NSW Law Reform Commission

REPORT 47 (1986) - COMMUNITY LAW REFORM PROGRAM: WILLS - EXECUTION AND REVOCATION

Table of Contents

Terms of Reference and Participants

New South Wales Law Reform Commission
To the Honourable T W Sheahan, BA, LLB, MP

Attorney General for New South Wales

COMMUNITY LAW REFORM PROGRAM

WILLS - EXECUTION AND REVOCATION

Dear Mr Attorney General

We make this Report under the reference from the late Honourable D P Landa, LLB. MP, Attorney General dated 20 June 1983.

Keith Mason QC

(Chairman)

Russell Scott

(Deputy Chairman)

Professor Colin Phegan

(Commissioner)

Paul Byrne

(Commissioner)

Professor Marcia Neave

(Commissioner)

March 1986

Terms of Reference

To inquire into and report on:

(i) The law relating to the execution and revocation of wills and documents of a testamentary nature, including the law relating to:

signature, attestation and witnessing;

privileged wills;

revocation by marriage and by dissolution of marriage.

(ii) Any incidental matter.

D P Landa

Attorney General and

Minister of Justice

20 June 1983

Participants in this Report

Commission Members:

For the purpose of the reference a Division was created by the Chairman, in accordance with s12A of the Law Reform Commission Act, 1967. The Division when first constituted on 20 December 1984 comprised the following members of the Commission:

Mr Paul Byrne

Miss Deirdre O'Connor

Professor Colin Phegan (Commissioner in charge of reference)

Professor Ronald Sackvihle

The Division was reconstituted on 21 March 1985 to comprise:

Mr Keith Mason QC (Commissioner in charge of reference)

Mr Paul Byrne

Ms Marcia Neave

Professor Colin Phegan

Mr Russell Scott

Consultants to the Commission:

Mr Kevin Booker

Dr Ian Hardingham

The Honourable Mr Justice Hutley

Associate Professor Andrew Lang

Ms Marcia Neave

Associate Professor George Winterton

Miss Olive Wood

Research and other assistance:

Mr James Hirshman

Ms Ruth Jones

Ms Ros Robertson

Ms Fiona Tito

Ms Meredith Wilkie

Secretary:

Mr John McMillan

Word Processing:

Ms Lorna Clarke

Ms Nozveen Nisha

Miss Meg Orr

Administrative Assistance

Miss Zoya H owes

Ms Dianne Wood

Librarian

Mrs Beverley Caska

Glossary

Attest, Attestation
To attest a will is to witness its execution by seeing the testator's act of signing or acknowledging.

Beneficiary

A person who receives a gift under a will.

Bequest

A gift of personal property by will.

Devise

A gift of land by wilt

Family provision

A term derived from the Family Provision Act, 1982 to describe the power of the court to vary a will to ensure proper provision for the adequate maintenance of a testator' s dependants where a testator has not made adequate provision under his or her wilt

Holograph will

A will written entirely in the testator's own handwriting

Intestate/Intestacy

A person who dies without leaving a valid will, dies intestate. Subject to any order made under the Family Provision Act, 1982, the estate is distributed to the classes of persons stipulated in the Wills, Probate and Administration Act, 1898.

Nuncupative Will

A declaration by the testator without any writing before a sufficient number of witnesses.

Personalty

A term used to denote personal property for example goods and shares, particularly in regard to the estate of a deceased person Depending on its context the term may include certain interests in land, such as leaseholds

Power of Appointment

A right given to a person to select the person or class of persons entitled to a gift made by another.

Privileged Will

A shorthand expression for an informal but valid will made by a privileged testator (see chapter 11).

Probate

The certification by the Court of the validity of a will.

Realty/Real Property

Land and interests in land, excluding leaseholds.

Subscribe

To subscribe a will is to sign it as a witness.

Succession

A term used to describe the body of law relating to the passing of property on the death of a person.

Testator/Testatrix

The person who makes a will. In this Report the masculine term testator has been used, unless in a specific case the female term is appropriate.

Summary of Principle Recommendations

Proposals for Specific Reforms of Execution Formalities

1. There should continue to be no requirement that wills be executed before a notary or other authorised person (4.6)

2. There should be no requirement that wills be deposited in order to be valid.(4.8)

3. There should be no requirement that particulars relating to wills should be registered. (4.10)

4. Oral or “nuncupative” wills should not be introduced. (4.14)

5. Videotape wills should not be introduced.(4.16)

6. Holograph wills should not be accorded validity as a special class of informal wills (4.23)

7. In lieu of the provisions in sections 7 and 8 of the Wills, Probate and Administration Act, 1898 about the position of the testator’s signature, the Act should require that it appear (on the face of the will or otherwise) that the testator intended to give effect to the will by making his or her signature or directing some other person to sign on his or her behalf.(4.31)

8. There should continue to be a requirement of the joint presence of two witnesses to the testator’s act of signing or acknowledgment of signature.(4.34)

9. Section 7 should be amended so as to ensure that the requirement that the witnesses attest and sign the will in the presence of the testator is satisfied where one signs after the testator or his or her agent makes his or her signature and before the testator acknowledges that signature and the other signs after the testator has acknowledged that signature. (4.42)

10. The Act should be amended to make clear that witnesses need not sign in each other’s presence. (4.43)

Proposal for Specific Reform of Revocation Formalities

11. A will or any part of a will may be revoked by any writing on the will or any dealing with it, which is done by the testator, or a person by his or her direction and in his or her presence, if the court is satisfied from the state of the document that the writing or dealing was done with the intent of the testator to revoke.(5.12)

General Dispensing Power

12. The Wills, Probate and Administration Act, 1898 should confer on the Supreme Court power to admit to probate or otherwise treat as valid any will, alteration to a will or document expressing an intention to revoke a will, notwithstanding that it has not been executed with the statutory formalities, provided that the court is satisfied that the deceased intended the will, alteration or revocatory document to take effect as such. Extrinsic evidence, including statements made by the testator should be admissible as to the manner of execution and the testator’s intention. (6.25)

Rectification of Wills

13. Rectification of a will should be available wherever the Court is satisfied that the will is so expressed that it fails to carry out the testator’s intentions. (7.25)

14. There should be ancillary provisions imposing a time limit on making applications for rectification and giving protection to executors.(7.27)

15. The Supreme Court Rules should provide that a claim relating to the validity of a will and other claims (including claims for the rectification or interpretation of a will) may be joined in the one proceeding unless it would cause undue inconvenience or cost. (7.30)

Gifts to Interested Witnesses

16. (a) Section 13 of the Wills, Probate and Administration Act, 1898 should be repealed.

(b) In lieu, the Act should provide that a gift under a will in favour of a person who is either an attesting witness to the will or the spouse of such witness shall be void unless all the persons entitled to benefit from the avoidance of the gift, being *sui juris,* consent in writing to the distribution of the gift according to the will or unless the court is satisfied that the testator knew and approved of the gift and that it was the free and voluntary disposition of the testator.

(c) No part of an estate which is the subject of a gift avoided pursuant to (b) shall be distributed prior to one month after the executor has notified the first mentioned person in (b) of his or her intention to distribute.

(d) Where there are at least two attesting witnesses who are not beneficiaries or the spouse of a beneficiary, a gift under a will shall not be avoided by the provision recommended in (b).

(e) In this recommendation. “gift” is defined as in the existing s13 of the Act, and executor” includes administrator to whom letters of administration are granted with the will annexed.

(f) A written consent given pursuant to (b) should not be liable to duty under the Stamp Duties Act. 1920.

(g) Rules of court should be formulated:-

(i) to make plain that an application to the court pursuant to (b) may be determined concurrently with the probate proceedings relating to the will;

(ii) to provide that any proceedings pursuant to (b) shall be brought against the executor and to provide how such proceedings may be instituted and conducted;

(iii) to provide that, unless the court otherwise orders, the burden of the costs of proceedings pursuant to (b) shall be borne by the applicant; and

(iv) to provide that the court may, subject to the giving of such notice as it thinks fit, order that the burden of any costs ordered to be paid by the estate may be borne by one or more persons to the exclusion of others.(8.28)

Who May be a Witness?

17. Sections 12 and 14 of the Wills Probate and Administration Act. 1898 should be replaced by a provision which enacts that any person competent to be a witness in civil proceedings in court. other than a blind person. may act as a witness to a will. (8.30)

Revocation by Marriage

18. The general rule providing for revocation of a will by marriage contained in s15(1) of the Wills, Probate and Administration Act, 1898 should be retained.(9.20)

19. (a) Section 15 of the Wills, Probate and Administration Act, 1898 should be amended so as to provide that a will made in contemplation of a marriage, whether or not that contemplation is expressed in the will, shall not be revoked by the solemnisation of the marriage contemplated.

(b) Section 15 should also provide that a will expressed to be made in general contemplation of marriage shall not be revoked by the solemnisation of a marriage. (9.21)

Revocation by Divorce

20. In lieu of the existing rule that termination of marriage does not in itself affect provisions in a will made in favour of a spouse:

(a) on the termination of marriage any beneficial gift by will in favour of a former spouse (which expression includes putative spouse) and any power of appointment conferred on a former spouse shall be revoked, and the testamentary appointment of a former spouse as executor, trustee or guardian shall be treated as omitted from the will.

(b) in addition to the result specified in (a), on the termination of marriage any property prevented from passing beneficially to the former spouse or putative spouse shall pass as if that person predeceased the testator, but no class of beneficiaries under the will is to close earlier than it would have done if the gift had not been revoked.

(c) “termination of marriage” means:-

(i) the dissolution of the testator’s marriage (upon the decree becoming absolute);

(ii) the annulment of the testator’s marriage effected in accordance with the law of an overseas jurisdiction where such annulment would be recognised in Australia pursuant to section 104 of the Family Law Act 1975; or

(iii) the making of a decree of nullity in relation to a void marriage in which the testator was a putative spouse.

(d) the result specified in (a) and (b) should not occur -

(i) where the court is satisfied by any evidence, including evidence of statements made by the testator, that the testator did not at the time of the termination of marriage intend that such result should occur, or

(ii) where the gift or testamentary appointment is contained in a will which is republished after the termination of marriage by a will or codicil which evinces no intention to affect the gift or testamentary appointment.

(e) the result specified in (a) and (b) should not affect:

(i) any right of the former spouse to apply for an order for provision under the Family Provision Act, 1982; or

(ii) beneficial gifts made in accordance with contracts binding on the testator.

(f) in these recommendations “gift” has the meaning contained in the existing s13 of the Act. (10.38)

Repeal Status of Privileged Testator

21. No class of persons should have the status of being privileged testators.(11.36)

Minors

22. The minimum age for testamentary capacity should not be reduced below 18. (12.7)

23. The Supreme Court should be invested with jurisdiction to grant capacity to a minor of any age to make a specific will subject to such conditions as the Court thinks fit. (12.12)

24. Section 6 of the Wills, Probate and Administration Act. 1898 should be amended to allow a valid will to be made by a person who is or has been married. (12.13)

25. A will made by a minor who has the capacity to marry but otherwise lacks testamentary capacity should be valid where the will is made in contemplation of a particular marriage and that marriage takes place. (12.14)

26. Section 6(2)(b)(c) and (d) of the Wills Probate and Administration Act, 1898 should be repealed. (12.15)

27. Section 18 of the Wills Probate and Administration Act. 1898 should be amended by making it clear that it extends to alterations by minors made whilst they have capacity to make a will. (12.16)

Application of Reforms Proposed

28. The amendments to the Wills. Probate and Administration Act, 1898 suggested in this Report should apply in the case of deaths occurring after the commencement of the amending Act. (13.1)

29. The power of rectification of wills proposed in Chapter 7 should be available in relation to wills whenever made which have not been admitted to probate when the amendment takes effect.(13.2)

1. Community Law Reform Program and This Reference

1.1 This is the eighth report in the Community Law Reform Program. The Program was established by the then Attorney General, The Hon F J Walker, QC, MP, by letter dated 24 May 1982 addressed to the Chairman of the Commission. The letter included the following statement:

> This letter may therefore be taken as an authority to the Commission in its discretion to give preliminary consideration to proposals for law reform made to it by members of the legal profession and the community at large. The purpose of preliminary consideration will be to bring to my attention matters that warrant my making a reference to the Commission under s.10 of the Law Reform Commission Act, 1967.

The background of the Community Law Reform Program is described in greater detail in the Commission's Annual Report for 1982.

1.2 In response to publicity about the Commission's Community Law Reform Program, Associate Professor Andrew Lang of Macquarie University wrote to the Commission in August 1982 drawing attention to areas in the law of wills which were ripe for reform that would be of general community benefit. Preliminary research by Ms Ruth Jones, a legal officer of the Commission. revealed that some of these areas had been considered by other law reform agencies and that there were models for reform in some areas to be found in the legislation of other states or countries. On 5 May 1983 the Commission submitted draft terms of reference to the Attorney General.

1.3 On 20 June 1983 the then Attorney General, the late Hon D P Landa LLB, MLC, made the following reference to the Commission:

> To inquire into and report on:
>
> (i) The law relating to the execution and revocation of wills and documents of a testamentary nature, including the law relating to:
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> signature, attestation and witnessing;
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> privileged wills;
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> revocation by marriage and by dissolution of marriage.
>
> (ii) Any incidental matter.

1.4 Thereafter the Commission engaged Mr George Winterton and Mr Kevin Booker, then senior lecturer and lecturer respectively in the Faculty of Law at the University of New South Wales, to prepare a working draft report covering some of the areas now dealt with in this Report. This was completed by early 1984. This work was then embodied in a very substantial working draft report prepared later in 1984 by Associate Professor Lang. This draft covered additional areas and expanded the earlier work considerably. Its primary function was to provide the Commission and its consultants with a detailed discussion of various options for reform and the policy factors underlying them. The Commission wishes to place on record its debt to these three consultants, especially Associate Professor Lang whose extensive treatment of the subject relieved the Commission of the task of preliminary research.

1.5 The "Lang draft" contained a series of proposals. It was then submitted to four specialist consultants retained by the Commission for their comments. These were Dr I J Hardingham who was then Reader in Law in the Law School of the University of Melbourne, the late Honourable Mr Justice Hutley who was then Judge of Appeal of the Supreme Court of New South Wales, Ms Marcia Neave who is Professor-elect in the Faculty of Law, University of Adelaide, and was a part-time member of this Commission until the end of 1985 when the Report was substantially completed and Miss Olive Wood who is a Senior Lecturer in the Faculty of Law at the University of Sydney. Each of these specialists in the field of succession law responded with detailed comments and

suggestions about the “Lang draft”. While not always unanimous, this body of expert opinion was very influential in shaping the Commission’s recommendations.

