Law Act* 1958. See also paragraphs s.3.4–5 above.

57 See *Written Submission 8*.

58 See *Fourth Report of the Real Property Commissioners* (1833).

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

s.11.26.4 The Committee considers that this simplification of the witness rule, given the availability of the suspicious circumstances doctrine, would be justifiable.

Recommendation 27.1

The Committee recommends that, if the interested witness rule is not abolished, it be restricted to the witness alone, and the disqualification of the spouse be removed.

s.11.26.5 The exception to the rule to the extent that the witness might inherit an intestacy share if the testator had died intestate is another exception which is deserving of comment.[60] The Wills Working Party, in *Recommendation 11,* advised:

> (d) That the section should operate irrespective of whether or not the testamentary beneficiary in question would have received benefits on a total intestacy.

s.11.26.6 Although there is no commentary in the Working Party's Report on the reason for this particular recommendation, at its meeting on 15 December 1993 the Wills Advisory Group took the view that the intention was that the provision remitting the witness rule to a certain extent in the case of a hypothetical intestacy beneficiary should be removed from the legislation.

s.11.26.7 The difficulty with the provision is that it appears to offer a reward to the most undeserving of beneficiary–witnesses. If a child or spouse of a testator were to exert undue influence on the testator to secure a major benefit, and at the same time acted as witness to the will, that child or spouse would receive the intestacy benefit ordained by law, or the benefit secured by the undue influence, whichever happened to be the less in value, by a statutory rule which, it could be argued, does not allow for scrutiny of the witness's conduct. It represents an illogical response to a rule the hardship of which is a source of perennial anxiety.

s.11.26.8 Even if the provision is retained, it will have to be considerably redrafted because there is a difficulty in it. Suppose the testator leaves $5000

60 See *Written Submission 1*, and evidence of Professor Marcia Neave *Hansard*, 24 March 1993, pages 15–17. See also NSWLRC Report and section 13(2), *Wills, Probate and Administration Act* 1898 (NSW).

to A, whose spouse, B, witnesses the will. Suppose B would have been entitled, had the testator died intestate, to, say, $4000. S.11(2)(b)(ii) of the 1991 Draft Wills Bill reads:

> the witness or partner is deemed to have been given, by a codicil to the will, a gift of the share he or she would have been entitled to if the testator had died wholly intestate.

s.11.26.9 On this wording, since A, to whom the $5000 was left, is not entitled to anything on the intestacy of the testator, the "codicil" would give A nothing. But B might argue that he or she is entitled to $4000. This would seem to be an anomalous consequence. One could hardly justify giving A the intestacy share to which the spouse B would have been entitled or to give B that entitlement. This appears to be a confusion inherited from s.13 of the *Wills Act* 1958.

Recommendation 27.2

The Committee recommends, if the interested witness rule is not abolished, removing the provision which enables a witness to take either the disposition or a hypothetical intestacy benefit, whichever is of the less value.

s.11.26.10 A comment is perhaps worth making with respect to Part V of the *Administration and Probate Act* 1958, in the light of the decision in *Re Emanuel* [1981] V.R. 113, referred to above. The Committee agrees with the policy implicit in the judge's view that the principal question was whether the testator intended the witness to take the benefit, and that it was not necessary to pursue meticulously the proof which the section seems to require with respect to undue influence. That requirement could, if taken strictly by a judge, make it very difficult indeed for a witness–beneficiary to persuade the court. The Committee considers that it should be sufficient to show that the entitlement of the applicant under the will was known to and approved by the testator and that the words in s.101(1), "and was not included in the will as the result of the exercise of any undue influence by any person", should be reconsidered.

s.11.26.11 As a comparison it is to be noted that the New South Wales *Wills, Probate and Administration Act* 1898 provides, by s.13(2), that the witness may take a benefit if—

> (c) the Court is satisfied—
>
> (i) that the testator knew and approved the gift; and
>
> (ii) that the gift was given or made freely and voluntarily by the testator.

s.11.26.12 Even this provision says more than it needs to. If the court is satisfied that the testator knew and approved of the gift what further evidence could be required to show that he or she made the gift freely and voluntarily? This second requirement is redundant. But the Committee considers that the provision is as effective as, and far more concise than, Part V of the *Administration and Probate Act* 1958.

s.11.26.13 The section also requires the personal representative to advise a beneficiary–witness of his or her intention to distribute the estate (excluding the beneficiary) but allows the beneficiary one month within which to apply to the court for its consent to the benefit.

Recommendation 27.3

The Committee recommends, if the interested witness rule is not abolished, repealing Part V of the *Administration and Probate Act* 1958 and inserting in s.11(2)(c) an abridged version of s.13(2)(c) of the New South Wales Act.

Conclusion

s.11.27 To conclude, the Committee considers that there is justification for the repeal of the witness rule altogether. This course has already been taken by the American *Uniform Probate Code* and by the South Australian legislature, without any reported difficulties. In view of the opinion of the Wills Advisory Group that the rule should be retained, if it were decided to retain the interested witness rule the Committee considers that there is justification for simplifying it by:

(a) removing the disqualification of the spouse, so as not to prejudice a spouse in comparison with a de facto partner;

(b) removing the provision which enables a witness to take either the disposition or a hypothetical intestacy benefit, whichever is of the less value; and

(c) repealing Part V of the *Administration and Probate Act* 1958 and inserting in s.11(2)(c) an abridged version of s.13(2)(c) of the New South Wales Act.

S.12—What is the effect of marriage on a will?

Wills Act 1958, s.16—Effect of marriage on prior will

S.12.1 A general observation is warranted before considering what effect the marriage of a testator should have on his or her will. This is that statistically speaking most people marry in their twenties and most people die in their seventies. As a general rule, therefore, so far as making legislative provision about the effect of marriage on a will is concerned, fifty years may well elapse between the making of the will in question and its coming into effect on the death of the testator. The circumstances of the married couple will have changed so considerably during this period that the will in question is unlikely to be as effective as it may well have been when it was made, in contemplation of death in the circumstances then prevailing. Attempts to keep such a will on foot, despite the marriage of the testator, are therefore likely to cause as many problems as solutions to problems, particularly in the context of up to date intestacy rules and access to family provision jurisdiction.[61] Legislation respecting the effect of marriage on a will should therefore be kept brief and unarguable, since it is unlikely to be of major general importance.

S.12.2 On the other hand different considerations may apply when the marriage in question takes place late in life, perhaps after the death of a spouse, and in the circumstances of a retirement village or nursing home. Here the interests of persons such as children, grandchildren and others lie in preventing the revocation of a former will under which they are beneficiaries. Whether the elderly testator so intends or not, they will be disinherited by the "twilight marriage". The Committee considers that there are three possible answers to these concerns. The first is that competent solicitors should routinely canvas with clients their intentions when making a will, especially later in life, as when a longtime spouse has died, and

61 See, for example, paragraph S.12.20 below.

consider expressly providing for the effect of a future marriage on the will, so as to avoid the statutory revocation. The second is to suggest that the categories of persons eligible for family provision application under Part IV of the *Administration and Probate Act* 1958 should be widened. The third, however, is to observe that if a person wishes to marry, albeit at a late age, conscious that this action will revoke a previous will, he or she has a right to do so.

s.12.3 Section 16 of the *Wills Act* 1958 provides that a will is revoked by the marriage of the testator except in certain circumstances. The section was the subject of a Report of the Chief Justice's Law Reform Committee in 1970, the result of which was that two paragraphs[62] were added to a section which until then had been the same as, or closely similar to, earlier general legislation. Sub-section 2 at present reads:

> A will shall not be revoked by a marriage of the testator if—
>
> (a) the will is expressed to be made in contemplation of that marriage;
>
> (b) it appears from the terms of the will or from those terms taken in conjunction with the circumstances existing at the time of the making of the will that the testator had in contemplation that he would or might marry and intended the disposition made by the will to take effect in that event; or
>
> (c) the will contains a devise bequest or disposition of real or personal property to or confers a general power of appointment upon the person whom the testator marries.

s.12.4 In its work on the *Wills Act* in 1984 the Wills Working Party recommended that sub-section 2(a) could be deleted on the grounds that it adds nothing to paragraph (b).

s.12.5 In the 1991 Draft Wills Bill (2)(a) and (b) are redrafted as follows:

> (2) Despite sub-section (1), a will is not revoked by the marriage of the testator if—
>
> (a) 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.

62 Namely s.16(2)(b) and (c)

s.12.6 This draft retains the intention of the existing legislation but omits the former provision, which required that the will be "expressed to be made in contemplation of marriage" before the will would remain on foot.

s.12.7 It should be observed that this provision is apt to cover both the case where the testator contemplates marriage to a particular person, and marries that person, and the case where the testator contemplates marriage generally. Some States make a distinction between the two cases. Thus in New South Wales s.15 of the *Wills, Probate and Administration Act* 1898 provides:

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

s.12.8 Significantly, sub-section (3) allows extrinsic evidence of the testator's intention to be admitted, even if the will is entirely silent upon the matter. But sub-section (4) requires that the intention be expressed in the will.

s.12.9 In its *Report on the Effect of Marriage or Divorce on Wills*, Project N^{o} 76 Part II, December 1981, the Law Reform Commission of Western Australia recommended (at 3.25) that extrinsic evidence be admissible in both cases:

> (b) An additional exception [to the rule that marriage revokes a will] should be added to section 14 of the *Wills Act* 1970, namely that where there is no declaration in the will that it is made in contemplation of the particular marriage the will should not be revoked by the marriage of the testator if the will was made in contemplation of the marriage. It should be expressly provided that extrinsic evidence (including evidence of statements by the testator) should be admissible to establish that the will was made in contemplation of the marriage and that this may be established by such extrinsic evidence alone.
>
> (c) The amending legislation should provide that where the will was made in contemplation of the marriage, but there is no declaration in the will that it is not so made, the will should be void if the marriage is not solemnised, unless the testator at the time of making the will intended the contrary. It should be expressly provided that extrinsic evidence (including evidence of statements by the testator) should be admissible to establish that the intention of the testator was that the will should not be void if the marriage was not solemnised and that this may be established by such evidence alone.

s.12.10 The Western Australian recommendations go very much further than the New South Wales provision, so far as a will made in contemplation of marriage generally is concerned. The Committee does not believe the law needs to go as far as the Western Australian recommendation. After all, the surviving spouse of an intestate is entitled to substantial provision under modern intestacy rules; and in addition has access to the court for family provision if the intestacy rules do not "make adequate provision for the proper maintenance and support" (*Administration and Probate Act* 1958, s.91) of the surviving spouse. In the absence of appropriate intestacy rules or access to a family provision application, an attempt to allow a surviving spouse, or person whom the deceased might have married, to salvage a will from an absolute rule might be justifiable; but the cost of litigating a difficult question of fact—whether, in the absence of any indication in the will, the testator intended the will to remain on foot or not, in the event of marrying, or not marrying—is not irrelevant and could be used as a bargaining counter by a claimant without a strong case. The law should not encourage the bringing of difficult litigation where there is a general scheme of law to ensure reasonable justice exists. Furthermore, in a law of wills, the Committee considers that to allow extrinsic evidence of the testator's intention to be admitted should not be readily adopted as the solution every time a necessarily rigid rule may cause injustice, since such a solution involves departing from the fundamental protective rule that testamentary intentions should be expressed in testamentary instruments. In the end, the admissibility of extrinsic evidence strikes at the very concept of the written will as the appropriate vehicle for the expression of testamentary intention. It is different if the difficulty is caused by the way in which the will is written by the testator. Then extrinsic evidence may be justifiable to arrive at the testator's true intention. But where there is no indication in the will itself of the testator's intention, particularly with respect to a statutory rule, the Committee considers that the approach taken by the 1984 Wills Working Party and reflected in s.12(2)(a) of the 1991 Draft Wills Bill is appropriate. A draft in rather more general terms is, however, suggested. In any case, for a reason mentioned below, it is unlikely that litigation with respect to this question will ever occur.

s.12.11 Sub-section (2)(c) of the *Wills Act* 1958 (quoted above) is redrafted as (2)(b) of the 1991 Draft Wills Bill in the following terms—

> … a will is not revoked by the marriage of the testator if—

(b) there is a disposition in the will of property to, or of a general power of appointment exercisable by the person the testator marries.

s.12.12 This paragraph is however limited in the *Wills Act* 1958 by sub-section (3) which reads as follows—

> Where a will is not revoked by the marriage of the testator by reason of the operation of paragraph (c) of Sub-section (2) any real or personal property that is disposed of by the will to, or is the subject of a general or special power of appointment conferred upon, any person other than the spouse of the testator shall be deemed to form part of the residuary estate of the testator and to be property in respect of which the testator died intestate.

s.12.13 In the 1991 Draft Wills Bill this appears as sub-section (3) in the following terms—

> If a will is revoked by the marriage of the testator because of the operation of sub-section (2)(c), property disposed of to a person who is not the spouse of the testator is to be taken to be part of the residuary estate of the testator and property in respect of which the testator died intestate.

s.12.14 There appears to be a typing error here in the reference to sub-section (2)(c). It should read (2)(b). This is because paragraph (a) of the *Wills Act* having been removed paragraph (c) has become paragraph (b).

s.12.15 The Committee questions, however, whether (2)(b) and (3) are appropriately drafted. Is it necessary to "save" the entire will, if there happens to be a provision in it for the spouse, and then, in sub-section (3) to provide for the revocation of everything not left to the spouse? Might it not be better simply to say that the will is revoked except to the extent of any disposition of property to, or a general power of appointment exercisable by, the person whom the testator marries? It is also worth asking why sub-section (2)(b) refers only to a general power of appointment. If a testator confers a special power of appointment upon the person whom he or she subsequently marries, why should the marriage revoke that power?

Recommendation 28

The Committee recommends that a disposition to the person to whom the testator is married at the time of the testator's death not be revoked by the marriage to that person.

S.12.16 The Committee notes that, as a result of the proposed definition of "disposition",[63] if the testator exercises a power of appointment in favour of the person who is his or her spouse at the time of death that exercise is not revoked by the marriage. There is, however, a further matter. If the will appoints the person to whom the testator is married at the time of his or her death to be an executor, trustee, advisory trustee or guardian, why should such appointment be revoked by the marriage to that person? The Committee considers that such appointments, equally with dispositions of property or of powers of appointment to such person, should remain on foot.

Recommendation 29

The Committee recommends that appointments of the person to whom the testator is married at the time of the testator's death as trustee, guardian &c not be revoked by the marriage to that person.

S.12.17 The provision that the will is not revoked so far as any benefit is left to the person to whom the testator is married at the date of the death radically changes the applicability of this legislation. A spouse will never be required to show a contrary intention. The Committee considers that there will be few cases where a person other than a spouse would wish to litigate a difficult contrary intention question in order to keep the whole will, and not just the disposition to the spouse, on foot. This provision can therefore be seen as bypassing the problem most usually caused by the original legislation, that is, the problem encountered by the spouse of the testator in proving that the will was made in contemplation of marriage, so as to retain a benefit conferred on the spouse by the will. That problem had been highlighted in *Re Taylor* [1949] V.L.R. 201.

63 See s.3 and paragraphs S.3.6–9.

S.12.18 There is disagreement about the value of this novel provision. It has not been accepted in New South Wales[64] or in Western Australia,[65] although most of the discussion has been about the admissibility of extrinsic evidence to show an intention contrary to the provision of the section.

S.12.19 The Wills Advisory Group, at its meeting on 24 November 1993,[66] concluded that consideration should be given to—

- redrafting the exceptions so that it is deemed that if a will contains a specific disposition in favour of the spouse the entire will is saved;
- making provision that a spouse may elect to take under the will or on intestacy;
- removing the partial intestacy rule.

Comment on these three matters

S.12.20 The difficulty with the first is that if the testator makes a paltry provision for the person to whom he or she is married at the date of death, the surviving spouse will receive only that paltry provision, rather than that provision plus the provision on intestacy as to the residue. The Committee expects this would simply have the effect of requiring the spouse to initiate an application under Part IV of the *Administration and Probate Act* 1958; and while this might have the same effect in the end, it necessarily involves additional expense and stress to which the bereaved ought not to be put without good reason. The reason for a paltry provision is most likely to be that it was intended as a gift to one who was at the time of making the will a mere friend, rather than the person whom the testator expected or intended to marry;[67] otherwise the will would surely provide expressly that it was not to be revoked by the marriage.

S.12.21 The difficulty with the second proposal is that although it has good equitable antecedents it is nevertheless a complicated one: the spouse would have to make a positive election and give notice of it; and the election might be difficult to

64 NSW Law Reform Commission, *Wills – Execution and Revocation* N° 47, 1986 at paragraph 9.22.

65 Law Reform Commission of WA, *The Effect of Marriage or Divorce on Wills*, Project N° 76 Part II at paragraphs 3.22–3.25 and 3.32.

66 *Minutes*, Item 2.

67 Cf paragraph S.12.1.

make because the value of the provision and of the intestacy rights would have to be ascertained and weighed against each other.

s.12.22 Getting rid of the partial intestacy consequence seems to have the same effect as the first proposal, namely that the rest of the will remains in force.

s.12.23 A possible underlying objection to the provision as it stands is that the surviving spouse not only takes the benefit left by the will but also the spouse's rights on intestacy, and that that is too much, there being no requirement in Victoria for a spouse to bring into hotchpot[68] in intestacy any benefit received under a will.

s.12.24 With respect to this objection the Committee considers that where substantial provision is made, by intestacy rules, for a surviving spouse, in the case of smaller estates the consequence will be that the spouse will receive the entire estate anyway. Anxiety that the intestacy rules make insufficient provision for surviving spouses may well have been partly responsible for the creation of the existing rule in s.16(3) of the *Wills Act* 1958, which provides that property not left to the spouse is "to be property in respect of which the testator died intestate". It is not necessarily undesirable that a surviving spouse should receive more than an intestacy portion: indeed what a surviving spouse receives on intestacy should be regarded as a *minimum* rather than a maximum entitlement. This is consistent with the rule that a surviving spouse does not have to bring into hotchpot upon intestacy any benefit received under a will.

s.12.25 The advantage of the provision in the 1991 Draft Wills Bill is that it will usually save any litigation to ascertain whether there is a contrary intention, saving the will, so far as it benefits the spouse, from the rigidity of the rule that the will is revoked by marriage.

Gift to "my fiancée" etc

s.12.26 It has always been difficult to know whether a gift to "my fiancée" or to "my wife", where the testator was not married at the date of the will but later married the person referred to, constituted an expression of contemplation of marriage. Sometimes those words have been held to constitute such an expression,

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68 "Bringing into account on an intestacy of benefits received by one beneficiary prior to the death of the intestate" (*Osborne's Concise Law Dictionary*, 8th ed., Sweet & Maxwell, London 1993); and see s.52(1)(f)(i), *Administration and Probate Act* 1958.

e.g. *Pilot v. Gainfort* [1931] P. 103 ("wife"); *Re Chase* [1951] V.L.R. 477 ("fiancée"); but sometimes not, e.g. *Re Taylor* [1949] V.L.R. 201 ("wife"). There are numerous cases but the Committee considers that the difficulty which they represent is rendered virtually irrelevant by the provision that a disposition to a person whom the testator later marries is not revoked by the marriage. This provision bypasses that question because the "fiancée" or "wife" will take the benefit in any event. Moreover if there is a gift by will to "my fiancée" but the testator later marries someone else, the gift to the fiancée will be revoked by the section. Presumably if the testator expressly indicates that the will is not to be revoked in the event of marriage generally, the will will not be revoked and a gift to a "fiancée", even if the testator married someone else, would still take effect.

s.12.27 The foregoing discussion is summarised in the following proposed draft:

Draft s.12—What is the effect of marriage on a will?

(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.

S.13—How may a will be revoked?

Wills Act 1958, s.18—In what cases wills may be revoked

s.13.1 This section is a redraft of s.18 of the *Wills Act* 1958. It refers to the possibility that an act of revocation may be informal and might attract the dispensing power of the Court under s.9. Apart from that reference, no reform of the law is required and the only question is one for Parliamentary Counsel.

Recommendation 30

The Committee recommends that the dispensing power apply to acts of revocation, that a statutory will be able to effect revocation, and that otherwise the law relating to revocation remain unchanged.

s.13.2 The Committee considers that this section would be better placed after the section dealing with the effect of divorce, and it is accordingly shown as s.14 here.

s.13.3 The result is the adoption of s.13 of the 1991 Draft Wills Bill, but with the omission from paragraph (a) of the reference to s.11(2)(b)(i), the Committee having recommended the omission of s.11(2) of the 1991 Draft Wills Bill, and with the addition of a reference to new s.5A.

Draft s.14—How may a will be revoked?

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

(a) under section 5, 5A or 9 or by the operation of section 12 or 13; or

(b) by a later will; or

(c) by some writing declaring an intention to revoke it, executed in the manner in which a will is required to be executed by this Act; or

(d) by the testator, or some person in his or her presence and by his or her direction, burning, tearing or otherwise destroying it with the intention of revoking it.

S.14—What is the effect of divorce on a will?

Wills Act 1958 — No counterpart

s.14.1 The Wills Working Party in 1984 favoured the concept of revocation by divorce. However, the Working Party was divided as to whether divorce should completely revoke a will or should only revoke it in so far as it confers upon the

testator's spouse property or power or appoints the spouse to an office under the will. By a narrow majority the Working Party recommended that revocation by divorce should be partial only and that Section 18 of the Queensland *Succession Act* 1981 be adopted as a model for a new provision.

S.14.2 New South Wales has a provision in s.15A of its *Wills, Probate and Administration Act* 1898 by which divorce effects a partial revocation of the will. The Australian Capital Territory has a provision very similar to the New South Wales provision in s.20A of its *Wills Act* 1968.

S.14.3 Tasmania has a provision, inserted in its *Wills Act* 1918 by s.5 of the *Wills Amendment Act* 1985, which reads:

> 11 Where a marriage is dissolved, a will made by a party to the marriage is revoked on the dissolution of the marriage.

S.14.4 This is followed by a provision saving such a will if made in contemplation of dissolution of marriage. Tasmania is the only State or Territory in Australia which provides that a will is entirely revoked by the dissolution of the marriage of the testator.

S.14.5 In 1977 the South Australian Law Reform Committee issued a report entitled *The Effect of Divorce upon Wills*. Its primary recommendation was that gifts in favour of the former spouse should be revoked. There has not been any legislative action following this report. In 1991 the Western Australian Law Reform Commission published a Report entitled *Effect of Marriage or Divorce on Wills* which in substance recommended following the New South Wales precedent.

S.14.6 The 1991 Draft Wills Bill by s.14 implements the recommendation of the Wills Working Party and provides:

> (1) The granting of a decree absolute of dissolution of the marriage or the annulment of the marriage of a testator revokes—
>
> (a) any disposition by the testator of a beneficial interest in property to, or of a power of appointment exercisable by or in favour of his or her spouse other than a power of appointment exercisable by the spouse in favour of the spouse's children only; and

(b) any appointment made by the testator of his or her spouse as executor, trustee, advisory trustee or guardian other than a trustee, advisory trustee or guardian of the spouse's children.

(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) In this section—

"**spouse**" includes a party to a void marriage.

S.14.7 The Committee considers that the recommendation of the majority of the Working Party, reflected in draft s.14, that divorce should effect a partial revocation of the will is preferable to the minority view, as in the Tasmanian provision, that revocation should be total. The reason why divorce should affect the will of a testator is similar to the reason why the will of a testator should be revoked upon marriage. It is, to recall the reasons set out in the 22nd Report of the UK Law Reform Committee *The Making and Revocation of Wills* (1980) in relation to the revocation of wills by marriage:

> Marriage represents a fundamental change in a person's life and with it he or she acquires new personal and financial responsibilities.

S.14.8 Upon divorce, too, a fundamental change occurs in a person's life and his or her financial responsibilities assume an entirely different character. Since in many cases divorce is accompanied by a settlement or agreement with respect to the sharing of the property of the divorcing parties, and since it is desirable that they should not be forced to become involved financially with each other again, the distribution of their estates upon death should reflect the fact of their separation. Thus upon the divorce of a person who has no will, the former spouse loses his or her rights upon intestacy and those entitled upon intestacy take as in the case where the intestate's spouse has predeceased the intestate.

S.14.9 There is no reason to assume that a testator who has made a comprehensive will, which includes provision for his or her spouse, and perhaps substitutional provisions in the event of the spouse's dying before the testator, as well as provisions for other members of his or her family, friends, or perhaps charitable purposes, would wish the entire will to be revoked upon divorce. This is particularly the case if the testator was married more than once and had children by

another spouse. A carefully considered will may create a scheme of dispositions far broader than the context of the testator's marriage.

s.14.10 The provision in s.14(2) of the 1991 Draft Wills Bill that a disposition or appointment revoked by divorce takes effect as if the spouse had predeceased the testator has been adopted by all the jurisdictions which have adopted a limited revocation by divorce rule. This ensures that if, for instance, a life interest were left to the spouse, the effect of the divorce would be to accelerate the interests of the beneficiaries entitled upon the death of the spouse; and if the testator had included a substitutional provision in the will in the event of the prior death of the spouse, that substitutional provision would take effect.

Recommendation 31

The Committee recommends that divorce should effect a partial revocation of a will, with dispositions to the former spouse treated as if he or she had predeceased the testator, the rest of the will to remain on foot.

Comment: "the spouse's children"

s.14.11 One comment needs to be made concerning the drafting of this section. That is that (1)(a) concludes with the words "the spouse's children only", but (1)(b) concludes with the words "the spouse's children". Does "the spouse's children only" mean "the children of the spouse who are not children of the testator"? This assumes that there is a provision in the will for such children of the spouse. On the other hand perhaps it means "children of the testator and the spouse". This assumes that there are children of the testator and the spouse, for whom there is provision in the will, and the testator intends the parent of the children to exercise a power of appointment, divorce or no. This appears to be the more probable intention. Perhaps (1)(a) should therefore read:

> ... other than a power of appointment exercisable by the spouse only in favour of the children of the testator and the spouse.

Recommendation 32

The Committee recommends that the revocation of dispositions to the former spouse not apply to the exercise by the spouse of a power of appointment in favour of the spouse's children, where the power is not exercisable in favour of any persons other than those children, and that the drafting be clarified accordingly.

Comparison with New South Wales provision

S.14.12 The New South Wales revocation by divorce provision contains material which is not to be found in s.14 of the 1991 Draft Wills Bill. Thus s.15A(1)(c) provides:

> any property which would, but for this sub-section, have passed to the former spouse of the testator pursuant to a beneficial gift referred to in paragraph (a) shall pass as if the former spouse had predeceased the testator, but no class of beneficiaries under the will shall close earlier than it would have closed if the beneficial gift had not been revoked.

S.14.13 The Committee considers that the provision that no class of beneficiaries shall close earlier than it would have closed if the beneficial gift had not been revoked is wrong. The class closing rules are rules of construction and the intention of the testator is an uppermost consideration. The rules are complex enough without adding a statutory provision which could tie the court's hands in the construction process. On the whole, where a prior interest followed by a gift to a class fails, the gift to the class accelerates and the class closes. This is the construction preferred by the courts in many cases.

S.14.14 A main reason for accelerating and closing the class upon acceleration is to ensure efficient management of the estate.

S.14.15 For example, suppose that a testator leaves property to his wife for life, then to the children of his brother in equal shares. If the wife were to predecease the testator the gift to the children would take effect at once and the children of the brother alive at the death of the testator would take. Children born to the brother subsequently would not take. This is the old rule in *Viner v. Francis*.[69] If the gift to

69 (1789) 2 Cox 190; 30 E.R. 88

the wife fails for some other reason, e.g. if the wife happened to witness the will, then the gift to the brother's children would still accelerate and the class would close.[70] Under the New South Wales provision, however, if the spouse loses entitlement by reason of divorce, the class would not apparently close upon the death of the testator but presumably, if the wife survives the testator, on the death of the wife, or the death of the brother if the brother predeceased the wife. The children of the brother at the closing date would take, to the exclusion of later born children of the brother. In the meantime the fund would be held separately until the death of the wife and the income of it would go to the persons entitled to the residuary estate or if the gift were of residue, to those entitled upon intestacy.

s.14.16 In other words the tendency of the New South Wales provision is to bring into being estates *pur autre vie*. The effect of this is that the estate might not be distributable finally until the death of the divorced wife, although she might not even be related to the beneficiary class. It is the inconvenience of this that is one of the driving principles of the class closing rules. To postpone distribution is considered not to be the testator's intention.

s.14.17 As for the origin of the provision, there was a recommendation to the effect contained on page 8 of the report of the South Australian Law Reform Commission in 1977 entitled *Report Relating to the Effect of Divorce on Wills*. A report of the New South Wales Law Reform Commission in 1986 entitled *Wills – Execution and Revocation* agreed, in paragraph 8, with the South Australian recommendation, referring to *Wyndham v. Darby*,[71] a case where the court accelerated a legacy and closed the class. The legislature accepted the recommendation of the Law Reform Commission. The Western Australian Law Reform Commission has also made a similar recommendation in paragraph 4.31 of its report entitled *Effect of Marriage or Divorce on Wills* (1991, Project Nº 76 Part II).

s.14.18 It seems that all these recommendations were made in ignorance of the origin of the problem, which has been revealed in paragraph 2.6 of a report of the English Law Commission entitled *Family Law – The Effect of Divorce on Wills* (Law Com. Nº 217) (Cm2322) published in September 1993. That paragraph reads:

70 *Jull v. Jacobs* (1876) 3 Ch.D. 703

71 (1896) 17 LR (NSW) Eq. 272

> if the former spouse is a member of a class of beneficiaries under the will, the consequences may not be what the testator intended. Where the former spouse is a member of a class of beneficiaries, such as where the property is left to beneficiaries "jointly", his or her share would pass on intestacy, since "lapse" cannot be equated with "pre-decease".

s.14.19 In other words, the problem supposed to have arisen was a problem arising from the English legislation which provided that upon divorce any legacy to the spouse was considered to have "lapsed". The case of *Re Sinclair*,[72] cited in the report, had demonstrated that that approach could defeat the testator's intention. The problem does not arise where the effect of the divorce is the same as if the spouse had predeceased the testator. In any case a disposition to a spouse as a member of a class is difficult to envisage—"to my cousins", perhaps, if the spouse happened to be a cousin of the deceased; and even a gift to a spouse "jointly" with another is hardly usual. The perceived problem seems to have been academic rather than likely. The remedy proposed, and implemented in New South Wales, which strikes at all class gifts, goes far beyond the needs of the imagined problem. The recommendation of the English Law Commission in its report is to amend the rule that divorce has the effect of causing a provision made for the spouse to lapse and to provide that the effect of divorce is as if the former spouse had died on the date on which the marriage is dissolved or annulled.

s.14.20 Section 15A continues as follows:

> (2) A beneficial gift or power of appointment is not revoked pursuant to sub-section (1)(a), and an appointment shall not be taken to be omitted from a will pursuant to sub-section (1)(b), if—
>
> (a) the Court is satisfied by any evidence, including evidence (whether admissible before the commencement of this section or otherwise) of statements made by the testator, that the testator did not, at the time of termination of the marriage, intend to revoke the gift, power of appointment, or appointment; or
>
> (b) the gift, power of appointment or appointment is contained in a will which is republished after the termination of the marriage by a will or codicil which evidences no intention of the testator to revoke the gift, power of appointment or appointment.

s.14.21 This is a contrary intention provision. Since there is a contrary intention provision in s.12 (Effect of Marriage on Will), it is arguable that it should

72 [1985] Ch. 446

be considered for inclusion in this section. A possible criticism of the New South Wales provision is that it is rigid. It concerns itself exclusively with the position of the divorced spouse and with a possibility of ensuring that the section should not apply, based on the discoverable intention of the testator. However, attempting to discover the testator's intention is often a difficult, if not illusory, task because a testator may simply not have thought about the particular matter at all.

S.14.22 The Committee considers that it is not fair to leave the personal representative in a position in which it is impossible to know how an estate can be administered because a former spouse might come forward with *extrinsic* evidence of an alleged intention of the testator's that the divorce was not to have any revoking effect on the will. The Committee considers that there is no justification for the admission of extrinsic evidence in this context and that if a testator wishes that divorce should have no effect on the will, or limited effect, the will itself should expressly so provide.

S.14.23 Paragraph (b) goes further. If a testator, relying on the revoking effect of a divorce, executed a codicil conferring a benefit on any individual, that would republish the will and presumably revive the provisions in the original will with respect to the divorced spouse. It might constitute a trap for the unwary. An intention to republish a will is very different from an intention to revive a revoked provision in a will. The Committee considers that the provision is not justifiable.

S.14.24 The sub-section as a whole seems to have the effect of a rearguard action against the main purpose of the section.

S.14.25 Sub-sections (3), (4) and (5) of the New South Wales s.15A expressly save the former spouse's right to make a family provision application (notwithstanding the deemed pre-decease), and to enforcement of a direction in the will concerning payment of any debt or liability of the testator to the former spouse. These do not appear to be objectionable and should, perhaps, be adopted, although it is arguable that the courts would achieve the same results by ordinary operation of law.

S.14.26 The Committee's views are summarised in the proposed s.13, which, as previously noted, is relocated to appear immediately after s.12 (Effect of Marriage) and before s.14 (How may a will be revoked?):

Draft s.13—What is the effect of divorce on a will?

(1) Termination of the marriage or the annulment of the marriage of a testator revokes—

(a) any disposition by the testator in favour of his or her spouse other than a power of appointment exercisable by the spouse exclusively in favour of the spouse's children; and

(b) any appointment made by the testator of his or her spouse as executor, trustee, advisory trustee or guardian other than an appointment of the spouse as guardian of the spouse's children, or as trustee of property left by the will to trustees upon trust for beneficiaries including the spouse's children

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

(2) If a disposition or appointment is revoked by sub-section (1), that disposition or appointment takes effect as if the spouse had predeceased the testator.

(3) For the purposes of this section, the termination or annulment of a marriage occurs, or shall be taken to occur—

(a) when a decree of dissolution of the marriage pursuant to the *Family Law Act* becomes absolute; or

(b) on the making of a decree of nullity pursuant to the *Family Law Act* in respect of a purported marriage which is void; or

(c) on the termination or annulment of the marriage, in accordance with the law of a place outside Australia if the termination or annulment is recognised in Australia in accordance with the *Family Law Act*.

(4) In this section—

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

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

Recent amendment of the *Wills Act*

S.14.27 Towards the end of the Committee's inquiry the Committee became aware that the Government intended to amend the *Wills Act* 1958 to deal

immediately with the effect of divorce on a will, and its views were sought on the form such amendment might take.

s.14.28 The Committee is empowered to make available to members of the public a copy of the report of any investigation carried out for it, and also a copy of the record of any determinations made by it, pursuant to s.4R of the *Parliamentary Committees Act* 1968, which states:

> **4R.** ***Committees to publish submissions and reports of investigations***
>
> (1) A Joint Investigatory Committee shall on request make available to any member of the public—
>
> (a) a copy of any written submissions made to it under section 4J (6);
>
> (b) a copy of the report of any investigation carried out under section 4K (1) or 4K (2); or
>
> (c) a copy of the record of any evidence given before it or determinations made by it—
>
> unless in the opinion of the Committee special circumstances make it undesirable to do so.
>
> (2) For making available to him any document under sub-section (1) a Joint Investigatory Committee may charge a member of the public a reasonable sum not exceeding the cost of making the document so available.
>
> (3) A Joint Investigatory Committee shall not disclose or publish any evidence given to it in private.

s.14.29 The Committee therefore considered it appropriate to make available the relevant portion of the Consultant's Report, and the information that the Committee had determined to adopt the substance of the Consultant's recommendations as to the effect of divorce on a will.

s.14.30 The Committee observes that the amendment of the *Wills Act* 1958 effected by the *Administration and Probate (Amendment) Act* 1994, which inserts a new s.16A into the *Wills Act*, is in conformity with the policy recommendations of the Committee expressed above. The drafting of the new section differs in style from the

draft s.13 proffered at paragraph S.14.26, as anticipated in the comment upon legislative drafting at paragraph 2.2 above.

S.14.31 The only changes which the Committee would recommend to s.16A as it now stands are those changes consequential on the adoption of the Committee's proposed definition of "disposition" and "dispose of" in s.3 (see paras S.3.5–15 above).

S.14.32 The new s.16A of the *Wills Act* 1958 is set out in Appendix III of this report.

S.15—Can a will be altered?

Wills Act 1958, s.19—No alteration in a will shall have any effect unless executed as a will

S.15.1 Section 15 of the 1991 Draft Wills Bill makes provision with respect to the alteration of wills. It replaces s.19 of the *Wills Act* 1958. There is no need for reform in this area of the law; but the recommendation of a dispensing power (see s.9) affects the law indirectly, as does the recommendation that the Court be empowered to make a statutory will (s.5A). The sole function of the draft is therefore to rewrite s.19 in plain English. This is a matter for Parliamentary Counsel.

Recommendation 33

The Committee recommends that the dispensing power apply to the alteration of wills, that a statutory will be able to effect an alteration, and that otherwise the law relating to alteration remain unchanged.

S.15.2 The Committee therefore proposes the following draft:

Draft s.15—Can a will 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 comes under section 5, section 5A 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.

S.16—Can a revoked will be revived?

Wills Act 1958, s.20—How revoked will shall be revived

S.16.1 Section 16 of the 1991 Draft Wills Bill is intended to replace s.20 of the *Wills Act* 1958. No reform of the provisions of s.20 is needed. The draft section should therefore perform the function of rewriting s.20 in plain English.

S.16.2 One comment to be made about the drafting of s.16 in the 1991 Draft Wills Bill is that the words "which shows an intention to revive the will or part" need to be seen as referring not only to the "execution of a codicil", but also to the "re-execution" of a will; and it is not clear to the Committee that the wording is apt to do so. These are all questions for Parliamentary Counsel.

S.16.3 Another comment to be made is that the words "which has been executed and" appearing in s.16(1) of the 1991 Draft Wills Bill appear to the Committee to be redundant: execution as a will is a prerequisite for an instrument to be a will.

S.16.4 The Committee observes that the draft suggested by the Wills Working Party[73] states that the will or part "is revived", rather than the 1991 Draft Wills Bill's "may be revived". The Committee prefers the former. A similar remark can be made about the 1991 Bill's sub-section (3), where an apparently circular reference to "the will" appears; this reference should perhaps be to the instrument of revival.

73 *Recommendation 17.*

Recommendation 34

The Committee recommends that there be no change to the law relating to the revival of revoked wills or parts of wills, and that the revised draft of s.16 be adopted, subject to reconsideration by Parliamentary Counsel of sub-section (3).

S.16.5 The Committee therefore proposes the following draft:

Draft s.16—Can a revoked will be revived?

(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.

Division 6—Wills to which foreign laws apply.

Wills Act 1958 – Part IA – Formal Validity of Wills

S.17—When do requirements for execution under foreign laws apply?

Wills Act 1958, ss.20B and 20C

S.17.1 Sections 17–19 and 24 of the 1991 Draft Wills Bill rewrite existing sections 20A–20D. These sections were introduced by the *Wills (Formal Validity) Act* 1964 and deal with the formal recognition of wills made outside the jurisdiction of Victoria. Provisions for the recognition of wills made in other jurisdictions are more or less uniform throughout Australia.[74] The provisions of sections 20A to 20D are based on the *Wills Act* 1963 (UK), which was enacted to conform with the Hague Convention of 1960 on the conflict of laws concerning the form of testamentary dispositions.

74 See sections 25a–25c, *Wills Act* 1956 (SA), sections 20–23, *Wills Act* 1970 (WA), sections 22–25, *Succession Act* 1981 (Qld) and sections 32A–32F, *Wills, Probate and Administration Act* 1898 (NSW).

S.17.2 The effect of sections 20A–20D is that a will is valid if it is executed in accordance with the "internal law" of the:

- place of its execution;
- testator's domicile or habitual residence at the time of the execution or death;
- testator's country of citizenship;
- registered country of a vessel or aircraft if the will is executed on a vessel or aircraft;
- place where the property is situated if the will disposes of immovable property.[75]

S.17.3 Although "internal law" is defined to exclude rules of private international law,[76] as the provisions do not repeal common law conflict of laws rules a will may also be valid by reference to the law of the domicile for movables and the law of the situs for immovables.[77]

S.17.4 The application of conflict of laws rules to wills in Australia may therefore cause some difficulties where there is a lack of uniformity between States as to substantive rules for making a will.[78] For example, if a Queensland resident makes a will which includes the disposition of land in Victoria to the spouse and divorce later takes place, the will may only be revoked in so far as it deals with property in Queensland and the Victorian land may still pass to the former spouse.

S.17.5 The Committee notes that this possibility adds further weight and urgency to the Uniform Succession Laws Project of the Standing Committee of Attorneys General referred to at paragraph 1.37 above.

S.17.6 The New South Wales Law Reform Commission noted[79] that it had

> considered the operation of the conflicts of laws rules relating to the formal validity of wills and a need for New South Wales to adopt the Convention Making Provision for a Uniform

75 Sections 20B and 20C. See also Certoma G. L., *The Law of Succession in New South Wales*, 2nd Edition, 1992, Chapter 2.
76 Section 20A.
77 Certoma, op cit, page 24.
78 See, generally, *Hansard*, 24 March 1993.
79 NSWLRC Report at paragraph 1.11.

> Law on the Form of an International Will (1973). As to the former, they appear to us to be working satisfactorily. As to the latter, we are not persuaded that there is a present need to propose change in this area.

S.17.7 Further, Australia has participated in the negotiations leading up to the drawing of the 1988 Hague Convention on the Succession of Estates, which, among other things, revises choice of law rules, but also goes well beyond the matters of formal requirements dealt with by sections 20A to 20D. In addition, in 1991 negotiations were in place for the making of an International Wills Convention that would replace the 1960 and 1973 Conventions. Australia is yet to ratify or adopt the 1988 Convention, as negotiations between the Federal and State Governments continue through the Standing Committee of Solicitors-Generals.

S.17.8 The Wills Working Party recommended by *Recommendation 18* that the provisions of ss.20B and 20C should be retained. However in comparing them with the draft s.17[80] it is observed that the later section opens with words ensuring that it does not limit the operation of the earlier section. In the 1991 Draft Wills Bill, however, s.17(2) opens with the words: "The following wills are to be taken to be properly executed". It would be a pity if the omission of words indicating that this sub-section is not intended to limit the previous sub-section were construed to mean that it is intended to limit the operation of the previous sub-section.

Recommendation 35

The Committee recommends that there be no change to the law as to the applicability of foreign law to the execution of wills, and that s.17 of the 1991 Draft Wills Bill be adopted, but that in s.17(2) the opening words should read: "The following wills are also to be taken to be properly executed."

S.17.9 The Committee therefore proposes the following draft:

80 Cf also ss.23 and 24 of the Queensland *Succession Act* 1981; and ss.32C and 32D of the New South Wales *Wills, Probate and Administration Act* 1898.

Draft s.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.

Ss.18 and 19

Wills Act 1958, s.20A—Formal Validity of Wills

s.18.1 The Wills Working Party recommended the retention of s.20A of the *Wills Act*. It has been redrafted in these two sections. No reform of the law is in question.

Recommendation 36

The Committee recommends that there be no change to the law as to the determination of the system of law applicable to a will, nor to the law as to the construction of that law, and that ss 18 and 19 of the 1991 Draft Wills Bill be adopted.

s.18.2 The Committee therefore proposes the following draft sections:

Draft s.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.

Draft s.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.

DRAFT WILLS BILL 1991—PART 3—CONSTRUCTION OF WILLS

S.20.1 Sections 20 to 26 (Division 1, Part 3) of the 1991 Draft Wills Bill set out general rules about the construction of wills. Sections 27 to 36 (Division 2, Part 3) deal with the manner in which certain phrases in wills should be construed. Apart from proposed sections 20, 23, 24, 25 and 35, the operation of the rules set out in the provisions of proposed sections 20 to 36 is subject to any contrary intention appearing in the will. The Committee therefore suggests that it might be appropriate to include a single all-embracing "contrary intention" provision rather than repeating such a provision throughout Part 3 of the Act.[81]

Recommendation 37

The Committee recommends that Parliamentary Counsel give consideration to including a single all-embracing "contrary intention" provision rather than repeating such a provision throughout Part 3 of the Act.

S.20.2 Many of the construction provisions were first enacted to overcome limitations at common law on the disposition of certain kinds of property by will. They might now be repealed, as those limitations no longer exist, but at this point that is a task better suited to the Uniform Succession Laws project than to the inquiry and report which this Committee has undertaken.

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

Wills Act 1958, s.21—When a devise not to be rendered inoperative, &c

S.20.3 Section 20 of the 1991 Draft Wills Bill replaces section 21 of the 1958 Act which deals with the disposition of the testator's remaining interests in property. Before the *Wills Act* 1837 (UK), a man[82] could dispose by will only of such property as he had both at the date of the will and at the time of death, and any change to the status of that property in the immediate period—say, from an interest in fee simple to a life interest—would render inoperative the relevant disposition unless the will

81 See section 31, *Wills Act* 1992 (Tas).

82 Generally, married women could not deal with property or make a will until the latter part of the 19th Century. See also paragraph S.11.26.2 above.

was altered to reflect the change in title.[83] Any change in the nature of the testator's interest in the land after the making of the will revoked the relevant disposition.[84]

S.20.4 The Wills Working Party recommended that s.21 of the *Wills Act* 1958 be retained in its present form.[85] However the drafter of the 1991 Draft Wills Bill has put the provision in up-to-date language which does not appear to change the meaning of s.21. This provision ensures that whatever interest a testator has in property at the time of death passes under the will, even though at the time of the making of the will the testator may have had a greater or different interest in that property.

Recommendation 38

The Committee recommends that it continue to be the law that a will disposing of property disposes of whatever interest the testator has in that property at death, and that s.20 of the 1991 Draft Wills Bill be adopted.

S.20.5 The Committee therefore proposes the following draft:

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

If —

(a) a testator has made a will disposing of property; and

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

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

83 *House of Lords Debates*, 23 February 1837, columns 966–967. See also *Fourth Report of the Real Property Commissioners* (1833).

84 Hardingham at paragraph 813.

85 *WWP Recommendation 19*.

S.21—When does a will take effect?

Wills Act 1958, s.22 – A will to speak from the death of the testator

s.21.1 The Wills Working Party recommended by *Recommendation 20* that ss.22, 23, 24, 25, 26, 28 and 29 of the *Wills Act* 1958 be repealed and that s.28 of the Queensland *Succession Act* 1981 be adopted as a model for their replacement. S.21 of the 1991 Draft Wills Bill is a rewrite of s.28(a) of the Queensland precedent. It has the same effect and is recommended.

Recommendation 39

The Committee recommends that, as in s.21 of the Draft Wills Bill 1991, it should continue to be the law that 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.

s.21.2 On the other hand there does not seem to be any point in including the proposed sub-section (3) in this section. It has always been accepted that where a power of appointment is exercised by will it is exercised on the date the will comes into effect, not before. It is not necessary to attempt to say this by statute; and it is anyway a consequence of the definition of "disposition" discussed in relation to s.3.

Recommendation 40

The Committee recommends that sub-section 21(3) of the 1991 Draft Wills Bill be omitted.

s.21.3 The Committee therefore proposes the following draft:

Draft s.21—When does a will take effect?

(1) A will takes effect, with respect to the property disposed of by the will, as if it had been executed immediately before the death of the testator.

(2) Sub-section (1) does not apply if a contrary intention is shown in the will.

S.22—What is the effect of the failure of a disposition?

Wills Act 1958, s.23—What a residuary devise shall include

S.22.1 Section 22 of the 1991 Draft Wills Bill is a re-write of s.28(b) of the Queensland *Succession Act* 1981, as recommended by the Wills Working Party. It does not appear to make any change to the law now found in s.23 of the *Wills Act* 1958.[86]

S.22.2 In the light of the Committee's discussion of the definition of "disposition" in s.3, the words "other than the exercise of a power of appointment" should be added. If the exercise of a power of appointment is ineffective the property will pass in accordance with the provisions of the document creating the power.[87]

Recommendation 41

The Committee recommends, as in the 1991 Draft Wills Bill, that there be no change in the law which provides that a failed disposition, other than the exercise of a power of appointment, should form part of the residuary estate unless the will otherwise provides.

S.22.3 The Committee therefore proposes the following draft:

Draft s.22—What is the effect of a failure of a disposition?

(1) If any disposition of property, other than the exercise of a power of appointment, is ineffective, the will takes effect as if the property were part of the residuary estate of the testator.

(2) Sub-section (1) does not apply if a contrary intention is shown in the will.

S.22.4 The Committee considers it necessary to make a further observation in relation to proposed s.22, s.28 and s.35, as it notes that one of the possible consequences of the enactment of proposed s.35 concerning delegation of will-making power is that home-made wills may create valid powers of appointment

86 Proposed s.22 makes no distinction between real property, for which s.23 of the *Wills Act* 1958 made provision, and personalty. In so far as it refers to personalty it merely restates the common law rule.

87 See paragraph S.3.15.

without a gift over, which would entitle the donee of the power to appoint to himself or his legal representatives.

s.22.5 Such a power might not be a general power of appointment within the meaning of proposed s.28, so that a gift of residue would include it. However that maybe, the Committee's attention has been drawn to the possible inadequacy of the law to deal with a failure to exercise a general power of appointment in respect of which there is no express or implied gift over.

s.22.6 A power might have been given to B in a deed or will by A, now long dead, allowing B to distribute certain property to whomever he chooses, or possibly to whomever he chooses except X and Y, but without providing a valid gift over to persons or purposes in default of its exercise. B, who may not know of, or remember, the gift of power may die intestate or without a disposition of residue which takes effect. In that event neither proposed sections 22 or 28 operate and the power of appointment will lapse.

s.22.7 If the Committee is right in concluding that the property the subject of the lapsed power will then fall to be distributed as part of the residue, or as on the intestacy or partial intestacy, of the original donor of the power, the result appears both anomalous and inconvenient, and not even most likely to accord with the preferences of the original donor.

s.22.8 In *Tatham v. Huxtable* and other authorities such powers are equated to property and as such should arguably be treated as property for the purposes of distributions on intestacy.

Recommendation 42

The Committee recommends that the law relating to powers of appointment that allow the donee of the power to appoint to himself or his legal personal representatives be reviewed in the context of a review of the *Administration and Probate Act* 1958 or the *Property Law Act* 1958.

S.23—Is extrinsic evidence admissible to clarify a will?

Wills Act 1958, s.22A – Provisions as to the construction of wills

s.23.1 At common law, extrinsic evidence is generally inadmissible when it would, if accepted, have the effect of adding to, varying or contradicting the terms of a document.[88] The relevance of the use of extrinsic evidence in assisting with the construction of wills is related to the issue of whether the courts should be concerned with discovering the meaning of the words used in a will or determining the real intentions of the testator. The traditional view is that the courts are concerned with ascertaining the meaning of the words used in the will, which they equate with the meaning of the testator.[89] In support of this, it is said that drafters, testators and beneficiaries rely on the words used in the will and any generous use of extrinsic evidence would result in a lack of certainty and an increase in litigation.[90]

s.23.2 Accordingly, the general rules for the construction of wills are as follows:

- words in the will are to interpreted in the context in which they appear according to their usual meaning;
- where the words give rise to a clear meaning the courts will not admit evidence which might show that the testator used the words in a different sense;
- where the words used are unclear or ambiguous, the courts may have regard to the testator's circumstances and the circumstances surrounding the making of the will in order to ascertain their intended meaning. This is sometimes referred to as "armchair" evidence.[91]

s.23.3 Section 23 of the 1991 Draft Wills Bill broadly follows s.21 of the English *Administration of Justice Act* 1982, which provides:

> (1) This section applies to a will—
>
> (a) in so far as any part of it is meaningless;
>
> (b) in so far as the language used in any part of it is ambiguous on the face of it;

88 Byrne D. and Heydon J.A.D., *Cross on Evidence*, Fourth Australian Edition, 1991 at para 39145.
89 Hardingham at paragraph 1101.
90 *Ibid*.
91 *Ibid* at paragraph 1103.

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

(2) In so far as this section applies to a will extrinsic evidence, including evidence of the testator's intention, may be admitted to assist in its interpretation.

s.23.4 This is in accordance with the opinion of a majority of the Wills Working Party, which took the view that the English precedent is preferable to s.22A of the Victorian *Wills Act*, which was enacted following a review by the Chief Justice's Law Reform Committee (*First Report Concerning the Construction of Wills*, 1978) before the English legislation was enacted. It seeks to allow the ascertainment of genuine testamentary wishes consistent with basic formality, the purpose of which is the protection of the testator from fraud and imposition. The English precedent does not envisage oral wills. It envisages wills which can be given effect to with the assistance of extrinsic evidence where doubts and ambiguities arise in the will itself.

s.23.5 The New South Wales Law Reform Commission has supported adoption of the English model (*Report on Wills – Execution and Revocation* (1986) at 90) but the recommendation has not as yet been acted on. In a Memorandum of the Registrar of Probates of South Australia (Mr A Faunce-de-Laune) dated 29 April 1992 addressed to the South Australian Chief Justice, the Registrar recommended adoption of the English model. But the matter was not taken up in the recent *Wills (Miscellaneous) Amendment Act* 1994.

s.23.6 The recommendation of the Wills Working Party and the provisions of s.23 of the 1991 Draft Wills Bill would ease the process of interpretation of wills, particularly in those cases where the existing restrictions on the admissibility of extrinsic evidence make the construction process difficult. The advantage of adopting an existing precedent, even if of an overseas jurisdiction, is that cases decided on that precedent will be of value in deciding similar cases in Victoria. The provision goes further than the existing Victorian s.22A, which concentrates on acts, facts and circumstances touching intention of the testator rather than on evidence of the testator's actual intention.

s.23.7 At its meeting on 2 March 1994, however, the Wills Advisory Group, some members of which were also members of the Wills Working Party, expressed considerable reservation about the draft, expressing preference for the existing s.22A. The difficulty with the 1991 draft based on the English precedent is that it appears to

admit extrinsic evidence of the testator's intention if "any part of the will is meaningless" or if "any of the language used in a will is ambiguous on the face of it".

S.23.8 The Committee observes, however, that the drafter of the 1991 Draft Wills Bill appears to have made a significant change. The English provision restricts the use of the extrinsic evidence to the explication of the part whose ambiguity or meaninglessness leads to its admission. By contrast the 1991 Bill opens the whole will to extrinsic evidence if any part of it leads to such evidence being admitted.

S.23.9 The breadth of these provisions could be seen as a highway for anyone minded to challenge a will, particularly a home-made will; and as a means of destabilising the existing rules for the construction of wills, the objective of which is precisely to resolve frequently found ambiguities. If a provision in a will is meaningless, and cannot be made meaningful, for example by the "armchair" rule or by rectification, then it is proper that that provision should be ineffective.

S.23.10 However it should be pointed out that the present s.22A may not unfairly be described as a statutory rendition of the "armchair" rule which, briefly, allows evidence of the testator's verbal habits, for example the meaning of nick-names of beneficiaries. S.22A states:

> **22A.** ***Provisions as to the construction of wills***
>
> (1) In the construction of a will acts, facts and circumstances touching intention of the testator shall be considered and evidence of such acts, facts and circumstances shall be admitted accordingly but evidence of a statement by the testator declaring the intention to be effected or which had been effected by the will or any part thereof shall not be received in proof of the intention declared unless the statement would apart from this section be received in proof of the intention declared.
>
> (2) Where in any matter relating to the construction of the will any evidence adduced by a party is admissible by reason of and by reason only of the provisions of sub-section (1), the party or parties by which that evidence is adduced or relied upon shall bear such part of the costs of the proceedings as is attributable to the introduction of that evidence unless the court or judge otherwise determines.

S.23.11 But there are other limited occasions when extrinsic evidence of the testator's actual intention is already admissible. One is where an expression used is "equivocal", that is it could refer equally to one thing (e.g. a beneficiary) or another.

An illustrative case is *Re Fleming* [1963] V.R. 17.[92] The other is where presumptions of intention are made by equity, for instance the presumption that a legacy is sometimes given to a creditor in satisfaction of the debt owed. These presumptions may already be rebutted, or fortified, by extrinsic evidence of the testator's intention.

s.23.12 The English provision, unlike the 1991 Draft Wills Bill, appears to make an acceptable compromise between the need to give effect to the testator's intention and the need to construe an instrument in writing in the necessary absence of its maker.

s.23.13 The Committee notes that neither the Wills Working Party nor the 1991 Draft Wills Bill advert to the question as to who shall bear the costs of introducing hitherto inadmissible extrinsic evidence; the existing s.22A, reversing the usual presumption, provides that such costs will ordinarily be borne by the party introducing that evidence, unless the Court otherwise determines. No submissions urged the Committee specifically to reinstate this provision, and the Committee makes no recommendation upon the question, though it observes that a different Victorian rule as to costs, in this provision alone, may not assist the Uniform Succession Laws project. The Committee sees no need for the statute to direct the Court on this point, as the Court has the discretion in any case to determine how costs shall be awarded.

Recommendation 43

The Committee recommends that the common law rules as to the admissibility of extrinsic evidence in the construction of a will be liberalised, and that the narrower effect of s.21 of the English *Administration of Justice Act* 1982 should be preferred to that of s.23 of the 1991 Draft Wills Bill.

s.23.14 The Committee therefore proposes the following draft:

92 The will referred to "my son John". The testator had a son of his first wife called John, and a stepson, the son of his second wife, called John. The words of the will made clear that he did not distinguish between children and step-children. The resulting ambiguity permitted the admission of parol evidence, which then revealed that he habitually referred to his son Terence as "John", and that this son was in fact the intended beneficiary.

23. ***Is extrinsic evidence admissible to clarify a will?***

(1) If —

(a) any part of a will is meaningless; or

(b) any of the language used in a will is ambiguous on the face of it; or

(c) evidence, which is not, or to the extent that it is not, evidence of the testator's intention, shows that any of the language used in a will is ambiguous in the light of surrounding circumstances —

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

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

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

Wills Act 1958, s.20D — Construction of wills

S.24.1 "Domicile" is a term of private international law. It relates to the system of law applicable to a person, and is not necessarily the same as place of residence.

S.24.2 It should also be noted that existing section 20D — change in a testator's domicile — has been relocated into the Part dealing with the general rules of construction: see paragraphs S.17.1–5 above. This structure is consistent with the position in South Australia, Western Australia, Queensland and Tasmania, although New South Wales has the same structure as Victoria's current Act.[93]

S.24.3 Section 24 is a rewording of s.20D of the *Wills Act* 1958. The Wills Working Party recommended that it be retained.

S.24.4 The Committee notes, however, that "construction" is capable of bearing two meanings: both the process of interpreting an instrument, and the settled meaning reached by that process. The 1991 draft, perhaps following current drafting style, has reversed the word order of s.20D; but this appears to incline the balance towards the meaning reached, rather than the process, whereas the Committee believes that it is

93 Section 23, *Wills Act* 1936, (SA), section 24, *Wills Act* 1970 (WA), section 26, *Succession Act* 1981 (Qld), section 33, *Wills Act* 1992 (Tas) and section 32F, *Wills, Probate and Administration Act* 1898 (NSW).

the process of construction which is to remain unaltered by change in domicile. To this extent the Committee would prefer a draft which made this interpretation clear.

Recommendation 44

The Committee recommends that it continue to be the law that the construction of a will is not altered by a change in the testator's domicile, and that the word order of s.20D of the *Wills Act* 1958 is to be preferred to s.24 of the 1991 Draft Wills Bill.

s.24.5 The Committee therefore proposes the following draft:

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

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

S.25—Income on contingent and future dispositions

Wills Act 1958, s.33—Contingent and future testamentary gifts to carry the intermediate income

s.25.1 The Wills Working Party recommended the adoption of s.62 of the Queensland *Succession Act* 1981 because it considered it to be clearer than s.33 of the *Wills Act* 1958. Under case law the beneficiary of a *deferred* residuary gift did not take the income arising before the gift vested.[94] 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,[95] unless a fund was set aside[96] for the purpose of answering the bequest.

s.25.2 Difficulties in knowing whether a legacy or devise would carry intermediate income from the date of the death or from a later date led the Queensland Law Reform Commission to recommend that there be a general rule giving intermediate income to the beneficiary of the capital in all cases unless the income were given elsewhere. Section 62 of the *Succession Act* 1981 gave effect to this recommendation.

94 *Re Gillett's Will Trusts* [1950] Ch. 102; *Re Geering* [1964] Ch. 136.
95 *Guthrie v. Walrond* (1883) 22 Ch.D. 573.
96 *Re Woodin* [1895] 2 Ch. 309.

Section 33 of the *Wills Act* 1958 does not go as far. It does not refer to deferred residuary bequests. There has been no criticism of the Queensland provision, which makes administration easier for executors. It ensures that the intermediate income does not fall into a partial intestacy.

s.25.3 The statutory provisions relating to accumulations to which the current provision, s.33 of the *Wills Act* 1958, refers are found in s.37 of the *Trustee Act* 1958. The 1991 Draft Wills Bill omits the reference, and there is no objection to doing so.

s.25.4 Furthermore, at least for minor beneficiaries, the income of a deferred bequest can be made available for the minor's education and advancement under the general law of trusts.

s.25.5 It has been suggested to the Committee that it is undesirable that the income should be accumulated until the capital vests, and that to do so is likely to consume it in administration expenses. Whether or not this is the case, the Committee affirms that the purpose of s.25 is to make sure that the income on the unvested capital does not have to be dealt with on a partial intestacy while the vesting of capital is deferred or uncertain; it says nothing about the vesting of the income and it is not intended to interfere with the rules of equity and the provisions of the *Trustee Act* 1958 as to the ability of trustees to make payments to contingent or deferred beneficiaries out of income.

s.25.6 It may be desirable to consider in a different context whether express provision for early or deferred vesting of income might be made.

Recommendation 45

The Committee recommends that there should be no change to the rule that contingent and future dispositions carry the intermediate income, that this rule should also apply to deferred dispositions, and that s.25 of the 1991 Draft Wills Bill be adopted.

s.25.7 The Committee therefore proposes the following draft:

Draft s.25—Income on contingent and future dispositions

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

S.26—Beneficiaries must survive testator by thirty days

Wills Act, 1958—No comparable provision

s.26.1 A devise or bequest will ordinarily lapse if the devisee or legatee dies before the testator. This is a rule of law and is not expressed in statute. It is a rule to which there are exceptions.[97] Statute too provides a major exception to the rule, and is considered next.

s.26.2 The provision of s.26 of the 1991 Draft Wills Bill is taken from s.32 of the Queensland *Succession Act* 1981. It extends the lapse rule to the case where the beneficiary fails to survive the testator by a period of 30 days. There is a similar provision in the American *Uniform Probate Code* s.2–702, the relevant terms of which read:

> an individual who is not established by clear and convincing evidence to have survived an event, including the death of another individual, by 120 hours, is deemed to have predeceased the event.

s.26.3 The effect of this is that if a testator and a beneficiary are killed in the same accident, the lapse rule will apply unless it can be shown that the beneficiary survived the testator by at least 120 hours. There is a similar rule with respect to the rights of an intestate successor in s.2–104.

s.26.4 The Queensland provision, which is matched in the case of intestacy[98] by s.35(2), is expressed in more direct terms. It has been closely followed by s.26 of the 1991 Draft Wills Bill.

s.26.5 The justification for this provision is the same as the justification for the lapse rule itself, that is that, with important exceptions, it is considered that a testator who leaves property to individuals other than issue, or to a particular charitable purpose,

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97 See e.g. Hardingham, Neave & Ford's *Wills and Intestacy in Australia and New Zealand* paragraphs 910–912.