1.6 In an article appearing in the Law Society Journal in June 1985 submissions were invited from the profession In response to this and other direct requests, the Commission has received a number of oral and written submissions from the persons listed in Appendix B. Each of these has been considered carefully and the Commission is most grateful for the participation of these persons and organisations in the task of co-operative law reform.

1.7 As indicated in the text of the Report the Commission has drawn substantially upon research done by other law reform agencies. A list of the principal reports of this nature is set out in Appendix C.

1.8 The body of information outlined above was considered by the Commission in 1985. Some of the topics contained in the “Lang draft” were omitted and other topics were added by the Commission The report was then written, substantially in its present form (apart from Appendix A which contains draft legislation). containing the views and reasons of the Division For the purpose of the reference a Division was constituted which, at the critical period, consisted of Mr Paul Byrne, Mr Keith Mason QC, Ms Marcia Neave, Professor Colin Phegan and Mr Russell Scott. The Commission is particularly indebted to Ms Ros Robertson. Legal Officer attached to the Division, who revised the Lang draft and co-ordinated the submissions of the specialist consultants, to Ms Fiona Tito who, in the capacity of Acting Director of Research. edited the final report, and to Mr James Hirshman who, in the course of checking the penultimate draft. made a number of useful suggestions in matters of detail.

1.9 The Commission then submitted its draft Report to various persons and organisations including judges of the Probate and Equity Divisions of the Supreme Court, the Honourable K J Holland QC former Judge in Probate, the Law Society of New South Wales. the Bar Association of New South Wales. the Family Law Council various academic lawyers (including the Commission’s specialist consultants referred to above), the Public Trustee and representatives of the trustee companies operating in this state, and the Military Law Sub Committee of the Department of Defence who had a particular interest in Chapter 11 (privileged testators). The decision was taken to submit the Report at such a late stage of its preparation in order that the persons involved might have the benefit of a fully researched and argued Report to which they were invited to respond. Thereafter submissions were received from a number of these persons and organisations and there were meetings and discussions with them. Several very useful proposals were advanced at this stage of the reference and these were then considered by the Commission and are reflected in this final form of the Report. This process of consultation led the Commission to conclude that one major change it was proposing (the abolition of the rule about revocation by marriage) should not be made, and to vary a number of other recommendations in detail. The upshot of the Commission’s consultation concerning privileged testators is indicated in para 11.35.

1.10 The range of topics covered by this Report maybe seen in the Index. Chapters 2-7 cover the areas of will-making and revocation formalities and problems arising from mistakes affecting the execution or form of documents of a testamentary nature. Chapters 8 (gifts to interested witnesses), 9 (revocation by marriage) and 10 (revocation by divorce) deal with matters of the substantive law of wills, and consider areas where gifts or wills might be avoided or revoked in particular circumstances. Chapters 11 (privileged testators) and 12 (minors) deal with the rights of particular categories of testators. Finally, chapter 13 considers the application of the particular reforms proposed. Appendix A contains draft legislation which would implement our proposals: we are grateful to Mr D R Murphy QC Parliamentary Counsel and Mr C M Orpwood from the office of Parliamentary Counsel for their assistance in this regard.

1.11 Certain other areas in the law of wills were also considered by us and our consultants. but are not covered in this Report.

> We considered the operation of the conflict of laws rules relating to the formal validity of wills and the need for New South Wales to adopt the Convention Making Provision for a Uniform 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.
>
> We considered the operation of the rules of undue influence in relation to wills. Although we have decided to make no recommendations in this area at this stage. we invite further comment. Some comments about this issue appear at paras 8.3 1-8.35.

Some preliminary investigation took I)lace about the desirability of conferring on the court power to order execution of a will for a mentally disabled person The Court of Protection in England has such a power and the Victorian Chief Justice's Law Reform Committee made detailed recommendations on the subject in a report *Wills for Mentally Disordered Persons* published in 1981. Our preliminary view formed after discussions with Mr Justice Powell and Mr B F Porter, the Protective Commissioner, is that there would be real merit in considering such a proposal for New South Wales. However the matter probably falls outside our terms of reference and, in any event. would merit detailed investigation in a separate Report.

1.12 Our various recommendations are summarised at the commencement of the Report.

2. Wills Formalities: History, Present Law and Function

2.1 A person wishing to provide for such matters as the disposition of his or her property and the administration of his or her affairs after death usually does so by making a will In ordinary cases a will must be in writing and be signed and witnessed in a particular manner in order to be valid. The will may be revoked at any time by the person who makes it (the testator[1]), and again there are rules which must be complied with before the revocation is valid. These rules, which determine the validity of acts of will-making (testator) and revocation. are generally referred to in this Report as "formalities". In this chapter we summarise the existing formalities and discuss their history and function.

I. A BRIEF HISTORY

2.2 The law prescribing the formalities for making and revoking wills in New South Wales evolved in England.[2] During the feudal era different rules applied to real and personal property. The first statutory formalities were imposed in 1540, when the Wills Act[3] enabled most real property to be devised by will. The will was required to be in writing, although there was no requirement for signature by the testator or for attestation by witnesses, or indeed for the writing to be the testator's.

2.3 The ecclesiastical courts, which applied the law relating to wills of personalty,[4] permitted the making of oral wills in certain circumstances. Such wills, which were termed "nuncupative wills", could be validly made provided the testator declared his or her will before a sufficient number of witnesses.

2.4 In 1677 the law was altered by the Statute of Frauds.[5] Section 5 required that a will devising real property should be in writing and signed by the testator or by some other person in his presence and by his express direction. and should be attested and subscribed (see para 2.11) in the presence of the testator by three or four credible witnesses, failing which it should be" utterly void and of none effect". This provision did not apply to the execution of wills of personal property when the value of the estate was 30 pounds or less. But for estates above that size there were detailed formalities regulating when an oral will would be admitted to probate.[6] These limitations meant that many estates were too large to qualify for nuncupative wills or that it was difficult to rely on nuncupative wills, which gradually went out of fashion.

2.5 These statutory formalities rendered invalid some testamentary instruments that represented the genuine "will" of testators. In 1757 Lord Mansfield protested that:

> many more fair wills have been overturned for want of the form. than fraudulent have been prevented by introducing it. I have had a good deal of experience.., and hardly recollect a case of a forged or fraudulent will where it has not been solemnly attested ... it is clear that judges should lean against objections to the formality They have always done so, in every construction upon the words of the statute ... And still more ought they to do so, if that system would spread a snare, in which many honest wills must unavoidably be entangled, and be no preservative against fraud.[7]

2.6 Despite this, the only alteration to the statutory formalities prior to 1837 was the addition of the requirement that a beneficiary who witnessed a will lost the benefit under it, but remained competent to prove the will.[8]

2.7 However, in 1833 the English Real Property Commissioners published their Fourth Report which dealt with the law of wills. They recommended repeal of the provisions of the Statute of Frauds relating to nuncupative wills and the relaxation of some of the general formalities required for making and revoking wills.

2.8 These recommendations were incorporated in the Wills Act 1837,[9] which eliminated the differences in formalities relating to real and personal property. Section 9 of that Act is the source of the current requirements for formalities in most Australian, American and Canadian jurisdictions. Its counterpart in New South Wales is set out at para 2.11.

2.9 In recent years there have been substantial law reform proposals relating to the making and the revocation of wills in England, several Canadian provinces, New Zealand and some Australian States. The reports by law reform agencies or committees that have been considered are listed in Appendix C.

II. SUMMARY OF THE PRESENT LAW

2.10 The formalities prescribed for the valid execution, alteration and revocation of wills are contained in the Wills, Probate and Administration Act, 1898. We do not propose to discuss in detail the vast body of case law relating to the meaning and application of the relevant sections. It is however necessary to refer to some of the principles embodied in this case law, as a background to our discussion in later chapters about appropriate reforms.

A. Executing and Altering a Will

2.11 The formalities prescribed for the making of a valid will are set out in s7 of the Wills, Probate and Administration Act, 1898. These formalities apply to all wills other than those made by privileged testators.[10] Section 7 provides:

> 7. No will shall be valid unless it is 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 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.

The expressions" attest' and" subscribe" in s7 require explanation "Attesting" is witnessing execution of the will, by seeing the testator's act of signing or by being present when the testator acknowledges his or her signature. "Subscribing" is the act of signing the will as a witness. We now consider briefly the various formal requirements set out in s7.

1. Writing

2.12 Except for privileged wills a will must be "in writing" to be valid. The writing may be in ink or pencil, or in typewriting, printing, lithography, or photography.[11] Any permanent form of visual representation is sufficient.[12] The writing may be on any material, including on an egg shell.[13] It maybe in any language, or in a code or use abbreviations.[14] A will recorded on sound or video tape, not being a visual representation of the words used, does not satisfy the statutory requirements for writing, Whether this last mentioned limitation should be varied is considered in paras 4.15-4.16.

2. Testator' s Signature

2.13 The requirement for the testator to sign has been construed by the courts with considerable latitude No particular form of signature is required, but it must be intended by the testator to constitute execution (or authentication) of the will Signature by mark initials, assumed name or stamped name, or by description (such as "your loving mother"[15])[16] is acceptable. Part of a person's name or normal signature is also sufficient if it is clear that the testator intended this to constitute his or her signature for the purpose of execution.[17] This last mentioned requirement created a particular problem in *Re Colling,*[18] a case which is considered in more detail in chapter 4.

2.14 The testator need not sign personally but may sign by an agent, provided that the agent signs in the presence and by the direction of the testator. This allows a person who is physically unable to execute a document to make a valid will It has been held that this method of execution is effective if the agent signs the testator's name, or the agent' s name, or both.[19] The courts have taken a generous approach when a testator is unable to give express authority to the agent and the authority may be evidenced by conduct.[20] The agent may also attest the will as one of the witnesses.[21]

3. Position of Testator' s signature

2.15 One of the statutory requirements in s7 and its counterparts elsewhere, is for the will to be signed at its "foot or end" by the testator. Despite the apparent simplicity of this, one text writer has pointed out that:

> It is... almost as if there was an underground organisation of troublesome testators who plotted together to see where else they could place their signatures. Signatures were placed length wise and sideways in the margin, in the middle of the text, at the top, on the back, and in almost every conceivable place.[22]

2.16 The practical operation of this requirement has caused difficulties and has resulted in the failure of many wills. In an attempt to resolve those difficulties. the Wills Act Amendment Act was passed in 1852 in the United Kingdom. Section 1 of that Act was adopted in New South Wales and now appears as s8 of the 1898 Act Section 8 provides:

> 8.(1) 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 meaning of this part, 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 by the circumstances -
>
> (a) that the signature does not follow or be immediately after the foot or end of the will; or
>
> (b) that a blank space intervenes between the concluding word of the will and the signature; or
>
> (c) that the signature is placed among the words of the testimonium clause or of the clause of attestation. or follows or is after, or under the clause of attestation, either with or without a blank space intervening, or follows, or is after, or under, or beside the names or one of the names of the subscribing witnesses; or
>
> (d) that the signature is 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 is written above the signature; or
>
> (e) that there appears 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.
>
> (2) The enumeration of the above circumstances shall not restrict the generality of the above enactment, but no signature under this part 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.

This provision outlines some commonly occurring situations in which the signature is not physically at the foot or end of the will and protects the will from invalidity where these occur. It has solved some but not all problems.

2.17 In one sense, s8 has added two further complications. First, it is necessary that the signature be placed so that it *"shall be apparent, on the face of the will"* that the testator intended to give effect by that signature to the writing signed as his or her will Secondly, the signature does not give effect to any disposition which is underneath it or which is inserted after the testator signed the will.

2.18 Testators' aberrations in placing their signatures in almost any position in some wills have continued to cause difficulties. Generally signatures at or near the top of wills have been held ineffective.[23] Similarly, signatures written across the middle of the will do not satisfy the Act without some indication on the face of the will that the testator regarded the signature as intended to give effect to all of the writing in the will: and the consequence has usually been to exclude the whole of the document from probate.[24] In some decisions signatures written perpendicularly in the margin of the will, near or towards the top of the will have been held to be effective where there was no space left for a signature at the bottom of the page.[25] In *In the Goods of Hornby,*[26] Wallington J allowed the signature in the margin on the basis that the testator intended that space for the signature giving effect to the will However, such a subjective test appears to be unjustified[27] in view of the need for objective criteria (ie. *apparent* on the face of the will) imposed by s8.

2.19 Many of the cases involve wills signed at the bottom of the first or second pages, which were followed by subsequent pages that were not signed. In some cases it was possible to regard execution on the first page as being at the foot or end of the will because the testator had deliberately and obviously used the pages in an unconventional order or because the signed part referred to later parts of the will in such a way as to incorporate them.[28] The result has been that the courts have dealt in three different ways with wills in which the testator' s signature was not situated geographically at the end of the writing:

by granting probate of the entire will;[29]

by granting probate of that portion of the instrument situated before the signature;[30]

by refusing to grant probate on the ground that the will was not signed at the foot or end.[31]

This is hardly satisfactory.

2.20 A complex and almost irreconcilable body of judicial decisions has emerged in dealing with the problems caused by the position of testators' signatures. In some cases the judges have bemoaned the fact that the clear intentions of testators have been defeated by the formality requiring signature at the" foot or end".[32] The courts have struggled with the express terms of the statutory requirements and the desire to give effect to testamentary intentions contained in dubiously executed wills. The "end" of a will is capable of being construed spatially (subject to the latitude permitted by s8), or in terms of the time of the signature (ie. after the entire will has been completed), or at the end in intention.[33]

2.21 *Re Beadle*[34] is an example of how testators' intentions have been defeated by these statutory requirements:

> The testatrix Mrs Emma Beadle was assisted in preparing her will by Mr and Mrs Mayes, to whom she referred as Charley and Maisy. Mrs Mayes wrote the will as dictated by the testatrix. The testatrix and Mr Mayes signed the paper in the right hand corner, but Mrs Mayes did not sign it The testatrix then wrote on an envelope" My last will and testament, EN Beadle, to Charley and Maisy. After the will was placed inside the envelope which was sealed, Mr Mayes wrote on the back of the envelope "We certify that the contents of this letter was written in the presence of ourselves" and Mr and Mrs Mayes signed it. Although Goff J held that there was a sufficient connection between the paper and the envelope to enable them to constitute the will, neither of the testatrix' s two signatures constituted an effective signature at the foot or end of the will and the attestation was also defective.

2.22 Some judges have attempted to rationalise this maze of decisions, notably Helsham J (as he then was) in *In the Will of Spence.*[35] His Honour held that the court should first determine what is the face of the will, and that this may be done with the aid of extrinsic evidence, including how the testator handled, read, treated and signed the paper. Only then may the court determine the geographical end of the will and whether it is apparent from the position of the signature relative to that end that the testator intended "to give effect by such his signature to the writing signed as his will". Whilst his Honour's approach appears to be fully justified in principle,[36] it does not resolve some of the anomalies and difficulties in this area Clearly some legislative solution would assist in rationalising the law and creating some order in a confused area.

4. Witnessing

Making or Acknowledgment of Signature by Testator

2.23 A testator must make or acknowledge his or her signature in the presence of two witnesses. The testator must sign the will before the witnesses subscribe their signatures. The testator has two alternatives:

to sign the will in the presence of the witnesses; or

to acknowledge before the witnesses the signature he or she has already made.

2.24 Acknowledgment may be made by words or by gestures, which involve an acknowledgment that the signature on the instrument has been made by the testator, but the witnesses must see or have the opportunity of seeing the testator' s signature at the time of the acknowledgment.[37] The requirement is to acknowledge the signature and not the will Therefore the witnesses need not be made, aware that the instrument which has been executed is a wilt It is not sufficient for the testator to acknowledge the signature to each witness in turn, for the acknowledgment must be made in the joint presence of the witnesses. The testator cannot sign in front of one witness and acknowledge his or her signature to the other witness. This requirement has frequently been the downfall of wills.[38]

The Presence of Two or more Witnesses

2.25 A witness must be mentally and physically capable of witnessing the testator's signature. Therefore a blind person cannot be a witness,[39] nor can a person lacking appropriate mental awareness such as someone "asleep, or intoxicated, or of unsound mind".[40] The witnesses must either see or have the opportunity of seeing the testator's signature, and this is not satisfied if the signature is covered with blotting paper.[41]

2.26 The requirement that the testator's signature be made or acknowledged in the joint presence of the witnesses means that if one of the witnesses was so far away at the time the signature was made or acknowledged that he or she did not have the physical opportunity of seeing the signature at the same time as the other witness the will is invalid.[42] It is insufficient for the testator to sign or to acknowledge his or her signature separately to each witness.[43] The stated reason for this requirement is that otherwise there might be a substantial interval between one witness's involvement and another's, with the result that they could be observing the testator at different times and thus seeing materially different facts relevant to issues of the testator' s capacity, understanding or freedom from pressure. It also is said to operate as a check upon fraud by effectively requiring the attesting witnesses to agree upon the same story if they are to give perjured evidence.[44]

Attesting and Subscribing the Will

2.27 Section 7 requires the witnesses to attest (ie witness the testator's act of signing or acknowledging and subscribe (ie sign as witness). The witnesses should each attest and subscribe the will *after* the testator has signed the will. As in the case of the testator, a witness can sign the will by using a signature or mark.

2.28 But unlike testators, witnesses must actually sign ("subscribe") in the presence of the testator. They cannot merely acknowledge a signature previously made in the testator's absence.[45] Each witness should, in the testator' s presence, complete what is intended to be his or her signature on the will.[46]

2.29 The witnesses must have signed the will with the intention of attesting the testator's signature and not merely for the purpose of identification.[47]

2.30 There is no need for the signature of a witness to be positioned in any particular place in the will, It need not be at the end of the will, or next to or below the testator's signature, or next to the signature of the other attesting witness. It is however usual (and prudent) for both witnesses to sign at the end of the will, following the testator' s signature, to avoid difficulties in establishing due execution of the will and to avoid the suggestion that signatures far removed from the testator's were not for attestation. but for some other purpose. It is essential that the witnesses should attest the testator's signature to the will, and not some other signature on the will.[48]

In the Presence of the Testator

2.31 "Presence" of the testator also involves physical and mental elements. The testator should see, or have the opportunity of seeing, the witnesses subscribe their signatures to the will, and he or she should also be conscious of the witnesses' activities with reference to the will. There have been several decisions in which there was a dispute involving a witness who, after the testator signed, took the document to another room or part of a house: the validity of the wills in question turned on whether the testator could, from the position which he or she occupied at that time, have seen the witnesses sign the will.[49]

5. Alterations

2.32 Section 18(1) of the Wills, Probate and Administration Act, 1898 prescribes the formalities required for valid alterations to wills. other than wills of privileged testators.[50] That subsection provides:

> 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 are not apparent, unless such alteration is executed in like manner as here in before is required for the execution of a 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 are 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.

These formalities are only necessary for alterations made after the will was executed, but there is a presumption that alterations which are not duly signed and attested were made after execution.[51]

2.33 A valid alteration after execution requires that the alteration be executed with the same formalities as for the execution of a will. It is not enough for the alteration to be signed by the testator alone, or by the witnesses alone[52] unless the testator previously acknowledged his or her signature at the end of the will as applying to the altered will in the joint presence of the two witnesses.[53]

2.34 Where alterations are not executed in accordance with the formalities prescribed in s18(1) different consequences flow depending on whether or not the words or effect of the will before the alteration are "apparent". The original state of the will is ”apparent” if it can be ascertained on inspection (including inspection by use of a magnifying glass or microscope).[54] It is not apparent if the will has to be physically interfered with by a chemical process or by removing a piece of paper pasted over a word[55] or by making another document such as an infra red photograph[56]:

> If the original state of the will is “apparent” it will be admitted to probate in its original form.[57]
>
> If the original state of the will is not “apparent” probate will be granted with the obliterated parts left blank,[58] unless what is known as the doctrine of dependent relative revocation applies.[59] One example of the application of that doctrine is *In Goods of Itter*[60] where the testatrix pasted strips of paper over the amounts of legacies making them “non-apparent”. She wrote amounts of money on top of these strips but the alterations were neither signed nor attested. From the fact that the names of the legatees were not obliterated the court inferred that the testator intended to revoke the original legacies only if the new ones were effectively substituted and accordingly granted probate of the will in its original form.

B. Revoking a Will

2.35 Generally, to revoke a will, it must be shown that the testator actually intended to revoke it and that the revocation complied with certain formalities.[61] With one exception. a will is not revoked by an alteration to the circumstances of the testator.[62] The exception is the automatic revocation of a will by marriage, which is the subject of chapter 9.

2.36 Section 17 of the Wills, Probate and Administration Act, 1898 provides for the manner of revocation of wills, in the following terms:

> 17. (1) A will shall not be revoked wholly or in part except as mentioned in section 15 [revocation by marriage] or in this section.
>
> (2) A will may be revoked by another will,
>
> (3) A will may be revoked -
>
> > (a) by some writing declaring an intention to revoke the will and executed in the manner in which a will is required to be executed by sections 7 and 8;

(b) if the will is in writing, by the burning, tearing or destruction otherwise of the will by the testator or by some person in his presence and by his direction, with the intention of revoking the will; or

(c) if at the time of the recovation the testator is a priviledged testator, by his declaration of an intention to revoke the will.

(4) A testator may revoke his will as mentioned in subsection (3) notwithstanding that he is a minor.

(5) This section applies to a revocation made after the commencement of the Minors (Property and Contracts) Act, 1970.[63]

2.37 Like the law relating to making and altering a will, these statutory provisions have been construed as requiring strict and literal compliance in order that the revocation might be legally effective. Leaving aside privileged testators,[64] s17 prescribes three means of revocation:

by another will

by some writing, duly executed as a wilt declaring an intention to revoke the will

by the burning, tearing or "destruction otherwise" of the will by the testator or by some person in his presence and by his direction, with the intention of revoking it.

2.38 A will or writing declaring an intention to revoke an earlier will does not achieve revocation unless it is validly executed in the same way as a will, Consequently, any defects in the execution formalities (and proposals for their reform) will extend to the revocation area.

2.39 There are however two additional areas, peculiar to revocation formalities, which in our view need close attention:

wills containing express revocation clauses which do not truly represent the testator's intention and

the scope of the" destruction" category of revocatory action mentioned in para 2.37.

We shall elaborate on the issues for reform presented by these two areas in chapter 5.

III. THE FUNCTIONS OF WILLS FORMALITIES

2.40 Before one can properly determine whether the formalities for making or revoking wills should be extended, modified or dispensed with, it is necessary to consider the functions which these formalities may be performing. It has been pointed out[65] that formalities" should not be revered as ends in themselves, enthroning formality over frustrated intent". Consequently we must examine the purpose of these requirements before we can decide whether they should be modified.

2.41 As we shall indicate in Chapter 3, our overall approach has been to question whether any particular formality related to the execution or revocation of wills is serving a useful purpose, and to weigh this up against the perceived capacity of that formality to defeat the genuine intentions of indiyidual testators. Naturally this weighing up involves judgment rather than any mathematical process. In performing this process we have borne in mind that the three major options for reform are to relax some of the formalities, to add some further formalities, or to provide some judicial power to dispense with formalities on an *ad hoc* basis. These options are not mutually exclusive.

2.42 There is a body of academic literature which provides a functional analysis of wills formalities.[66] Various functions have been identified which the writers have labelled "evidentiary" "cautionary" or "ritual"; "protective"; and" channelling". These labels will be used here, although the concepts summarised by them will be explained. The purposes of some specific formalities will be more closely examined when we turn to the possible reform of formalities.

A. Evidentiary Function

2.43 This function refers to the role of wills formalities in preserving cogent proof of facts vital to determining what the testator intended and showing that he or she was consciously involved in making or revoking a will, The requirement for writing preserves in permanent form the language chosen by the testator or the testator's adviser to indicate the testator's testamentary intention and to express his or her particular wishes. It is designed to enable the court to ascertain these matters with certainty. Writing provides some protection against fraud and lapse of memory, since at the time when these matters must be determined the testator will be dead and unable to testify. There may also be an extended lapse of time between the making of the will and the grant of probate, so that the witnesses may be dead or unavailable, or their evidence may be unreliable as regards the contents of the will.

2.44 The testator's signature authenticates the document and identifies the maker of the will. That function is not always observed, because (i) the testator' s signature may not be his or her correct name; (ii) it may be in the form of a sign or mark, or (ii) the testator may authorise someone else to sign the will on his or her behalf. However, generally the testator' s signature does indicate finality of testamentary intention and authenticates the document as the testator's will.

2.45 Signatures at the end of the will and attestation provide some evidence of completeness, and act as some safeguards against interpolation Attestation[67] also fulfils an evidentiary function with reference to execution and testamentary capacity. The requirement that the witnesses be disinterested (Chapter 8) is meant to eliminate self-serving testimony.

2.46 Nelson and Starck conclude, with reference to the evidentiary function of wills formalities:

> It cannot be said with certainty that these goals will be achieved by the requirements of such formalities. Interpolation of a signed and witnessed will is not impossible since there is no requirement that the testator sign every page and there is no requirement that the witnesses know what is in the instrument. The fact that they promote achievement of the goals is, however, sufficient to warrant their inclusion in the statute.[68]

B. Cautionary or Ritual Function

2.47 The requirements for writing, signing and witnessing of wills may also serve the purpose of reminding the testator and the witnesses of the significance of their actions. The ritual of will-making should bring home to the testator the fact that an important transaction is involved as well as assist in demonstrating to the court that he or she was aware of that fact. Formalities tend to emphasise the solemnity of the testamentary act and to preclude the possibility that the testator was acting casually or haphazardly. The presence of the signature shows that the instrument was completed and adopted by the testator as his or her will and that the writing was not merely deliberative, or a preliminary draft, or haphazard scribbling However, ritual or ceremony cannot guarantee that each testator is aware of the solemnity of the testamentary act, nor will it preclude proof that a particular will was a sham, in the sense that the testator had no actual testamentary intent.

C. Protective Function

2.48 The requirements that the testator sign or acknowledge his or her signature in the presence of disinterested witnesses and that they attest in the testator's presence are meant to protect the testator from imposition at the time of execution The essential presence of a number of people acts as a check against impropriety and influence.

D. Channelling Function

2.49 Wills formalities also perform what has been referred to as a channelling function. by promoting uniformity in the organisation, language and content of most wills and facilitating "judicial diagnosis"[69] of whether a legally enforceable transaction was intended. The formalities are important in establishing the integrity of the wilt and in minimising the judicial time and effort required to ascertain the purpose of the document and to implement it after the testator's death. They also tend to avoid litigation and expense and make the provision of legal advice more certain.[70]

FOOTNOTES

1. In this Report the term “testator” will be used to include “testatrix”.

2. For a review, see Hastings & Weir. *Probate Law and Practice* 2nd ed (1948) pp 7-15.

3. Wills Act. 1540. (32 HenryVill. cl). Previously, land could be effectively devised by means of a feoffment to the uses of the testators will. These were prohibited in 1535 by the Statute of Uses (27 Henry VIII, c10).

4. This term is not exactly equivalent to personal property see Glossary.

5. 29 Car II el.

6. See Holdswortb. *A History of English Law.* Vol VI. p385.

7. *Windham v Chetwyn* (1757) 1 Burr 414 at 420-421 (97 FR 377 at 381).

8. 25 Ceo II c6. s1. See further, chapter 8 infra.

9. 7 Will IV & I Vict c26. The Act was adopted in New South Wales in 1840 (3 Vict No 5).

10. As to privileged testators, see generally chapter 11.

11. Interpretation Act. 1897. s19: *In Will of Black* 5 WN(NSW) 36.

12. Mellows, *The Law of Succession,* 4th ed (1983) p53.

13. *Hodson v Barnes* (1926) 43 TLR 71, although that “will” failed for lack of testamentary intention.

14. *Kell v Charmer* (1856) 23 Beav 195 (53 FR 76).

15. *In the Estate of Cook* [1960] 1 WLR 353.

16. Hardingham, Neave and Ford. *Wills and Intestacy in Australia and New Zealand* (1983) pp28-29: Williams. *Law Relating to Wills*. 5th ed. Vol 1. Pp 83-85.

17. *In the Goads of Chalcraft* [1948] P 222: *Re Colling* [1972] 3 All FR 729: [1972] 1 WLR 1440: *In re Smith* (1955) SASR 227.

18. See note 17.

19. *In the Goods of Clark* (1839) 2 Curt 329 (163 ER 428): *In Goods of Bailey* (1838) 1 Curt 914 (163 FR 316).

20. Williams, note 16 above, at pp84-85: *In the Estate of Haltam* (1913)108 LT 732: *In Goods of Marshall* (1866) 13 LT 643.

21. *In Goods of Bailey* (1838) 1 Curt 914 (163 FR 316).

22. Mellows, *The Law of Succession* (1977) 3rd ed, p74.

23. *In re Stalman* (1931) 145 IT 339: *In the Goods of Harris* [1952] P 319: *In the Estate of Roffe* (1920) 20 SR (NSW) 632: *Re Beadle (deceased)* [1974] 1 All ER 493.