98 The Victorian *Administration and Probate Act* does not have a corresponding rule for intestacy.

intends those individuals or that charitable purpose to take the benefit, and not the *estates* of those individuals after their death, or a different charitable purpose.

S.26.6 The phenomenon of multiple deaths of family members in the same incident, for instance a car or aeroplane accident, has brought to light the difficulties of a simple lapse rule. In well drawn wills there is frequently found a provision to the effect that if a certain beneficiary fails to survive the testator for a period of time, often thirty days, a disposition to that beneficiary shall pass elsewhere. Often such provisions are confined to the larger bequests or devises contained in the will.

S.26.7 There are two major advantages of such a provision. Under the existing law if a beneficiary survives the testator at all the benefit left to that beneficiary forms part of the beneficiary's estate. If the beneficiary were an infant child of the testator who dies within 30 days of the testator leaving no issue and no estate of his or her own, two administrations would be necessary—the administration of the parent's estate and another administration of the infant's estate, the only property of which might well be the property left to the infant. That property would then be distributed on intestacy to the surviving parent, or siblings, and further as set out in s.52 of the *Administration and Probate Act* 1958. The provision saves this expensive and time consuming process.

S.26.8 Secondly it seems likely that the practice of including a thirty days provision in wills originated in the days when very heavy duties were being exacted in England on deceased estates. If a testator and a sole beneficiary under his will were killed in the same incident, double duties would be charged if the beneficiary survived the testator. The damage done to large estates was so great that eventually mitigating legislation was enacted. A thirty days rule avoids this difficulty.

S.26.9 If death or succession duties were to be introduced in Australia or Victoria well versed practitioners would no doubt, in the absence of legislation, make sure that they included a survivorship qualification in important provisions in wills. But other practitioners might fail to do this and be, perhaps, subject to action for negligence.

S.26.10 As to the period of time—thirty days—this seems to derive from the standard precedents used by drafters of wills. But it is far more justifiable a period than the American *Uniform Probate Code*'s period of 120 hours. That period is

governed by the rule that a grant of probate cannot be uttered in less than five days. It is governed therefore by procedural considerations. In most Australian jurisdictions it is highly unlikely that the need to distribute a deceased estate in less than thirty days will be urgent. In many cases an estate should not be distributed until the possibility of a family provision application has been eliminated. In Victoria a period of six months after the grant of probate or letters of administration is allowed to a potential applicant for family provision, and a personal representative may be held liable if he or she distributes without paying attention to family provision rules (*Administration and Probate Act* 1958, ss.99, 99A; and cf *Re Hill* Q.S.C., O.S. N^{o} 1079 of 1987, unreported, where a personal representative was held liable to an intending family provision applicant for distributing a deceased estate to himself within five weeks after the death).

S.26.11 Interesting statistics as to the length of survival of car accident victims have been furnished to the Queensland Law Reform Commission by the Queensland Police Service. Of 390 deaths resulting from motor vehicle accidents in Queensland between 1 September 1992 and 31 August 1993, 377 victims died instantly or within seven days. The remaining 13 victims all died within nineteen days after the accident. No victims died more than nineteen and less than thirty days after the accident.[99]

S.26.12 These statistics are unlikely to be peculiar to Queensland. They certainly indicate that a period of 120 hours is far too short. A period of 21 days could be countenanced; but it is not desirable to suggest that the winding up of deceased estates should be rushed; and a thirty day period is consistent with the weight of precedent.

S.26.13 In s.26 of the 1991 Draft Wills Bill the words "of a beneficial interest in property", taking into account the comments at paragraph S.3.6 on the definition of "disposition", are redundant and hence omitted. In sub-section (3) the words "is not a contrary intention" would be more appropriately expressed as "does not indicate a contrary intention".

Recommendation 46

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

The Committee recommends that in the absence of a contrary intention in the will the death of a beneficiary within 30 days of the testator's death should give the will the effect it would have had had that beneficiary predeceased the testator, and that s.26 of the 1991 Draft Wills Bill, with redundant words omitted and a grammatical change in sub-section (3), be adopted.

s.26.14 The Committee therefore proposes the following draft:

Draft s.26—Beneficiaries must survive testator by 30 days

(1) If a disposition is made to a person who dies within 30 days after the death of the testator, the will is to take effect as if the person had died before the testator.

(2) Sub-section (1) does not apply if a contrary intention appears in the will.

(3) A general requirement or condition that a beneficiary survive the testator does not indicate a contrary intention for the purpose of this section.

S.27—What does a general disposition of land include?

Wills Act, 1958, s.24—What estates a general devise shall include

s.27.1 Because of the earlier limitations of the law relating to the disposition of certain kinds of property by will[100] and on the use of extrinsic evidence to ascertain the intentions of a testator, section 24 of the 1958 Act provides, in essence, that any disposition of land includes any leasehold interest.[101] Until 1837, a general disposition of land included only freehold interests, unless the testator owned only leaseholds, in which case the disposition would be regarded as referring to the latter.[102]

s.27.2 The Committee notes that leasehold interests in land are classified as personalty, not realty.[103] A reference in a will to land can therefore be construed, by this section, to include both realty and personalty. It is therefore possible that if a

100 See paragraph s.4.2 above.

101 See Hardingham at paragraph 1103.

102 See Lee at paragraph 1505.

103 The expressions realty, real estate and real property are equivalent; similarly the expressions personalty, personal estate and personal property are equivalent, except that "personal property" is more likely to be used in the colloquial sense to mean things of a personal nature.

testator made a general disposition of land, but a residuary disposition of his or her "personalty" or "personal estate", such use of the specific technical term might be construed as sufficient indication of contrary intention to result in any leasehold interests in land going with the residuary gift. While the provisions governing the construction of particular words in wills were first introduced to overcome certain technicalities of the old law before 1837, they remain to this day to assist in construing wills where testators, perhaps without taking legal advice, use expressions which either are vague or employ terms with a precise legal meaning not necessarily fully understood by the testator.

s.27.3 The Wills Working Party recommended that the Queensland precedent—s.28(c) of the *Succession Act* 1981—be used as a model for this draft. It is an abridged version of the previous law.

Recommendation 47

The Committee recommends that a general disposition of land should continue to include both leasehold and freehold land unless the will indicates otherwise, and that s.27 of the 1991 Draft Wills Bill be adopted.

s.27.4 The Committee therefore proposes the following draft:

Draft s.27—What does a general disposition of land include?

(1) A general disposition of land or of the land in a particular area includes leasehold land whether or not the testator owns freehold land.

(2) Sub-section (1) does not apply if a contrary intention appears in the will.

S.28—What does a general disposition of property include?

Wills Act 1958, s.25—General devise or bequest may include property subject to a general power of appointment

s.28.1 The Wills Working Party recommended that the Queensland precedent—s.28(d) of the *Succession Act* 1981—be adopted. This section of the 1991 Draft Wills Bill is a re-write of the Queensland precedent, but with "had" replacing "has" in (1). This is an error. The general power may have arisen after the date of the will. The original precedent has "has".

s.28.2 The provision omits, on the face of it, a gift of residue,[104] which is not well defined by the words "property of a particular kind". Likewise the provision, having no counterpart to the Wills Act's reference in s.25 to property "otherwise described in a general manner", may not have the same breadth as the provision it is to replace. The Committee therefore offers a revised draft which takes up these matters.

Recommendation 48

The Committee recommends—

- that a general disposition of property should continue to include property the subject of a general power of appointment (whether the power arises before or after the date of the will) and to operate as an exercise of the power,
- that the same rule should apply to a gift of residue,
- that the rule apply to property by "description" rather than by "kind",
- that the rule should cover property the subject of a power arising after the date of the will, and
- that s.28 of the 1991 Draft Wills Bill , with these amendments, be adopted.

s.28.2 The Committee therefore proposes the following draft:

Draft s.28—What does a general disposition of property include?

(1) A general disposition of all or the residue of the testator's property, or of all or the residue of his or her property of a particular description, includes all the property of the relevant description over which he or she has a general power of appointment exercisable by will and operates as an exercise of the power.

(2) Sub-section (1) does not apply if a contrary intention appears in the will.

104 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".

s.28.3 The Committee refers again to its discussion at paragraphs s.22.4–9 above of the questions raised by references to general powers of appointment.

S.29—What interest in real property does a disposition without limitation apply to?

Wills Act 1958, s.26—How a devise without words of limitation shall be construed

s.29.1 At common law, for a disposition of real property to take effect, it was necessary for the testator to use in his or her will the formal words of limitation that the land is to pass "to A and the heirs of his body".[105] In the absence of such words the will would not pass fee simple in the land and only a life interest would pass.[106] Section 26 of the *Wills Act* 1958 overcomes this problem by providing that notwithstanding the absence of any words of limitation a disposition of "real estate" is to be construed as passing the fee simple or such interest as the testator had in the property. This provision is not relevant to leasehold interests, which are traditionally classified as personalty, not realty.

s.29.2 The Wills Working Party recommended the adoption of s.28(e) of the Queensland *Succession Act* 1981. It is not intended to make a change to the law. The restriction to real property is correct because usually it was only in relation to devises of realty, which were considered to be conveyances, that the use or absence of words of limitation could be crucial. The Committee considers the question at the heading of the section could be changed.

Recommendation 49

The Committee recommends that it continue to be the law that words of limitation are not required to pass the whole of the testator's interest in real property, and that s.29 of the 1991 Draft Wills Bill be adopted, with a change of heading to read: "What is the effect of a devise of real property without words of limitation?".

s.29.3 The Committee therefore proposes the following draft:

105 This has not been necessary in Victoria since 1918: s.60 *Property Law Act* 1958

106 Lee at paragraph 1508.

Draft s.29—What is the effect of a devise of real property without words of limitation?

(1) A disposition of real property to a person without words of limitation is to be construed as passing the whole estate or interest of the testator in that property to that person.

(2) Sub-section (1) does not apply if a contrary intention appears in the will.

S.30—How are dispositions to issue to operate?

Wills Act 1958 – No counterpart

s.30.1 The Wills Working Party recommended by *Recommendation 23* that s.27 of the *Wills Act* be replaced and that s.30 of the Queensland *Succession Act* 1981 be used as a model for the replacement. Section 30(1) of the Queensland Act corresponds to s.27 of the *Wills Act* 1958; see paragraph s.31.1 below. Section 30 of the 1991 Draft Wills Bill derives from the Queensland s.30(2). Unfortunately, although the recommendation as a whole is justifiable for the reasons given by the Queensland Law Reform Commission in its Report (Q.L.R.C. 22 at 17–19) quoted at length by the Wills Working Party, it omitted to notice that the Queensland precedent was governed by a new, modified *per stirpes* rule which the Law Reform Commission had decided to adopt not only for the purposes of this provision but also for the purposes of its intestacy rules. That modified *per stirpes* rule is not found in the Victorian intestacy rules. Therefore, if the Queensland precedent is followed exactly in Victoria there would be a disparity between the manner in which a deceased estate is distributed between issue of a testator under a will and the way in which it is distributed in the case of intestacy.

s.30.2 The *per stirpes* rule is understood by lawyers and governs the manner in which a deceased estate is distributed amongst the issue of an intestate. The rule has been modified in Queensland by a slight change of formula, encapsulated by the words of s.30(2) of the *Succession Act* as follows:

> Unless a contrary intention appears by his 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 one nearest issue, among them in equal shares and by representation among the remoter issue of that person.

s.30.3 The difference between this modified *per stirpes* rule and the traditional *per stirpes* rule is that under the modified rule if the testator is survived by grandchildren only, those grandchildren take in equal shares. Under the traditional *per stirpes* rule they would take according to their stocks, that is each grandchild would take, and between them if more than one of one stock, the share his or her parent would have taken had he or she survived the testator.

s.30.4 The wording of the Victorian *Administration and Probate Act* 1958, s.52(1)(f), which is concerned with the rights of issue on intestacy, is different. It refers to distribution

> in equal shares among *the children* of the intestate living at his or her decease and the representatives then living of any children who predeceased the intestate…

s.30.5 The difference between "the nearest issue" and "the children" is not a small one, since the nearest issue may be grandchildren belonging to families with both large and small numbers of siblings.

Recommendation 50

The Committee recommends that the law should ensure that a disposition of property amongst issue of the testator is (unless otherwise intended in the will) distributed to them in the same way as if the testator had died intestate leaving only issue surviving, and that s.30 of the 1991 Draft Wills Bill as modified be adopted.

s.30.6 The Committee therefore proposes the following draft:

Draft s.30—How are dispositions to issue to operate?

(1) A disposition to a person's issue without limitation as to remoteness must be distributed to that person's issue in the same way as if that person had died intestate leaving only issue surviving.

(2) Sub-section (1) does not apply if a contrary intention appears in the will.

S.31—How are requirements to survive with issue construed?

Wills Act, 1958, s.27—How the words "die without issue" &c, shall be construed

S.31.1 Section 27 of the *Wills Act* 1958 also provides for how to construe a devise or bequest which contains a requirement that the benefit will fail if the beneficiary dies without issue. S.31 of the 1991 Draft Wills Bill is a rewrite of this provision, and is shown here with the omission of redundant words (see definition of "disposition").

Recommendation 51

The Committee recommends that the current law as to the construction of a reference to want or failure of issue not be changed, and that s.31 of the 1991 Draft Wills Bill, with the omission of redundant words, be adopted.

S.31.2 The Committee therefore proposes the following draft:

Draft s.31—How are requirements to survive with issue construed?

(1) If there is a disposition to a person in a will which is expressed to fail if there is either—

(a) a want or a failure of issue of that person either in his or her lifetime or at his or her death; or

(b) an indefinite failure of issue of that person—

those words must be construed to mean a want or failure of issue in the person's lifetime or at the person's death and not an indefinite failure of his or her issue.

(2) Sub-section (1) does not apply if a contrary intention appears in the will.

S.32—Dispositions not to fail because issue have died before testator

Wills Act 1958, s.31—Gifts to issue who die before testator's death but leave issue surviving

S.32.1 Statute provides that the lapse rule shall not apply to the case where there is a legacy or devise to issue of the testator who predecease the testator but who leave issue who survive the testator. The trouble is that the statutory expression of that principle has led to confusion.

S.32.2 This section of the 1991 Draft Wills Bill is not without difficulties, one of which is the result of the same misunderstanding of the Queensland legislation (s.32

of the *Succession Act* 1981) as is described in the commentary on s.30 of the 1991 Bill and s.27 of the *Wills Act* 1958. Accepting the structure of s.32(1) of the 1991 Draft Wills Bill, sub-section (1)(a) should read as follows:

> (a) the surviving children, if more than one, take in equal shares; and
>
> (b) the issue of children who have not survived the testator by 30 days, take by representation.

s.32.3 Alternatively 32(1) could read:

> If a person makes a disposition of a beneficial interest in property 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 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 deceased 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.

s.32.4 The point is that the general principle should be that the statutory substitutional provision should ensure that the substituted issue take the disposition in the same shares as if there were an intestacy.

Recommendation 52

The Committee recommends that the statutory substitutional provision should ensure that the substituted issue take the disposition in the same shares as if there were an intestacy.

s.32.5 Sub-section (2) of the 1991 Draft Wills Bill provides that only those who attain the age of 18 years or marry are entitled to be substitutionary beneficiaries.

s.32.6 It has been argued that consistency with the Committee's views on s.30 require the condition in s.32(2) of the 1991 Draft Wills Bill as to attaining the age of 18 years or marrying to be omitted because they have no place in Victoria's law of intestate succession. However the point of s.30 is to identify persons included in the description of issue, whereas s.32 attempts to give effect to the presumed or most likely intention or preference of testators who have indicated the importance of survivorship. The Wills Working Party recommended the inclusion of the condition,

and gave as a reason that it would prevent property of one side of the family going to the other side of the family on the intestacy of a minor. The Committee accepts that a testator would ordinarily prefer his or her property not to be distributed on the early death of an intestate minor who had never controlled it.

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.

s.32.7 The Queensland provision says (s.33(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.

s.32.8 It is quite common for a testator to refer to a beneficiary's surviving. But if the beneficiary is issue of the testator the policy of the legislation is that the disposition should not lapse if there are issue of the beneficiary who survive the testator. A contrary intention must therefore be more explicit than a mere reference to surviving. It will usually take the form of an explicit gift over, that is "to A, but if A predeceases me, to B".

s.32.9 The words underlined—"or attain a specified age"—are also significant. Suppose that a testator leaves provision for "my child A upon condition that she attains the age of 25". If A predeceases the testator aged 23, then the legacy would lapse because A had never attained the requisite age. But if A leaves (say, two infant) children who survive the testator the policy of the law should be that the children should take their mother's share between them. The added words make sure that surviving children do take. The testator can indicate a contrary intention by providing that if the child fails to attain the age of 25, then, whether or not the child leaves issue surviving, the property is to go elsewhere. The policy of the legislation is to ensure that issue of the testator take unless there is a conscious intention, clearly expressed, that they must not.

s.32.10 Sub-section (4) seems to require reconsideration. It is obvious that the section cannot apply at all if issue who predecease the testator do not leave issue who survive the testator. The underlined words in the 1991 Draft Wills Bill—"do

not"—appear to have been inserted in error. If a testator leaves property "to my children" the rule will apply and issue of children who predecease the testator should take the shares they would have taken had the testator died intestate leaving only issue surviving. If the testator leaves property to "my children, but if they predecease me, then to Y" the statutory rule would appear to be displaced and issue of the children could not displace Y. The wording is an attempt to meet the problem which occurred in *Re King*.[107] The Committee considers that it would be better to use the usual language and say:

> The provisions of this section do not apply if a contrary intention appears in the will

but to add:

> but a general requirement or condition that a beneficiary survive the testator or attain a specified age does not indicate a contrary intention for the purpose of this section.

s.32.11 This is the provision in Queensland and should have the effect that *Re King* would not be decided in the same way in future.[108]

Recommendation 54

The Committee recommends that s.32(4) of the 1991 Draft Wills Bill be redrafted, following the Queensland provision, so as to ensure that, for issue not to take, a contrary intention must be in more than general words.

s.32.12 The Committee therefore proposes the following draft:

Draft s.32—Dispositions not to fail because issue have died before the testator

(1) If a person makes a disposition to any of his or her issue, where the disposition is not a disposition to which section 30 applies, and where the interest in the property disposed is not determinable at or before the death of the issue, and the issue does not survive the testator for thirty days, the issue of that issue who survive the testator for thirty

107 [1953] V.L.R. 648

108 The disposition was "to such of … my two sons S. and W. as shall be living at the date of my death and if both shall then be living as tenants in common in equal shares", W. had died, leaving one son. It was held that the will showed a contrary intention, so s.31 did not apply and S. took all and W.'s son took nothing.

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.

S.33—Construction of residuary dispositions

Wills Act 1958—No counterpart

S.33.1 This provision is taken from s.29 of the Queensland *Succession Act* 1981 and its inclusion was recommended by *Recommendation 29* of the Wills Working Party. The Queensland precedent reads:

29. ***Construction of residuary dispositions***

Unless a contrary intention appears by the will—

a) a residuary disposition referring only to the real estate of the testator or only to the personal estate of the testator shall be construed to include all the residuary estate of the testator both real and personal; and

b) subject to this Act, where a residuary disposition in fractional parts fails as to any of such parts for any reason that part shall pass to that part of the residuary disposition which does not fail, and if there is more than one part which does not fail to all those parts proportionately.

S.33.2 The objects of the provision are clear enough. Sub-section 33(1) is intended to relieve testators of the consequences of an error which they may make if they are not clear about the difference between realty and personalty. For instance in *Harter v. Harter*[109] a residuary gift of realty was held not to include residuary personalty. In *Re Cook* [110]a gift of personalty was held to exclude realty. Sub-section 33(1) is

109 (1873) L.R. 3 P. & D. 11.
110 [1948] Ch. 212.

intended to prevent such a mistaken use of language from having the effect that part of the residuary estate is left undisposed of.

s.33.3 In its *Report on the Administration of Assets of Solvent Estates of Deceased Persons in the Payment of Debts and Legacies*, Project N° 34—Part VII, 1988, the Law Reform Commission of Western Australia expressed a doubt concerning the interpretation of this provision. In paragraph 4.35 it comments:

> In one particular respect the overall effect of section 29 is not clear. This is the case where a testator simply gives his residuary realty to X and his residuary personalty to Y—a common enough case where the testator is, say, a farmer survived by a widow and one child, or by two children. The question is whether the terms of such a residuary clause evince an intention to oust the section. It may well be that they would evince an intention to oust paragraph (a) of section 29, but not paragraph (b). This construction of the section is not, of course, beyond dispute and could well require judicial determination.

s.33.4 The Commission went on, in paragraph 5.18, to offer a revised draft of the Queensland provision in the following terms:

> Subject to this Act, where there is a residuary disposition either in fractional parts or which operates by reference to a distinction between real and personal property and that disposition fails as to any such parts or property for any reason, that part or property shall form part of and pass under that part of the residuary disposition which does not fail then that part or property shall form part of and pass under those parts proportionately.

s.33.5 In the Committee's view this redraft effects a substantial change of meaning in the Queensland provision. Sub-section (a) of the Queensland provision is intended merely to relieve a testator who uses the word realty or personalty without realising that the word has a highly technical legal meaning. The testator fails to differentiate between them and probably intends not to. But if a testator leaves personalty to A and realty to B then an intention to differentiate between the two is inescapable. Such a residuary disposition does not refer, as s.29(a) of the Queensland legislation says, "*only* to the real estate of the testator or *only* to the personal estate of the testator". It refers to both the real estate and the personal estate. Section 29(a) would not therefore apply to it, unless from the terms of the will as a whole it appeared that the testator intended the lapsed legacy or devise to go to the other beneficiary. Furthermore it is more difficult to justify giving the real estate to the beneficiary of the personalty, or the personalty to the beneficiary of the realty, where separate gifts are given. The Queensland provision is therefore narrower than the Western Australian suggested redraft. It is to some extent a matter of opinion

whether there should be a provision going further, in this respect, than the Queensland provision, but the Committee considers that it would be difficult to come to the conclusion that where a testator differentiates between realty and personalty it is nevertheless intended that both realty and personalty shall go to the same person, in the event of failure of one of the dispositions. The Committee therefore considers that the Queensland provision is more justifiable, if narrower.

Recommendation 55

The Committee recommends, as in the 1991 Draft Wills Bill, that a disposition of residue which does not differentiate between realty and personalty should be construed as including both, although only one of these categories is mentioned.

s.33.6 Sub-section (2) has an entirely different purpose, although it is also concerned with residuary dispositions. It too is intended to relieve testators of the consequences of a badly worded provision. If a testator leaves the residue of the estate "as to one half to my son A, one quarter to my daughter B and one quarter to my son C", and A predeceases the testator in circumstances which cause the lapse of the legacy, under the existing law the one half left to A will pass on intestacy. Under s.33(2), however, there will not be an intestacy of A's share. It will pass to B and C in equal shares. If the testator had a fourth child, D, whom he or she intended to omit from the residuary benefit, under s.33(2) D would not take, although if it were not for the proposed rule B, C and D would take A's lapsed share. The provision is subject to a contrary intention.

s.33.7 The provision amounts to a substitutional gift among the remaining beneficiaries of residue and its object is to give effect to a residuary intention and to prevent a presumably unintended partial intestacy. Sometimes a similar result is obtained by process of construction of the will. See *Re Palmer* [1893] 3 Ch. 369 and *Re Green* [1928] S.A.S.R. 473.

Recommendation 56

The Committee recommends that, where there is a partial failure of a disposition in fractional parts, the statute should provide, as in the 1991 Draft Wills Bill, for a substitutional gift to give effect to a residuary intention and to prevent a presumably unintended partial intestacy.

s.33.8 The provision has been strictly construed in Queensland. Thus in *Re Olive* [1989] 1 Qd.R. 544 a testator left the residue of her estate as to two fifteenths to some, three fifths to others and "the remaining one fifteenth part" to another. Demack J. held that s.29(b) did not apply as there was a contrary intention. The Committee does not consider that making special provision for the possible injustice of such a conclusion in a single case is desirable, especially in the light of its recommendations as to rectification and the admission of extrinsic evidence.

s.33.9 Unfortunately in *Re Harvey* [1990] Qd.R. 508 Dowsett J. considerably reduced the effectiveness of the provision by holding that it did not apply to a gift of the whole of the testator's estate. The learned judge considered that a gift of the whole of an estate was not a gift of the residue of an estate and that the section could not apply to it. Thus if a testator leaves "the whole of my estate as to one half to A, one quarter to B and one quarter to C" and A predeceases the testator in circumstances bringing about lapse of the legacy there will be a partial intestacy of the residue.

s.33.10 It is highly unlikely that those who framed the original s.29(b) of the Queensland *Succession Act* 1981 intended this consequence. Moreover it is arguable that a gift of the whole of the estate is exactly the same as a gift of the residue of an estate, since the gift of the whole must be subject to the same deductions, with respect to the payment of other legacies, if any, and debts and administration costs, as a gift of residue. The Committee therefore considers that in order to prevent a similar construction being placed on s.33(2) the wording should be amended to give full effect to the provision.

Recommendation 57

The Committee recommends that, where there is a partial failure of a disposition expressed in fractional parts, the statutory substitutional gift apply not only to a

fractional disposition of the residue, as in the 1991 Draft Wills Bill, but also to a fractional disposition of the whole estate.

s.33.11 The Committee therefore proposes the following draft:

Draft s.33—Construction of residuary dispositions

(1) A disposition of the whole or of the residue of the estate of a testator which refers only to the real estate of the testator or only to the personal estate of the testator is to be construed to include both the real and personal estate of the testator.

(2) If any part of a disposition in fractional parts of the whole or of the residue of the estate of a testator fails, the part that fails passes to the part which does not fail, and, if there is more than one part which does not fail, to all those parts proportionately.

(3) This section does not apply if a contrary intention appears in the will.

S.34—Dispositions to unincorporated associations of persons

Wills Act 1958—No counterpart

s.34.1 This section derives from s.63 of the Queensland *Succession Act* 1981 and is intended to eliminate problems which have been identified in the past in relation to legacies or devises to unincorporated associations of persons. If the aims, objects or purposes of an unincorporated association of persons are not charitable in law (e.g. a social or sports club), a legacy or devise on trust for those aims or purposes would fail for want of charity. This question is dealt with in detail in Ford & Lee *Principles of the Law of Trusts,* 2nd ed. Law Book Co., 1990 at [527–531] and was considered by the Queensland Law Reform Commission in its *Report on the Law relating to Succession* (1978). The following comment was made in that Report:

> A lay testator, minded to include in his will a legacy or devise for an unincorporated association of persons, has a phenomenal series of legal obstacles to overcome. If he leaves the benefit to the members of the association for the time being the legacy will take effect. But, if he leaves it to the present and future members of the association, it will fail. If he leaves it to augment the general funds of the association the legacy will take effect; but, if he leaves it for the purposes of the association, then, unless the purposes are charitable, it will fail. None of the problems arise if the association of persons happens to be incorporated. Perhaps even less explicable, in laymen's terms, is the fact that one may easily make a gift in one's lifetime to an unincorporated association of persons, but, if one attempts the same thing by one's will inordinate technicalities block the way. Further, how is anyone to understand why it is that a legacy to "the Communist Party of Australia" should fail (*Bacon v. Pianta*

> (1976) 114 C.L.R. 634 – the same fate would, of course, await the same legacy to any unincorporated political party) whereas a legacy "for the general purposes of the Loyal Orange Institution of Victoria" (*Re Goodson* [1971] V.R. 801) or a Masonic Lodge (*Re Turkington* [1973] 4 All E.R. 501), or the Old Bradfordian Club (*Re Drummond* [1914] 2 Ch. 90), should succeed?

s.34.2 The section is intended to relieve testators, who clearly wish to provide a benefit for a lawful, non-charitable unincorporated association of persons, from these often fatal technicalities.

s.34.3 Sub-section (1) reads as follows:

> 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.

s.34.4 Legacies or devises coming under (b) and (c) would almost certainly fail without the gloss of this provision. A legacy coming under (a) may be effective, if it can be interpreted as a legacy or devise in augmentation of the general funds of the association, that is, not upon trust for the aims or purposes of the association, or on trust for present and future beneficiaries. As the Privy Council said in *Leahy v. A.-G. (N.S.W.)* [1959] A.C. 457 at 477:

> In law a gift to such a society simpliciter (that is, where, to use the words of Lord Parker in Bowman v. Secular Society Ltd. [1917] A.C. 406 at 437), neither the circumstances of the gift nor the directions given nor the objects expressed impose on the donee the character of a trustee) is nothing else than a gift to its members at the date of the gift as joint tenants or tenants in common. It is for this reason that the prudent conveyancer provides that a receipt by the treasurer or other proper officer of the recipient society for a legacy to the society shall be a sufficient discharge to executors.

s.34.5 The provision is intended to marshal these principles so as to ensure the validity of gifts intended for unincorporated associations of persons.

s.34.6 Sub-section (3) takes care of the problem where a testator fails to include, in a will, provisions respecting the giving of a receipt by a Treasurer or other officer.

s.34.7 The benefits of the provision are very clear and the Wills Working Party in 1984 recommended, by *Recommendation 31*, that the Queensland provision be adopted with the exception of sub-section (3)(c) which is a particular provision which refers to certain technical aspects of Queensland's *Real Property Act* 1861–1979.

s.34.8 The 1991 Draft Wills Bill makes it clear, unlike the Queensland precedent, that the provision only applies to unincorporated associations which are "not a charity". It has been put persuasively to the Committee that 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 under the provisions of s.131 of the Victorian *Property Law Act* 1958, then the law relating to charities should govern not only the validity but also the administration of that gift.

s.34.9 Sub-section (4) reads:

> It is not an objection to the validity of a disposition to an unincorporated association of persons that a list of persons who were members of the association at the time the testator died cannot be compiled.

s.34.10 The reason for this provision is worthy of comment. It might be argued that if a complete list of all the members of an unincorporated association of persons could not be compiled at the date of death of the testator a disposition to them could not take effect because it could not be divided amongst them in equal shares. That is, the assumption is that the gift must be divisible amongst the members before it can be valid. This assumption stems from a principle, as formerly understood, of the law of trusts that to be valid all the beneficiaries of a trust must be listable, or, in the case of a gift to a class, that each member of the class must be identifiable. Although that principle is no longer insisted upon in the law of trusts, since *McPhail v. Doulton* [1971] A.C. 424, this provision is intended to stave off arguments based on the former understanding of that principle.

s.34.11 Although the Queensland precedent goes no further than this, there is another provision which is recommended for inclusion in this provision. It would read to the following effect:

It is not an objection to the validity of a disposition to an unincorporated association of persons that the members have no power to divide assets of the association beneficially amongst themselves.

S.34.12 There are, and have in the past been, many unincorporated associations of persons the members of which cannot terminate the association and divide the assets amongst themselves. Today these are associations which enjoy taxation benefits. In the case of such associations there is usually a requirement of the Commissioner of Taxation that in the case of termination of the association any assets must be distributed to a similar, tax exempt association and not divided amongst the members of the terminating association. Not all such associations are necessarily charitable, although the courts use concepts from charity law to ensure the validity of such gifts over (see e.g. *Darwin Cyclone Tracy Relief Trust Fund* (1979) 39 F.L.R. 260). A provision such as that proffered would pre-empt some arguments of this sort.[111]

Recommendation 58

The Committee recommends that the law should facilitate the giving of effect to a testator's desire to make a gift to an unincorporated association, and that s.34 of the 1991 Draft Wills Bill be adopted, with the addition in sub-section (5) of the words "or that the members of the association have no power to divide assets of the association beneficially amongst themselves".

S.34.13 The Committee therefore proposes the following draft:

Draft s.34—Dispositions to unincorporated associations of persons

(1) A disposition—

(a) to an unincorporated association of persons, which is not a charity; or

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

111 See Lee, W. A. "Trusts and Trust-like Obligations with Respect to Unincorporated Associations" Ch. 10 of *Essays in Equity* (Ed P D Finn, Law Book Co, 1985), page 2.

(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.

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

Wills Act 1958 — No counterpart

S.35.1 This again is a provision first found in the Queensland *Succession Act* 1981. There is an extensive literature concerning the rule that a testator cannot delegate the power to make a will. Difficulty is caused by reason of the fact that the ability to include in wills powers of appointment that are standard in settlements made *inter vivos* is subject to considerable doubt. The doubt was fuelled, in Australia, by

remarks of Fullagar J. in *Tatham v. Huxtable*,[112] by the decision in *Horan v. James*,[113] where it was held that a testator could not create a hybrid power by will, and by *Re Norway*,[114] where a power given to trustees of a will to "make such further payments" to the widow of the testator "either in the form of payments to her or payments for her benefit as they may consider reasonable after the balancing the interests of all parties" was held to be invalid as a delegation of the testator's will making power. There is an extensive literature on the subject and an entire chapter in Hardingham, Neave & Ford's *Wills and Intestacy in Australia and New Zealand* (2nd ed. 1989), Chapter 5, is devoted to the subject. It seems probable that much of the difficulty of the subject was generated by an article by D M Gordon.[115]

S.35.2 It is anomalous that there should be one law for trusts created *inter vivos* but a different, far more restrictive law for trusts created by will. Furthermore it has the effect that developments in precedents for *inter vivos* trusts cannot be relied on when drafting wills. Since developments in drafting trusts *inter vivos* are frequently driven by tax planning considerations, the supposed non-delegation rule has the effect of placing testators in an historical strait jacket.

S.35.3 The Committee refers again to its discussion at paragraphs S.22.4–9 above of the questions raised by references to general powers of appointment and the further possibilities for their creation arising from proposed s.35.

S.35.4 The Wills Working Party by *Recommendation 32* recommended that the Queensland precedent, s.64 of the *Succession Act* 1981, should be adopted. S.35 of the 1991 Draft Wills Bill more or less follows the wording of that precedent. It is clearly a desirable provision.

Recommendation 59

The Committee recommends that a testator should be able by will to create a power or trust to dispose of property if the same power or trust would be valid if made by

112 (1950) 81 C.L.R. 638.
113 [1982] 2 N.S.W.L.R. 376.
114 Unreported, Vic. Sup. Ct, 1963, Case N° 63/4731.
115 "Delegation of Will Making Power" (1953) 69 *Law Quarterly Review* 334.

the testator by instrument during his or her lifetime, and that s.35 of the 1991 Draft Wills Bill be adopted.

s.35.5 The Committee therefore proposes the following draft:

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

> A power or a trust to dispose of property, created by will, is not void on the 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.

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

Wills Act 1958, s.22B – Reference in a will to a valuation

s.36.1 The Wills Working Party recommended[116] that s.22B remain unaltered. That section states:

> Where a will refers expressly or by implication to a valuation made or accepted for the purpose of assessing probate duty or any other form of death duty, that reference shall, if the valuation contemplated by the reference is not at the relevant time required under the law of Victoria or under the law of any other jurisdiction, be construed as if it were a reference to a valuation of the relevant property as at the date of death of the testator made by a competent valuer.

s.36.2 The corresponding provision of the 1991 Draft Wills Bill is instead a briefer version of s.67 of the Queensland *Succession Act* 1981.

s.36.3 The limited purpose of the draft section and of s.22B of the *Wills Act* 1958 is to provide a method of valuation in case the statutory sources in death duty legislation are not available. The 1991 draft has dropped the word "as" in the expression "as at the date of death", which alters the meaning inappropriately. Beyond that comparatively minor criticism the Committee considers the section could be made more useful by making provision for any other requirement for valuation where no method is clearly laid down. Such a requirement may result from an express or implied reference in a will, or a reference to some other tax provision. Capital gains tax, which was introduced in 1985, may be such a tax.

116 *Recommendation 22.*

Recommendation 60

The Committee recommends that, unless a law of Victoria or another jurisdiction requires some other method, or the will otherwise provides, an express or implied reference in a will to a valuation is to be taken as referring to a valuation made by a competent valuer, and that the time of valuation is as at the testator's death.

s.36.3 The Committee therefore proposes the following draft:

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

> Except to the extent that a method of valuation is at the relevant time required under a law 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.

S.37—Can a will be rectified?

Wills Act 1958—No counterpart

s.37.1 The Wills Working Party recommended by *Recommendation 28* that s.20(1) and (2) of the English *Administration of Justice Act* 1982 be used as a precedent for a rectification power to be vested in the Court, together with an additional provision which it recommended. The Wills Working Party had compared the English provision with a provision in narrower terms to be found in s.31 of the Queensland *Succession Act* 1981.

s.37.2 Sub-section (1) of s.37 of the 1991 Draft Wills Bill reads as follows:

> 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.

s.37.3 This sub-section limits the extent of the Court's power to rectify.

s.37.4 The narrower Queensland provision reads as follows:

31. ***Power of Court to rectify wills***

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

(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 six months after the date of the grant in Queensland.

S.37.5 At the time the Queensland Law Reform Commission recommended this reform to the law there was no precedent available for a general rectification power. The English provision furnishes such a precedent.

S.37.6 The New South Wales provision, contained in s.29A of the *Wills, Probate and Administration Act* 1898, is broader than the provision in the 1991 Draft Wills Bill. Sub-section (1) reads:

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

S.37.7 This provision may be described as a substantial power to rectify, which brings the law of rectification of wills into close proximity with the law as to rectification of instruments made *inter vivos*.

S.37.8 A far more radical power to rectify is conferred on the court by s.12A of the *Wills Act* of the Australian Capital Territory. Sub-section (2) in particular is very wide. It reads:

> 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 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 probable copy of the will be rectified so as to give effect to that probable intention.

s.37.9 This provision reflects a recommendation contained in a report of the Wills and Probate Committee of the Australian Capital Territory Law Society; the Committee understands that it derives from European Civil Law. The Committee considers that this provision, which is clearly as radical as could be imagined, and which attempts to enable the court to probe the most inaccessible intentions of every testator, pays too little attention to the possible costs which might be incurred in carrying out such an exercise.[117] There is a far cheaper way of ascertaining the intention of testators whose testamentary intentions are not, perhaps, expressed with perfect clarity. This is by the application of the rules for the construction of wills which have been accumulated by the experience of many years and which can move with the times. These rules would be destabilised by the presence of so broad a rectifying provision in legislation.

s.37.10 The Committee considers, therefore, that the more conservative approach taken by s.37 of the 1991 Draft Wills Bill is to be preferred, at least for the present. Time may show that the Australian Capital Territory provision is workable; or that it induces costly litigation without commensurate (or any) benefit.

s.37.11 With respect to the New South Wales provision, a fundamental question for consideration is whether, indeed, the law of rectification of wills should match the law of rectification of documents made *inter vivos*. The Committee considers that there is a distinction between a document the sole maker of which is deceased and a document made between two or more parties who may be alive and able to give evidence and be cross-examined upon it in Court. The rule that a will must be in writing has as one of its main objects ensuring that stray claimants cannot, when there is no evidence to rebut what they say, approach the court and insist that the testator's intention differed from what the words of the will say.

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117 It is arguable that such a provision is not conceptually related to rectification, but is better characterised as a power in the Court to vary a will, in rather wider terms than family provision legislation allows.

Recommendation 61

The Committee recommends that the Court be given jurisdiction to rectify a will where it is satisfied that the will does not carry out the testator's intentions because of a clerical error or an error by the solicitor or other person preparing the document in carrying out the testator's instructions.

Distribution before rectification

s.37.12 There is, however, one question which sub-section (4)(b)(ii) of the 1991 Draft Wills Bill raises, in its reference to a period of 30 days after the testator's death. The sub-section provides:

> (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 (Family Provision) having been made; and
>
> (ii) at least 30 days after the death of the testator.

s.37.13 The Committee considers the period of 30 days is too short. Six months after the grant of probate is the time given within which an *application* for rectification under sub-section (2) (or for family provision) must be made. A similar period should be stipulated with respect to the distribution of the estate. The Committee notes that section 99A(3) of the *Administration and Probate Act* 1958 provides:

> No action shall lie against the personal representative by reason of his having distributed any part of the estate if the distribution was properly made by the personal representative after the expiration of six months after the grant of probate of the will or letters of administration (as the case may be) and without notice of any application or intended application under this Part in respect of the estate.

s.37.14 This section relates to family provision applications. It may well be said, therefore, that the proposed s.37(4) is inconsistent with s.99A(3).

s.37.15 In any case, even a suggestion that an estate may be distributable 30 days after a *grant of probate* is, the Committee considers, doubtful. In Queensland the *Succession Act* 1981 speaks of six months after the *date of death* as the period within which a family provision application should be made. This takes care of the problem where probate is not sought for a long time, so giving potential applicants, whether for rectification or family provision, a virtually indefinite time to think of making an application. This, however, is concerned more with the *Administration and Probate Act* than with the *Wills Act*.

s.37.16 Both the UK Act and the recommendation of the Wills Working Party adopt as the relevant period six months after the grant of representation, and this is consistent, as noted above, with s.99A of the *Administration and Probate Act* 1958. No explanation has been given to the Committee of the course of drafting changes that led to the 1991 provision. Moreover the Committee considers sub-sections (4) and (5) of the 1991 draft of s.37 give too little protection against fraud when there is already available a sound precedent in s.99A of the *Administration and Probate Act* 1958.

s.37.17 Sub-section (5) of the 1991 s.37 makes a significant change in the law by barring certain claims against a beneficiary. It is contrary to the recommendation of the Wills Working Party and the UK Act. The Committee is not aware of the origin of this exemption and has been given no reason for any such change in the general law.

Recommendation 62

The Committee recommends that the personal representative not be protected against liability for making distributions from the estate (other than maintenance distributions) until six months after the taking out of representation, rather than the 30 days after the death provided for in the 1991 Draft Wills Bill; and that the provision in sub-section 37(5) preventing recovery from a beneficiary not be proceeded with; and that, with these amendments, s.37 of the 1991 Draft Wills Bill be adopted.

s.37.18 The Committee therefore proposes the following draft:

Draft s.37—Can a will be rectified?

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

(a) a clerical error was made; or

(b) the will does not give effect to the testator's instructions.

(2) A person who wishes to claim the benefit of sub-section (1) must apply to the Court within six months from the date of the grant of probate.

(3) The Court may extend the period of time for making the application if the Court thinks this is necessary, even if the original period of time has expired, but not if the final distribution of the estate has been made.

(4) If a personal representative makes a distribution to a beneficiary, the personal representative is not liable if—

(a) the distribution has been made under section 99B of the *Administration and Probate Act* 1958; or

(b) the distribution has been made—

(i) at a time when the personal representative has not been aware of any application for rectification or any application under Part IV of the *Administration and Probate Act* 1958 having been made; and

(ii) at least six months after the grant of probate.

S.38—Transitional provisions

s.38.1 The Committee observes that s.38 as drafted is very restrictive with respect to any possibly retrospective operation of the Act. Only six sections, according to s.38 of the 1991 Draft Wills Bill, will have effect with respect to wills made before the commencement of the Act (where the death occurs after the commencement of the Act). These sections are—

Section 9—When may a Court dispense with requirements for execution?

Section 14[118] – What is the effect of divorce on a will?

Section 23 – Is extrinsic evidence admissible to clarify a will?

Section 34 – Dispositions to unincorporated associations of persons

Section 35 – Can a person, by will, delegate the power to dispose of property? and

Section 37 – Can a will be rectified?

S.38.2 All these provisions are remedial in nature, that is, they are intended to give effect to, rather than to thwart, testamentary acts and testators' intentions.

Recommendation 63

The Committee recommends that sections 9 (dispensing power), 13 (divorce), 23 (extrinsic evidence), 34 (dispositions to unincorporated associations), 35 (delegation) and 37 (rectification) be given effect with respect to wills made before the commencement of the Act (where the death occurs after the commencement of the Act).

S.38.3 It is arguable that the Act should be less restrictive in this respect and that other sections, too, should be applicable to wills made before the commencement of the Act, because of their remedial nature.

S.38.4 Thus the Committee sees no reason why the following sections, too, should not have effect with respect to wills executed before the commencement of the Act, namely:

Section 6 – How should a will be executed? – The law has been relaxed with respect to the placing of the testator's signature.

Section 15 – Can a will be altered? – The law has been slightly relaxed.

Section 25 – Income on contingent and future dispositions. – This section clarifies law to which testators rarely address themselves and makes administration that much easier.

118 Section 14 of the 1991 Draft Wills Bill has been recommended to be renumbered as s.13.

Section 33—Construction of residuary dispositions.—This provision is intended to clarify the operation of residuary provisions where the testator has used incorrect language inadvertently or has not clearly indicated how a residuary disposition in fractional parts is to be distributed in the event of the death of one or more of the beneficiaries.

Recommendation 64

The Committee recommends that sections 6 (formalities), 15 (alteration), 25 (income on deferred dispositions) and 33 (residuary dispositions) be given effect with respect to wills made before the commencement of the Act (where the death occurs after the commencement of the Act).

s.38.5 Other sections are remedial but it is arguable that perhaps they should not be made applicable to wills made before the commencement of the Act because testators may have made their wills in the way they have because they know the law and have not expressed any contrary intention.

s.38.6 These sections include the following—

Section 26—Beneficiaries must survive testator by 30 days

s.38.6.1 This provision is new and some testators will have taken account of the existing law and will not include a sufficient expression of intention to exclude either the existing or the proposed law. Other testators will have given no thought to the consequences of the death of a beneficiary within 30 days of their own death. They might well prefer the proposed rules to apply rather than the existing; but there is no way of distinguishing testators who have thought about it and decided to do nothing and those who have not thought about it and so have done nothing.

Section 30—How are dispositions to issue to operate?

Section 31—How are requirements to survive with issue construed?

Section 32—Dispositions not to fail because issue have died before the testator.

s.38.6.2 These three sections introduce the same scheme with respect to distributions amongst issue, whether of the testator, or of a person whose issue the testator intends to benefit. All the provisions make it clear that the distribution should accord with the rules for distribution amongst issue upon the intestacy of the testator or beneficiary, unless a contrary intention appears by the will. Again some testators may have made wills without reference to the present rules, either in ignorance of them or with the view that the existing rules are satisfactory. To change these rules retrospectively might have the effect that some wills might have a different effect from that intended by some testators.

s.38.7 There is one section, however, that may tighten up, rather than relax the law, if the Committee's recommendation is not proceeded with. This is s.11—Can an interested witness benefit from a disposition under a will? The 1991 Draft Wills Bill suggested that the rule might be extended to cover the de facto partner of the beneficiary, as well as the spouse; and that there should be omitted from the legislation the present provision which allows a witness–beneficiary who would be entitled, in the event of the intestacy of the testator, to take an intestacy portion, to take either that portion or the benefit left by the will, whichever benefit is of the less value. If the section is amended in either of these ways the new section should apply only to the case of wills made after the commencement of the Act, even though it is unlikely that any testator who falls foul of the witness rule is aware of it.

s.38.8 If the Committee's primary recommendation on s.11, the abolition of the interested witness rule, is adopted, then the section is clearly remedial and should apply to all wills where the testator dies after the commencement of the Act.

Recommendation 65

The Committee recommends that s.11 (abolition of interested witness rule) be given effect with respect to wills made before the commencement of the Act (where the death occurs after the commencement of the Act).

s.38.9 Other provisions either do not change the law at all or change it only very slightly, the new provisions being plain English re-writes. These provisions include sections 4, 8, 10, 12, 16, 20–22, 24, 27–29 and 36.

Recommendation 66

The Committee recommends that sections 4 (property disposable), 8 (witnesses' need to know), 10 (who can witness), 12 (effect of marriage), 16 (revival), 20–22 (construction), 24 (change of domicile), 27–29 (construction of references to land and real property) and 36 (valuation) be given effect with respect to wills made before the commencement of the Act (where the death occurs after the commencement of the Act).

s.38.10 To a certain extent the issues raised in relation to this section are matters for Parliamentary Counsel; but the Committee considers that a less, rather than a more, restrictive view could be taken of the retrospectivity of the legislation in view of its fundamental objective of remedying present difficulties.

S.39—Consequential amendments to the Administration and Probate Act *1958*

s.39.1 Sub-section (1) of this section is for Parliamentary Counsel. However in sub-section (2), which adds a new[119] s.99B of the *Administration and Probate Act* 1958, the Committee suggests that it would be convenient for personal representatives when making maintenance payments to a widow, widower or children of a deceased person during the period of 30 days after the death and at a time when it cannot be known whether the widow, widower or children will survive the 30 days and take the benefit, to know out of which account those payments should properly be made.

s.39.2 This has already been done in the Queensland *Succession Act* 1981, by s.49(3), which reads as follows.

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

119 The existing s.99B is part of Part V, which the Committee has recommended repealing.

S.39.3 Two or more members of the same family might be involved in a tragedy in which the testator (or intestate) is killed and the deceased's spouse or a child is left seriously injured and requiring hospital treatment,[120] or generally in need of maintenance. By this provision the personal representative can make the necessary provision for them even if the spouse or child fails to survive the thirty days and so would not be entitled to receive any benefit included in the will. If the person survives and receives the benefit, it is right that the costs incurred by the personal representatives should be met out of the benefit; but if the spouse or child fails to survive, it is appropriate that the expenses incurred should (to the extent that they cannot be recovered from the estate of the spouse or child who dies) be considered to be an administrative expense, that is, payable as a debt out of the residuary estate. Without a statutory provision the personal representative could not make such provision; and without a provision indicating from which account the expenditure can be made, the personal representative would not be able to act before the expiry of the thirty days.

S.39.4 It is possible that the provision recommended by the Committee could lead to a very substantial impost on residue when the testator might have preferred to reduce the benefit accruing to a remainderman who receives an unexpectedly accelerated interest after the death of a life tenant injured in an accident. The Committee is of the view that such possibilities should be considered in any review of the *Administration and Probate Act* 1958, when mechanisms for fine tuning can best be dealt with. The Committee is satisfied that the suggested section will deal appropriately with most cases now left unprovided for.

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120 Such costs could be large—if they resulted from a car accident in the United States of America, for example, or in some isolated place requiring private charter of an aeroplane—and they should first of all be a charge on the estate of the person for whom they are incurred.

Recommendation 67

The Committee recommends

- that distributions may be made for the maintenance, support or education of a spouse or child whose entitlement under a will does not become absolute until 30 days after the testator's death,
- that the personal representative not be liable for such distributions made in good faith, even if a rectification or family provision action is known to be pending,
- that if the person to whom such distribution is made does not survive the testator by 30 days it be treated as an administration expense, as in s.49(3) of the Queensland *Succession Act* 1981, but only to the extent that it cannot be recovered from the person's estate, and
- that, with the addition of a provision to this latter effect, the insertion of the proposed s.99B of the *Administration and Probate Act* 1958 by s.39 of the 1991 Draft Wills Bill be adopted.

s.39.5 The Committee therefore proposes the following draft:

Draft s.39—Consequential and further amendments to the *Administration and Probate Act* 1958

(1) In section 99A of the *Administration and Probate Act* 1958—

(a) in sub-section (1), after "Part" insert "or under section 37 of the *Wills Act* 1994"; and

(b) in sub-section (2), after "Part" insert "or under section 37 of the *Wills Act* 1994"; and

(c) in sub-section (3), after "Part" insert "or under section 37 of the *Wills Act* 1994"; and

(d) in sub-section (4), after "Part" insert "or under section 37 of the *Wills Act* 1994".

(2) After section 99A of the *Administration and Probate Act* 1958 insert—

"99B. ***Personal representatives may make maintenance distributions within 30 days***

(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.".

Drafting note

S.39.6 It is to be noted that the reference in the 1991 draft for s.99B(3) of the *Administration and Probate Act* 1958 to s.38 of the 1991 Draft Wills Bill should be a reference to s.37.

Duty to produce will—A further amendment

Administration and Probate Act 1958—s.66A—Duty to produce will

S.39.7 It sometimes happens that a person having possession or control of a deceased person's will, whether or not that person is named as executor, and whether or not, if so named, he or she has undertaken any of the duties of the executor, takes the view that the will is a private document to be shown only to such persons he or she deems fit. Although the Court can undoubtedly require a person named as executor to bring the will to Court (s.15 of the *Administration and Probate Act* 1958), the Committee considers that it should be made clear that a person having possession or control of a will must allow any person properly interested in it to see it, although the will has not been, and may never be, brought to Court for admission

to probate. Once a will is admitted to probate it becomes a public document by virtue of the fact that the grant of probate is a public document.

S.39.8 The concealment of a will with intent to defraud is a crime under s.66 of the *Administration and Probate Act* 1958. To conceal a will without such intention, merely as an expression of personal whim or judgment, is equally intolerable. It may be, for instance, that it is only by seeing the will that a person can assess whether he or she has a case to bring an application for family provision under Part IV of the *Administration and Probate Act* 1958. It may be that the will contains no appointment of executor or makes special provisions respecting the meeting of debts or obligations. It may be that the will implements or fails to implement a promise made by the testator to a person. It is unconscionable that a person having possession or control of a will should refuse to show it to persons who may have legitimate claims against the estate, including rights of administration. The absence of clear law in this regard enables recalcitrant representatives to delay the proper administration of the estate, or to hinder a person from making an application to the Courts, for example under the proposed s.37 (Rectification).

S.39.9 On the other hand it is undesirable that persons who have no possible interest in the estate of a deceased person should be able to insist on seeing a deceased person's will before it has been admitted to probate. It is reasonable that only persons having an interest should be able to see the will. These persons must include any person named or referred to in the will, for whatever reason; any person who would be entitled to a share of the testator's estate if the testator had died intestate—after all the will may disclose a partial intestacy; the surviving spouse and issue of the testator—they may be interested as potential family provision claimants; and creditors and others having claims whether legal or equitable against the estate. They may need to know how the estate is disposed of for the purpose of attempting to settle a claim.

S.39.10 The Committee considers that it would be beneficial to the honest administration of deceased estates if persons having possession or control of any will of a deceased testator can see for themselves, because it is written in the Act, that they must produce the will in certain cases.

Recommendation 68

The Committee recommends that persons having possession or control of a purported will of a deceased testator be required to produce it in certain cases, and that the proposed s.66A be adopted for insertion in the *Administration and Probate Act* 1958.

S.39.11 The following draft is suggested.

Draft s.39—Consequential and further amendments to the *Administration and Probate Act* 1958

(3) After section 66 of the *Administration and Probate Act* 1958 insert—

"66A—*Who may see a will?*

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

(a) produce it in Court if required to do so;

(b) allow the following persons to inspect and, at their own expense, take copies of it, namely—

(i) any person named or referred to in it, whether as beneficiary or not;

(ii) the surviving spouse, any parent or guardian and any issue of the testator;

(iii) any person who would be entitled to a share of the estate of the testator if the testator had died intestate; and

(iv) any creditor or other person having any claim at law or in equity against the estate of the deceased.".

S.39.12 It follows from the Committee's recommendation that the interested witness rule be abolished that Part V of the *Administration and Probate Act* 1958 is to be repealed, and the following additional sub-section of proposed s.39 will do so—

Draft s.39—Consequential and further amendments to the *Administration and Probate Act* 1958

(4) Part V of the *Administration and Probate Act* 1958 is repealed.

S.40—Amendment to Property Law Act *1958*

Joint tenancy to become tenancy in common if tenants die within 30 days of each other

S.40.1 This provision appears at the end of the Draft Wills Bill 1991.

S.40.2 In brief it proposes that if a surviving joint tenant dies within thirty days of a deceased joint tenant the joint tenancy is to be taken as having been severed so that the estate of each joint tenant will take the property the subject of the joint tenancy as tenants in common.

S.40.3 The Committee considers this proposal is both radical and difficult.

S.40.4 It is of the essence of a joint tenancy that interests under it pass by survivorship. To undermine survivorship is to undermine the very concept of joint tenancy. It is understandable that a testator might wish a beneficiary to survive for a period of time so as to enjoy the benefit left to him or her. But persons usually enter into a joint tenancy agreement for a good reason and precisely because of its incident of survivorship. Admittedly if one joint tenant survives the other by only a short period of time one might perceive some sort of fortune or misfortune, depending upon the pure chance of whether one benefited or not from that accident of chance. But that is essentially the nature of the joint tenancy. If parties to an agreement do not wish to risk the advantages or the disadvantages of the joint tenancy, they can become tenants in common.

S.40.5 In addition the joint tenancy performs a particularly beneficial function where the joint tenants are trustees or business partners, where the equitable entitlements may be quite different from the legal joint tenancy.

S.40.6 Without a detailed consideration of this question in its broadest context the Committee considers that this provision should not be proceeded with.

Recommendation 69

The Committee recommends that s.40 of the 1991 Draft Wills Bill should not be proceeded with.

APPENDIX I 1991 DRAFT WILLS BILL

TABLE OF PROVISIONS

PART 1—PRELIMINARY

Clause

PART 2—FORMAL REQUIREMENTS

Division 1—Capacity to make a will

Division 2—Executing a Will

Division 3—Dispensing with the requirements for execution

Division 4—Witnessing a Will

Division 5—Alteration, Revocation and Revival of Wills

39. Consequential amendments to the **Administration and Probate Act 1958**.

PART 5 – AMENDMENT OF THE PROPERTY LAW ACT 1958

40. Insertion of new section 28A.

28A. ..... Join t tenancy to become tenancy in common if tenants die within 30 days of each other.

Eighth Draft
29/7/91

A BILL
to re-state with amendments the law relating to Wills in Victoria.

WILLS ACT 1991†

The Parliament of Victoria enacts as follows:

PART 1—PRELIMINARY

1. *Purpose*

The purpose of this Act is to re-state with amendments, the law relating to wills in Victoria.

2. *Commencement*

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

3. *Definitions*

In this Act—

"**Alteration**" includes obliteration and interlineation.

"**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.

"**De facto partner**" means—

(a) in relation to a man, a woman who is the only person in a de facto relationship with the man; and

(b) in relation to a woman, a man who is the only person in a de facto relationship with the woman.

† The text supplied to the Committee has the date 1990; as this is the 1991 Draft Wills Bill it is changed here to avoid confusion.

"**De facto relationship**" means the relationship of a man and woman living together as if they were husband and wife although not married to each other.

"**Disposition**" includes –

(a) any gift, devise or bequest of property under a will; or

(b) the creation by will of a power of appointment affecting property; or

(c) the exercise by will of a power of appointment affecting property.

"**Property**" does not include a power of appointment.

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

PART 2 – FORMAL REQUIREMENTS

Division 1 – Capacity to make a will

4. *What property may be disposed of by will?*

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

(2) For the purposes of sub-section (1), property to which a person is entitled at his or her death does not include property of which that person is trustee, but does include –

(a) property acquired either before or after the execution of the will; and

(b) a contingent, executory or future interest in property –

(i) whether the person becomes entitled to the interest by way of the instrument which created the interest or otherwise; and

(ii) whether that person has or has not been ascertained as a person in whom the interest may become vested; and

(c) a right of entry for condition broken or any other right of entry.

(3) In this section –

"Property" includes a power of appointment.

5. *Minimum age for making a will*

(1) A will made by a person who is less than 18 years old is not valid.

(2) Despite sub-section (1) –

(a) a will may be made by a married person who is less than 18 years old and may be altered or revoked by that person; and

(b) a will made by a person who is less than 18 years old, and who has been but is no longer married, continues in force after the end of the marriage and may be altered or revoked by that person.

(3) If a person, who is less than 18 years old, intends to make a will, he or she must obtain the approval of the Court before doing so.

(4) The Court may approve the making of a will by a person who is less than 18 years old, if the Court is satisfied that that person understands the effect of the will.

(5) If a person, who is less than 18 years old, has made a will with the approval of the Court and that person intends to alter or revoke that will, he or she must obtain the approval of the Court before doing so.

(6) The Court may approve the alteration or the revocation of a will by a person who is less than 18 years old, if the Court is satisfied that that person understands the effect of that alteration or revocation.

Division 2 – Executing a will

6. *How should a will 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) it is apparent from the document that the testator intended by the signature to give effect as his or her will to the writing so signed; and

(c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and

(d) each witness, in the presence of the testator (but not necessarily in the presence of any other witness) attests, and either signs the will or acknowledges his or her own signature.

(2) A statement in a will that the will has been executed in accordance with this section is not necessary for the will to be valid.

(3) 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.

(4) Where a power is conferred on a person to make an appointment by a will that is to be executed in some particular manner or with some particular solemnity, the person may exercise the power by a will that is executed in accordance with this section, but is not executed in that manner or with that solemnity.

7. *Wills of members of the armed forces*

(1) A will may be made by a person who is—

(a) in actual military, naval or air service in operations in a war or armed conflict or in a situation which is about to become a war or armed conflict; or

(b) engaged on any work of any Red Cross society, or ambulance association, or any other body with similar objects in a war or armed conflict, or in a situation which is about to become a war or armed conflict; or

(c) who is a prisoner of war or internee of an enemy or neutral country—

whether or not that person is less than 18 years of age, and such a will need not be executed in accordance with this Act, and may be either written or spoken or may be made without any formality, if it appears that the person intended it to have effect as a will.

(2) If a person—

(a) is less than 18 years old; and

(b) is a person to whom sub-section (1) (a), (b) or (c) used to apply; and

(c) is a person who does not otherwise have the capacity to make a will—

that person may make a will, but a will made by that person must be executed in accordance with this Act.

(3) A will made under this section may be altered or revoked.

8. *Must witnesses know the contents of what they are signing?*

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

Division 3—Dispensing with requirements for execution

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

(1) The Supreme Court may admit to probate as the will of a deceased person , a document which has not been executed in the manner in which a will is required to be executed by this Act, if the Court is satisfied beyond reasonable doubt that that person intended the document to be his or her will.

(2) The Supreme Court may refuse to admit a will to probate which the testator has purported to revoke by some writing, where the writing has not been executed in the manner in which a will is required to be executed by this Act, if the Court is satisfied beyond reasonable doubt that the testator intended to revoke the will by that writing.

(3) The Supreme Court may admit to probate a will which has been altered, in its altered form, where the alteration has not been executed in the manner in which an alteration to a will is required to be executed by this Act, if the Court is satisfied beyond reasonable doubt that the testator intended to make the alteration to the will.