24. See Hardingham. Neave & Ford, note 16 above, pp34-36. Williams. note 16 above. pp80-81.

25. *In the Will of Everingham* (1900) 21 LR (NSW) (B & P) 15: *In Estate of Roberts* [1934] P 102.

26. [1946] P 171.

27. Hodgekiss, *Hornby's Case and Signatures to Wills* (1953) 26 ALJ 575: Hardingham, Neave and Ford. note 16 above, p35.

28. *Cinnamon v Public Trustee* (1934) 51 CLR 403.

29. *In the Will of Plain* (1927) 27 SR (NSW) 241: *In the Will of Smith* (1965) Qd R 177.

30. *Rayle v Harris* [1895] P 163: *Re Alice* [1960] VR 481: *In Re Robertson* (1972) 2 SASR 481.

31. *In the Will of Maroney* (1928) 28 SR (NSW) 553; *In re Roberts* (1928) SASR 175.

32. Eg Harvey J in *Estate of Roffe* (1920) 20 SR(NSW) 632 at 634.

33. Mellows, *The Law of Succession* (1977) 3rd ed. p75.

34. [1974] 1 All FR 493.

35. (1969) 89 WN (Pt 1) (NSW) 641.

36. Hardingham Neave and Ford. note 16 above. p32

37. *Re Groffman* [1969] 1 WLR 733:[1969] 2 All FR 108.

38. See cases cited in *Theobald on Wills* 14th ed (1982) p44 and 35 and Hardingham, Neave and Ford. note 16 above, p39 n 44.

39. *In the Estate of Gibson* [1949] P 434.

40. *Hudson v Parker* (1844) 1 Rob Ecc 14 at 24 per Dr Lushington, *cited in Will of Morgan* [1950] VLR 335 at 337-8 per Dean J.

41. *In the Goods of Gunstan* (1882) 7 PD 102.

42. *In the Will of Morgan* [1950] VLR 335: *In re Groffman* note 37 above.

43. *In re Groffman* note 37 above.

44. See *Casement v Fulton* (1845) 5 Moo PC 130 (13 ER 439) and The Fourth Report of the Real Property Commissioners (1833) pp17- 18.

45. *In the Goods of Eynon* (1873) LR 3 P & D 92.

46. *In the Goods of Maddock* (1874) LR 3 P & D 169.

47. *Sweetland v Sweetland* (1865) 4 Sw & Tr 6 (164 ER 1416); *Re Beadle* [1974] 1 All ER 493.

48. *In the Estate of Bercavitz* [1962] 1 All ER 552.

49. *Casson v Dade* (1781)1 Bro CC 99(2 ER 1010): *Carter v. Seaton* (1901)85 LT 76: *In the Will of Callow* (1918) VR 406.

50. As to privileged testators see generally Chapter 11.

51. The presumption may he rebutted by internal evidence on the face of the document or extrinsic evidence such as the observations of an attesting witness.

52. *In Will of Phillips* (1932) 50 WN (NSW) 2; *Re Delves* 1 VLR (IP & M) 33.

53. *Re Sanders* (1944) SASR 22; *Re Melver* [1975] Qd R206.

54. *Re O'Connor* (1934) QWN 18: *In Will of Riddell* (1880)6 VLR (IP & M) 5.

55. *In Goods of Horsford* (1874) LR 3 P & D 211.

56. *In Goods of Itter* [1950] P 130.

57. Eg *Soar v Dolman* (1842) 3 Curt 121 (163 FR 675) where the original amount of the legacy was restored.

58. *In Goods of James* (1858) 1 Sw & Tr238 (164 FR 709).

59. As to the doctrine of dependent relative revocation. See Hardingham, Neave & Ford. note 16 above, para 612.

60. [1950] P 130.

61. See, generally *In Will of F J Page* [1969] 1 NSWLR I and Geddes & Rowland. Revocation by later will: relevance arid proof of intention (1984) 58 *ALJ* 186. Compliance with the requisite formality (eg total destruction) without there being an actual intention to revoke will not be enough see eg *Re Wright* [1970] QWN 28: *Lippe* r *Hedderwick* (1922) 21 CLR 148.

62. Wills, Probate and Administration Act. 1898. s16.

63. Section 15 deals with revocation by marriage. Despite the mandatory terms of s17(1), *semble* there is one additional means of partial revocation An intentional obliteration of part of a will which leaves the original words non-apparent is a valid alteration and probate will be granted with the obliterated parts being left blank: 518(1): *In Goads of James* (1858) 1 SW & Tr.238 (164 ER 709). Arguably this falls within 517(3)(b) (destruction").

64. As to privileged testators. see Chapter 11.

65. Gulliver and Tilson, *Classification of Gratuitous Transfers* (1941) 51 Yale LJ p3.

66. Gulliver and Tilson. *Classification of Gratuitous Transfers* (1941) 51 Yale LJ 1: Fuller. *Consideration and Form* (1941) 41 Cal FR 799: Fangbein. *Substantial Compliance with the Wills Act* (1975) 88 Harv LR 489: Nelson and Starck, *Formalities and Formalism: A Critical Look at the Execution of Wills* (1979) 6 Pepperdine LR 331.

67. For the meaning of the term, see para 2.11

68. Note 65 above, p351.

68. Fuller, note 65 above. p801.

70. Law Reform Commission of British Columbia. *Report an the Making and Revocation of Wills.* (1981) p25.

3. Our General Approach To Wills Formalities

3.1 It has been seen (Chapter 2) that, although formalities serve various purposes which are generally beneficial to the community, they can cause inconvenience or even, in particular cases, lead to the invalidity of a particular "will" or save a will from its intended revocation Much of this Report will be concerned with investigating whether the present law of wills formalities preserves a proper balance between serving these generally useful purposes and giving effect to the real intentions of individual testators.
3.2 The law of wills is designed to facilitate the transfer of property after death. But, trite though the observation is, this law must operate at a time after the principal actor has left the stage. The fact of death removes the best witness, leaving the court with only secondary materials with which to judge what that witness really intended. The law must also contemplate that other observers *who* could assist in the determination of what the testator wanted may themselves die before the testator or forget what really happened. Once one adds the possibility of witnesses being affected by rancour, self- interest or downright dishonesty it is easier to see why, in the past, the law has tended to shy away from evidence that may be contentious or dependent upon information other than that bearing the unmistakable stamp of the testator's approval. A will made in writing and executed in accordance with certain prescribed formalities has traditionally been seen as the surest method of ascertaining the testator s true intentions.

3.3 But experience has shown many examples of testators' apparently clear intentions being defeated by non-compliance with these formalities. From time to time judges and legal commentators have expressed regret at the particular result achieved in specific cases. However the problem for the law reformer considering whether or not to recommend change in the law, is the possibility that the particular formality that caused one testator's "will" to founder may have ensured that several testators were protected from having their intentions defeated by mistake, carelessness, fraud, undue influence or the simple absence or forgetfulness of witnesses.

3.4 For a variety of reasons, would- be beneficiaries are often disappointed in their hopes of inheritance. Disappointed expectations can lead to disputes. particularly amongst members of a family. One of the law's functions is to promote the settlement of disputes and it is vital that its rules (in this case wills formalities) lead to solutions which are likely to have broad acceptance and accord with what is generally regarded as fair.

3.5 As will become apparent, we think that the operation of some of the formalities relating to the making and execution of wills are generally regarded as unfair and are unnecessary to achieve the proper purposes to which we have already referred. In some respects we believe that the present law tends to frustrate the wishes of testators in more cases than are validly served by such formalities. This is partly due to the fact that it provides an all-or-nothing solution in which the slightest slip can invalidate a will, with no right to excuse non-compliance in cases where, despite the slip, it is clear that the testator intended to make a will. Some indication of the present injustice of some of the rules is given by the clear willingness of judges to cut them down or, in lawyers' terms, "distinguish" them, and the growing body of exceptions to some of the rules. Other indications are the criticisms voiced by judges and writers and the steps taken in other jurisdictions to change some of these rules - steps which in many cases appear to be working satisfactorily.

3.6 The Commission's general approach has been to simplify the statutory formalities relating to the making and revocation of wills where this can be done without undue risk. The general objects of our proposed reforms are twofold:

> to retain the liberty of the testator to dispose of his or her property; and
>
> to ensure as far as possible that wills which are recognised as legally valid (admitted to probate) represent the final wishes of a free and capable testator.

Neither object can be fulfilled in its entirety and the law must find the best possible balance between them. we have struck the balance between these two broad objectives in a manner which seems to us to be most reasonable and fair for New South Wales in the latter part of the twentieth century.

3.7 To the extent that we have been prepared to recommend modification of existing rules of wills formalities. this has been largely because we consider that the modern laws of evidence and court procedure are effective to separate truth from error, without the need of those rigid rules. We have also been prepared to recommend the repeal or modification of formalities where it is our view that they serve no apparent function other than the frustration of the genuine and ascertainable intentions of testators.

FOOTNOTES

1. The Family Provision Act, 1982 is designed to allow the Court to vary or set aside the terms of wills where testators have failed to give effect to proper obligations owed to members of their family or other “eligible persons”.

4. Proposals For Specific Reform of Execution Formalities

I. INTRODUCTION

4.1 Chapter 3 outlined our broad approach to the examination of wills formalities. In Chapter 6 we recommend the enactment of a general dispensing power to enable the court to validate particular acts of will-making or revocation which do not comply with the prescribed formalities but which nevertheless are found to express the genuine intentions of testators. But such a proposal does not exclude the possibility of specific changes to the existing formalities, whether by way of addition, modification or repeal Indeed, where changes are clearly called for, it is better to modify the formalities than to leave parties to the cost and risks involved in an application to invoke the dispensing power. In this chapter we consider the desirability of certain specific reforms to the formalities of due execution: in the next chapter we shall examine some specific proposals relating to revocation formalities.

4.2 Three broad areas are discussed in this chapter:

- proposals for certain additional formalities, namely
  - execution before an authorised person
  - deposit of wills
  - registration of wills
- proposals to allow certain types of presently informal wills, namely
  - oral wills
  - videotape wills
  - holograph wills
- proposals for the relaxation of specific execution formalities, namely those relating to
  - the position of the testator’s signature the joint presence of two witnesses when the testator signs or acknowledges
  - the requirement that witnesses sign after the testator has signed or acknowledged his or her signature
  - the joint presence of two witnesses when the witnesses sign.

II. SHOULD THE EXECUTION FORMALITIES BE STRICTER?

4.3 Bearing in mind that prescribed formalities may play various useful functions (see Chapter 2). it is necessary to consider whether any additional formalities relating to will-making should be imposed. Naturally, this will require examination of the efficacy of such additional formalities in achieving what are seen to be beneficial goals. It should also be borne in mind that the impact of any such additional requirements may be tempered by the provision of a dispensing power which would endeavour to ensure that non- compliance with formalities only defeated wills in appropriate cases.

A. Execution before an authorised person

4.4 From time to time suggestions have been made that the law should require that wills be recorded or witnessed by an authorised person such as a notary public.[1] This is the procedure in most countries with a legal

system derived from civil law although in many such instances it is permissible, by way of exception, for a person to make a holograph will.[2] In 1971 in a report on Home- Made Wills, Justice, the British Section of the International Commission of Jurists, argued in favour of increasing the formal requirements for a valid will by requiring wills to be witnessed by the English equivalent of a notary[3]. The report argued that the need to have a will formally executed in the presence of a Commissioner for Oaths or probate official would indirectly lead more testators to take proper legal advice before executing their wills, would eliminate problems of formal invalidity, and would form a more effective barrier against blatant forms of undue influence.[4]

4.5 We do not support such a proposal for a number of reasons.[5] It represents a radical departure from the present regime, about which there is fairly widespread public knowledge. Any stich proposal would add to the cost of will- making and would serve to deter some people from making a will at all, because of the cost, nuisance or intrusion upon privacy involved in dealing with a notary or other official Because of the long history in our legal system of the "home-made" will stich a change would be likely to lead to confusion without demonstrable resultant benefit. Problems would arise in relation to "death bed" wills. The suggestion that stich a procedure would provide some check against certain forms of undue influence may be accepted, but we are not convinced that the price is worth paying in an area of the law which is already "notorious for its harsh and relentless formalism"[6].

4.6 We therefore recommend that **there should continue to be no requirement that wills be executed before a notary or other authorised person.**

B. Deposit of Wills

4.7 Section 32 of the Wills, Probate and Administration Act 1898 enables any resident of New South Wales to deposit his or her will in the Probate Registry together with information designed to assist in the ready identification and location of the executors The will is sealed up and is not available to be inspected by the public, although the fact that a will has been lodged can be ascertained by searching the relevant index at the Probate Registry. There are similar provisions in some of the other Australian jurisdictions and in the United Kingdom.[7] None of them make lodgement mandatory. This seldom-used facility[8] is designed to overcome the problem of wills being lost and the resultant confusion and uncertainty that this causes.[9] It would be desirable if testators were advised of the existence of the facility.

4.8 We recommend that **there should be no requirement that wills be deposited in order to be valid**. The objections to compulsion are similar to those against a compulsory notarial system (discussed at para 4.5). Even if it were possible to overcome all privacy issues by keeping confidential the very fact that a will had been deposited until after the testator's death, there remains the fact that such a requirement would invalidate many home-made wills as well as add to the expense of will-making.

C. Registration of Wills

4.9 As an alternative to the compulsory deposit of wills, suggestions have been made from time to time that it be mandatory that certain facts about each will be recorded in a registry within a certain time after its execution Such suggestions envisage that wills would be invalid unless registered within a prescribed time limit.[10]

4.10 We do not favour any such proposals, for reasons similar to those already stated. We consider it to be an unwarranted and costly invasion upon testators privacy without any net tangible benefits. It would certainly lead to a number of wills that were otherwise made in perfectly proper circumstances being struck down for non-compliance with an additional formality, unless saved by some judicial power of dispensation It has fewer benefits than deposit because it may provide evidence of "missing" wills but no details of their contents. The actual will could still be lost We therefore recommend that **there should be no requirement that particulars relating to wills should be registered.**

III. SHOULD ORAL, VIDEOTAPE OR HOLOGRAPH WILLS BE INTRODUCED?

4.11 All wills must be written and executed in accordance with the statutory formalities unless the testator is "privileged" (ie a soldier or seaman placed in particular circumstances: see (Chapter 11). In this section we consider whether the law should generally permit certain types of presently informal wills, namely;

oral wills

videotape wills

holograph wills

A. Oral Wills

4.12 In England, nuncupative or oral wills were effective with respect to all types of property up to 1540, and, in respect of personal property, up to 1837. However their use declined after 1677 (see paras 2.2-2.8) and, except for privileged wills, they were abolished in 1837. The same situation has prevailed in New South Wales since 1840. Oral wills are permitted in some overseas jurisdictions, often subject to a requirement that they be reduced to writing.[11] They are said to afford a dying person who has no opportunity to make a formal will the privilege of making a last minute oral disposition.