Division 4—Witnessing a Will

10. *What persons cannot act as witnesses to wills?*

A person who is unable to see and attest that a testator has signed a document in his or her presence, may not act as a witness to a will.

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

(1) If a will is witnessed by a person to whom or to whose partner a disposition has been made by the will of a beneficial interest in property or a power of appointment exercisable in favour of the witness or his or her partner, that disposition to that person or partner is not effective.

(2) Despite sub-section (1), if the witness or partner would be entitled to a share of the estate, if the testator had died wholly intestate and—

(a) the value of that share is equal to or greater than the value of the witness' or partner's entitlement under the will and any partial intestacy—the disposition to that witness or partner is effective; or

(b) the value of that share is less than the value of the witness's or partner's entitlement under the will and any partial intestacy—

(i) the disposition is deemed to have been revoked by a codicil to the will; and

(ii) the witness or partner is deemed to have been given, by a codicil to the will, a gift of the share he or she would have been entitled to if the testator had died wholly intestate.

(3) Despite sub-section (1), if, in addition to the witness to whom or to whose partner the disposition has been made, the will has been witnessed by two persons to whom and to whose partners dispositions have not been made, the will has the same effect as if the witness to whom or to whose partner the disposition was made had not attested the will.

(4) Sub-section (1) does not apply to a disposition of property which is a charge or direction for the payment of a debt or for the payment of proper remuneration to a person administering the estate of the testator.

(5) Any part of the estate not disposed of, as a result of the operation of this section, forms part of the residuary estate, and, in respect of that part of the estate, the witness, his or her partner and any person claiming through them, are not entitled to benefit.

(6) In this section –

"**partner**" in relation to a witness, is the spouse of that witness or de facto partner of that witness, at the time of the attesting of the will.

Division 5 – Alteration, Revocation and Revival of Wills

12. *What is the effect of marriage on a will?*

(1) A will is revoked by the marriage of the testator.

(2) Despite sub-section (1), a will is not revoked by the marriage of the testator if –

(a) 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; or

(b) there is a disposition in the will of property to, or of a general power of appointment exercisable by the person whom the testator marries; or

(c) the will is made in exercise of a power of appointment, and, 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.

(3) If a will is not revoked by the marriage of the testator because of the operation of sub-section (2)(c), property disposed of to a person who is not the spouse of the testator is

to be taken to be part of the residuary estate of the testator and property in respect of which the testator died intestate.

(4) A will to which sub-section (2)(b) applies is void, if the will contemplates the testator marrying a particular person, and if the testator has not married that person, unless the will provides to the contrary.

13. *How may a will be revoked?*

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

(a) under section 5(5) or 9(2) or by the operation of section 11(2)(b)(i), 12 or 14; 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.

14. *What is the effect of divorce on a will?*

(1) The granting of a decree absolute of dissolution of the marriage or the annulment of the marriage of a testator revokes—

(a) any disposition by the testator of a beneficial interest in property to, or of a power of appointment exercisable by or in favour of his or her spouse other than a power of appointment exercisable by the spouse in favour of the spouse's children only; and

(b) any appointment made by the testator of his or her spouse as executor, trustee, advisory trustee or guardian other than a trustee, advisory trustee or guardian of the spouse's children.

(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) In this section—

"**Spouse**" includes a party to a void marriage.

15. *Can a will 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.

(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.

16. *Can a revoked will be revived?*

(1) A will or part of a will which has been executed and which has been revoked may be revived by re-execution or by execution of a codicil which shows 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.

Division 6—Wills to which foreign laws apply

17. *When do requirements for execution under foreign laws 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 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 connect ed 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.

PART 3 – CONSTRUCTION OF WILLS

Division 1 – General rules about the construction of wills

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

If –

(a) a testator has made a will disposing of property; and

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

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

21. *When does a will take effect?*

(1) A will takes effect, with respect to the property disposed of by the will, as if it had been executed immediately before the death of the testator.

(2) Sub-section (1) does not apply if a contrary intention is shown in the will.

(3) In this section –

"Property" includes a power of appointment.

22. *What is the effect of a failure of a disposition?*

(1) If any disposition of property 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.

23. *Is extrinsic evidence admissible to clarify a will?*

(1) If –

(a) any part of a will is meaningless; or

(b) any of the language used in a will is ambiguous on the face of it; or

(c) evidence, which is not 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 the will.

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

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

A change in a person's domicile after he or she has executed a will does not alter the construction of the will.

25. *Income on contingent and future dispositions*

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

26. *Beneficiaries must survive testator by 30 days*

(1) If a disposition of a beneficial interest in property 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 is not a contrary intention for the purpose of this section.

Division 2—Construction of particular provisions in wills

27. *What does a general disposition of land include?*

(1) A general disposition of land or of the land in a particular area includes leasehold land whether or not the testator owns freehold land.

(2) Sub-section (1) does not apply if a contrary intention appears in the will.

28. *What does a general disposition of property include?*

(1) A general disposition of all the testator's property, or of all his or her property of a particular kind, includes that property or that kind of property over which he or she had 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.

29. *What interest in real property does a disposition without limitation apply to?*

(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.

30. *How are dispositions to issue to operate?*

(1) A disposition of a beneficial interest in property to a person's issue, without limitation as to remoteness, must be distributed to that person's issue in the following manner—

(a) the nearest surviving issue, if more than one, take in equal shares; and

(b) the issue of nearest issue who have not survived the testator by thirty days, take by representation.

(2) Sub-section (1) does not apply if a contrary intention appears in the will.

31. *How are requirements to survive with issue construed?*

(1) If there is a disposition of property 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.

32. *Dispositions not to fail because issue have died before the testator*

(1) If a person makes a disposition of a beneficial interest in property 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 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 deceased issue who survive the testator for thirty days take in place of the deceased issue in the following manner—

(a) the nearest surviving issue, if more than one, take in equal shares; and

(b) the issue of nearest issue who have not survived the testator by 30 days, take by representation.

(2) Sub-section (1)(a) and (b) only apply to issue who attain the age of 18 years or who marry under that age.

(3) Sub-section (1) applies to dispositions to issue either as individuals or as members of a class.

(4) Sub-section (1) does not apply, if the testator has made specific provision in the will for the disposition of the property if the issue do not survive him or her and do not leave issue.

33. *Construction of residuary dispositions*

(1) A residuary disposition 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 residuary disposition which is in fractional parts 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) Sub-section (1) does not apply if a contrary intention appears in the will and sub-section (2) does not apply if a contrary intention appears in the will.

34. *Dispositions to unincorporated associations of persons*

(1) A disposition—

(a) to an unincorporated association of persons, which is not a charity; or

(b) to or upon trust for the aims, objects or purposes 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.

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

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

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

(1) If a will refers expressly or impliedly to a valuation made or accepted for the purpose of assessing probate duty or any other form of death duty, the reference is to be construed as if it were a reference to a valuation of the property made by a competent valuer at the date of the testator's death.

(2) Sub-section (1) does not apply if the valuation contemplated by the reference is at the relevant time required under the law of Victoria, or under the law of any other jurisdiction.

Division 3 – Rectification

37. *Can a will be rectified?*

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

(a) a clerical error was made; or

(b) the will does not give effect to the testator's instructions.

(2) A person who wishes to claim the benefit of sub-section (1) must apply to the Court within six months from the date of the grant of probate.

(3) The Court may extend the period of time for making the application if the Court thinks this is necessary, even if the original period of time has expired, but not if the final distribution of the estate has been made.

(4) If a personal representative makes a distribution to a beneficiary, the personal representative is not liable if—

(a) the distribution has been made under section 99B of the Administration and Probate Act 1958; or

(b) the distribution has been made—

(i) at a time when the personal representative has not been aware of any application for rectification or any application under Part IV of the Administration and Probate Act 1958 having been made; and

(ii) at least 30 days after the death of the testator.

(5) If a personal representative makes a distribution to which sub-section (4) applies, the distribution cannot be recovered from the beneficiary.

PART 4—TRANSITIONAL AND CONSEQUENTIAL PROVISIONS

38. *Transitional provisions*

(1) This Act, other than sections 9, 14, 23, 34, 35 and 37, applies only to wills made on or after the commencement of the Act.

(2) The Wills Act 1958, as in force immediately before the commencement of this Act, continues to apply to wills made before the commencement of this Act, in so far as those wills do not come under the operation of sub-section (3) or under the operation of the sections specified in sub-section (4).

(3) Section 14 applies to a will made 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 has taken place after the commencement of this Act.

(4) Sections 9, 23, 34, 35 and 37 apply to wills whether or not they are executed before, on or after the commencement of this Act, where the testator dies on or after that commencement.

39. *Consequential amendments to the Administration and Probate Act 1958*

(1) In section 99A of the Administration and Probate Act 1958 –

(a) in sub-section (1), after "Part" insert "or under section 38 of the Wills Act 1990"; and

(b) in sub-section (2), after "Part" insert "or under section 38 of the Wills Act 1990"; and

(c) in sub-section (3), after "Part" insert "or under section 38 of the Wills Act 1990"; and

(d) in sub-section (4), after "Part" insert "or under section 38 of the Wills Act 1990".

(2) After section 99A of the Administration and Probate Act 1958 insert –

"99B. *Personal representatives may make maintenance distributions within 30 days*

(1) If a widow, widower 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 38 of the Wills Act 1991 at the time the distribution was made.".

PART 5 – AMENDMENT OF THE PROPERTY LAW ACT 1958

40. *Insertion of new section 28A*

After section 28 of the Property Law Act 1958, insert –

"28A. ***Joint tenancy to become tenancy in common if tenants die within 30 days of each other***

(1) Despite any law to the contrary, if –

(a) a person owns property as a joint tenant at the date of his or her death; and

(b) all the other joint tenants of the property die within 30 days of that date –

the person is to be taken to have severed his or her interest in the joint tenancy on that date and is to be taken to have held that interest as a tenant in common.

(2) Sub-section (1) dos not apply to an interest a person has in property as a joint tenant if that person has left a will in which he or she expressly states his or her intention that this section is not apply to that property or to all interests in property that person has as a joint tenant.".

No. 6416/1958

TABLE OF PROVISIONS†

Section

† The authorized versions of the Victorian Statutes are published by THE LAW PRINTER and are available from Information Victoria Bookshop, 318 Lt Bourke St Melbourne 3000. The text reprinted here is (omitting marginal notes) the same as the official text of the *Wills Act*, but it is derived from the VICSTATS CD-ROM, with amendments only to October 1993.

PART IA.—FORMAL VALIDITY OF WILLS

PART II.—CONSTRUCTION OF WILLS

SCHEDULE

Nº 6416

WILLS ACT 1958

An Act to consolidate the Law relating to Wills

BE IT ENACTED by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say):

1. Short title, commencement and division

This Act may be cited as the **Wills Act 1958**, and shall come into operation on a day to be fixed by Proclamation of the Governor in Council published in the Government Gazette, and is divided into Parts as follows:

Part I.—The Making Alteration Revocation and Revival of Wills ss 5–20

Part IA.—Formal Validity of Wills ss 20A–20D

Part II.—The Construction of Wills ss 21–34

2. Repeals and savings

(1) The Acts mentioned in Schedule 1 to this Act to the extent thereby expressed to be repealed are hereby repealed accordingly.

(2) Except as in this Act expressly or by necessary implication provided—

(a) all persons things and circumstances appointed or created by or under the repealed Acts or existing or continuing thereunder immediately before the commencement of this Act shall under and subject to this Act continue to have the same status operation and effect as they respectively would have had if such Acts had not been so repealed;

(b) in particular and without affecting the generality of the foregoing paragraph such repeal shall not disturb the continuity of status operation or effect of any

rule disposition execution attestation appointment revocation revival liability or right made issued accrued incurred or acquired or existing or continuing by or under such repealed Acts before the commencement of this Act.

3. Interpretation

In this Act unless inconsistent with the context or subject-matter—

"**personal estate**" extends to leasehold estates and other chattels real, and also to moneys shares of Government and other funds securities for money (not being real estates) debts choses in action rights credits goods and all other property whatsoever which by law devolves upon the executor or administrator and to any share or interest therein.

"**real estate**" extends to messuages lands rents and hereditaments (whether freehold or of any other tenure and whether corporeal incorporeal or personal) and to any undivided share thereof, and to any estate right or interest (other than a chattel interest) therein.

"**will**" extends to a testament and to a codicil and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child by virtue of any Act, and to any other testamentary disposition.

4. Effect of re-execution or republication by codicil

Every will re-executed or republished or revived by any codicil shall for the purposes of this Act be deemed to have been made at the time at which the same is so re-executed republished or revived.

PART I.—THE MAKING ALTERATION REVOCATION AND REVIVAL OF WILLS

5. All property may be disposed of by will

(1) Every person may devise bequeath or dispose of by his will executed in manner hereinafter required all real estate and all personal estate which he shall be entitled to either at law or in equity at the time of his death and which, if not so devised bequeathed or disposed of, would devolve upon the heir-at-law of him or (if he became entitled by descent) of his ancestor or upon his executor or administrator. And the

power hereby given shall extend to estates pur autre vie, whether there shall or shall not be any special occupant thereof and whether the same shall be freehold or of any other tenure and whether the same shall be in corporeal or incorporeal hereditaments; and also to all contingent executory or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will ; and also to all rights of entry for conditions broken and other rights of entry; and also to such of the same estates interests and rights respectively and other real and personal estate as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

(2) The last preceding sub-section and any corresponding previous enactment shall (without prejudice to the rights and interests of a personal representative) authorize and be deemed always to have authorized any person to dispose of real property or chattels real by will notwithstanding that by reason of illegitimacy or otherwise he did not leave an heir or next-of-kin surviving him.

6. No will of a person under the age of eighteen years to be valid

(1) No will made by any person under the age of eighteen years shall be valid.

(2) This section shall not apply to a will of a testator who died before the date of the commencement of the **Wills (Minors') Act 1965** but shall apply to a will of a testator who dies after that date whether the will was executed before or after that date and section 6 of the **Wills Act 1958** as in force immediately before the commencement of the **Wills (Minors') Act 1965** shall continue to apply to a will of a testator who died before the date of commencement of the **Wills (Minors') Act 1965** as if that Act had not come into operation.

7. Every will to be in writing and signed by the testator in the presence of two witnesses

No will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned (that is to say):—it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses

present at the same time; and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

8. When signature to a will shall be deemed valid

Every will shall, so far only as regards the position of the signature of the testator or of the person signing for him as aforesaid, be deemed to be valid within the last preceding section if the signature shall be so placed at or after or following or under or beside or opposite to the end of the will that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will. And no such will shall be affected—

(a) by the circumstances that the signature shall not follow or be immediately after the foot or end of the will ; or

(b) by the circumstance that a blank space shall intervene between the concluding word of the will and the signature; or

(c) by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under the clause of attestation either with or without a blank space intervening, or shall follow or be after or under or beside the names or one of the names of the subscribing witnesses; or

(d) by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature; or

(e) by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature.

And the enumeration of the above circumstances shall not restrict the generality of the above enactment. But no signature shall be operative to give effect to any disposition or direction which is underneath or which follows it; nor shall it give effect to any disposition or direction inserted after the signature shall be made.

9. Appointments by will to be executed like other wills &c.

No appointment made by will in exercise of any power shall be valid unless the same be executed in manner hereinbefore required. And every will executed in manner hereinbefore required shall so far as respects the execution and attestation thereof be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

10. Soldiers' and mariners' wills

(1) Any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate whether under the age of eighteen years or not as he might have done before the coming into operation of this Act or any corresponding previous enactment.

(2) The last preceding sub-section and the corresponding previous enactments extend or shall be deemed to have extended —

(a) to any member of Her Majesty's naval or marine forces or the naval forces of the Commonwealth of Australia not only when he is at sea but also when he is so circumstanced that if he were a soldier he would be in actual military service;

(b) to any person who was engaged on war service as if such person were a soldier "being in actual military service" and for the purposes of this sub-section a person shall be deemed to have been engaged on war service if in connexion with the war commencing in August One thousand nine hundred and fourteen or the war commencing in September One thousand nine hundred and thirty-nine or hostilities or incidents in Korea or Malaya before the commencement of the **Statutes Amendment Act 1954** —

(i) he was engaged whether in or outside Victoria on naval or military service with Her Majesty's naval or military forces or with the naval or military forces of the Commonwealth; or

(ii) he was engaged outside Victoria on any work of any Red Cross society or ambulance association or any other body with similar objects; or

(iii) he was a prisoner of war in the enemy's country or interned in the country of a neutral power.

(3) A testamentary disposition of any real estate in Victoria made after the commencement of the **Wills (War Service) Act 1939** by a person to whom sub-section (1) of this section applies or to whom the said sub-section (1) is extended by sub-section (2) of this section shall, notwithstanding that the person making the disposition was at the time of making it under twenty-one years of age or that the disposition has not been made in such manner or form as was at the commencement of the said Act required by law, be valid in any case where the person making the disposition was of such age and the disposition has been made in such manner and form that if the disposition had been a disposition of personal estate made by such person domiciled in Victoria it would have been valid.

(4) When any person has died or dies on or after the fourth day of November One thousand nine hundred and eighteen having made a will which was or is or which if it had been a disposition of property would have been rendered valid by the preceding sub-sections of this section or any corresponding previous enactment any appointment contained in that will of any person as guardian of the infant children of the testator shall be of the same force and effect as if made in a will executed in the ordinary way.

11. Publication not to be requisite

Every will executed in manner hereinbefore required shall be valid without any other publication thereof.

12. Will not void by incompetency of witness

If any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

13. References to the interested witness

(1) In this section—

"**given**" includes "appointed".

"**interested witness**" in relation to a will means a witness to the will to whom or to whose spouse is given any property or any power.

"**power**" means a power of appointment exercisable in favour of the donee or one exercisable in favour of his spouse.

"**property**" means a beneficial interest given otherwise than by way of a charge in respect of, or direction for the payment of any debt.

"**spouse**" in relation to an interested witness means a person who is the spouse of the interested witness at the time of the attesting of the will.

(2) In this section a reference to a person claiming through an interested witness includes a reference to a person claiming in place of the interested witness by virtue of section 31.

(3) Where a will is attested by an interested witness –

(a) the interested witness is a competent witness to prove the execution of the will or its validity or invalidity;

(b) subject to paragraph (c) the will has the same force and effect as it would have had if neither the interested witness nor the spouse of the interested witness had been given anything under the will ;

(c) in relation to the property or power given to the interested witness or the spouse of the interested witness (as the case may be) under the will –

(i) where, disregarding the attestation by the interested witness and any attestation by any other interested witness, the will is duly executed the will has the same force and effect as if the interested witness had not attested the will ;

(ii) where sub-paragraph (i) does not apply and the interested witness or the spouse of the interested witness (as the case may be) would be entitled to a share in the estate of the testator if the testator had died wholly intestate and that share is of an amount or value equal to or greater than the amount or value of his entitlement under the will and any partial intestacy the will has the same force and effect as if the interested witness had not been an interested witness ;

(iii) where sub-paragraph (i) does not apply and the interested witness or the spouse of the interested witness (as the case may be) would not be entitled to share in the estate of the testator if the testator had died wholly intestate, neither he nor any person claiming through him is entitled to any property or to exercise any power under the will or any partial intestacy; and

(iv) where sub-paragraph (i) does not apply and the interested witness or the spouse of the interested witness (as the case may be) would be entitled to a share in the estate of the testator if the testator had died wholly intestate, and that share is of an amount or value less than the amount or value of his entitlement under the will the following provisions apply:

He is not entitled to any property or to exercise any power under the will and the gift of the property or power to him is deemed to have been revoked by a codicil to the will ;

He shall be deemed to have been given by codicil to the will a gift of the share that he would have been entitled to if the testator had died wholly intestate;

He is not entitled to take any further part of the estate of the testator and any part of the estate which is not disposed of by the operation of the will as it is deemed to be modified by codicils in accordance with this sub-paragraph shall devolve as if he had predeceased the testator without issue;

(d) for the purposes of paragraph (c) the entitlement of a person shall be deemed to consist of the property given him by the will together with the subject-matter of any power conferred on him thereby; and

(e) the amount or value of a share or entitlement referred to in paragraph (c) shall be assessed as at the date of the death of the testator and in conformity with any amounts and values as determined by a competent valuer.

14. Creditor attesting to be admitted a witness

In case by any will any real or personal estate shall be charged with any debt or debts and any creditor or the wife or husband of any creditor whose debt is so charged shall attest the execution of such will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such will or to prove the validity or invalidity thereof.

15. Executor to be admitted a witness

No person shall on account of his being an executor of a will be incompetent to be admitted a witness to prove the execution of such will or a witness to prove the validity or invalidity thereof.

16. Effect of marriage on prior will

(1) Subject to sub-sections (2) and (3) every will (except a will made in exercise of a power of appointment when the real or personal estate thereby appointed would not in default of such appointment pass to the executor or administrator or the person entitled under Part I of the **Administration and Probate Act 1958**) shall be revoked by the marriage of the testator.

(2) A will shall not be revoked by a marriage of the testator if—

(a) the will is expressed to be made in contemplation of that marriage;

(b) it appears from the terms of the will or from those terms taken in conjunction with the circumstances existing at the time of the making of the will that the testator had in contemplation that he would or might marry and intended the disposition made by the will to take effect in that event; or

(c) the will contains a devise bequest or disposition of real or personal property to or confers a general power of appointment upon the person whom the testator marries.

(3) Where a will is not revoked by the marriage of the testator by reason of the operation of sub-section (2) (c) any real or personal property that is disposed of by the will to, or is the subject of a general or special power of appointment conferred upon, any person other than the spouse of the testator shall be deemed to form part of the residuary estate of the testator and to be property in respect of which the testator died intestate.

17. No will to be revoked by presumption

No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

18. In what cases wills may be revoked

No will or codicil or any part thereof shall be revoked otherwise than—

(a) as aforesaid; or

(b) by another will or codicil executed in manner hereinbefore required; 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 his presence and by his direction, with the intention of revoking the same.

19. No alteration in a will shall have any effect unless executed as a will

No obliteration interlineation or other alteration made in any will after the execution thereof shall be valid or have any effect (except so far as the words or effect of the will before such alteration shall not be apparent) unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will. But the will with such alteration as part thereof shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration or 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.

20. How revoked will shall be revived

No will codicil or any part thereof which shall be in any manner revoked shall be revived otherwise than by the re-execution thereof or by a codicil executed in manner hereinbefore required and showing an intention to revive the same. And when any will or codicil which shall be partly revoked and afterwards wholly revoked shall be revived such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof unless an intention to the contrary shall be shown.

PART IA.—FORMAL VALIDITY OF WILLS

20A. Formal validity of wills

(1) In this Part—

"**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; and

"**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).

(2) Where under this Act the internal law in force in any country or place is to be applied in the case of a will, but there are in force in that country or place two 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; or

(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 his death and the time of execution of the will in any other case.

(3) In determining for the purposes of this Act 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 execution, but this shall 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.

(4) This Part shall not apply to a will of a testator who died before the date of the commencement of the **Wills (Formal Validity) Act 1964** and shall apply to a will of a testator who dies after that date whether the will was executed before or after that date.

(5) Where (whether in pursuance of this Act or not) a law in force outside Victoria falls 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.

20B. General rule as to formal validity

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, he was domiciled or had his habitual residence, or in a country of which, at either of those times, he was a national.

20C. Additional rules

(1) Without prejudice to the preceding section 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 country or place where the property was situated;

(c) A will so far as it revokes a will which under this Act would be treated as properly executed or revokes a provision which under this Act 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.

(2) A will so far as it exercises a power of appointment shall not be treated as improperly executed by reason only that its execution was not in accordance with any formal requirements contained in the instrument creating the power.

20D. Construction of wills

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.

PART II.—CONSTRUCTION OF WILLS

21. When a devise not to be rendered inoperative, &c.

No conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised (except an act by which such will shall be revoked as aforesaid) shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

22. *A will to speak from the death of the testator*

Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. This section shall apply to the will of a married woman made during coverture whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or re-published after the death of her husband.

22A. *Provisions as to the construction of wills*

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

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

22B. *Reference in a will to a valuation*

Where a will refers expressly or by implication to a valuation made or accepted for the purpose of assessing probate duty or any other form of death duty, that reference shall, if the valuation contemplated by the reference is not at the relevant time required under the law of Victoria or under the law of any other jurisdiction, be construed as if it were a reference to a valuation of the relevant property as at the date of death of the testator made by a competent valuer.

23. *What a residuary devise shall include*

Unless a contrary intention appears by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained which shall fail or be void by reason of the death of the devisee in the lifetime of the

testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

24. What estates a general devise shall include

A devise of the land of the testator or of the land of the testator in any place or in the occupation of any person mentioned in his will or otherwise described in a general manner and any other general devise which would describe a leasehold estate if the testator had no freehold estate which could be described by it shall be construed to include the leasehold estates of the testator or his leasehold estates or any of them to which such description shall extend (as the case may be) as well as freehold estates, unless a contrary intention appears by the will.

25. General devise or bequest may include property subject to a general power of appointment

A general devise of the real estate of the testator or of the real estate of the testator in any place or in the occupation of any person mentioned in his will or otherwise described in a general manner shall be construed to include any real estate or any real estate to which such description shall extend (as the case may be) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention appears by the will. And in like manner a bequest of the personal estate of the testator or any bequest of personal property described in a general manner shall be construed to include any personal estate or any personal estate to which such description shall extend (as the case may be) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention appears by the will.

26. How a devise without words of limitation shall be construed

Where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee-simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention appears by the will.

27. How the words "die without issue" &c, shall be construed

In any devise or bequest of real or personal estate the words "die without issue" or "die without leaving issue" or "have no issue" or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death or an indefinite failure of his 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 his issue, unless a contrary intention appears by the will by reason of such person having a prior estate tail or of a preceding gift being without any implication arising from such words a limitation of an estate tail to such person or issue or otherwise: Provided that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift are born, or if there are no issue who live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

28. Devise to trustees or executors

Where any real estate is devised to any trustee or executor, such devise shall be construed to pass the fee-simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years absolute or determinable or an estate of freehold shall hereby be given to him expressly or by implication.

29. Trustees under an unlimited devise to take the fee

Where any real estate is devised to a trustee without any express limitation of the estate to be taken by such trustee and the beneficial interest in such real estate or in the surplus rents and profits thereof is not given to any person for life or such beneficial interest is given to any person for life but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee-simple or other the whole legal estate which the testator had power to dispose of by will in such real estate and not an estate determinable when the purposes of the trust shall be satisfied.

30. Devises of estates tail shall not lapse

Where any person to whom any real estate is devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail and any such issue is living at the time of the death of the

testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will.

31. Gifts to issue who die before testator's death but leave issue surviving

(1) Subject to the provisions of the next two succeeding sub-sections—

(a) where a testator devises, bequeaths, or in the exercise of any general power of appointment by his will appoints, any real or personal property to or in favour of any of his issue (whether individually or as a member of a class) for some estate or interest not determinable at or before the death of such issue; and

(b) such issue dies in the lifetime of the testator, whether before or after the making of the will, leaving issue living at the death of the testator—

the issue of the deceased issue who are living at the death of the testator and attain the age of eighteen years or marry under that age shall take, if more than one as tenants in common in equal shares, the real or personal property or share or interest therein which the deceased issue of the testator would have taken if such deceased issue had survived the testator and attained a vested interest; but no issue remoter than children of the deceased issue shall so take except in the case of the death of their parent before the testator and in that case the remoter issue shall take the place of that parent.

(2) This section shall not apply—

(a) where a contrary intention appears by the will ; or

(b) where the deceased issue was, as a condition of attaining a vested interest, required by the will to fulfil any contingency (other than that of surviving the testator or of attaining some specified age) but had not fulfilled such contingency at the time of his death—

but (subject to any contrary intention appearing by the will) this section shall apply notwithstanding that the deceased issue was, as a condition of attaining a vested interest, required by the will to fulfil some contingency, if the only such contingency unfulfilled at the time of his death was either or both of the following, namely, surviving the testator or attaining a specified age.

(3) This section shall apply with respect only to wills of testators who die on or after the commencement of the **Wills (Amendment) Act 1947**.

32. Direction to pay debts not to be deemed to charge real estate

In the construction of the will of any person who has died or dies on or after the thirty-first day of January One thousand nine hundred and five a general direction (whether to his executors or not) that his debts or that all his debts or that his funeral testamentary or other expenses or all or some of them shall be paid shall not (whether real estate if devised or not and if devised whether to his executors or not) be deemed to charge the same upon his real estate or any part of it in exoneration of specific bequests or any other personalty unless an intention so to charge the said debts or all the said debts or the said expenses or all or some of them is further declared in such will expressly or by necessary implication.

33. Contingent and future testamentary gifts to carry the intermediate income

In any will coming into operation after the commencement of this Act a contingent or future specific devise or bequest of property whether real or personal and a contingent residuary devise of freehold land and a specific or residuary devise of freehold land to trustees upon trust for persons whose interests are contingent or executory shall subject to the statutory provisions relating to accumulations carry the intermediate income of that property from the death of the testator except so far as such income or any part thereof may be otherwise expressly disposed of.

34. Prescribed forms for reference in wills

The judges of the Supreme Court may from time to time make rules prescribing forms to which a testator may refer in his will and give directions as to the manner in which they may be referred to but unless so referred to such forms shall be deemed not to be incorporated in a will.

SCHEDULE

Section 2

Number of Act	*Title of Act*	*Extent of Repeal*

3803	**Wills Act 1928**	So much as is not already repealed.
4191	**Statute Law Revision Act 1933**	Item in Schedule 1 referring to the **Wills Act 1928**.
4684	**Wills (War Service) Act 1939**	The whole.
5213	**Wills (Amendment) Act 1947**	The whole.
5846	**Statutes Amendment Act 1954**	Section 12.
6050	**Marriage (Property) Act 1956**	Section 8(3).

APPENDIX III EFFECT OF DIVORCE: 1994

ADMINISTRATION AND PROBATE (AMENDMENT) ACT 1994

A3.1 As discussed in the body of this report at paras s.14.27–32, the Government introduced legislation into Parliament in March 1994 which made certain technical amendments to the *Administration and Probate Act* 1958, and by s.14 inserted a new section, s.16A, into the *Wills Act* 1958.

A3.2 The new section 16A is set out below. If the Committee's recommendation as to the definition of "disposition" is adopted (see paras s.3.5–15 and Recommendation 5), s.16A(1)(c) will be redundant, but otherwise the section is in the Committee's view entirely appropriate.

A3.3 The Committee notes that this amendment is of a remedial nature, and that accordingly by s.15(2) of the *Administration and Probate (Amendment) Act* 1994 its effect is retrospective to the extent that it applies to any will whenever made where the testator dies after the section commences.

16A. ***Effect of divorce on 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.

(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.

NOTE: Section 15(2) of the *Administration and Probate (Amendment) Act* 1994 provides:

15. ***Cases to which certain amendments do not apply***

(2) Section 16A of the **Wills Act 1958** (as inserted by section 14) does not apply to any will made by a testator who died before the commencement of section 14.

APPENDIX IV THE WILLS ACT 1837

Please click on the following link to view the Wills Act 1837 (UK):

http://www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=wills&Year=1837&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&TYPE=QS&NavFrom=0&activeTextDocId=1032973&PageNumber=1&SortAlpha=0

APPENDIX V WILLS WORKING PARTY

INITIAL REPORT

1984

INTRODUCTION

In 1984 the Attorney-General of Victoria established a Working Party consisting of representatives of the Law Department, the Probate Office, the Law Faculty of the University of Melbourne, the Law Institute of Victoria and the Victorian Bar, for the purpose of carrying out a general review of the *Wills Act* 1958.

The members of the Working Party were:

Dr. Clyde Croft	–	Law Department (Chairman)
Ms. Jennifer Eastick	–	Law Department
Mr. Alan McDonald	–	Law Department
Dr. Ian Hardingham	–	University of Melbourne
Ms. Marcia Neave	–	University of Melbourne
Mr. Andrew Dixon	–	Probate Office
Dr. Ross Sundberg	–	Victorian Bar
Mrs. Pat Duke	–	Solicitor
Mr. Ian Cox	–	Solicitor
Mr. Alan Box	–	Solicitor
Mr. Geoffrey Park	–	Solicitor
Mr. Robert Hatch	–	Law Institute of Victoria
Mrs. Eve Grimm	–	Law Institute of Victoria (Secretary)

The attached document comprises a review of the *Wills Act* 1958 with recommendations for alteration or amendment where appropriate. For ease of comparison by the reader, it has been arranged as far as possible in the same order as the sections of the present Act, and in such a way as to highlight the views of the

members of the Working Party, particularly where conflicting views emerged on some of the issues raised.

In some areas, notably in relation to the formal execution of wills, the proposal to give to the court the power to dispense with formalities in the execution of wills, the effects of marriage on a will, the effects of divorce on a will, certain aspects of the rules for construction of wills and the power of the court to rectify wills, the Working Party's recommendations represent considerable departures from the law as it stands. In other areas, the recommendations are designed to restate the present law in a more modern and acceptable form without altering the substance.

The Working Party has deliberately refrained from making any recommendations in relation to the position of de facto spouses, as it is aware that there is a general review of the law relating to the rights of persons in de facto relationships in course at the present time. The Working Party does have views on the various issues thereby raised and would be prepared to put those views forward upon request.

The purpose of this initial report on the Working Party's deliberations is to invite and encourage comment and constructive criticism of the material so that final recommendations may be prepared for submission to Government.

Members of the Working Party would like to acknowledge the assistance of Mr. Tony Rahilly, Solicitor, in the compilation of this report.

Interested persons are invited to submit their comments on any of the issues raised to Mrs. Eve Grimm, at the Law Institute of Victoria.

SECTION 4

> "4. *Every will re-executed or revised by any codicil shall for the purposes of this Act be deemed to have been made at the time at which the same is so re-executed republished or revised.*"

Recommendation 1

That the Working Party recommends that Section 4 be retained in its present form but, as a matter of logical arrangement, be placed in the Act after the present Section 20.

SECTION 5

"5. (1) Every person may devise bequeath or dispose of by his will executed in manner hereinafter required all real estate and all personal estate which he shall be entitled to either at law or in equity at the time of his death and which, if not so devised bequeathed or disposed of, would devolve upon the heir-at-law of him or (if he became entitled by descent) of his ancestor or upon his executor or administrator. And the power hereby given shall extend to estates pur autre vie, whether there shall or shall not be any special occupant thereof and whether the same shall be freehold or of any other tenure and whether the same shall be in corporeal or incorporeal hereditaments; and also to all contingent executory or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken and other rights of entry; and also to such of the same estates interests and rights respectively and other real and personal estate as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

(2) The last preceding sub-section and any corresponding previous enactment shall (without prejudice to the rights and interests of a personal representative) authorize and be deemed always to have authorized any person to dispose of real property or chattels real by will notwithstanding that by reason of illegitimacy or otherwise he did not leave an heir or next-of-kin surviving him."

Property to be Disposed of by Will

Section 5 of the present Act renders statutory and ambulatory nature of a will and emphasises the rule that a will may dispose of property acquired by the testator after, as well as before, the making of the will.

The Working Party considered the various equivalent sections in comparable legislation, and came to the conclusion that the counterpart of Section 5 appearing in the Queensland *Succession Act* 1981 represented an abridged and better arranged version of the provision.

Section 7 of the Queensland *Succession Act* reads:-

> *"7. What property may be disposed of by will*
>
> *(1) A person may, by his will, devise bequeath or dispose of any property to which he is entitled at the time of his death, not being property of which he is trustee, whether he became entitled to the property before or after the execution of the will.*
>
> *(2) Without limiting the generality of the last preceding sub-section, a person may, by his will, dispose of -*
>
> *(a) property that, if not disposed of by his will, would devolve on the executor of his will or the administrator of his estate;*
>
> *(b) a contingent, executory or future interest in property, whether he 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 he has or has not been ascertained as the person or one of the persons in whom the interest may become vested; and*
>
> *(c) a right of entry for condition broken or any other right of entry."*

Recommendation 2

> *That Section 7 of the Queensland Succession Act 1981 be adopted as the model for replacement of the existing Section 5 of the Wills Act.*

SECTION 6

> *"6. (1) No will made by any person under the age of eighteen years shall be valid.*
>
> *(2) This section shall not apply to a will of a testator who died before the date of the commencement of the Wills (Minors') Act 1965 but shall apply to a will of*

a testator who died after that date whether the will was executed before or after that date and section six of the Wills Act 1958 as in force immediately before the commencement of the Wills (Minors') Act 1965 shall continue to apply to a will of a testator who died before the date of the commencement of the Wills (Minors') Act 1965 as if that Act had not come into operation."

Testamentary Capacity

The general rule throughout Australia is that a person should be 18 years of age before acquiring the capacity to make a will.

In Victoria, the only exception to this rule (other than the transitory provisions in Section 6(2)) is that contained in Section 10, which is the special provision relating to soldiers' and mariners' wills.

The Working Party reviewed the various further exceptions applicable in other States. In particular, it considered the position of married minors under the comparable legislation and recommends that minors who are married should be entitled to make a will.

The Working Party also was of the view that if a minor is considered by the law to have sufficient maturity on marriage to have testamentary capacity, it would seem incongruous that the termination of the matrimonial status should restore the former disability.

The Working Party considered that it was not necessary to allow minors the right to make wills in contemplation of marriage, but suggested that the Supreme Court ought, in any event, to have a general jurisdiction to approve the making of a will by a minor. Such an application may be appropriate in a number of different circumstances, e.g. where the minor owns substantial assets and it is desired that, in the event of the minor's death, those assets should pass direct to the minor's brothers and sisters rather than to his or her parents.

Recommendation 3

(1) *The age of majority should be retained as the general age of testamentary capacity.*

(2) *The Supreme Court should have power to approve the making of a will by a minor.*

(3) *Married minors ought to be accorded testamentary capacity and minors who were once married, but are no longer married, should retain their testamentary capacity.*

SECTIONS 7 AND 8

"7. No will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned (that is to say):- it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

8. Every will shall, so far only as regards the position of the signature of the testator or of the person signing for him as aforesaid, be deemed to be valid within the last preceding section if the signature shall be so placed at or after or following or under or beside or opposite to the end of the will that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will. And no such will shall be affected –

(a) by the circumstances that the signature shall not follow or be immediately after the foot or end of the will; or

(b) by the circumstance that a blank space shall intervene between the concluding word of the will and the signature; or

(c) by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under the clause of attestation either with or without a blank space intervening, or shall follow or be after or under or beside the names or one of the names of the subscribing witnesses; or

(d) by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or

paragraph or disposing part of the will shall be written above the signature; or

(e) by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature.

And the enumeration of the above circumstances shall not restrict the generality of the above enactment. But no signature shall be operative to give effect to any disposition or direction which is underneath or which follows it; nor shall it give effect to any disposition or direction inserted after the signature shall be made."

Formal Requirements for the Execution of Wills

As the law presently stands, wills must be executed in strict conformity with the requirements of Sections 7 and 8 of the *Wills Act* 1958.

Those sections are designed to minimize the risk of fraud and other impositions so that only testamentary intentions are implemented.

The Chief Justice's Law Reform Committee (CJLRC) recommended, in its report on the Execution of Wills (1984), that the requirements of Sections 7 and 8 be liberalised consistently with their underlying purpose and with the report of the Lord Chancellor's Law Reform Committee on the Making and Revocation of Wills (1980) which proposed:-

- *That the present law governing the position of the testator's signature should be relaxed, and a will should be admitted to probate if it is apparent on its face that the testator intended his signature to validate it, regardless of where on the will the signature was placed; and*
- *That an acknowledgement of his signature by an attesting witness should have the same effect as his actual signature where witnesses' signatures are distributed between the testator's signature and his acknowledgement of that signature in the presence of the witnesses present at the same time.*

The CJLRC, accordingly, proposed that Section 8 be repealed and that Section 7 be amended to read:-

"*7. No will shall be valid unless:-*

(a) it is in writing and signed by the testator or some other person in his presence and by his direction; and

(b) it is apparent on the face of the will that the testator intended by the signature to give effect as his will to the writing so signed; and

(c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and

(d) each witness in the presence of the testator but not necessarily in the presence of any other witnesses) attests and –

(i) signs the will, or
(ii) acknowledges his own signature;

but no form of attestation shall be necessary."

(Para. 12.1, CJLRC Report 1984.)

The Working Party accepted that the traditional formal requirements for the valid execution of a will should be retained, but was of the view that the use of the words "on the face of the will" in the suggested Section 7(b) might lead to continuing confusion and argument as to the placement of the testator's signature. The Working Party accordingly recommends that the words "from the document" be substituted for those words so that suggested Section 7(b) would read as follows:

"*(b) it is apparent from the document that the testator intended by the signature to give effect as his will to the writing so signed; and*"

The adoption of the new draft section as amended would mean that Section 8 would no longer be necessary.

Recommendation 4

That the draft Section 7 approved by the Chief Justice's Law Reform Committee be adopted (subject to the amendment to Section 7(b) set out above) as the model to replace the existing Section 7 and that Section 8 be repealed.

Dispensing Power

The Working Party was in agreement that documents which fail to meet the formal requirements of the *Wills Act* but which genuinely represent the testator's intentions should be accepted as wills.

Some common examples are:-

(a) where a husband and wife instruct their solicitor to prepare "mirror wills" but inadvertently sign each other's will,

(b) where a will is prepared by a solicitor on clear instructions but is then executed incorrectly, often not in the presence of the solicitor.

The Working Party divided on how this could be achieved.

THE MAJORITY VIEW

The majority view of the Working Party recommend the conferment on the Supreme Court of a power to dispense with strict compliance with the requirements of Section 7 in cases where the Court is quite satisfied that the deceased intended the relevant document to be his will. Such a power – a dispensing power – has been conferred upon the Supreme Court of South Australia by Section 12(2) of the *Wills Act* 1936-1980 (S.A.) which provides:-

> "*A document purporting to embody the testamentary intention of a deceased person shall, notwithstanding that it has not been executed with the formalities required by this Act, be deemed to be a will of the deceased person if the Supreme Court, upon application for admission of the document to probate as the last will of the deceased, is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will.*"

In Queensland, a somewhat different approach has been taken. The Supreme Court in that State is empowered to admit to probate any document executed in substantial compliance with the regular formal requirements if the Court is, as well, satisfied that the instrument expresses the testamentary intention of the testator.

On the other hand, the CJLRC 1984 Report, following the view expressed in the 22nd Report of the Lord Chancellor's Law Reform Committee, rejected the incorporation of either a dispensing power or a substantial compliance provision on the grounds that both Committees felt that either alternative would inevitably lead to an increase in litigation and consequent expense and delay.

Whilst recognising the validity of this proposition, since litigation is an essential pre-requisite for the exercise of either power, the majority of the Working Party nevertheless felt that it was better for the Court to have the power to save what were otherwise clearly intended to be testamentary instruments from rejection simply because technical requirements had not been complied with than that the genuinely-expressed intention of testators should be frustrated.

The majority expressed a preference for the incorporation of a dispensing power as opposed to a substantial compliance provision for two reasons:-

(a) It avoids the very difficult question of degree inherent in the requirement of substantial compliance. The Court need only be satisfied that the deceased intended the relevant document to constitute his will.

(b) If the Court is quite satisfied that the relevant document constitutes a genuine expression of testamentary intention by the deceased, there appears to be no reason in principle why, in addition, substantial compliance with normal formalities should be required.

A dispensing power contemplates that, in some cases, normally applicable formalities may have been largely ignored. In Victoria, subject to Part IV of the *Administration and Probate Act* 1958, people are accorded complete freedom of testamentary disposition. Formal requirements are prescribed, not as an end in themselves, but as a means of protecting testators from fraud, imposition or misunderstanding. The majority view is that if a court is quite satisfied that a document contains the freely and genuinely expressed testamentary intentions of a deceased person, that document should be given effect despite its failure to satisfy particular requirements the purpose of which is to ensure that only freely and genuinely expressed testamentary intentions are acted upon. The means of protection should not be accorded more significance than the end of protection.

It may be argued that the enactment of a provision conferring a dispensing power upon the court would lead to litigation and, consequently, to expense and delay (Lord Chancellor's L.R.C., 22nd Report, para. 2.5; CJLRC, Report on Execution of Wills, para.13.5). It is undeniable that a dispensing power would result in an increase in litigation for litigation is an essential pre-requisite for any exercise of the power. And expense and a certain amount of delay are inevitable concomitants of litigation. However, against some increase in litigation, expense and delay, one must

weigh in the balance the doubtful merit of assigning what a court would be prepared to recognise as genuine, freely-expressed testamentary intentions to the dust-bin.

It may be argued that the availability of a dispensing power would promote a casual attitude of "near enough is good enough" to what should be regarded as a serious and significant exercise, and that, as a consequence, traditional formal requirements would cease to be observed. The majority believes, however, that people will be keen to avoid litigation with its attendant costs, delays and traumas and thus will strive to ensure that their wills are executed strictly in accordance with Section 7. Practically speaking, a dispensing power would assume a relevance in cases where, by reason of mistake, accident or other good cause, Section 7 has not been complied with.

Again, it may be argued that a dispensing provision would encourage or attract frivolous litigation or litigation motivated by reasons apart from those based on the merits of the claim. Information obtained from South Australian sources indicate that this has not been the South Australian experience. But that apart, the court always has a discretion to deal with frivolous or unworthy claims by means of an appropriately-worded order for costs. (The Working Party considered the desirability of preventing frivolous or unworthy claims by means of vetting procedures and express costs provisions, but finally concluded that it should be left to the court to decide in each particular case whether costs should be borne by the estate or by particular parties.)

It may also be argued that "such a general provision would invite the court to decide what was sufficient in each case, and to do so upon no fixed rules or criteria whatsoever unless and until the court itself legislated the criteria" (CJLRC, Report on Execution of Wills, para. 13.5). This argument, however, would seem to be more relevant to a substantial compliance provision than to a dispensing power. In the latter case, the court need only be satisfied that the deceased intended the relevant document to constitute his will. This, it is suggested, does not entail any need for the court to legislate criteria or rules.

To the extent that the efficient administration of a dispensing power presupposes or involves the accumulation of a body of case law defining the circumstances in which the power may be exercised and the extent of possible limitations on the power, it may be observed that, over the years, a considerable body of case law had

developed around Section 12(2) of the South Australian *Wills Act* 1936-1980. This would assist, although of course not bind, Victorian courts and would guide Victorian practitioners.

South Australian case law indicates that the dispensing power may be used in cases of technical infringement (Graham (1978) 20 S.A.S.R. 198; Kolodnicky (1981) 27 S.A.S.R. 374; Dale (1983) 32 S.A.S.R. 215), in cases where the testator has failed to have his signature witnessed (Crocker (1982) 30 S.A.S.R. 321; Kelly (1983)34 S.A.S.R. 370), and in cases where the testator has actually failed to sign his own will (Blakely (1983) 32 S.A.S. R. 473 [a case of mirror wills prepared for spouses, each of whom signed the other's will]; Williams (1983)115 L.S.J.S. 183).

It may be queried whether it is appropriate to require compliance with the criminal standard of proof in a provision dealing with the process of establishing the formal validity of wills. The answer to this query is provided by the Western Australian Law Reform Commission in para. 4.6 of its Discussion Paper on Wills: Substantial Compliance (1984):-

> "*If only minor deviations are to be permitted, it would seem that the civil standard might apply. However, if the court's dispensing power is to be very wide (as in South Australia) it might seem appropriate to require that the testamentary intent of the deceased in relation to the document should be proved beyond reasonable doubt. This is not only because of the increased possibility of fraud but also because of the need to be certain that the deceased was genuine in his action.*"

The majority of the Working Party concluded that a dispensing power, based on the South Australian model, should be provided for in the *Wills Act*.

THE MINORITY VIEW

The minority acknowledges that there is a need for reform in the area of strict compliance with the formal requirements of the *Wills Act* so that those documents which are not wills for technical reasons only but which genuinely represent the testator's intentions should be recognized as wills.

The present formalities of a will as set out in the *Wills Act* provide a safeguard not only against forgery and undue influence, but against hasty or ill-considered dispositions. The time taken to purchase a will form or to consult a solicitor allows a for reason to prevail over emotional decisions. A family argument, or a display of

emotion, can result in a hasty written disposition which may not have been repeated in "the clear light of day".

Perhaps the most important reason for the formalities of the *Wills Act* is the difficulty of ascertaining the intentions of a deceased person. "Any law which requires the court to investigate the intention or state of mind of an individual provides real and practical difficulties not only for the courts but also for those who have to advise people as to their rights." (William F. Ormiston Q.C., "Formalities and Wills: A plea for caution", 54 ALJ 451).

First, statements by testators describing their intentions cannot be relied on. "Frequently persons in that position wish to justify their present or future acts by reference to what they proposed to do in their wills. They make promises and point to documents as indicating their good faith in order to induce greater or lesser acts of kindness and generosity by relatives and friends. They frequently make such promises in circumstances where they are desperate for either affection or merely attention." (William F. Ormiston Q.C., supra).

Secondly, the evidence of witnesses is rarely reliable as to conversations or expressions of intention or opinion, particularly when they took place many years previously. If financially or emotionally involved in the outcome of the matter, witnesses frequently rationalize or exaggerate.

The Dispensing Power

A general dispensing power along the lines of the South Australian legislation means that the only requirement for a will is that it must be in writing. Any document may be a will, the only safeguards being that it must purport "to embody the testamentary intentions of a deceased person" and "that there can be no reasonable doubt that the deceased intended the document to constitute his will".

It is important to understand that a general dispensing power will inevitably introduce a degree of uncertainty into every situation. For example, a spouse and parent may have a formal will providing for the family, but at the same time a secret "liaison" with a secret informal will, worthy of at least application to the court. In the event of death can any family act quickly and with certainty to continue maintenance in the wings?

The South Australian Experience

Some aspects of the South Australian legislation should be considered:-

1. The "genesis" of the legislation was the lone desert traveller dying of thirst, and such cases where it was impossible or impracticable to obtain witnesses.

2. Mr. Justice Zelling, who wrote the report for the Law Reform Committee, has since stated "I had no idea what is now Section 12(2), which came from one of the ideas I incorporated in the report, would produce the amount of case law that it has."

3. South Australian judges have recognized the difficulty in determining the intentions of the testator - "The approach has been liberal and pragmatic, perhaps rather 'ad hoc"' - Bollen J. in Kelly's case. This problem will become more difficult as the courts are asked to consider informal wills made many years previously (so far they have only considered recent wills).

4. Since the legislation came into force it has been necessary to change the rules because of the disproportionate expense of proceedings in small estates.

5. If there is a document which might get the benefit of the dispensing power then it is expected that the document be brought to the attention of the court. In some cases these matters can be "settled" by the agreement of all parties concerned, but otherwise this involves considerable expense and delay. To quote a South Australian solicitor, "It is more or less inevitable that many documents are going to be turned out from the cupboards ... and presented to solicitors for opinions".

6. A formal will may be informally altered and those could give rise to a great number of applications (or settlements), even when the subject of the alteration is relatively minor.

7. The experience in South Australia has shown that a document can be valid even if all the formalities are ignored.

Other Jurisdictions

Not many jurisdictions have followed the South Australian example. As far as is known the Northern Territory and Manitoba have like legislation and British Columbia has recommended the same, provided the document is signed.

The English Law Reform Committee stated in its report: "We think that to attempt to cure the tiny minority of cases where things go wrong in this way might create more problems than it would solve and we have therefore concluded that such a general dispensing power should not be introduced into our law of succession."

Two Australian jurisdictions, Queensland and Tasmania, have adopted a rule of "substantial compliance" and rejected a general dispensing power. This lack of uniformity will create some fanciful domicile arguments.

Substantial Compliance Rule

Many of the problems associated with a general dispensing power apply equally to a substantial compliance rule, particularly the necessity to investigate the intentions or state of mind of the individual.

However if there has been substantial compliance with the formalities this would generally mean considered action has been taken by the deceased.

It is argued that substantial compliance raises the very difficult question of degree, but likewise a dispensing power involves the very difficult question of deciding the "degree" of evidence required to satisfy the burden of proof.

It is further argued that where the court is satisfied there is a genuine expression of testamentary intention there should be no need for any compliance with formalities and that the formalities should be seen as a means of protecting testators, and not as an end in themselves. This argument overlooks the very real difficulty the courts have in ascertaining the intentions of a deceased person, of having to consider the unreliable statements by a "testator" of his intentions and the unreliable evidence of witnesses to those statements.

Summary

It is argued that the expense and delay of some increased litigation must be weighed against the doubtful merit of assigning genuine testamentary intentions to the waste basket.

The minority view is that a general dispensing power may cure a minority of cases but will create more problems than it would solve. It is not just the cases litigated, but the general uncertainty (with resultant expense, hardship and delay) and cases which will be settled under threat of litigation at a cost to everybody concerned.

There is a real need to seek a means of validating genuine testamentary intentions but a general dispensing power may not be the answer. Introduced to solve one problem, it is likely to cause a number of other problems, the "cost of which may be substantial". In particular, the courts will need to interpret the intentions of the deceased, and experience has shown this to be far from satisfactory. Extrinsic evidence of this nature is not admissible to explain the meaning of a will, then why should it be admissible to prove the very existence of the will?

Accordingly, the minority view is that a general dispensing power not be accepted but that further discussion and research take place with a view to finding a satisfactory means of saving genuine testamentary documents which do not comply with the formalities of the *Wills Act*.

Recommendation 5

By a majority, the Working Party recommends:-

(a) *That a dispensing power, based on the model contained in Section 12(2) of the Wills Act 1936-1980 (South Australia) be provided for in the Victorian Wills Act and that that power should apply not only to matters relating to the execution of testamentary instruments but also to their alteration and revocation.*

(b) *That such a power should apply only to cases where the testamentary instrument has been brought into existence after the commencement of operation of the new provision.*

SECTION 9

> "*9. No appointment made by will in exercise of any power shall be valid unless the same be executed in manner hereinbefore required. And every will executed in manner hereinbefore required shall so far as respects the execution and attestation thereof be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.*"

Appointments by Will

Section 9 contains formal requirements in relation to the validity of appointments made by will.

The Working Party considered that the drafting of the equivalent provision in the Queensland *Succession Act* was better than the Victorian provision.

Section 11 of the Queensland *Succession Act* reads as follows:-

> "*11. Appointment by will to be executed like other wills*
>
> *(1) Where a testator purports to make an appointment by his 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 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 Part but is not executed in that manner or with that solemnity.*"

Recommendation 6

> *That Section 11 of the Queensland Succession Act 1981 be adopted as the model for replacement of the existing Section 9 of the Wills Act 1958.*

SECTION 10

"10. (1) Any soldier in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate whether under the age of eighteen years or not as he might have done before the coming into operation of this Act or any corresponding previous enactment.

(2) The last preceding sub-section and the corresponding previous enactments extend or shall be deemed to have extended -

(a) to any member of Her Majesty's naval or marine forces or the naval forces of the Commonwealth of Australia not only when he is at sea but also when he is so circumstanced that if he were a soldier he would be in actual military service;

(b) to any person who was engaged in war service as if such person were a soldier "being in actual military service" and for the purposes of this sub-section a person shall be deemed to have been engaged in war service if in connection with the war commencing in August One thousand nine hundred and thirty-nine or hostilities or incidents in Korea or Malaya before the commencement of the Statutes Amendment Act 1954 -

(i) he was engaged whether in or outside Victoria on naval or military service with Her Majesty's naval or military forces or with the naval or military forces of the Commonwealth; or

(ii) he was engaged outside Victoria on any work of any Red Cross society or ambulance association or any other body with similar objects; or

(iii) he was a prisoner of war in the enemy's country or interned in the country of a neutral power.

(3) A testamentary disposition of any real estate in Victoria made after the commencement of the Wills (War Service) Act 1939 by a person to whom sub-section (1) of this section applies or to whom the said sub-section (1) is extended by sub-section (2) of this section shall, notwithstanding that the person making the disposition was at the time of making it under twenty-one years of age or that the disposition has not been made in such manner or form as was at the commencement of the said Act required by law, be valid in any case where the person making the disposition was of such age and the disposition has been made in such manner and form that if the disposition had been a disposition of personal estate made by such person domiciled in Victoria it would have been valid.

(4) When any person has died or dies on or after the fourth day of November One thousand nine hundred and eighteen having made a will which was or is or which if it had been a disposition of property would have been rendered valid by the preceding sub-sections of this section or any corresponding previous enactment any appointment contained in that will of any person as guardian of the infant children of the testator shall be of the same force and effect as if made in a will executed in the ordinary way."

Privileged Wills

The Working Party considered the present Victorian legislation which affords to soldiers engaged in actual military service, or marines or seaman at sea, irrespective of age, the right to make a will without any of the usual formalities, using any form of words whether written or spoken, provided that it is clear that the maker intended to dispose of his property on death.

The Working Party considered that in modern conditions it was no longer necessary to afford such a privilege to mariners or seaman in the ordinary course of their duties at sea (except insofar as they may be engaged from time to time in "actual military service").

The Working Party also considered that the privilege should continue to be afforded to minors. It noted the anomaly which can occur where a minor makes a will in privileged circumstances and then ceases to be within the category of privilege whilst still a minor. At present, in such circumstances, he could not make a new will or revoke the old will. The Working Party suggests that, once a person is acknowledged as sufficiently responsible to make a will, he ought to retain that capacity thereafter (subject of course to due compliance with other requirements applicable at the relevant time).

The Working Party considered that the following draft provision would be more suitable to modern conditions:-

> "*16. (1) A will made by –*
>
> *(a) any person, whether a member or not, serving with armed forces 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;*
>
> *(b) any person who is a prisoner of war or internee in an enemy or neutral country -*
>
> *need not be executed in the manner otherwise prescribed by this Act, 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 property after death.*
>
> *(2) Notwithstanding anything else contained in this Act, a person shall not cease to be capable of making a will in consequence of sub-paragraph (a) of sub-section (1) of this section ceasing to apply to him, but in such event any will made by that person shall be executed in the manner prescribed by this Act.*"

Recommendation 7

> *That the above provision be adopted as the model for the replacement of the existing Section 10 of the Wills Act.*

SECTION 11

> "*11. Every will executed in manner hereinbefore required shall be valid without any other publication thereof.*"

Publication of Wills

Section 11 provides that every will executed in accordance with the formal requirements of the *Wills Act* shall be valid without any other publication.

The Section has its basis in the historical requirement for a testator to acknowledge in some public manner that a particular document was his will. That requirement predates the strict provisions relating to the witnessing of wills.

The Working Party preferred the wording of the equivalent section in the Queensland *Succession Act* which makes clear that it is not even necessary that a subscribing witness know what is the nature or content of the document which he is witnessing.

Section 13 of the Queensland *Succession Act* 1981 reads:-

> "*13. Publication of will unnecessary*
>
> *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.*"

Recommendation 8

> *That Section 13 of the Queensland Succession Act 1981 be adopted as the model for the replacement of the existing Section 11 of the Wills Act 1958.*

SECTION 12

> "*12. If any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the executing thereof, such will shall not on that account be invalid.*"

Competence of Witnesses

Section 12 provides that a will shall be valid notwithstanding that at the time of its execution or at any time thereafter, an attesting witness was, or became, incompetent to be admitted as a witness to prove the execution of the will.

The Section has its basis in the law of evidence as it stood in England prior to 1837. At that time, a person having an interest in the subject of litigation might have been regarded as incompetent to give evidence. Consequently, if a person to whom a benefit had been left by a will witnessed the will, his evidence of execution was not receivable, and the will might not therefore be admitted to probate. The object of Section 12, therefore, was to nullify the effect of the rule by enacting that a will attested by an incompetent witness should not on that account be invalid. A corollary of the removal off the disability to attest was the imposition of a disability to benefit under the instrument attested.

The incompetence of an interested party to give evidence in civil proceedings has long been removed in Victoria as part of the general law of evidence, and the Working Party believes that the section no longer has any significance.

Recommendation 9

That Section 12 of the Wills Act be repealed.

SECTIONS l3(3)(a), 14 AND 15

"*13. (3) Where a will is attested by an interested witness -*

(a) the interested witness is a competent witness to prove the execution of the will or its validity or invalidity...

14. In case by any will any real or personal estate shall be charged with any debt or debts and any creditor or the wife or husband of any creditor whose debt is so charged shall attest the execution of such will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such will or to prove the validity or invalidity thereof.

15. No person shall on account of his being an executor of a will be incompetent to be admitted a witness to prove the execution of such will or a witness to prove the validity or invalidity thereof."

Interested Witnesses

These provisions respectively enable beneficiary-witnesses, creditor-witnesses and executors to be admitted as witnesses to prove the execution of wills.

In Queensland, a shorter general provision has been adopted which leaves the matter of the competence of witnesses to the general law of evidence applicable in civil proceedings, and expressly reiterates the recognised rule that a blind person may not be a witness to the execution of a will.

Section 14 of the Queensland *Succession Act* reads:-

> "*14. Competence of witnesses*
>
> *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.*"

Recommendation 10

> *That Sections 13(3)(a), 14 and 15 of the Wills Act 1958 be repealed and that Section 14 of the Queensland Succession Act 1981 be adopted as the model for their replacement.*

SECTION 13

> "*13. (1) In this section –*
>
> "*Given*" *includes* "*appointed*".
>
> "*Interested witness*" *in relation to a will means a witness to the will to whom or to whose spouse is given any property or any power.*
>
> "*Power*" *means a power of appointment exercisable in favour of the donee or one exercisable in favour of his spouse.*
>
> "*Property*" *means a beneficial interest given otherwise than by way of a charge in respect of, or direction for the payment of, any debt.*
>
> "*Spouse*" *in relation to an interested witness means a person who is the spouse of the interested witness at the time of the attesting of the will.*

(2) In this section a reference to a person claiming through an interested witness includes a reference to a person claiming in place of the interested witness by virtue of section 31.

(3) Where a will is attested by an interested witness –

(a) the interested witness is a competent witness to prove the execution of the will or its validity or invalidity;

(b) subject to paragraph (c) the will has the same force and effect as it would have had if neither the interested witness nor the spouse of the interested witness had been given anything under the will.