4.13 The Lord Chancellor's Law Reform Committee considered whether such wills should be introduced in England (with, perhaps, a limitation upon their availability based on the size of the estate disposed of) and concluded:

> The overwhelming response of our witnesses was against the introduction of nuncupative wills on the basis that they would create uncertainty and give rise to litigation because of the difficulties of proving and interpreting oral statements. It would be difficult to fix an upper financial limit and any limit would continually have to be adjusted to take account of inflation As there is no clear demand for nuncupative wills, we conclude that there is no case for any change.[12]

4.14 We recommend that **oral or nuncupative wills should not be introduced**, either generally or subject to qualifications. We agree with the reasons expressed by the Lord Chancellor's Law Reform Committee and would add that the present intestacy rules coupled with the availability of relief pursuant to the Family Provision Act, 1982 reduce the evils of intestacy.

B. Videotape Wills

4.15 In para 2.12 we noted that the requirement that a will be in writing precludes the use of videotape as the means of recording a valid will. From time to time suggestions have been made that testators should have the freedom to make a "videowill" whereby they can speak "live" to those whom they choose to inherit and disinherit. It has been argued that this would enable the court to examine clearly "the testator himself his disposition, his voice and its inflections, his intent,[13] and that such wills would thereby perform an "evidentiary" function of assisting in the resolution of disputes about testamentary capacity.

4.16 However, although a videotape would generally avoid any difficulty of proving the words used, it has one of the substantial disadvantages of oral wills in that there is likely robe less attention to accuracy of expression and detail. Further, the time taken to play through tapes compared to the time involved in reading documents makes tapes unattractive to process in large numbers, ie tapes perform the "channelling function" (cf para 2.49) very poorly. Testators who desire to speak "live" to their beneficiaries are free to make their own video in addition to a will and persons intent upon preserving "living" evidence of the testator s pbysical and mental condition may film the testator whilst he or she is in the act of will- making in the traditional manner. These commments apply a *fortiori* to wills recorded just on sound tape. For these reasons we recommend that videotape wills should not be introduced.

C. Holograph Wills

4.17 A holograph will is written in the handwriting of the testator and is signed by the testator without there being any requirement for attestation. Holograph wills were recognised as effective in France under the Napoleonic Code and have been adopted in many civil law jurisdictions, in more than twenty States of the United States of America and in the majority of the Canadian provinces and territories.[14] It has been claimed that the majority of wills in Germany and in France are holograph wills.[15] It has been pointed out that the holograph will:

> is the simplest and most commonly used [in France.] The only requirements are that it should be written entirely by the hand of the testator and dated and signed in his handwriting This form has the obvious advantages of cheapness, simplicity and secrecy. On the other hand, there are the very real risks of forgery, undue influence and difficulty of construction of its terms.[16]

4.18 Although there has been relatively little litigation in the United States and in Canada relating to holograph wills, some serious difficulties have been indicated in the judicial decisions. These relate to what will suffice as an effective signature to a holograph will,[17] the requirement for the entire will to be written in the testator's handwriting,[18] and whether particular informal instruments were made with testamentary intention and constituted wills.[19] As Nelson and Starck point out:

> Holographic wills, though required to be in writing, are often cast in very conversational tones which have the reader wondering whether the expression was nothing more than a segment of the writer's "stream of consciousness" instead of a finalized act.[20]

4.19 The Lord Chancellor's Law Reform Committee in the United Kingdom recommended against the introduction of holograph wills on the following grounds:

> Despite the fact that there is no evidence that holograph wills do not operate successfully elsewhere, the majority of our witnesses thought that they would be likely to be confused with draft wills, would give rise to difficulties of interpretation and would provide no safeguard against forgery, insanity or undue influence. Further, the evidence suggested that it was well known that the present law required a will to be witnessed and that there was no demand for holograph wills. In the light of this evidence we do not see any case for change.[21]

English commentators have accepted this conclusion, on the basis that the difficulties with holograph wills outweigh the advantages,[22] or because the better way to deal with unattested wills is by relying on a judicial dispensing power rather than by recognising holograph wills.[23]

4.20 In Canada, the Ontario Law Reform Commission recommended the recognition of holograph wills.[24] The Commission listed the following arguments against holograph wills:

> 1. The presence of two witnesses lessens the possibility of forgery. Or makes it easier to prove that the will is the will of the testator.
>
> 2. A provision for holograph wills would induce more people to prepare their own wills and this, in turn, would lead to:
>
> (a) additional litigation involving interpretation of home-made wills: and
>
> (b) unintelligent disposition of estates.
>
> 3. The provision for holograph wills would raise problems and litigation as to what is and what is not a will.
>
> 4. A holograph will lends itself more readily to fraud or undue influence than does a will executed with the safeguard of witnesses.[25]

The Commission answered these arguments as follows:

> 1. If anything, it would seem that a will completely in the handwriting of the testator can more easily be proved to be his will than a printed or typewritten document which he merely signs, the presence of witnesses notwithstanding.
>
> 2. It is open to question whether a provision for the making of holograph wills would appreciably increase the number of home-made wills. It is more likely that it would merely make valid some of the attempts at home-made wills which are being made under the present system.

3. Jurisdictions which have had experience with a provision permitting holograph wills have found that such wills do in fact create some additional problems. The Commission believes this is not a valid reason for denying such wills validity.

4. It would be very difficult to induce a testator by fraud or trickery to make a holograph will through ignorance of its contents...The presence of witnesses is no guarantee against fraud. The real value of witnesses in guarding against undue influence is open to considerable doubt.

4.21 In 1981 the Law Reform Commission of British Columbia considered whether holograph wills should be accepted in that Canadian province.[26] The arguments in favour of permitting holograph wills were summarised as follows:

(i) Such a provision will assist those in circumstances where it is difficult to comply with the formal attestation requirements, *viz*:

(a) those living in remote areas without access to solicitors;

(b) those in extremis who have no opportunity to arrange for the preparation formal execution of a will;

(c) those who, because of poverty, ignorance or prejudice. cannot or will not consult a solicitor.

(ii) The majority of Canadian provinces provide for holograph wills, and such an enactment promotes uniformity of legislation in Canada.

(iii) The stated policy of the law is to validate wills where possible.

The Commission referred to the difficulty of attributing testamentary intention to some instruments, such as letters, which might otherwise be holograph wills and considered that

The objection that the introduction of holograph wills will result in new problems is well taken Although the problems so generated are far from insoluble, their existence detracts somewhat from the desirability of holograph wills.[27]

The Commission concluded that a holograph will is merely a type of informal will and that policies which support the introduction of holograph wills equally support broader proposals such as the granting of a dispensing power to the courts which should apply to all wills It did not favour the introduction of holograph wills as such, but was prepared to encompass holograph wills by conferring a judicial dispensing power from some formalities.

4.22 In deciding whether we should recommend the introduction of holograph wills, it is worthwhile examining the policy criteria outlined in paras 2.40-2.49. The major justification for holograph wills is that they satisfy the evidentiary function of will formalities An instrument which is entirely written by the testator, as well as signed, is said to furnish cogent evidence that it is genuine, notwithstanding that there is no requirement for witnesses The handwriting and signature partially fulfil a protective function, but holograph wills do not fulfil the protective function of preventing fraud or undue influence. “A holographic will is obtainable by compulsion as easily as a ransom note”.[28] Furthermore, holograph wills do not adequately fulfil what have been labelled as the cautionary or ritual function (cf para 2.47) and the channelling function (cf para 2.49) of will formalities.[29]

4.23 We recommend that holograph wills should not be accorded validity as a special class of informal wills. This conclusion is reached for the reasons expressed by law reform Commissions in the United Kingdom and in British Columbia. There is no tradition in Australia for the use of holograph wills If the requirement to use witnesses were relaxed in the case of holograph wills, testators could be misled into thinking any will prepared by themselves, in whatever form, would be valid without the need to involve witnesses. For example, a statutory requirement that a holograph will should be wholly in the testator’s handwriting,[30] would probably not be satisfied where the testator adopted a printed form of will purchased at a newsagent. There are no other Australian jurisdictions where holograph wills are valid, so that the uniformity argument, which favours their introduction in North America, works against their introduction in New South Wales.

IV. SHOULD THE EXECUTION FORMALITIES BE RELAXED IN SPECIFIC WAYS?

4.24 As we said in para 4.1, although we favour the introduction of a general dispensing power (see Chapter 6), we think that there are particular areas where the existing law should be changed. It prescribes formalities that operate to strike down otherwise valid instruments without serving sufficiently well any of the appropriate functions discussed in Chapter 2. We consider it appropriate that these particular formalities be relaxed generally, and that it is undesirable that the law should require persons wishing to rely upon wills affected by non-compliance with them to go to court seeking dispensation. Whilst a dispensing power should be available as a "long stop",[31] there is a risk that cost factors or the unavailability of vital evidence may discourage or preclude resort to it in an otherwise appropriate case.

4.25 We shall also consider one area where there are arguments supporting change which, on balance, we reject (paras 4.32-4.34).

A. Position of Testator' s Signature

4.26 The state of the existing law is summarised in paras 2.15-2.22. It is complex, confusing and far from consistent, While legislation requiring the testator's signature to be in a particular place on the will is designed to prevent unauthorised interpolation, we agree with the comment of the Victorian Chief Justice's Law Reform Committee that:

> The judicial ingenuity exercised in deeming an oddly placed signature to be at the foot or end of a propounded document for the purposes of sections 7 and 8 suggests that, once a court is satisfied that it is "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", very little more will be required for it to conclude that the signature is not misplaced.[32]

However, there have been cases where apparently genuine dispositions were defeated despite expressions of judicial regret about being driven to such conclusions. We consider that modern judges, assisted by scientific aids to detection of forgery and rules of evidence that provide greater scope for "getting at the real facts", are reasonably capable of detecting unauthorised interpolations. In these circumstances, it is better to cast the evidentiary onus upon those seeking to argue that such interpolations occurred than to strike down wills simply because signatures are not placed in a particular position on the document.

4.27 In Western Australia and the United Kingdom there is no longer any requirement that the signature be in a particular spatial relationship to the provisions of the will There is however a significant difference between the two statutory provisions.

> In Western Australia[33] the testator is required to sign "in such place on the will so that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as his will".
>
> In the United Kingdom[34] it is provided that:
>
> "9. No will shall be valid unless -
>
> (a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction, and
>
> (b) it appears that the testator intended by his signature to give effect to the will..."[35]

4.28 Although the Report of the Lord Chancellor's Law Reform Committee which preceded the enactment of the United Kingdom provision recommended that "a will should be admitted to probate if it is apparent on the face of the will that the testator intended his signature to validate it",[36] the United Kingdom section does not have such a restriction.[37] In contrast, the Western Australian Act, which requires the testator's intention to be "apparent on the face of the will" seems to exclude extrinsic evidence of the testator' s intention in cases of doubt.

4.29 We see no compelling reason wby a will should be invalid simply because the signature is at the top of the document or even on an envelope which contains a will referred to as being inside.[38] In most cases it will be

obvious on the face of the will that the signature was placed by the testator with the intention of validating the will, but we would not wish to exclude other evidence that this was done. Therefore we suggest that legislation be drafted along the lines of the United Kingdom provision. This allows extrinsic evidence of the testator's intention in signing a document (including an envelope containing a will: cf *Re Beadle*[39]) to be admitted in appropriate cases.

4.30 There is one additional matter of detail not dealt with in the United Kingdom section which should be covered.[40] As we pointed out in para 2.14 a testator unable to write may use an agent to sign provided that the latter does so in the testator's presence and at the testator's direction Section 9(b) of the United Kingdom provision (see para 4.27) does not expressly extend to an agents signature. The possibility of this mode of execution should be clearly included in any similar provision in New South Wales.

4.31 We therefore recommend that in lieu of the provisions in sections 7 and 8 of the Wills, Probate and Administration Act, 1898 about the position of the testator's signature, the Act should require that it appear (on the face of the will or otherwise) that the testator intended to give effect to the will by making his or her signature or directing some other person to sign on his or her behalf.

B. Joint Presence of Two Witnesses When Testator Signs or Acknowledges

4.32 As we pointed out in paras 2.25-2.26, the existing law requires the testator to perform the relevant act of signing or acknowledging his or her signature in the joint presence of two witnesses. Why isn't one witness sufficient? What is wrong with allowing the testator to sign in the sole presence of one witness and then to acknowledge his or her signature in the sole presence of another?

4.33 One good reason for requiring the joint presence of two witnesses is to ensure that there are two people to observe and, hopefully, later give evidence about the testator's apparent capacity and understanding. Since each is the observer of the testator at the same time, it is possible to test the evidence of one witness by comparing it with that of the other, and thereby reach a greater level of satisfaction as to any contested issue of capacity or understanding.

4.34 The existing requirement also serves to make it considerably harder for forgery or fraud to occur. As the English Real Property Commissioners commented in their Fourth Report (1833) which was the basis for the law now found in the New South Wales Act of 1898:

> we think it expedient and sufficient to require two witnesses ... The protection against forgery is greatly increased by requiring a second witness, on account of the difficulty of engaging an accomplice, the necessity of rewarding him, and the danger to be apprehended from his giving information, or not being able to elude a discovery of the fraud by a searching cross- examination We think it expedient not to require more than two witnesses but of course the number should not be restricted.[41]

For these reasons we recommend that there should continue to be a requirement of the joint presence of two witnesses to the testator' s act of signing or acknowledgement of signature.

4.35 As we pointed out in para 2.14 the testator may use an agent to sign provided that such person signs in the presence and by the direction of the testator, and it has been held that the agent may also be one of the two attesting witnesses.[42] We are aware of no reported instances in the last century of an attesting witness assuming this dual role, let alone abusing the right, and for that reason alone make no recommendation for change.

C. Witnesses Signing After the Testator Makes or Acknowledges Signature

4.36 Section 7 of the Wills, Probate and Administration Act, 1898 (set out in full in para 2.11) provides that the testator's 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 subscribe the will in the presence of the testator". Two separate rules have been derived by the courts from this provision.