(c) in relation to the property or power given to the interested witness or the spouse of the interested witness (as the case may be) under the will -

(i) where, disregarding the attestation by the interested witness and any attestation by any other interested witness, the will is duly executed the will has the same force and effect as if the interested witness had not attested the will;

(ii) where sub-paragraph (i) does not apply and the interested witness or the spouse of the interested witness (as the case may be) would be entitled to a share in the estate of the testator if the testator had died wholly interstate and that share is of an amount or value equal to or greater than that amount or value of his entitlement under the will and any partial intestacy the will has the same force and effect as if the interested witness had not been an interested witness;

(iii) where sub-paragraph (i) does not apply and the interested witness or the spouse of the interested witness (as the case may be) would not be entitled to share in the estate of the testator if the testator had died wholly interstate, neither he nor any person claiming through him is entitled to any property or to exercise any power under the will or any partial intestacy; and

(iv) where sub-paragraph (i) does not apply and the interested witness or the spouse of the interested witness (as the case may be) would

be entitled to a share in the estate of the testator if the testator had died wholly interstate, and that share is of an amount or value less than the amount or value of his entitlement under the will the following provisions apply:-

He is not entitled to any property or to exercise any power under the will and the gift of the property or power to hint is deemed to have been revoked by a codicil to the will;

He shall be deemed to have been given by codicil to the will a gift of the share that he would have been entitled to if the testator had died wholly interstate;

He is not entitled to take any further part of the estate of the testator and any part of the estate which is not disposed of by the operation of the will as it is deemed to be modified by codicils in accordance with this sub-paragraph shall devolve as if he had predeceased the testator without issue;

(d) for the purposes of paragraph (c) the entitlement of a person shall be deemed to consist of the property given him by the will together with the subject-matter of any power conferred on him thereby; and

(e) the amount or value of a share or entitlement referred to in paragraph (c) shall be assessed as at the date of the death of the testator and in conformity with any amounts and values as determined by a competent valuer."

Gifts to Attesting Witnesses

The general rule which Section 13 affirms is that a testamentary disposition in favour of an attesting witness or the spouse of an attesting witness is void. Its original historical significance has already been referred to, but its modern rationale lies in the prevention of improper imposition or undue influence at the time of execution of a will.

Section 13 must be read in conjunction with Part V of the *Administration and Probate Act* 1958 which permits a disqualified beneficiary to make application to have the operation of Section 13 reversed. Before it may be declared that Section 13 should

not apply, the court must be satisfied that the entitlement of the applicant under the will was known to and approved by the testator.

The Working Party was divided as to whether or not Section 13 should be retained. A bare majority favoured its retention on the basis that it lessened the possibility of improper imposition or undue influence at the time of execution of the will, whilst Part V of the *Administration and Probate Act* precluded any injustice. The minority favoured total repeal on the basis that the existing general law affords sufficient protection against those possibilities.

The majority also considered that Section 13 should continue to apply to dispositions in favour of spouses of attesting witnesses as its general operation would be too easily circumvented if the spouses of attesting witnesses were permitted to take testamentary benefits. The minority was of the opinion that such a restriction was no longer justifiable.

The members of the Working Party unanimously agreed with the proposition presently reflected in Section 13(3)(c)(i) that Section 13 should not apply where the will has otherwise been attested by at least two disinterested witnesses. They also agreed that Section 13 should apply irrespective of whether or not the disqualified beneficiary or his spouse would have been eligible to participate in the deceased's estate intestacy.

Section 15 of the Queensland *Succession Act* not only exempts from the application of the provision any charge or direction for the payment of a debt, but also exempts "any charge or direction for the payment or proper remuneration to any person ... for acting in or about the administration of the estate of the testator". The Working Party considers that any version of Section 13 should included a similar provision, since the payment contemplated is in the nature of a payment for services rather than a gratuity.

Recommendation 11

(a) *That, subject to the recommendation set out below, the general rule contained in Section 13 be preserved and maintained.*

(b) *That the Section should invalidate dispositions in favour not only of attesting witnesses but also of their spouses.*

(c) *That the Section should not apply where the will has been witnessed by at least two other persons who are disinterested.*

(d) *That the Section should operate irrespective of whether or not the testamentary beneficiary in question would have received benefits on a total intestacy.*

(e) *That charges or directions for the payment of debts and for the payment of proper remuneration to any person for acting in or about the administration of the estate should be exempted from the operation of the Section.*

(f) *That the jurisdiction conferred on the Court by Part V of the Administration and Probate Act 1958 be retained.*

SECTION 16

"16. (1) Subject to sub-section (2) and (3) every will (except a will made in exercise of a power of appointment when the real or personal estate thereby appointed would not in default of such appointment pass to the executor or administrator or the person entitled under Part 1 of the Administration and Probate Act 1958) shall be revoked by the marriage of the testator.

(2) A will shall not be revoked by a marriage of the testator if -

(a) the will is expressed to be made in contemplation of that marriage;

(b) it appears from the terms of the will or from those terms taken in conjunction with the circumstances existing at the time of the making of the will that the testator had in contemplation that he would or might marry and intended the disposition made by the will to take effect in that event; or

(c) the will contains a devise bequest or disposition of real or personal property to or confers a general power of appointment upon the person whom the testator marries.

(3) Where a will is not revoked by the marriage of the testator by reason of the operation of paragraph (c) of sub-section (2) any real or personal property that is disposed of by the will to, or is the subject of a general or special power of

appointment conferred upon, any person other than the spouse of the testator shall be deemed to form part of the residuary estate of the testator and to be property in respect of which the testator died intestate."

Effect of Marriage on a Prior Will

Section 16 provides that a will is revoked by the marriage of a testator. The Working Party recommends that this rule be retained and favours the reasons set out in the 22nd Report of the U.K. Law Reform Committee, "The Making and Revocation of Wills" (1980):-

"*(a) Marriage represents a fundamental change in a person's life and with it he or she acquires new personal and financial responsibilities. It is, therefore, a time for starting with a clean slate.*

(b) A spouse and children should not inadvertently be deprived of the rights which they would have upon the intestacy of the other spouse and parent. Insofar as people fail to make fresh wills after marriage, or at least fail to revoke a pre-marriage will, this is normally the result of inadvertence and most persons marrying would wish their spouse and children to benefit from their estate: the deceased's intentions are, therefore, more likely to be achieved by the statutory imposition of an intestacy than by preservation of his earlier will. This may, indeed, prevent hardship to the family.

(c) The present rule is well known and accords with the intentions and expectations of the great majority of those who marry."

Section l6 itself sets out a number of limited exceptions to the rule that a will is revoked by the marriage of a testator. These may be paraphrased as follows:-

(1) A will made in exercise of a power of appointment when the real or personal property thereby appointed would not in default of such appointment pass to the legal personal representative of the testator or to the person(s) who would have taken if the testator had died intestate.

(2) (a) The will is expressed to be made in contemplation of a particular marriage which is subsequently solemnized.

(b) It appears from the terms of the will or from those terms taken in conjunction with the circumstances existing at the time of making the

will that the testator had in mind that he would or might marry and intended the dispositions of the will to take effect in that event.

(c) The will confers a general power of appointment on or gives benefits to the person whom the testator marries. Property left to any other person is to pass as on intestacy.

The Working Party recommends the retention of these exceptions subject to the following qualifications:-

(a) Section 16(1) should be more simply drafted. At present it contains the general rule about revocation by marriage and a significant exception to that rule. The general rule should be stated separately:-

"*(1) Subject to sub-sections (2) and (3), every will shall be revoked by the marriage of the testator.*

Then the exception should be inserted into Section 16(2) as paragraph (a) in the following form:

"*(a) the will is made in the exercise of a power of appointment if the property so appointed would not, in default of the testator exercising that power, pass to the executor or administrator or the person entitled under Part 1 of the Administration and Probate Act 1958;*"

(b) The Working Party noted that (2)(a) requires a particular marriage whereas (2)(b) does not. It was also noted that (a) and (b) could be formulated into one clause because (b) is wider than (a) reflecting as it does the decision of In the Will of Foss [1973] l N.S.W.L.R. 180.

It is noted that paragraphs (b) and (c) were introduced in 1977 by the *Wills (Interested Witnesses) Act* 1977 and that the amendments themselves derived from a report on Section 16 adopted by the Chief Justice's Law Reform Committee in 1970. Section 16 as it then stood contained only the first two exceptions listed above.

The Working Party recommends that the present paragraph (a) of Section l6(2) be simply deleted as it adds nothing to paragraph (b).

Finally, the Working Party recommends the introduction of a provision along the lines of Section 14(2) of the Western Australian *Wills Act* which is to the effect that, where a will is expressed to be made in contemplation of marriage, it is void if the marriage is not solemnized unless the will provides to the contrary. The Working Party considers that this provision, when introduced, should apply only to wills executed after the commencement date of the amendment. It should appear as sub-section (4) of the relevant section.

Recommendation 12

> *That Section 16 of the Wills Act be repealed and the following draft adopted as the model for a new Section 16:-*
>
> *"16. (1) Subject to sub-sections (2) and (3) every will shall be revoked by the marriage of the testator.*
>
> *(2) A will shall not be revoked by the marriage of the testator if -*
>
> *(a) the will is made in exercise of a power of appointment if the property so appointed would not, in default of the testator exercising that power. pass to the executor or administrator or the person entitled under Part I of the Administration and Probate Act 1958; or*
>
> *(b) it appears from the terms of the will or from those terms taken in conjunction with the circumstances existing at the time of the making of the will that the testator had in contemplation that he would or might marry and intended the disposition made by the will to take effect in that event; or*

(c) the will contains a devise bequest or disposition of real or personal property to or confers a general power of appointment upon the person whom the testator marries.

(3) Where a will is not revoked by the marriage of the testator by reason of the operation of paragraph (c) of sub-section (2) any real or personal property that is disposed of by the will to, or is the subject of a general or special power of appointment conferred upon, any person other than the spouse of the testator shall be deemed to form Part of the residuary estate of the testator and to be property in respect of which the testator died intestate.

(4) A will made in contemplation of the marriage of the testator under Section 16(2)(b) is void if the marriage is not solemnized, unless the will provides to the contrary.

SECTION 17

"17. No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances."

Alteration in Circumstances

The Working Party considered that this section required only minor amendment by inserting at its commencement the words "Subject to this Act ...". The alteration is intended to clarify the meaning of the section when read in conjunction with the sections dealing with revocation of a will by marriage or divorce.

Recommendation 13

That Section 17 of the Wills Act be amended by inserting the words "Subject to this Act ..." at its commencement.

SECTION 18

"18. No will or codicil or any part thereof shall be revoked otherwise than -

(a) as aforesaid; or

(b) by another will or codicil executed in manner hereinbefore required; 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 his presence and by his direction, with the intention of revoking the same."

Revocation generally

Section 18 provides that no will or codicil shall be revoked other than by:-

(a) marriage as provided by Section 16;

(b) another will or codicil executed in accordance with the Act;

(c) a writing declaring an intention to revoke and executed in accordance with the Act;

(d) the testator, or some other person in his presence and by his direction, burning, tearing or otherwise destroying the will or codicil with the intention of revoking it.

The U.K. Law Reform Commission did not recommend any change in the law on revocation by destruction, whereas the Tasmanian Law Reform Commission has recommended that any method of destruction would suffice including "mental" destruction, e.g. by writing "cancelled' across the document. The Working Party favoured the U.K. approach.

The Working Party was also of opinion that the so-called "dispensing power" to be given to the Supreme Court enabling it to dispense with the strict formalities for execution of a will should extend to the execution of a document purporting to revoke a will or codicil. It would be illogical for the Court to have such a power in relation to a will and not to have an equivalent power in relation to a document by which a testator seeks to revoke a valid will.

Recommendation 14

> *That Section 18 be retained in its present form but that it be made clear that the Supreme Court has power to dispense with strict compliance with the requirements of Section 7 in relation to a document where the Court is satisfied that the deceased intended the document to revoke his will or any Part of it.*

Effect of Divorce on a Prior Will

The Working Party favours the concept of revocation by divorce. However, the Working Party was divided as to whether divorce should completely revoke a will or should only revoke it insofar as it confers property or power upon the testator's spouse to an office under the will.

The Tasmanian Law Reform Commission advocated total revocation and the Tasmanian Parliament has now enacted legislation to that effect. On the other hand, in Queensland, South Australia and the U.K., legislation provides for partial revocation only, deeming that, insofar as a beneficial disposition of property is revoked by divorce, the will shall otherwise take effect as if the spouse had predeceased the testator.

The Working Party considered in detail the possible effects which would occur if either of the suggested courses was adopted.

If divorce were totally to revoke the wills of the parties, the effect would be to revoke not only specific provisions in favour of the ex-spouse but also gifts to all other beneficiaries. It was suggested that such a result would probably not reflect the testator's intention, since he would probably not wish to remove possible benefits from children or friends otherwise named in the will.

On the other hand, the effect of a provision for partial revocation only is to treat the will as if the ex-spouse had predeceased the testator.

In answer to the contention that those who miss out on a total revocation may seek relief under family provision legislation, it was noted that total revocation would disadvantage people who had no recourse whatever to family provision legislation, and that wills implement the wishes of testators whereas family provision legislation is concerned with the need to fulfil basic maintenance obligations imposed upon the testator by the community.

A narrow majority favoured partial revocation on the ground that partial revocation affects only the former spouse whereas total revocation affects a much wider group.

Section 18 of the Queensland *Succession Act* provides a clearly worded model. It reads:-

> "*18. Effect of divorce on will*
>
> *(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 his spouse; and*
>
> *(b) any appointment made by will by the testator of his spouse as executrix, trustee, advisory trustee or guardian.*
>
> *(2) So far as any beneficial disposition of property which is revoked by the operation of sub-section (1) of this section is concerned the will shall take effect as if the spouse had predeceased the testator.*"

Recommendation 15

> *The Working Party recommends that divorce should result in revocation of the testator's will.*
>
> *By a narrow majority, the Working Party recommends that such revocation be partial only, and that Section 18 of the Queensland Succession Act 1981 be adopted as the model for a new provision to be inserted in the Wills Act.*

SECTION 19

> *"19. No obliteration or other alteration made in any will after the executing thereof shall be valid or have any effect (except so far as the words or effect of the will before such alteration shall not be apparent) unless such alteration shall be executed in like manner hereinbefore is required for the execution of the will. But the will with such alteration as part thereof shall be deemed to be duly executed if the signature if the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration or 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."

Alterations to Wills

The Working Party suggest that the substance of the existing provision be retained subject to the following qualifications:-

(a) the section should operate subject to the power of the Supreme Court to dispense with strict compliance with the formalities required by Section 7 if the Court is satisfied that the deceased intended the alteration to have effect; and

(b) the section should reflect the alterations to Section 7 recommended by the Chief Justice's Law Reform Committee.

The Working Party proposes a provision along the following lines:-

"(1) Subject to this section, no alteration made in any will after the execution thereof shall be valid or have any effect (except so far as the words or effect of the will before such alteration shall not be apparent) unless such alteration is executed in like manner to that required 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 sub-section (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 beside or near such alteration; or

(b) by way of authentication of a memorandum referring to such alteration and written on the will.

(3) In this section, the expression "alteration" includes obliteration and interlination. "

Recommendation 16

That the substance of Section 19 of the Wills Act be retained but that the draft set out above be adopted as the model for the new section.

SECTION 20

> *"20. No will codicil or any part thereof which shall be in any manner revoked shall be revived otherwise than by the re-execution thereof or by a codicil executed in manner hereinbefore required and showing an intention to revive the same. And when any will or codicil which shall be partly revoked and afterwards wholly revoked shall be revived such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof unless an intention to the contrary shall be shown."*

Revival of Wills

The Working Party considered the differences between the existing Section 20 of the *Wills Act* and Section 21 of the Queensland *Succession Act*. It was decided that neither section was completely appropriate and therefore proposed a redraft of Section 20 as follows:-

> *"20. (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) Unless a contrary intention is shown, a revival of a will which was partly revoked and then revoked as to the balance will only revive that part of the will most recently revoked.*
>
> *(3) The date of the revival of a revoked will or part is the effective date of that will."*

Recommendation 17

> *That the present Section 20 be replaced by a new Section in the form of model section set out in the above draft.*

SECTIONS 20A TO 20D

> *"20A. (1) In this Part –*
>
> > *"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; and*

"*Country*" *means any place or group of places having its own law or nationality (including the Commonwealth of Australia and its territories).*

"*Place*" *means any territory (including a State or territory of the Commonwealth of Australia).*

(2) Where under this Act the internal law in force in any country or place is to be applied in the case of a will, but there are in force in that country or place two or more systems of internal law relating to the formal validity of will, 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 as follows; or

(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 his death and the time of execution of the will in any other case.

(3) In determining for the purposes of this Act 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 execution, but this shall 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.

(4) This part shall not apply to will of a testator who died before the date of commencement of the Wills (Formal Validity) Act 1964 and shall apply to a will of a testator who dies after that date whether the will was executed before or after that date.

(5) Where (whether in pursuance of this Act or not) a law in force outside Victoria fails 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.

20B. 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, he was domiciled or had his habitual residence, or in a country of which, at either of those times, he was a national.

20C. (1) Without prejudice to the preceding section 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 mostly 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 country or place where the property was situated;

(c) A will so far as it revokes a will which under this Act would be treated as properly executed or revokes a provision which under this Act would be treated as comprised in a properly executed will if the execution of tho 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.

(2) A will so far as it exercises a power of appointment shall not be treated as improperly executed by reason only that its execution was not in accordance with any formal requirements contained in the instrument creating the power.

20D. 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.

Formal Validity of Wills

These sections deal with private international laws concerning the formal validity of wills.

Recommendation 18

The Working Party recommends that the provisions of Sections 20A, 20B, 20C and 20D stand unaltered.

SECTION 21

"21. No conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised (except an act by which such will shall be revoked as aforesaid) shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death."

Effect of Subsequent Conveyance on Will

The Working Party compared Section 21 with the corresponding Section 27 of the Queensland *Succession Act*, and noted that there is a provision equivalent to Section 21 in all relevant legislation.

Recommendation 19

The Working Party recommends that Section 21 be retained in the Act in its present form.

SECTIONS 22,23,24,25,26,28 AND 29

"22. Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. This section shall apply to the will of a married woman made during coverture whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or re-published after the death of her husband.

23. Unless a contrary intention appears by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

24. A devise of the land of the testator or of the land of the testator in any place or in the occupation of any person mentioned in his will or otherwise described in a general manner and any other general devise which would describe a leasehold estate if the testator had no freehold estate which could be described by it shall be construed to include the leasehold estates of the testator or his leasehold estates or any of them to which such description shall extend (as the case may be) as well as freehold estates, unless a contrary intention appears by the will.

25. A general devise of the real estate of the testator or of the real estate of the testator in any place or in the occupation of any person mentioned in his will or otherwise described in a general manner shall be construed to include any real estate or any real estate to which such description shall extend (as the case may be) which he may have power to appoint in any manner he may think proper, and shall operas in an execution of such power unless a contrary intention appears by the will. And in like manner a bequest of the personal estate of the testator or any bequest of personal property described in a general manner shall be construed to include any personal estate or any personal estate to which such description shall extend (as the case may be) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention appears by the will.

26. Where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee-simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention appears by the will.

28. Where any real estate is devised to any trustee or executor, such devise shall be construed to pass the fee-simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years absolute or determinable or an estate or freehold shall hereby be given to him expressly or by implication.

29. Where any real estate is devised to a trustee without any express limitation of the estate to be taken by such trustee and the beneficial interest in such real estate or in the surplus rents and profits thereof is not given to any person for life or such beneficial interest is even to any person for life but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee-simple or other the whole legal estate which the testator had power to

dispose of by will in such real estate and not an estate determinable when the purposes of the trust shall be satisfied."

Construction of Wills

These sections contain the general rules in the *Wills Act* in relation to the construction of wills.

The Working Party was of the opinion that the equivalent provision of the Queensland *Succession Act,* which in turn reproduces the provisions of the Western Australian *Wills Act,* were more easily understood, and grouped more logically.

Section 28 of the Queensland *Succession Act* 1981 reads as follows:-

"*28. General rules for the construction of wills*

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

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

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

(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."

Recommendation 20

That Sections 22, 23, 24, 25, 26, 28 and 29 of the Wills Act be repealed and that Section 28 of the Queensland Succession Act 1981 be adopted as the model for their replacement.

SECTION 22A

"22A. (1) In the construction of a will acts, facts and circumstances touching intention of the testator shall be considered and evidence of such acts, facts and circumstances shall be admitted accordingly but evidence of a statement by the testator declaring the intention to be effected or which had been effected by the will or any part thereof shall not be received in proof of the intention unless the statement would apart from this section be received in proof of the intention declared.

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

The Construction of Wills – The Admissibility of Evidence

Section 22A of the *Wills Act* 1958 deals with the admissibility of evidence in the construction of wills. It in effect provides that, except as allowed at common law, direct evidence of testamentary intent, not embodied in a writing satisfying the provisions of the Act, is inadmissible and that is what is commonly referred to as "arm-chair evidence" or evidence of surrounding circumstances is always admissible in the construction of a will. Section 22A was only recently included in the Act as a result of recommendations made by the Chief Justice's Law Reform Committee (First Report Concerning the Construction of Wills (1978)).

Since the inclusion of Section 22A of the *Wills Act,* the English legislation has been amended to take into account the recommendations of Lord Chancellor's Law Reform Committee (or, strictly speaking, the recommendations of a minority of that Committee) on the admissibility of evidence in the construction of wills; 19th Report (Interpretation of Wills), 1973. The relevant English provision appears in Section 21 of the *Administration of Justice Act* 1982:-

"*21. (1) This section applies to a will -*

(a) insofar as any part of it is meaningless;

(b) insofar as the language used in any part of it is ambiguous on the face of it;

(c) insofar as evidence, other than evidence of the testator's intention, shows that the language used in any part if it is ambiguous in the light of surrounding circumstances.

(2) Insofar as this section applies to a will extrinsic evidence, including evidence of the testator's intention, may be admitted to assist in its interpretation."

(It ought to be noted that, while the Chief Justice's Law Reform Committee had the benefit of the recommendations, majority and minority, contained in the 19th Report of the Lord Chancellor's Law Reform Committee, it did not have the advantage which the Working Party have had of viewing a legislative model based upon the somewhat obscurely worded minority recommendations of that Committee.)

While it may be said that Section 22A of the Victorian Act simply clarified the relevant laws of evidence, it may also be said that Section 21 of the English Act radically overhauls them. Traditionally, extrinsic evidence of testamentary intent is inadmissible except in two circumstances: the resolution of equivocations (that is, descriptions capable of applying with legal certainty to more than one subject-matter: Re Cullen [1946] V.L.R. 47) and the rebuttal of certain equitable presumptions. It is argued that such evidence is inadmissible because the Act requires that expressions of testamentary intent be formal. Section 21, however, contemplates three occasions upon which extrinsic evidence may be admitted despite the basic requirement that a will be written: to clarify a meaningless passage in the will, to resolve a patent ambiguity; to resolve what the arm-chair evidence reveals to be latent ambiguity.

A majority of the Working Party considered that Section 21 is preferable to Section 22A. It simply allows the ascertainment of genuine testamentary wishes consistently with basic formality, the purpose of which is the protection of the testator from fraud and imposition. Section 21 does not envisage oral wills, it envisages written wills which can be given effect to with the assistance of extrinsic evidence where

doubts and ambiguities arise. The rectification provision (see Recommendation 28 below) will allow the correction of drafting mistakes with the aid of extrinsic evidence; a provision like Section 21 will permit the resolution of ambiguities in the drafting of the will with the aid of extrinsic evidence.

A minority considered that Section 22A, being relatively new, ought to be persevered with longer; that it is dangerous to widen the categories or circumstances appropriate for resolution by extrinsic evidence as the latter is notoriously unreliable, may date back many years, and may reflect a degree of disingenuousness on the part of a tactful testator. The minority also felt a concern that increased admissibility of extrinsic evidence may give rise to more uncertainty than it resolves and may cause delay in the administration of deceased estates.

Recommendation 21

> *By a narrow majority, the Working Party recommends that Section 22A be repealed and that a new section drawn on the model of Section 21 of the U.K. Administration of Justice Act 1982 be inserted in its place.*

SECTION 22B

> *"22B. Where a will refers expressly or by implication to a valuation made or accepted for the purpose of assessing probate duty or any other form of death duty, that reference shall, if the valuation contemplated by the reference is not at the relevant time required under the law of Victoria or under the law of any other jurisdiction, be construed as if it were a reference to a valuation of the relevant property as at the date of death of the testator made by a competent valuer.*

The Working Party has not recommended any change to this section.

Recommendation 22

> *The Working Party recommends that the provisions of Section 22B stand unaltered.*

SECTION 27

> *"27. In any devise or bequest of real or personal estate the words "die without issue" or "die without leaving issue" or "have no issue" or any other words which*

may import either a want or failure of issue of any person in his lifetime or at the time of his death or an indefinite failure of his 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 his issue, unless a contrary intention appears by the will by reason of such person having a prior estate tail or of a preceding gift being without any implication arising from such words a limitation of an estate tail to such person or issue or otherwise: Provided that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift are born, or if there are no issue who live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue."

Construction of Wills "Die Without Issue"

The Working Party considered that the equivalent provision contained in the Queensland *Succession Act* was drawn in a more acceptable form.

The section reads:-

"30. Construction of documents : "die without issue"; mode of distribution amongst issue

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

(2) Unless a contrary intention appears by his 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 one nearest issue, among them in equal shares and by representation among the remoter issue of that person."

Whilst the new draft of sub-section (1) above represents only a change of form to the present law, the amendment suggested in sub-section (2) of the Queensland Act involves a change in the law as it now stands.

The Working Party considered and agreed with the comments of the Queensland Law Reform Commission (Q.L.R.C. 22 at pp. 17-19) which says:-

"Sub-section (2). The terms "issue" and "descendants" of a person mean prima facie issue and descendants of that person of all degrees of remoteness of that person. Prima facie, too, a legacy or devise to the issue or descendants of a person is construed as giving them a per capita benefit, because that is regarded as the "natural" meaning of the word. The development of that rule was probably inevitable because it would be hard to find an intention to distribute per stirpes from a complete absence of any wording in the will.

But it is to be doubted whether the rule performs any function except to violate the intention of a testator and cause hardship and dissent between members of a family, for it operates in a capricious and unpredictable fashion. One example will illustrate the point. If a benefit is left to the "issue" of A, and when it takes effect the issue of A consist of one child aged 30 who has four children and one child aged 20 who has no children each will take one-sixth of the benefit. Any further children born to the elder child would take nothing; and children born to the younger child would take nothing. A per stirpes distribution would give each child one-half.

The rule was attacked by Kindersley V. C. in Cancellor v. Cancellor (1862)2 Dr. & Sm. 194; 62 E.R. 595, where a benefit was left to the "children and issue" of a certain person. The Vice Chancellor said at p.198:-

"Now it is certainly not very probable, a priori, that a testator should intend that parents and children and grandchildren should take together as tenants in common per capita and the court will not very willingly adopt such a construction.

A more recent and forceful criticism of the rule appears in the judgment of Adam J. in In the Will of Moore [1963] V.R. 168 at p.172:-

> *"The consideration urged by Mr. Newton might well, I think, have led the courts to adopt, as a general rule of construction, that prima facie, gifts to issue were to be construed as stirpital, this being are probably in accord with the testator's intention. But now to adopt such a rule would fly in the face of authority. Misgivings about the settled rule of construction, based on the capriciousness of the consequences of its application, have at time been expressed by English judges (see, for example, Freeman v. Parslev [(1977) 3 Ves. Jun. 421; 30 E.R. 1985] and Cancellor v. Cancellor ((1862)2 Dr. & Sm. 194; 62 E.R. 595) but notwithstanding, the rule has been consistently applied to cases within it. In*

> *passing I may observe that it appears that the rule of construction in Scot's law is the other way, and a gift to issue prima facie imports in Scotland a stirpital distribution (see Boyd's Trustee v. Shaw [1958] S.C. 115)."*

Because of the capriciousness of the rule, the courts have tended, and will be tempted, to find indications of contrary intention in wills brought before them in order to ensure a stirpital division and indeed the consequence of a rule which is in itself neither strong nor just is that litigation is invited to displace it and judges are tempted to co-operate, so giving further litigation.

Further cogent criticism of the rule has been advanced at length in an article "Stare Decisis and Rules of Construction in Wills and Trusts" written by the distinguished American expert Professor Edward G. Halbach Jr., former Dean of the Berkeley Law School of the University of California, in the California Law Review (1964) Vol. 52 pp. 921-955, at pages 926-932, in which it is observed that the State Legislature of New York amended the rule in 1921.

The fact is that the rule as it stands has attracted criticism in cases where it has been raised in issue and that it is desirable to change the already rather weak rule in favour of a more decisive just rule, namely that legacies and devises to the issue or descendants of a person should be distributed to them in equal shares among the nearest surviving issue referred to and by representation among the more remote surviving issue. The expression "by representation" has its statutory origin in the Statute of Distributions of 1670 and its meaning is quite clear, although complex. It means in principle that surviving issue more remote than the nearest surviving issue represent their parent, if deceased, and take (between them if more than one) the share that their deceased parent would have taken had he survived. Thus if T dies leaving 8 issue, namely two children, A and B, and 6 grandchildren, A1 and A2, children of A, B1 and B2, children of B, and C1 and C2, children of a deceased child C, then (1) A and B, being the nearest surviving issue, will take equal shares and remoter issue will take by representation, i.e. between them, if more than one, the share which their deceased parent would have taken had he survived. A1, A2, B1 and B2 can therefore take nothing since they cannot represent their parents A and B who are still alive. But C1 and C2 represent their deceased parent C and take the share he would have taken had he survived. Accordingly, A and B take one-third of the estate each and C1 and C2 take the other third between them. The formula works however remote the nearest surviving issue are, and however remote the more remote representatives are. Thus if a deceased person leaves only grandchildren and great grandchildren, the

grandchildren will take in equal shares and the great grandchildren by representation. It is considered that this is fairer than the traditional per stirpes rule which bases itself on the factual assumption, generally but not universally correct, that a deceased person never dies leaving grandchildren surviving him without also leaving children surviving him.

There are added reasons, quite apart from the criticisms of the rule, which exist for changing this rule. One is that it is consistent with the per stirpes policy of this Act which emerges as part of the intestacy rules in Part III and as part of the rules against lapse in Section 33. It is desirable that the prima facie rule of construction should coincide with the prima facie policy of the legislature. The other is that by having a settled, clear rule, the use of per stirpes clauses, which are very much the preserve of technical draftsman, will not be so crucial, and indeed it may often be possible to omit them altogether. On the other hand, it will be very easy, technically, to displace the per stirpes presumption, which we now recommend should be brought into the law, by the use of a very simple layman's expression such as "equally" or "in equal share"."

Recommendation 23

That Section 30 of the Queensland Succession Act 1981 be adopted as the model for the replacement for the existing Section 27 of the Wills Act 1958.

SECTION 30

"30. Where any person to whom any real estate is devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail and any such issue is living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will."

Estates Tail

The Working Party was of the opinion that, since it has not been possible to create an estate in Victoria for over 100 years, there was no requirement for this section to be retained.

Recommendation 24

That Section 30 of the Wills Act 1958 be repealed.

SECTION 31

"31. (1) Subject to the provision of the next two succeeding sub-sections –

(a) where a testator devises, bequeaths, or in the exercise of any general power of appointment by his will appoints, any real or personal property individually or as a member of a class) for some estate or interest not determinable at or before the death of such issue; and

(b) such issue dies in the lifetime of the testator, whether before or after the making of the will, leaving issue living at the death of the testator -

the issue of the deceased issue who are living at the death of the testator and attain the age of eighteen years or marry under that age shall take, if more than one as tenants in common in equal shares, the real or personal property or share or interest therein which the deceased issue of the testator would have taken if such deceased issue had survived the testator and attained a vested interest; but no issue remoter than children of the deceased issue shall so take except in the case of the death of their parent before the testator and in that case the remoter issue shall take the place of that parent.