4.37 First, attesting witnesses, unlike testators, must actually sign (" subscribe") the will in the presence[43] of the testator if one or both of them simply acknowledges a signature made outside the testator's presence the will is invalid.[44]

4.38 Secondly, the testator's signature must be either written or acknowledged by the testator in the presence of both witnesses together, before either of them attests and signs the will. The witnesses "cannot be distributed between a signature and an acknowledgement.... they must either both sign after seeing or having the opportunity to see an acknowledged signature, or both sign after an actual signature in their presence.[45]

4.39 These rules have led to wills being invalidated in circumstances where there was a purely unintentional slip and no suggestion of fraud or undue influence. Examples of the inequitable operation of these rules include:

> A testator who was a patient in a hospital asked another patient and a nurse to witness his signature, but while he was signing, and before he had completed his signature the nurse was called away to attend another patient. The testator nevertheless continued signing and the other witness then signed. When the nurse returned, the testator and the other witness both acknowledged their signatures and the nurse added her signature. The first subscribing witness had already signed before the testator acknowledged his completed signature in the joint presence of the nurse and that witness and, not surprisingly, it was not perceived that the first witness need sign again Nevertheless the will was invalid: Re Colling.[46]
>
> A testator produced his will to one witness, pointed to his signature already on it and asked the witness to sign it, which he did. A second witness was then called in After the testator pointed to the two signatures already on the will, the second witness signed, all three being present. The will was invalid: Wyatt v Berry.[47]
>
> A testatrix signed her will in the presence of one witness who then signed it. Whilst the witness was writing her name on the document a second witness entered the room. After the testatrix signified to him that the document was her will which she wished him to attest and had acknowledged her signature on it to him he also signed as a witness. The will was invalid: Re Davies, Re Bladen.[48]

In each case the will was invalid because the first witness signed the will before the testator acknowledged his or her signature in the joint presence of the witness There are numerous reported instances of wills failing through such slips,[49] and in many of them eminent judges have deplored the fact that the intentions of testators have been defeated on technical grounds.[50]

4.40 The injustice of these rules and their capacity to defeat testamentary intentions without serving any worthwhile function has been adverted to by various law reform agencies.[51] Debate has centred around whether the appropriate remedy is a specific statutory reversal of the rule or whether a general dispensing power should be created which can be invoked in appropriate cases. In our view the rule serves no useful function and has often destroyed otherwise valid wills. We do not see wby estates should be put to the expense and uncertainty of making application for its displacement and we recommend the legislative abrogation of the rule itself.

4.41 This still leaves the question as to the most appropriate way to legislate in order to effect stich a reform. On the recommendation of the Lord Chancellor's Law Reform Committee,[52] the English Wills Act was amended by prescribing that each witness either

> (i) attests and signs the will; or
>
> (ii) acknowledges his signature, in the presence of the testator.[53]

4.42 This repeals the effect of Re Coiling but probably not the judicially-developed prohibition against the distribution of witnesses between the testator s act of signing and acknowledging his or her signature. In the Re Coiling situation discussed in para 4.39 an amendment which allowed a witness to acknowledge his or her signature in the presence of the testator would have saved the will because the witness who remained throughout acknowledged his signature in the presence of the testator. However in the other cases discussed (Wyatt v Berry, Re Davies and Re Bladen), the first witness did not acknowledge his signature, which had been placed on the document in the presence of the deceased and before the second witness entered the deceased's

presence. We consider that there is no reason in principle wby both categories of technicality should not be removed. We therefore recommend that section 7 be amended so as to require the two witnesses to attest and sign the will in the presence of the testator either by each signing after the testator makes or acknowledges his or her signature or that of his or her agent, or by one signing after the testator or his or her agent makes his or her signature and before the testator acknowledges that signature and the other signing after the testator has acknowledged that signature. Where one of the witnesses signs before the testator acknowledges, the joint presence of witnesses at the time of acknowledgement (para 4.34) remains essential.

D. Joint Presence of Two Witnesses when Witnesses Sign

4.43 If our recommendations are adopted s7 will have to be recast. In that event we recommend that it be made clear that the witnesses need not sign in the presence of each other. Whilst the weight of authority supports wills where the witnesses do not sign in each others presence[54] and the practice is for witnesses in fact to sign in each others presence, some doubts have been expressed in view of an obiter dictum in the Privy Council in *Casement v Fulton*.[55] We suggest that the matter be put beyond doubt when s7 is recast.[56] We recommend that the Act be amended to make clear that witnesses need not sign in each other's presence. Any requirement that they should do so would not in our view provide any protection against imposition upon a testator but would merely add an additional formal step in an already complicated procedure.

FOOTNOTES

1. A notary public is a specially authorised person who attests the execution of documents or makes certified copies of them in order to render the same authentic.

2. A holograph will is one written in the handwriting of the testator and signed by the testator but not witnessed otherwise complying with any formalities.

3. *Home-made Wills*, A Report of Justice (1971) para 5. The report recommended the introduction of an optional national system on a trial basis for ten years as a preduce to making a decision whether to make it compulsory (para 19).

4. *Id* para 6.

5. We have drawn largely upon criticisms of the Justice proposal by Miller, *The Machinery of Succession* pp 151-152: the Lord Chancellor's Law Reform Committee Report on *The Making and Revocation of Wills* (1980) Cmnd 7902 para 2.23: Davey, the *Making and Revocation of Wills* (1980) The Conveyancer 64 at p74; and the Law Reform Commission of Tasmania *Working Paper on Reform in the Lame of Wills* (1981) at p27.

6. Langbein, Substantial Compliance with the Wills Act, (1975) 88 *Harvard Law Review* p489.

7. Wills Ordinanec 1968. ss52-54 (ACT): Public Trustee Act, 1978, s65(2) (Qld): Wills Act, 1958, ss58-41 (NT): Public Trustee Act 1941, s54 (WA): Administration of Justice Act 1982, ss25-26 (UK).

8. Less than five wills are deposited each year. compared with about 20,000 estates processed each year by the Probate Division: information supplied to the Commission by Mr Leslie James, Registrar in Probate, on 31 July 1985.

9. If the court is satisfied that a missing will was not destroyed by the testator with the intention of revoking it, probate may he granted of all or part of the lost will provided that its contents can be established.

10. Eg. The Law Commission, Should English Wills be Registrable? (1966) Working Paper No 4.

11. Eg. in Scotland for small bequests, in some States of the United States and in Spain, as discussed in Report on *The Making and Revocation of Wills* of the Law Reform Commission of British Columbia. pp25-26.

12. Twenty-second Report on the Making and Revocation of Wills, at pp8-9.

15. Eg. Nash, A Video will: Safe and Sure (1984) 70 A 11 A Journal 87.

14. Law Reform Commission of British Columbia Report on the *Making and Revocation of Wills*, p34: Yates. Wills - Validity of Signature for Holographic Wills (1975) 28 Arkansas Law Journal 521: Best, Holographic Wills in Montana - Problems in Probate (1963) 24 Montana Law Review 148.

15. Cohn, *Manual of German Law* (1968) Vol 1, pp273-274: Amos and Walton. Introduction to French Law, 3rd ed, p318.

16. Amos and Walton. note 15 above. p318.

17. Yates, note 14 above.

18. Best. note 14 above p149. Statutes directing that the will be "entirely in the testator's handwriting have produced a large and ugly case law voiding wills which contained some innocuous printed matter": Laugbein, Substantial Compliance with the Wills Act, (1975) 88 *Harvard Law Review* 489 at p519.

19. Best. note 14 above, pp155-159.

20. Nelson and Starck, Formalities and Formalism: A Critical look at the Execution of Wills (1979) 6 *Pepperdine Law Review* 551. at p349.

21. Report on the Making and Revocation of Wills (198f)(Cmnd 7902, pp9-10).

22. Davey, *The Making and Revocation of Wills* (1980) The Conveyancer 64, at p75.

23. SM, (1981) 125 Solicitors' Journal p265.

24. The Proposed Adoption in Ontario of the Uniform Wills Act (1968).

25. *Id*, pp10-11.

26. Report on the Making and Revocation of Wills, pp34-39. In 1980, the Manitoba Law Reform Commission discussed some difficulties with holograph wills in its report on *"The Wills Act"* and the Doctrine of Substantial Compliance. However, that discussion occurred in the context of reform proposals relating to granting courts a dispensing power with reference to formalities, and holograph wills are currently recognised in Manitoba. The Commission did not consider whether the provisions permitting holograph wills should be repealed.

27. *Id,* p36.

28. Gulliver and Tilson. Classification of Gratuitous Transfers (1941) 51 Yale LJ 1 at p14.

29. Fuller, Consideration and Form (1941) 41 Col L R 799. at p804.

30. And stich is the requirement in most Canadian jurisdictions and most American jurisdictions allowing such wills: see Manitoba Law Reform Commission Report on The Wills Act and the Doctrine of Substantial Compliance (1980) at p9 and Langbein. note 18 above, p519.

31. SM. (1981) 125 Solicitors Journal p264.

32. Report on Execution of Wills (1984) para 7.3.

33. Wills Act. s8(b).

34. Administration of Justice Act 1982, s17.

35. The Victorian Chief Justice's Law Reform Committee has recently recommended adoption of the English provision in its Report on Execution of Wills (1984) para 7. For the suggested recasting of section 7, see ibid para 12.1

36. Report on The Making and Revocation of Wills (1980) Cmnd 7902 para 2.8.

37. In contradistinction to other sections in the same Act: see Mackay, Statutory Reform in the Law of Wills (1985) *NLJ* 861. If. as we suggest extrinsic evidence should be available this should be clearly indicated in the relevant section.

38. The authorities are divided on whether a signed envelope containing a list of intended testamentary dispositions is valid: In Goods of Mann [1942] P146: *In Will of Curry* (1945) 46 SR (NSW) 158: cf *In Estate of Bean* [1944] 185: Re Beadle [19741] WLR 417.

39. [1974] 1 All FR 495. See para 2.21 of this Report.

40. The addition was suggested by the Acting Secretary to the Principal Registry mf the Family Division of the English High Court in a letter dated 25 February 1985 prepared in response to a request for information from this Commission.

41. Forth Report at p17. See also The law Commission, Should English Wills be Registrable? (1966) Working Paper No 4. para 46.

42. In Goods of Bailey (1858) 1 Curt 914 (I65 FR 516).

43. As to "presence" see paras 2.25, 2.51.

44. See para 2.27- 2.28

45. *Re Unsworth* (1974) 8 SASR 512 at 522 per Bray CJ.

46. *Re Colling* [1972] 3 All ER 729; [1972] WLR 1440.

47. *Wyatt v Berry* [1893] P 5.

48. *Re Davies* [1951] 1 All ER 920: *Re Bladen* [1952] VLR 82 at 85.

49. See chapter 2 n38.

50. See eg authorities cited above in notes 46, 47 and 48.

51. Eg Lord Chancellors law Reform Committee, Report on the Making and Revocation of Wills (1980) Cmnd 7902 para 2.11: Law Reform Commission of British Columbia, note 14 above pp32-33: Queensland Law Reform Commission, Report on *The Law Relating to Succession* (1978) pp6-7: Victorian Chief Justice Law Reform Committee, note 55 above, paras 8-12: Law Reform Commission of Western Australia, Discussion Paper on Wills: *Substantial Compliance* (1984) paras 2.12-2.14.

52. Note 51. above. A similar recommendation has been made by the Victorian Chief Justice's Law Reform Committee, note 55 above paras 8-12.

53. Section 9(d) of the Wills Act (inserted by Administration of Justice Act 1982).

54. See *In the Will of Wilhelmsen* (1959) 56 WN (NSW) 39 and other authorities cited in Hardingham, Neave and Ford, *Wills and Intestacy in Australia and New Zealand*, (1983) p39 n42 and Theobald on Wills 14th ed (1982) p46 n53.

55. (1845) 5 Moo PC 130 at 140-2(13 ER 439 at 443-4). See Smith, Execution of Wills in Presence of Attesting Witnesses (1935) 8 *ALJ* 363.

56. This was done in the new s9 of the English Wills Act.

5. Proposals for Specific Reforms of Revocation Formalities

I. INTRODUCTION

5.1 In Chapter 2 (paras 2.35-2.39) we briefly surveyed the existing law of revocation of wills. It was noted that s17 of the Wills, Probate and Administration Act, 1898 prescribes three ways of revoking a will, namely:

> by another will
>
> by some writing, duly executed as a will, declaring an intention to revoke the will
>
> by the burning, tearing or "destruction otherwise" of the will by the testator or by some person in the testator' s presence and by the testator's direction with the intention of revoking it.

Except for privileged testators (see Chapter 11), these formalities must be strictly complied with before a will is revoked.[1] Failure to comply means that, under the existing law, the will stands despite evidence that the testator intended to revoke the will or even attempted to do so.

5.2 In our proposal for the introduction of a general dispensing power we provide that such power shall extend to wills and documents intended to operate so as to revoke earlier wills (para 6.31). There are however two areas, peculiar to revocation formalities, which require close attention

> wills containing express revocation clauses which do not truly represent the testator's intention and
>
> the scope of the "destruction" category of revocatory action.

II. EXPRESS REVOCATION CLAUSES INSERTED BY MISTAKE

5.3 From time to time testators leave a will containing a general revocation clause in circumstances where there is evidence that it was not intended that the will would revoke all or part of an earlier one. If the revocation clause is inserted by clerical error it may be omitted from probate on the principle that only those parts of the document that the testator knew and approved of are the true will However, what of the testator who is aware of the inclusion of a general revocation clause, but who, through ignorance or bad legal advice, fails to appreciate its effect or operation on prior dispositions intended to be left untouched?

5.4 There are some older cases where the testator's true intention was defeated by the application of the principles that (i) reading over and due execution were conclusive of knowledge and approval of the text, and (ii) that a testator was bound by the terms of a general revocation clause notwithstanding an error as to its legal or practical effect.[2] The first principle no longer applies.[3] But the second has not been clearly laid to rest and, despite strong judicial and academic criticism in recent years,[4] it possibly survives.

5.5 The adoption of our more general recommendation about rectification (para 7.25) will ensure that if necessary, the court will be able to reform the terms of revocation clauses so that they operate only so far as the testator truly intended. We say "if necessary" because it is quite conceivable that there will be cases where there will be no need to seek such remedy in relation to mistakenly inserted revocation clauses in view of the judicially-created doctrine of dependent relative revocation in its various manifestations and the body of authority suggesting that the second principle mentioned in the preceding paragraph would not now be applied.

III. REVOCATION BY DESTRUCTION

5.6 The statutory requirements for revocation by destruction have, in some cases clearly thwarted a testator' s intention to revoke a will. Courts have held symbolic acts of destruction such as

writing “cancelled” on the will;

drawing a line through it; or

crumpling the will and throwing it away.

as insufficient to revoke a properly executed will, even where there is considerable evidence to indicate the testator thought he or she had effectively revoked the document.[5]

5.7 For example, in Cheese v *Lovejoy*[6] the testator made a will and three codicils which were found upon his table at his death He had drawn lines through parts of the will and written on the back “All these are revoked”. The testator told his housekeeper that he had cancelled his will and, in her presence, threw it among a heap of waste paper on the floor. The will was held to be unrevoked.