(2) This section shall not apply -

(a) where a contrary intention appears by the will; or

(b) where the deceased issue was, as a condition of attaining a vested interest, required by the will to fulfil any contingency (other than that of surviving the testator or of attaining some specified age) but had not fulfilled such contingency at the time of his death -

but (subject to any contrary intention appearing by the will) this section shall apply notwithstanding that the deceased issue was, as a condition of attaining a vested interest, required by the will to fulfil some contingency, if the only such contingency unfulfilled at the time of his death was either or both of the following, namely, surviving the testator or attaining a specified age.

(3) This section shall apply with respect only to wills of testators who die in or after the commencing of the Wills (Amendment) Act 1947."

Anti Lapse Provision

The Working Party reviewed the content and effect of Section 31.

It recommends that the substance of Section 31 be retained and noted the following aspects of its operation:-

(a) it applies whether or not the original disposition is a class gift or a gift to individuals;

(b) the substituted beneficiaries are of the deceased issue and not merely children of the deceased issue;

(c) substituted beneficiaries only take if they are living at the testator's death and attain 18 years of age or marry under that age; this minimises the chances of the testator's property leaving the stock of descent on the death intestate of an infant substituted beneficiary.

The Working Party favoured the wording of the equivalent Queensland section (Section 33, Queensland *Succession Act* 1981) with appropriate variations to accord with the substance of the existing Victorian section.

The suggested section would read as follows:-

"*( ) (1) Unless a contrary intention appear by the will, where a testator devises, bequeaths or in the exercise of any general power of appointment by his will appoints, property to any of his issue (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 thirty days the nearest issue of that issue who survive the testator for thirty days shall take the place of that issue and if more than one the nearest issue to survive shall take in equal shares and the more remote issue of that issue who survive the testator for a period of thirty days shall take by representation.*

(2) No issue shall take by reason of the provisions of sub-section (1) unless that issue attains the age of eighteen or married under that age.

(3) 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."

The Working Party notes that the decision in Re King deceased [1953] V.L.R. 648, in which it was held that a gift to such of two sons as was living at the testator's death indicated a contrary intention for the purposes of Section 32 of the *Wills Act* 1958, has been the subject of a good deal of criticism. The Working Party is of the view that, when the proposed new section is drafted, care needs to be taken to ensure that wording such as that considered in Re King deceased is not held to constitute a "contrary intention".

Recommendation 25

That the substance of Section 31 be retained but that the draft set out above be adopted as the model for the new section and that the effect of the decision in Re King deceased be negatived.

SECTION 32

"32. *In the construction of the will of any person who has died or dies on or after the thirty-first day of January One thousand nine hundred and five a general direction (whether to his executors or not) that his debts or that all his debts or that his funeral testamentary or other expenses or all or some of them shall be paid shall not (whether real estate is devised or not and if devised whether to his executors or not) be deemed to charge the same upon his real estate or any part of it in exoneration of specific bequests or any other personality unless an intention so to charge the said debts or all the said debts or the said expenses or all or some of them is further declared in such will expressly or by necessary implication.*"

Payment of Debts

In view of the comprehensive nature of the provision in the *Administration and Probate Act* dealing with the order of application of assets in the payment of a deceased's debts, the Working Party considered this section to be redundant.

Recommendation 26

That Section 32 of the Wills Act 1958 be repealed.

SECTION 33

> *"33. In any will coming into operation after the commencement of this Act a contingent or future specific devise or bequest of property whether real or personal and a contingent residuary devise of freehold land and a specific or residuary devise of freehold land to trustees upon trust for persons interests are contingent or executory shall subject to the statutory provisions relating to accumulations carry the intermediate income of that property from the death of the testator except so far as such income or any part thereof may be otherwise expressly disposed of."*

Intermediate Incomes

The Working Party felt that the wording of the equivalent section of the Queensland *Succession Act* was clearer than the Victorian section.

That section reads:-

> *"62. Intermediate income on contingent and future bequests and devises*
>
> *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."*

Recommendation 27

> *That Section 62 of the Queensland Succession Act 1981 be adopted as the model for the replacement of Section 33 of the Wills Act 1958.*

Rectification of Wills

The Working Party dealt at some length with the question of the power of the court to rectify errors in or omissions from wills.

Their deliberations were set out in a working paper, the substance of which is set out hereunder:-

A. Present Law

> Words may be blue-pencilled from a will if they were introduced:

(a) as a consequence of a clerical error; or

(b) as a consequence of the draftman's failure to understand the testator's instructions.

There are some qualifications to this jurisdiction to sever but the above represents the general rule. Two important points should be noted:

(a) Words introduced by mistake of law (i.e. as a consequence of an inexpert attempt to draft the testator's properly understood instructions) may not be omitted.

(b) While words introduced into the will by mistake may be omitted, words omitted from the will by mistake may not be supplied.

Examples

Re Morris [1971] p.62: a testatrix wished, her codicil, to revoke clause 7(iv) of her will, in which she had made a certain provision which she wished to alter. But by mistake the codicil revoked not clause 7(iv) but clause 7, and that had the unintended effect of revoking 19 pecuniary legacies contained in the clause. The Court held that it had jurisdiction to strike out the 7 from the codicil - so restoring the original legacy altogether - but it had no jurisdiction to insert, after the 7, the numeral (iv), which is what the testatrix wanted.

In the Goods of Boehm [1981] p.247: a testator intended to make one provision for his daughter Georgiana and a similar provision for his daughter Florence. But by a mistake in the drafting, Georgiana's name was inserted in both clauses and Florence's name was omitted altogether. The Court held that it had jurisdiction to strike out Georgiana's name in one of the two clauses but it had no jurisdiction to insert Florence's name in that clause. Thus a blank was left in one of the clauses.

Re Hemburrow [1969] V.R. 764: a testatrix's will, as transcribed, was meant to provide: "I give, devise and bequeath the whole of my real estate and the residue of my personal estate unto my trustee ...". By mistake the underlined passage was omitted. The executor applied for probate of the will omitting the word "real" from the clause in question. This omission would have resulted in an effective implementation of the testatrix's wishes. Gillard J.

refused the application: it amounted to an application to insert words inadvertently left out and not to omit words inserted by mistake. The word "real" had not been inserted by mistake and thus could not be deleted.

Construing the resulting blank spaces

The Supreme Court, acting as a Court of probate, omits words included by error. The Supreme Court, as a Court of construction, subsequently attempts to make sense of the resulting mess - i.e. to construe the blank spaces. It may also attempt to supply other inadvertent omission. At this stage, the Court is not permitted to look at direct extrinsic evidence of the testator's intentions. Its approach is restricted:

(a) If it finds that there was an obvious omission from the will and can determine by necessary implication what was omitted, it may supply the words omitted in order to give effect to the testator's intention.

(b) In determining what was omitted the Court may only consider the language of the will read in the light of the circumstances in which it was made.

B. The Need for Reform

In England the Law Reform Committee, in its 19th Report (Interpretation of Wills) (1973), took it as read that there should be conferred "on the court of construction some power to rectify a will so as to make it accord with what the testator intended". In Queensland the draftsman of the *Succession Act* 1981 were "convinced that some step should be made in the direction of enabling the court to perform at least a limited function in rectifying wills".

If these views are accepted, the next, and perhaps more difficult question, is how to define the relevant jurisdiction.

C. The English Approach

The English approach is a wide one. The Court is not limited to blue-pencilling words included by mistake or supplying precise expressions that can be shown to have been omitted by error. The court has a general power to modify the terms of the will so as to give effect to the real intention of the

testator. Section 20 of the *Administration of Justice Act* 1982 (Eng.) provides that:-

> *"20. Rectification*
>
> *(1) If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence -*
>
> *(a) of a clerical error; or*
>
> *(b) of a failure to understand his instructions,*
>
> *it may order that the will shall be rectified so as to carry out his intentions.*
>
> *(2) An application for an order under this section shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out.*
>
> *(3) The provisions of this section shall not render the personal representatives of a deceased person liable for having distributed any part of the estate of the deceased after the end of the period of six months from the date on while representation with respect to the estate of the deceased is first taken out, on the ground that they ought to have taken into account the possibility that the court might permit the making of an application for an order under this section after the end of that period, but this sub-section shall not prejudice any power to recover by reason of the making of an order under this section, any part of the estate so distributed.*
>
> *(4) In considering for the purpose of this section when representation with respect to the estate of a deceased person was first taken out, a grant limited to settled land or to trust property shall be left out of account, and a grant limited to real estate or to personal property shall be left out of account unless a grant limited to the remainder of the estate has previously been made or is made at the same time."*

D. The Queensland Approach

The Queensland approach is much more restricted. The court is empowered to exercise the same jurisdiction with respect to the insertion of material accidentally or inadvertently omitted from a will as it had previously exercised to omit material which had been accidentally or inadvertently

inserted in a will. A litigant seeking to utilise the Queensland rectification jurisdiction would have to show not only the material had been omitted from the will by error or accident but also precisely what that material was. In practice, the kind of evidence necessary to make good a claim would be of such matters as the form of the testator's instructions to his solicitors, failures to relay instructions accurately, and errors made by clerks or typists. It would be unlikely that the court would entertain general evidence of the testator's supposed intention.

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

> "*31. Power of the court to rectify wills*
>
> *(1) As from the commencement of this Act the court shall have the same jurisdiction to insert in the probate copy of a will material which was accidentally or inadvertently omitted from the will when it was made as it has hitherto exercised to omit from the probate copy of a will material which was accidentally or inadvertently inserted in the will when it was made.*
>
> *(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 six months after the date of the grant in Queensland.*"

The draftsman of Section 31 gave the following explanation of their refusal to adopt the wider English approach:-

> "*Although we see much in favour of this recommendation we are hesitant to embark on what would be completely unchartered waters. In exercising the jurisdiction to rectify deeds the court often has the evidence of all parties to the deed before it; in rectifying a will it would never have the evidence of the testator himself. Further, there is a great deal to be said for the retention of the strict formal requirements for making of wills which have been accepted for over a hundred years in most English and many American jurisdictions and which are fairly well understood and often acted upon by laymen. If a generous invitation were to be executed to would-be rectifiers of wills, it might be interpreted as a serious inroad on what is recognised to be an effective and*

> *justifiable requirement for the protection of testators. It is in any case undesirable to offer much hope for litigation in an area where family passions regrettably all too often override reasonable expectations. Furthermore, in Queensland the family maintenance system can ensure that justice is done at least as far as persons entitled to apply for maintenance are concerned, whatever appears in the will and whether it reflects the testator's intention or not. We are proposing to enlarge the class of possible applicants for family maintenance relief and we accordingly feel that there is less call for the more extreme measure of seeking to overthrow the will altogether, or to rectify it, where the immediate family of the deceased are protected anyway."*

E. Conclusions

(a) The Working Party concluded that a power to rectify ought to be conferred upon the Supreme Court. When a clerical error has been made in reducing a testator's instructions into will form or when a mistake has been made in the interpretation of a testator's wishes by his draftsman and, in either case, the intended wishes of the testator are clear, it would seem proper that the court should order an appropriate amendment to be made. The conferment of such a power upon the court would not jeopardise in any way the protection which is traditionally afforded testators by the *Wills Act*. Such a power would promote rather than subvert true testamentary intentions.

(b) It further recommended that the wider English legislative model be adopted. The Queensland provision envisaged that the court may only (a) blue-pencil inadvertent additions and (b) insert clearly omitted words or expressions in an operation almost the reverse of blue-pencilling. The English model is preferable in that it would also allow a court to recast a clause in order to have it properly reflect the testator's intentions. It considered that the added flexibility afforded by the English provision is desirable.

(c) Accordingly, the Working Party concluded that Section 20(1) and Section 20(2) of the English Act should be adopted, followed by a new sub-section (3) in the following terms:-

> *"(3) No application or order under this section shall disturb a distribution made by the personal representative pursuant to the unrectified will for the purpose of providing for the maintenance support or education of the widow,*

> *widower or any child of the deceased totally or partially dependent on the deceased immediately before the death of the deceased, whether or not the personal representative had notice at the time of the distribution of any application or intended application under this section*"

The above is based on Section 99A(1) of the *Administration and Probate Act* 1958. Its purpose is to ensure that close and dependent members of the family can be assisted out of the estate immediately after the death of the deceased without fear of adverse consequences following an application for rectification.

Recommendation 28

> *That sub-section (1) and (2) of Section 20 of the Administration of Justice Act 1982 of the United Kingdom followed by a new sub-section in the terms of the draft set out above be adopted as the model for a new section to be incorporated in Part II of the Wills Act.*

Construction of Residuary Dispositions

The Working Party also considered two further sections included in the Queensland *Succession Act* 198l and recommends that they be included in the amendments to Part II of the *Wills Act.*

The first deals with the construction of residuary dispositions and reads as follows:-

> "*29. Construction of residuary dispositions*
>
> *Unless a contrary intention appears by the will -*
>
> *a) a residuary disposition referring only to the real estate of the testator or only to the personal estate of the testator shall be construed to include all the residuary estate of the testator both real and personal; and*
>
> *b) subject to this Act, where a residuary disposition in fractional parts as to any of such parts for any reason that part shall pass to that part of the residuary disposition which does not fail, and if there is more than one part which does not fail to all those parts proportionately.*"

This provision deals with two commonly encountered difficulties and solves them in a manner which the Working Party considers would meet the expectations of testators in the generality of cases.

Recommendation 29

> *That Section 29 of the Queensland Succession Act 1981 be adopted as the model for a new section to be incorporated into Part II of the Wills Act.*

Lapse of Benefit where Beneficiary Fails to Survive Testator for Specified Time

The second provision is Section 32 of the Queensland *Succession Act* which reads:-

> "*32. Lapse of benefit where beneficiary does not survive testator by thirty days*
>
> *(1) Unless a contrary intention appears by the will, where any beneficial disposition of property is made to a person who does not survive the testator for a period of thirty days the disposition shall be treated as if that person had died before the testator and, subject to this Act, shall lapse.*
>
> *(2) A general requirement or condition that a beneficiary survive the testator is not a contrary intention for the purpose of this section.*"

The purpose of this provision is not so much to avoid the arbitrary operation of the commorientes provision (see Section 184, *Property Law Act* 1958) as to ensure that, to an appreciable extent, the benefit given is the subject of enjoyment by the named beneficiary rather than that beneficiary's successors in title. The thirty day period chosen is commonly employed in express survivorship provisions drawn in wills.

The Working Party adopted what it believes to be an improved redraft of the Queensland Section 32(1) above which would then read:-

> "*Unless a contrary intention appears by the will, where any beneficial disposition of property is made to a person who does not survive the testator for a period of thirty days, the will shall have effect as if that person had died before the testator and, subject to this Act, the disposition in favour of that person shall lapse.*"

Recommendation 30

That Section 32 of the Queensland Succession Act 1981 as amended by the above draft be adopted as the model for a new section to be incorporated into Part II of the Wills Act.

Legacies and Devises to Unincorporated Associations of Persons

The Working Party considers that technical rules and difficulties standing in the way of effective testamentary dispositions to unincorporated associations ought to be removed by legislation. In Queensland the following provision has been enacted as Section 63 of the *Succession Act* 1981. The Working Party recommended its adoption in Victoria, with the exception of Section 63(3)(c).

Section 63 reads:-

"63. *Legacies and devises to unincorporated associations of persons*

(1) A legacy or devise to an unincorporated association of persons or to 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.

(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 sub-section (1) of this section 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 ink 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;

(b) the transfer of property representing a legacy or devise to a person or persons designated in writing by any two persons holding the offices of

President, Chairman, 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 devised property which is land under the provisions of the Real Property Act 1861-1979 shall be effected by means of a Nomination of Trustees under and pursuant to the provisions of 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 Dealings 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, Registrar of Dealings 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."

The Working Party considered and adopted the comments of the Queensland Law Reform Commission which are repeated in full:-

"*Legacies and devises to unincorporated associations of persons*

A lay testator, minded to include in his will a legacy or devise for an unincorporated association of persons, has a phenomenal series of legal obstacles to overcome. But if he leaves the benefit to the members of the association for the time being the legacy will take effect. But, if he leaves it to the present and future members of the association, it will fail. If he leaves it to augment the general funds of the association the legacy will take effect; but, if he leaves it for the purposes of the association, then, unless the purposes are charitable, it will fail. None of the problems arise if the association of persons happens to be incorporated. Perhaps, even less explicable, in layman's terms, is the fact that one may easily make a gift in one's lifetime to an unincorporated association of persons, but, if one attempts the same thing by one's will inordinate technicalities almost block the way. Further, how is anyone to

understand why it is that a legacy to "the Communist Party of Australia for its sole use and benefit" should fail: (Bacon v. Pianta (1976) 114 C.L.R. 634 - the same fate would, of course, await the same legacy to any political party) whereas a legacy "for the general purposes of the Loyal Orange Institution of Victoria" (Re Goodson [1971] V.R. 801), or a Masonic Lodge (Re Turkineton [1973] 4 All E.R. 501), or the Old Bradfordians Club (Re Drummond [1914] 2 Ch. 90) should succeed?

Although the principles on which distinctions have been made in these cases are, in themselves, soundly based, in as much as trusts for non-charitable purposes must sometimes fail and gifts offensive to the rule against-perpetual non-charitable trusts must fail, the fact is that few, if any, testators ever intend to offend these principles and if they do so they do so inadvertently. The cost of their inadvertence is that their intention is defeated, whereas it might easily have been achieved if they had happened to use a more acceptable form of words. The principles on which these distinctions are made have been illustrated in such recent cases as Re Inman [1965] V.R. 238, Bacon v. Pianta (1966)114 C.L.R. 634 and Re Goodman [1971] V.R. 801.

Where a testator succeeds in his objective, the personal representatives may face a further problem because, if the legacy is to the members for the time being of the unincorporated association, strictly speaking, the personal representative may not be able to secure a valid discharge for the legacy unless he transfers it to the intended recipients, namely each and every individual member. The testator may have had the foresight to provide that the receipt of an officer of the association shall be a valid discharge and such a provision is recommended by legal advisers. But, unless the testator does that, the personal representatives may be placed in a difficulty. In any case, even the theoretical basis on which such legacies are regarded as valid, namely that they are legacies not to the association but to its members as private individuals, is out of accordance with the true intention of a testator. His intention is to benefit the association and it is a legal fiction, invented to give effect to his intention, that he intends to benefit the members individually.

But, in any case, we doubt the wisdom of a series of rules which, although they may not be harmful in themselves in the context in which they have developed, frustrate perfectly legitimate testamentary wishes for there seems to be no reason why a legacy should be left to a political party, an association or former school fellows, a golf or other sporting club, or, indeed, any of the voluntary associations of persons which play an enormous part in the social and private welfare life of the country. Gifts to such associations are encouraged. We therefore recommend that the two major technical pitfalls which beset the unwary testator should be removed from his path and that the administration of legacies and devises for unincorporated associations of persons should be rendered more practicable for personal representatives.

Sub-section (1) converts legacies for or on trust for the aims, objects or purposes of an unincorporated association of persons and legacies for or on trust for the present and future members of an unincorporated association of persons into legacies for the augmentation of the general funds of the associations. In effect, this validates legacies which would otherwise fail and gives effect, we believe, to the testator's true intention. It follows the reasoning in Re Goodman [1971] V.R. 801.

Sub-section (2) makes clear that these legacies are to go to the association and that they shall be applied by it in accordance with the provisions of its constitution from time to time with respect to the application of its general funds. Unless a testator specifies a particular purpose for his legacy, it would be reasonable to construe a legacy to an unincorporated association of persons in this way. The general funds of an association are within the control of the association and the varying needs of the association can best be met through the medium of its general funds. Any objection on the grounds of perpetuity is also avoided.

Sub-section (3) is designed to enable personal representatives to obtain a discharge from an unincorporated association of persons. Pecuniary legacies or sums of money may be paid to the Treasurer for the time being; but where a testator leaves a particular asset, such as a trophy or equipment or property in specie, it seems reasonable to facilitate transfer of such property by way of an authorised recipient.

Sub-section (4) It is occasionally objected that if the members of an unincorporated association of persons cannot be listed, then the testator cannot intend the legacy to be to the members of the association, and so it fails. Since, by sub-section (2), we recommend that in any event legacies to members should be paid to the association, it would be undesirable if this objection could be raised in what will be a different

context, and for the purpose of rendering invalid a legacy which it is the object of this provision to save from failure because of a technical rule which operates capriciously."

Recommendation 31

That Section 63 of the Queensland Succession Act 1981 (omitting sub-section (3)(c) thereof) be adopted as the model for a new section to be incorporated into the Wills Act.

Abolition of Certain Anomalies Flowing from the Rule Against Delegation of Will-Making Power

There currently exists in Australia a rule known as the rule against delegation of will-making power. It is said to be a consequence of this rule that it does not necessarily follow that, because a power of appointment or discretionary trust is valid in a settlement, it will be valid in a will: see Tatham v. Huxtable (1950) 81 C.L.R. 638 esp. per Fullagar J. Thus in Australia it has been held that while a hybrid power (that is, one exercisable in favour of anyone in the world less a person or group of persons) may be created inter vivos, it may not be conferred in a will: see Horan v. James [1982] 2 N.S.W.L.R. 376; Tatham v. Huxtable (supra) per Fullager J. It has been held that a power given to confer a testamentary benefit on the testator's widow is invalid although such a power may be conferred upon settlement trustees without adverse consequence: see Re Norway No. 63/4731, unreported decision of Adam J., Supreme Court of Victoria. It has also been held that a discretionary power to distribute property to a particular person with no express disposition to take effect pending any distribution is void: see Lutheran Church v. Farmers Co-operative Executors (1970) 121 C.L.R. 628 per McTiernan and Menzies JJ.; contra per Barwick C.J. and Windeyer J.

It was not clear to the Working Party that these provisions are offensive to rule that only the testator may make his own will. As the Queensland Law Reform Commission has observed:-

"*To allow such trusts to be created inter vivos quite freely but then to prevent their creation by will on the grounds that such a degree of discretion, vested in a personal representative, amounts to an undue delegation by the testator of his power of making a will, is arbitrary. It is found to lead to litigation ...*" *(Q. L. R. C. 22, p.49).*

We therefore recommend that legislation in the following terms be enacted in Victoria (cf. *Succession Act* 1981 (Qld.), Section 64):-

> "*A power 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 of trust would be valid if created by an instrument made inter vivos.*"

Recommendation 32

> *That the draft section set out above be adopted as the model for a new section to be incorporated into the Wills Act.*

SUMMARY OF RECOMMENDATIONS

Recommendation 1

> *That the Working Party recommends that Section 4 be retained in its present form but, as a matter of logical arrangement, be placed in the Act after the present Section 20.*

Recommendation 2

> *That Section 7 of the Queensland Succession Act 1981 be adopted as the model for replacement of the existing Section 5 of the Wills Act.*

Recommendation 3

> *(1)* *The age of majority should be retained as the general age of testamentary capacity.*
>
> *(2)* *The Supreme Court should have power to approve the making of a will by a minor.*
>
> *(3)* *Married minors ought to be accorded testamentary capacity and minors who were once married, but are no longer married, should retain their testamentary capacity.*

Recommendation 4

That the draft Section 7 approved by the Chief Justice's Law Reform Committee be adopted (subject to the amendment to Section 7(b) set out above) as the model to replace the existing Section 7 and that Section 8 be repealed.

Recommendation 5

By a majority, the Working Party recommends:-

(a) *That a dispensing power, based on the model contained in Section 12(2) of the Wills Act 1936-1980 (South Australia) be provided for in the Victorian Wills Act and that that power should apply not only to matters relating to the execution of testamentary instruments but also to their alteration and revocation.*

(b) *That such a power should apply only to cases where the testamentary instrument has been brought into existence after the commencement of operation of the new provision.*

Recommendation 6

That Section 11 of the Queensland Succession Act 1981 be adopted as the model for replacement of the existing Section 9 of the Wills Act 1958.

Recommendation 7

That the above provision be adopted as the model for the replacement of the existing Section 10 of the Wills Act.

Recommendation 8

That Section 13 of the Queensland Succession Act 1981 be adopted as the model for the replacement of the existing Section 11 of the Wills Act 1958.

Recommendation 9

That Section 12 of the Wills Act be repealed.

Recommendation 10

That Sections 13(3)(a), 14 and 15 of the Wills Act 1958 be repealed and that Section 14 of the Queensland Succession Act 1981 be adopted as the model for their replacement.

Recommendation 11

(a) *That, subject to the recommendation set out below, the general rule contained in Section 13 be preserved and maintained.*

(b) *That the Section should invalidate dispositions in favour not only of attesting witnesses but also of their spouses.*

(c) *That the Section should not apply where the will has been witnessed by at least two other persons who are disinterested.*

(d) *That the Section should operate irrespective of whether or not the testamentary beneficiary in question would have received benefits on a total intestacy.*

(e) *That charges or directions for the payment of debts and for the payment of proper remuneration to any person for acting in or about the administration of the estate should be exempted from the operation of the Section.*

(f) *That the jurisdiction conferred on the Court by Part V of the Administration and Probate Act 1958 be retained*

Recommendation 12

That Section 16 of the Wills Act be repealed and the following draft adopted as the model for a new Section 16:-

"16. (1) Subject to sub-sections (2) and (3), every will shall be revoked by the marriage of the testator.

(2) A will shall not be revoked by the marriage of the testator if -

(a) the will is made in exercise of a power of appointment if the property so appointed would not, in default of the testator exercising that power, pass to the executor or administrator or the person entitled under Part I of the Administration and Probate Act 1958: or

(b) it appears from the terms of the will or from those terms taken in conjunction with the circumstances existing at the time of the making of the will that the testator had in contemplation that he would or might marry and intended the disposition made by the will to take effect in that event: or

(c) the will contains a devise bequest or disposition of real or personal property to or confers a general power of appointment upon the person whom the testator marries.

(3) Where a will is not revoked by the marriage of the testator by reason of the operation of paragraph (c) of sub-section (2) any real or personal property that is disposed of by the will to, or is the subject of a general or special power of appointment conferred upon, any person other than the spouse of the testator shall be deemed to form Part of the residuary estate of the testator and to be property in respect of which the testator died intestate.

(4) A will made in contemplation of the marriage of the testator under Section 16(2)(b) is void if the marriage is not solemnized, unless the will provides to the contrary.

Recommendation 13

That Section 17 of the Wills Act be amended by inserting the words "Subject to this Act ..." at its commencement.

Recommendation 14

That Section 18 be retained in its present form but that it be made clear that the Supreme Court has power to dispense with strict compliance with the requirements of Section 7 in relation to a document where the Court is satisfied that the deceased intended the document to revoke his will or any part of it.

Recommendation 15

The Working Party recommends that divorce should result in revocation of the testator's will.

By a narrow majority, the Working Party recommends that such revocation be partial only, and that Section 18 of the Queensland Succession Act 1981 be adopted as the model for a new provision to be inserted in the Wills Act.

Recommendation 16

That the substance of Section 19 of the Wills Act be retained but that the draft set out above be adopted as the model for the new section.

Recommendation 17

That the present Section 20 be replaced by a new Section in the form of model section set out in the above draft.

Recommendation 18

The Working Party recommends that the provisions of Sections 20A, 20B, 20C and 20D stand unaltered.

Recommendation 19

The Working Party recommends that Section 21 be retained in the Act in its present form.

Recommendation 20

That Sections 22, 23, 24, 25, 26, 28 and 29 of the Wills Act be repealed and that Section 28 of the Queensland Succession Act 1981 be adopted as the model for their replacement.

Recommendation 21

By a narrow majority, the Working Party recommends that Section 22A be repealed and that a new section drawn on the model of Section 21 of the U.K. Administration of Justice Act 1982 be inserted in its place.

Recommendation 22

The Working Party recommends that the provisions of Section 22B stand unaltered.

Recommendation 23

That Section 30 of the Queensland Succession Act 1981 be adopted as the model for the replacement for the existing Section 27 of the Wills Act 1958.

Recommendation 24

That Section 30 of the Wills Act 1958 be repealed.

Recommendation 25

That the substance of Section 31 be retained but that the draft set out above be adopted as the model for the new section and that the effect of the decision in Re King deceased be negatived.

Recommendation 26

That Section 32 of the Wills Act 1958 be repealed.

Recommendation 27

That Section 62 of the Queensland Succession Act 1981 be adopted as the model for the replacement of Section 33 of the Wills Act 1958.

Recommendation 28

That sub-section (1) and (2) of Section 20 of the Administration of Justice Act 1982 of the United Kingdom followed by a new sub-section in the terms of the draft set out above be adopted as the model for a new section to be incorporated in Part II of the Wills Act.

Recommendation 29

That Section 29 of the Queensland Succession Act 1981 be adopted as the model for a new section to be incorporated into Part II of the Wills Act.

Recommendation 30

That Section 32 of the Queensland Succession Act 1981 as amended by the above draft be adopted as the model for a new section to be incorporated into Part II of the Wills Act.

Recommendation 31

That Section 63 of the Queensland Succession Act 1981 (omitting sub-section (3)(c) thereof) be adopted as the model for a new section to be incorporated into the Wills Act.

Recommendation 32

That the draft section set out above be adopted as the model for a new section to be incorporated into the Wills Act.

LIST OF SUBMISSIONS

Nº	Date of Submission	Name	Affiliation
1.	15 January 1993	Miss F W Baker	Citizen
2.	15 January 1993	Don Blythe	National Director, Trustee Companies Association of Australia
3.	26 February 1993	Dr Clyde Croft	Barrister
4.	28 February 1993	Mrs Yvonne Dolman	Citizen
5.	9 March 1993	Ms Marie Vern	Solicitor
6.	15 March 1993	Jack Dickinson	Citizen
7.	16 March 1993	Miss Joan Abbott	Citizen
8.	17 March 1993	Ms Gail Thompson	Manager, Legal Branch, State Trustees
9.	26 March 1993	Harry Marshall	Victorian State President, National Institute of Accountants
10.	31 March 1993	Daniel Fitzgerald	Secretary to the Submitting Group, A special group of senior lawyers
11.	31 March 1993	Stuart J Williamson	Solicitor
12.	23 April 1993	Ben Bodna	Public Advocate, Office of the Public Advocate
13.	12 May 1993	William L Abbott	Solicitor, Camberwell
14.	14 May 1993	W A Lee	Commissioner for Law Reform, Queensland
15.	20 May 1993	Trust Co of Australia Ltd.	
16.	20 July 1993	The Law Society of the ACT	

PUBLIC HEARINGS

Hearing		Name	Affiliation
1	3 March 1993	Mr Andrew Dickson	Registrar of Probates
		Mr Dan Fitzgerald	Law Institute of Victoria
		Mr Ian Morrison	State Trustees
		Dr Clyde Croft	Barrister
2	24 March 1993	Professor Marcia Neave	Monash University
3	26 July 1993	Mr Ben Bodna	Public Advocate Co-ordinator, Dispute Settlement Centre, Geelong, Inc.
		Mr Dan Fitzgerald	Solicitor, Law Institute of Victoria
		Mr Ian Cox	Solicitor, McKean and Park
		Mr Geoff Park	Solicitor, McKean and Park
		Mr Ian Morrison	Solicitor, Equity Trustees
4	17 Sept 1993	Mrs Nancy Dowdle	Solicitor, Abbott Tout Russell Kennedy
		Mr Ian Cox	Solicitor, McKean and Park
		Mr Ian Morrison	Solicitor, McKean and Park
		Mr Geoff Park	Solicitor, McKean and Park
		Mr W A Lee	Law Reform Commissioner Queensland, and Consultant to the Committee
5	16 Dec 1993	Mr W A Lee	Law Reform Commissioner Queensland, and Consultant to the Committee
6	3 March 1994	Mr W A Lee	Law Reform Commissioner Queensland, and Consultant to the Committee

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