5.8 Those who support retention of the section in its existing form argue that it is desirable to have certainty about what are valid acts of revocation. They argue, and we agree, that the present rules provide some protection against a stranger getting hold of the will and purporting to cancel it without the knowledge or authority of the testator, perhaps even after his or her death.[7] But it is also important that the law reflect the desire to implement the clear intentions of a testator not only in creation of a will but also in its revocation. We consider that the present law is unsatisfactory. In rejecting the English Law Reform Committee’s conclusion that there should be no change, the Law Reform Commission of British Columbia stated reasons for reform which we adopt:

> We do not agree with this conclusion, particularly since it preserves rules which can lead to results as contrary to common sense as those in *Cheese v Lovejoy*.... We have abandoned the unqualified acceptance of formalities in respect of the formation of wills and it would be inconsistent to ignore probative evidence in respect of their revocation Should the court be compelled to probate a will which, on strong evidence, it is satisfied represented the testator’s intent at the time it was written, but ignore equally strong evidence probative of the testator’s having revoked the will. The undue insistence on formalities respecting the revocation of wills would create the anomalous result that a court, directed to have regard to whether an informal document truly represents the testator’s intent, would be obliged to conclude that it did, even if in fact convinced that the testator intended to revoke it.[8]

We would add that in many cases a malevolent intervener might be more likely to destroy or suppress a will than symbolically revoke it, although if such person were unhappy with only part of a will he or she would be tempted to cross out just that portion.

5.9 The Law Reform Commission of British Columbia recommended[9] that an additional revocatory act be inserted into the legislation, namely:

> any other act of the testator, or of a person by his direction and in his presence, if:
>
> (i) the consequence of the act is apparent on the face of the will; and
>
> (ii) the court is satisfied that the act was done with the intent of the testator to revoke all or part of the will.

We agree with such an approach in principle. But the requirement that “the consequence of the act is apparent on the face of the will” is likely to produce uncertainty and disputes. Would it extend to the act of writing “cancelled” on the back of the will or on an envelope containing the will? On the other hand, if there is no requirement of some physical relationship between the relevant act and the will itself, a whole range of additional problems would be created such as disputes over the efficacy of oral conversations or letters of instruction to revoke a will. The validity of these matters is, in our view, best left to the operation of the general dispensing power which we propose in Chapter 6. We therefore favour the general approach of the Law Reform Commission of British Columbia and conclude that there should be some requirement of a physical relationship between the act and the will In our view there should be a requirement that there be “writing on” the will or some physical “dealing with” the will, coupled with the requisite intent (para 5.10), before there is revocation by this mode. The recommendation which we make (para 5.12) about the court being satisfied “from the state of the document” that

the writing on the will or the dealing with it was done with a particular intent will also underline this requirement of a physical relationship.

5.10 As to the requisite intent which should accompany such an act, it is our view that the court should be satisfied that it was the testator' s intention that the relevant act would revoke the will. Such a test would place an evidentiary onus on those alleging revocation For that reason alone; most testators would be encouraged to prefer the more traditional modes of revocation involving some writing expressing an intention to revoke which is duly attested and signed by witnesses. This test would also bring this mode of revocation into line with the philosophy underlying the general dispensing power recommended by us in the next chapter and the criterion for invoking it (see especially paras 6.25 and 6.29).

5.11 Such a method of revocation should be capable of extending to the partial revocation of a will, for example where the testator strikes out certain clauses of a will (provided again that the court is satisfied that the requisite intent existed).

5.12 We therefore recommend that a will or any part of a will maybe revoked by any writing on the will or any dealing with it, which is done by the testator, or a person by his or her direction and in his or her presence, if the court is satisfied from the state of the document that the writing or dealing was done with the intent of the testator to revoke.

5.13 We have considered whether it is desirable to change the requirement that if the testator uses an agent to destroy the will that person should perform the relevant act" at his direction and in his presence". The words quoted reveal a narrow double gateway through which testators must pass if they are to use agents to revoke wills by destruction "At his direction" has been interpreted to preclude a testator from subsequently ratifying a prior unauthorised destruction of the will by an agent.[10] "In his presence" means that the testator whose solicitor is holding a will, and who telephones the solicitor with instructions to destroy the will does not revoke the will where the solicitor complies with those instructions in the testator's absence.[11]

5.14 We do not propose any change in the law relating to these matters Our proposal in para 5.12 retains the requirements that a testator who uses an agent must direct the destruction and that the destruction take place in the testator's presence. To change these requirements would in our opinion expose the estate to undue risk of disputation without there being any clear evidence of need. The requirement that the testator should first direct the destruction puts the onus of acting clearly upon the testator to allow ratification of another's prior act of destruction might encourage third parties to preempt the testator's wishes and then put pressure on the testator to ratify the unauthorised action. Since the testator will be unable to testify on this issue and since it is a form of testamentary action not requiring any lasting evidence of the testator's participation (except the non- production of the destroyed will), we think it inadvisable that there should be any relaxation in the existing requirement The need for the act of destruction to be done in the testator's presence also serves to require the testator's attentive involvement and emphasises the solemnity of the relevant action.

FOOTNOTES

1. There is a rebuttable presumption that a will traced to the possession of the testator, and last seen there, but not forthcoming at his or her death was validly destroyed by the testator, Hardingham, Neave and Ford, Wills and Intestacy in Australia and New Zealand (1983) para 609.

2. The authorities are reviewed by Geddes and Rowland, Revocation by later will: relevance and proof of intention (1984) 58 *ALJ* 186 at pp187-189. See also *Re Resch's Will Trusts* [1969] 1 AC 514 at 547-8.

3. See Re Morris 119711 P 62: *Re Fenwick* [1972] VR 646.

4. Note 2 above.

5. *Re Jones' Will* (1895) 6 *QLJ* 261: *In the Will of Gordon* (1898) 9 BC(NSW) 12: *Cheese v Lovejoy* (1877) 2 P D 251.

6. *Ibid*.

7. See Lord Chancellor's Law Reform Committee Report on The Making and Revocation of Wills (1980) Cmnd 7902 paras 3.40-3.41 and *Re Kane* (1978) 5 ETR44. Of course if this happens and is entirely undetected then, even if the existence of the will was known to someone other than the testator, it maybe revoked through the application of the presumption of revocation of a lost will (see note 1 above).

8. Report on *The Making and Revocation of Wills* (1981) at p67.

9. *Id* at p69.

10. *Gill v Gill* [1909] P 157: *In Estate of Simkin* [1950] VLR 341.

11. Cf *In the Estate of Kremer* (1965) 110 *Solicitors' Journal* 18. A testator who gives such instructions by letter is in no better position unless the testator's signature in the letter is duly witnessed and attested. In that event the letter serves as "some writing declaring an intention to revoke" within s17(3)(a) and the subsequent destruction of the will is unnecessary *Re Spracklan's Estate* [1938] 2 All ER 345. Of course, under a general dispensing power, so framed as to indicate that it extends tint revocatory documents (see para 6.29), it will be possible to apply to have the letter admitted to probate despite non-compliance with the statutory formalities But this will not save an oral instruction to revoke (see para 6.28).

6. A General Dispensing Power

I. FORMALISM IN THE LAW OF WILLS

6.1 In Chapter 2 we discussed the functions of the formalities for making and revoking wills. We stressed that they should not be seen as ends in themselves, but rather as tools for achieving particular goals. One function is to reduce the opportunity for fraud and undue influence and thus ensure that a testator's true wishes are carried out after his or her death.

6.2 The law frequently operates in this way, setting out formal modes of behaviour to facilitate and protect a particular desirable activity. For example; the statutes of frauds[1] were designed to limit the potential for fraud in transactions between living people. The law has also generally developed safeguards to ensure that these protective, beneficial rules do not themselves cause the very harm they were designed to prevent. However, for reasons which are not entirely cleat there has not been a similar development in relation to wills formalities.[2] In many ways, they have been treated as ends in themselves, rather than safeguards to ensure the fulfilment of testators' wishes. This has led to the criticism that "the law of wills is notorious for its harsh and relentless formalism".[3]

6.3 The efforts of different judges to achieve a fair result within the limits of the law have led to a complex and inconsistent body of judicial decisions. Some judges have shown a willingness to rethink and challenge long-established propositions.[4] However many of the technical rules are so firmly established or are so clearly required by the terms of the statute that legislative reform is required if there is to be a change. One matter that is especially entrenched is the very approach to wills formalities mentioned in the preceding paragraph When this approach has been applied it has often been accompanied by strong statements of judicial regret at the defeat of clearly established testamentary intentions.[5]

6.4 Because most of the common law world adopted the English Wills Act 1837 there are reported cases in many jurisdictions attesting to the Act's capacity to produce inequitable results in particular cases. Examples of wills declared invalid in such circumstances include:

- wills where the testator inadvertently forgot to sign;[6]
- wills where a witness inadvertently forgot to sign;[7]
- wills where a husband and wife inadvertently signed the will prepared for the other;[8]
- wills where the testator was too sick to turn his head and watch the witness sign, although they were in the same room;[9]
- wills where the attesting witnesses were not present at the same time when the testator signed or acknowledged the will.[10]

6.5 How extensive is the problem and how can it be measured? The reported cases give some indication, although not of the numerical significance. Between 1 April 1985 and 30 June 1985 about 20 wills which were invalid because of lack of due formality came to the attention of the New South Wales Probate Registry.[11] The Lord Chancellor's Law Reform Committee commissioned a survey of all wills admitted to probate in England and Wales over a three month period in 1978. It showed that during that period 40,664 wills were admitted to probate and 97 (about 0.24%) rejected. Of those rejected, 93 were rejected because they failed to comply in one way or another with the formalities required by section 9 of the English Wills Act 1837.[12] In South Australia between 1976, when a judicial dispensing power was introduced, and the middle of 1985 there have been 32 applications for that power to be exercised. Details of these are analysed below (para 6.9).

6.6 It may however be inappropriate to pay undue attention to the numbers of recorded incidents giving rise to apparent injustices through the law's technicalities. We suspect that there are cases where wills have been

defectively executed and where; because this is apparent on the present state of the law, solicitors handling the estate have seen no point in bringing the error to the attention of the Court registry.[13]

6.7 In the report of the Australian Government Commission of Inquiry into Poverty on *Legal Needs of the Poor*[14] a survey of 183 respondents who reported making a will revealed 67% who used a lawyer for such purpose, 18% who used a printed form available at stationers, and 15% who "made it up themselves" or gave verbal instructions as to the disposition of their property These figures suggest a significant area within which problems of invalidity could arise.

6.8 Moreover, even if it is assumed that the number of cases where wills fail for purely technical reasons is relatively small, the mischief that is caused in such cases is of itself sufficient justification for reform:

> The consequences of an invalid will are not confined to those of a legal nature. A testator' s family may find it distressing for his wishes to be ignored because of what they perceive is a mere technicality. Moreover, besides financial loss to potential beneficiaries additional legal expense may be incurred, brought about for example; because the invalidity was disputed in legal proceedings or because the administration of the estate involved more work than if the will had been valid. It is probable that cases of formal invalidity would most often occur where it could least be afforded, that is in the home-made wills of small estates.[15]

II. TWO MODELS FOR REFORM

A. Judicial Dispensing Power

6.9 In 1975. on the recommendation of the South Australian Law Reform Committee,[16] the South Australian Wills Act was amended by inserting a section which empowered the Court to relieve against non-compliance with formal requirements. The section provides:

> 12(2) A document purporting to embody the testamentary intentions 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 he no reasonable doubt that the deceased intended the document to constitute his will.

A similar provision has recently been enacted in the Northern Territory.[17]

6.10 In the nine years since the South Australian Act came into operation[18] there have been 32 applications brought under s12(2) and these have fallen into the following categories:[19]

	No of applicants
(i) testator's signature unwitnessed	5
(ii) will not signed	3
(iii) alterations and additions	6
(iv) will not signed at "foot or end"	4
(v) will not executed in the presence of two witnesses both being present at the same time	14

6.11 A number of judicial decisions[20] have clarified the section's ambit:

> It applies to part of a document so that alterations made subsequent to execution may be included as part of the document admitted to probate.[21]
>
> Whilst the section by its terms requires that there be "a document" the Court will look at the document and extrinsic evidence in its search for material establishing the testator's intention in relation to that document.[22]

> It is not necessary that the testator attempt to comply with the formalities prescribed elsewhere in the Act Thus a document signed by the testator and handed to someone to take away and "get it witnessed"[23] and an unsigned document[24] have been admitted to probate where the Court was satisfied beyond reasonable doubt that the deceased intended the document to constitute his or her will.
>
> The Court has applied, as a practical test, the approach that" the greater the departure from the requirements of formal validity.., the harder it will be for the Court to reach the required state of satisfaction."[25]

The section has been applied to provide relief where:

> witnesses were not present or jointly present when the deceased made or acknowledged his or her signature;[26]
>
> the testator' s signature was not witnessed at all;[27]
>
> a witness acknowledged his signature to another who was not present when the first person witnessed the will;[28]
>
> the deceased did not sign at all due to a simple oversight;[29]
>
> a husband and wife who instructed a solicitor to prepare mirror wills for both of them read and approved the same but by mistake signed each other's will;[30]
>
> following the revocation of a will by marriage, a testator made certain minor alterations to her will (made prior to marriage) which she initialled. it was held that the document so altered was intended to constitute her will and, through the operation of the section, that the will was validly revived.[31]

6.12 Other jurisdictions, notably Israel and Manitoba, have provisions creating a general judicial dispensing power, in the former case subject to more stringent and in the latter more relaxed preconditions.[32] As will become apparent we generally favour the South Australian model. subject to certain modifications

B. Power to admit to probate where substantial compliance

6.13 In 1975 Professor Langbein advocated the adoption of a substantial compliance doctrine to alleviate the problems caused by literal compliance with will formalities. He pointed out that a peculiarity of the law of wills is not the prominence of formalities, but the judicial insistence that defects in compliance automatically and inevitably render wills ineffective. He argued that this lack of flexibility has inflicted "constant and mostly uncontrollable inequity",[33] and that "the rule of literal compliance with the Wills Act is a snare for the ignorant and ill-advised, a needless hangover from a time when the law of proof was in its infancy".[34] His proposal was to reduce the presumption of invalidity applied to a defectively executed will from a conclusive presumption of invalidity to a rebuttable presumption:

> The proponents of a defectively executed will should be allowed to prove what they are now entitled to presume in cases of due execution - that the will in question expresses the decedent's true testamentary intent. They should be allowed to prove that the defect is harmless to the purpose of the formality.[35]

He pointed out that a doctrine of substantial compliance is not a rule of no formalities, nor is it a rule of minimum or maximum formalities.[36] Rather, it is a "purposive" approach to wills formalities and enables courts to excuse formal defects when the purposes of the legislation have been satisfied in particular situations notwithstanding some deficiencies in complying literally with all the specified formalities. Later commentators have endorsed the attractiveness of such an approach.

> There is something inherently fair about an approach which says that formalities are important but they are a tool and not a sword If the result has been achieved without the tool, then the tool becomes unimportant.[37]

6.14 In 1978 the Queensland Law Reform Commission recommended the adoption of the, doctrine of substantial compliance in the following terms:

> We have therefore decided to recommend that some relaxation in the court's standard should be permitted, and that provided substantial compliance is shown, and the court is satisfied that the instrument presented for probate represents the testamentary intention of the maker of it, the court may admit it to probate. It will be for the court to work out what it understands by substantial compliance, but it is envisaged that the courts will be cautious in their approach to the latitude given, and that only in cases of accident and minor departures will it be possible to give effect to the obvious intention of the testator, as in cases where the court has hitherto wished to admit an instrument to probate but has felt unable to do so because of the shackles of its policy of meticulous compliance. We should add that Professor Langbein has seen and approves of the provision which we have added.[38]

In 1981 the formulation recommended by the Queensland Law Reform Commission became enacted as a proviso to s9 of Succession Act 1981 (Qld):

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

The provision has been in operation since 1 January 1982.

6.15 In the few cases which have arisen under the Queensland provision there are clear indications of the judicial approach to "substantial compliance" and of what we regard as the limitations of the Queensland model:

> In Re Johnston[39] probate was refused of a will which bore the signature of the testatrix and two attesting witnesses but which was apparently signed, first by one attesting witness (who pointed out that two witnesses were necessary but signed "to appease" the testatrix), then on a later occasion by the testatrix, then on a later occasion by the second witness. The testatrix did not sign in the presence of either attesting witness and the witnesses were never together at the same time. Without having to consider whether the instrument expressed the testamentary intention of the deceased, Thomas J held that there was no "substantial compliance" with the formalities prescribed. He distinguished the South Australian cases on the basis that the South Australian Act does not require substantial compliance with the formalities and consequently the South Australian courts have concentrated attention upon proof of testamentary intention on the part of the testator. Whilst acknowledging the need to take a liberal approach, his Honour concluded that on the facts there were substantial departures from the basic formal requirements. Whilst it is not entirely clear from the reasoning it appears that he would have required that it be shown that there was an attempted compliance with the statutory requirements as to manner of execution or attestation before the proviso could be applied.[40]
>
> In Re Grosert[41] probate was refused of a will which on its face was in proper form, where there was evidence that one of the witnesses attested the deceased' s signature and then subscribed her own, but on an occasion when the other witness (who later signed) was not present Although Vasta J had no doubt that the instrument expressed the testamentary intention of the testator, he held that there was no "substantial compliance" because the signature of the testator was not subscribed in the presence of two or more witnesses and because it was unclear as to whether the signature of the testator was placed in the presence of either one of the witnesses.

6.16 It does not seem that such an approach to the application of the proviso to s9 in these two cases accords with the approach advocated by Professor Langbein,[42] although Thomas J in Johnson's Case acknowledged his indebtedness to that authority and his writings. Nevertheless the decisions reinforce our view that the "substantial compliance" model should not be adopted for the following reasons:[43]

> The South Australian alternative appears to be functioning well and there is a growing body of practical and judicial experience which can be drawn upon.

The substantial compliance model is excessively narrow if it requires attempted compliance with the prescribed formalities because this would automatically exclude ignorant testators unless they happen by chance to have complied with the statutory formalities (as construed by the courts).

"Substantial" is an ambiguous concept, capable of meaning "large" or "complying with substance as distinct from form".[44]

The "substantial compliance" doctrine, at least in the form enacted in Queensland, provides no guidance as to the types of non-compliance which are substantial.

III. ARGUMENTS AGAINST A GENERAL DISPENSING POWER

6.17 Although there are many proponents of some form of judicial dispensing power,[45] others argue against such an amendment to the law.[46]

A. Lack of Certainty

6.18 It is said that such a power will make it less certain whether or not an informally executed will is capable of being admitted to probate and could lead to litigation, expense and delay often in cases where it could least be afforded, i e. where there is a home-made will.

6.19 We are not convinced that such a "floodgates" argument is justified. The present complexity of the law invites litigation where a will is apparently defeated by what a layperson may see as an unjustified technicality. "The rule of literal compliance can produce results so harsh that sympathetic courts incline to squirm".[47] The experience in Queensland and South Australia has not revealed a flood of litigation.[48] In our view the existence of such a remedial power is justifiable in the interests of fulfilling a testator's intentions. Whilst issues will arise as to whether certain defectively-executed documents were merely drafts which do not represent the testator's final intentions we consider that the courts will be able to distinguish between those which are and those which are not.[49] We do make some specific recom-mendations having the cost aspect in mind.[50]

B. Encouragement to Duress and Undue Influence

6.20 Secondly it has been suggested that any power to relax formalities may facilitate duress and undue influence.

6.21 We doubt that this will happen bearing in mind that the court will have to be satisfied as to the genuineness of the transaction before exercising whatever discretionary power of dispensation is available to it. To the extent that there is a risk we consider that it is worth taking in view of what we consider to be the injustice of refusing probate in the sorts of cases which have arisen in the South Australian experience to date.

C. Reduction in Standards

6.22 Finally it has been suggested that the existence of a general dispensing power might lead to a dropping of standards of compliance with formalities with a consequential erosion of those beneficial functions attendant upon will-making formalities which we have discussed in Chapter 2.

6.23 In our view the incentive for due execution will continue even if there is a dispensing power, because due execution will reduce litigation The majority of wills will continue to be professionally prepared and care will be used to ensure due execution.

IV. RECOMMENDATIONS

A. General

6.24 Two general principles or policies have governed the law relating to inheritance under wills since 1540. First: since the law allows people to dispose of their property by will, a testator' s intentions regarding the disposition of his or her property should be implemented if at all possible. Secondly certain formalities are required for a valid

will in order to ensure, as far as possible, that it represents his or her true testamentary intentions. While the two general principles reinforce one another, since they have a common objective - implementation of a testator's true intentions - they need to be kept in balance: excessive formality could frustrate many testators' true intentions, while excessive informality could enhance the potential for fraud and undue influence.

6.25 Our assessment of the proper balance between the two general principles leads to the following conclusions:

(a) The, basic formal requirements in s7 should be retained, subject to the amendments recommended in Chapter 4.

(b) The Wills Probate and Administration Act, 1898 should confer on the Supreme Court power to admit to probate or otherwise treat as valid any will, alteration to a will or document expressing an intention to revoke a will, notwithstanding that it has not been executed with the statutory formalities, provided that the court is satisfied that the deceased intended the will, alteration or revocatory document to take effect as such. Extrinsic evidence, including statements made by the testator should be admissible as to the manner of execution and the testator' s intention.

Our reasons follow.

6.26 The areas where changes have been proposed in Chapters 4 and 5 are recurring instances where; in our view, the existing formalities serve little useful function or where their beneficial effect is clearly outweighed by their capacity for mischief. The implementation of those suggestions will foster predictability without: in our view, appreciably undermining any of the appropriate functions of execution or revocation formalities.

6.27 The general dispensing power is designed to provide an ad hoc examination in other areas where there has been non- compliance with the requisite formalities so that: subject to appropriate safeguards, only those documents which the court is satisfied represent the testator's true "will" can be admitted to probate. The pattern of decisions in South Australia indicates that the courts are likely to test evidence critically and apply the dispensing power cautiously and responsibly.

B. Requirement for a Document

6.28 We agree with the requirement in the South Australian Act that there should be a "document" as a threshold requirement It avoids the uncertainty and difficulties of oral wills to which we adverted in Chapter 4. To those who say that this condemns the person dying of thirst in a desert or of cold in the icefields of Antarctica to die intestate or without the opportunity of revoking an earlier will,[51] we answer that such is a reasonable price to pay to avoid the problems inherent in disputes about oral wills The need for a document will substantially assist in the resolution of disputes as to whether particular statements were expressions of merely deliberative as distinct from final testamentary intent Since the statutory test would be that the deceased intended the document to constitute his or her will, letters to solicitors requesting the preparation of a will generally will be excluded. We think that it is reasonable that this should be so because testators sometimes change their mind as the result of legal advice and we would not wish to see merely deliberative documents being admitted to probate.

6.29 We do not suggest the additional threshold requirement of signing, Leaving aside Professor Langbein's example of the testator who is felled by an interloper's bullet or coronary seizure as his pen descends towards the dotted line,[52] a "signature" requirement would preclude relief being available in an appropriate case where the testator simply overlooked signing a document he or she proceeded to have witnessed,[53] or where mirror wills were accidentally swapped and signed by the wrong testator.[54] In our view relief should be available in such cases, subject to the requisite proof.

6.30 No other threshold requirement suggests itself to us.

C. Alterations and Revocation of Wills

6.31 We see no reason why a dispensing power should not be available in relation to alterations to wills[55] and to a document intended to operate solely as an instrument of revocation.[56] The legislation should make this clear.

D. Criterion for Invoking Dispensing Power and Standard of Proof

6.32 So far as concerns documents to be admitted to probate we support the test suggested in the latter part of the South Australian provision (para 6.9), namely that the court should be satisfied that the deceased intended the document to constitute his or her will It appears to work well, there is a body of judicial exegesis and there is merit in uniformity.

6.33 Since we propose (para 6.31) that this dispensing power should extend to documents which are intended to operate solely as an instrument of revocation[57] (ie. documents which are not wills) the statute should make it clear that the test in relation to such documents is satisfaction that the deceased intended the document to declare an intention to revoke a will.

6.34 The Law Reform Commissions of Manitoba and British Columbia both favour the adoption of the civil onus of proof, ie on the balance of probabilities.[58] This civil onus applies generally in probate proceedings at present, including trials where undue influence; fraud or lack of testamentary capacity is raised. The Queensland provision requires substantial compliance and the courts will have to determine the nature and degree of proof to satisfied the court: although it is clear that the court need only be satisfied according to the civil onus.[59] The South Australian legislation has adopted the criminal standard, that there should be no reasonable doubt that the deceased intended the document to constitute his or her will. The South Australian judicial decisions do not disclose any difficulty with that issue or with the quantity or quality of evidence required to satisfy the court. Nevertheless, it appears to be anomalous and contrary to the principles applied in civil litigation, including probate litigation, to impose a criminal standard of proof. If the validity of a will is opposed for non-compliance with statutory formalities and also because there is a denial of testamentary capacity or assertion of fraud or undue influence; the dispensation from formalities would be determined under a different standard of proof from that required for the other issues. There is little cause for concern that courts will not scrutinise closely the written and oral evidence before exercising the dispensing power. It is recommended that the civil standard provides sufficient safeguards and should be adopted. We assume that the courts would in fact require a standard of proof approximating that for rectification (cf para 7.26).

E. Evidence

6.35 The principles of evidence dealing with declarations made by testators in relation to their wills are rigid and beset by technicalities.[60] The use of such declarations as a means of proof is severely limited by the application of the hearsay rule. Thus, the declarations of a testator are probably not admissible to prove the execution of the will, although they may be received:

> to identify a testamentary instrument;
>
> to determine what instruments constitute the will,[61] and whether it (or some instrument of revocation) has been executed with testamentary intention;[62] and
>
> as secondary evidence of the contents of lost wills.[63]

6.36 The Queensland Law Reform Commission dealt with this topic and recommended the inclusion of a provision permitting the admission of extrinsic evidence in cases where compliance with the formalities was in issue. It was stated that such a provision:

> is considered to be declaratory and not reforming but the whole subject of the admissibility of extrinsic evidence, particularly of statements made by the testator, is not free of doubt, and this provision is intended to make the law clear at this point.[64]

The recommended provision has been enacted as proviso (b) to s9 of the Succession Act 1981 (Qld), which states:

> 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.

6.37 This Commission agrees with such an approach and recommends that extrinsic evidence including evidence of statements made at any time by the testator as to the manner of execution of a testamentary instrument should be admissible.

G. Rules of Court

6.38 If our recommendation for a judicial dispensing power is adopted, appropriate rules of court will need to be formulated to govern the procedure to be followed. We would support a provision along the lines of the South Australian rule,[65] which would allow an application to be made *ex parte* to the Registrar, supported by consents in writing given by persons who may be prejudiced by the admission of the document to proof. The Registrar would be able to refer any such application to a judge if he or she thought fit.[66] Subject to this, we would propose that all applications be made in open court before a judge.

6.39 Is there need for some special provision protecting executors whose position is affected by a document which does not comply with the statutory formalities but which may qualify for the exercise of the judicial dispensing power? We have considered this question and concluded that the existing law probably provides ample guidance for an executor in such circumstances. There is a body of case law[67] which discusses the duties of executors and rights of beneficiaries where there is a will which is of doubtful validity. Those cases relate to wills possibly affected by lack of testamentary capacity or undue influence. Whilst it could be argued that there is a distinction between a formally valid will of a testator whose capacity is in doubt and an informally executed will dependent upon a judicial dispensing power for validity, we see no reason why this case law ought not to be applied to a will whose validity is ultimately dependent upon a favourable exercise of the judicial dispensing power.[68]

FOOTNOTES

1. A compendious expression referring to various statutes prescribing formalities for particutar transaction. Most derive from the Statute in Frauds, 1677.

2. The Report on the Making and Revocation of Wills (1981) by the law Reform Commission of British Columbia suggests (p40) that the strict approach has been taken because the testator is dead and cannot assist in ascertaining the validity of the will and because, if the will is declared invalid, distribution on the resulting intestacy is provided for. With respect, the second reason overlooks the fact that the invalidation of a will may “revive” an earlier will which the testator intended to revoke.

5. Laugbein, Substantial Compliance with the Wills Act (1975) 88 *Harvard Law Review* 489.

4. A notable example is Helsham J (as he then was) in Re Spence (I 969) 89 WN(NSW) (Pt 1) 641.

5. Eg Murray CJ in *Re Roberts* (1928) SASR 175 at 178: Ungoed-Thomas J in *Re Colling* [1972] 5 All ER 729 at731: Morris J in Re Davies [1951] 1 All ER 920 at 922; R W Goff J in *Re Beadle* [1974] 1 *WLR* 417 at 419.

6. Re Bean [1944] 2 All ER 348.

7. Solicitor, *Ex parte Fitzpatrick* [1924] 1 DLR 981.

8. Re Meyer [1908] P 353: Re Petchell (1945) 46 WALR 62. In some jurisdictions both wills are admitted to probate with the omission from each of any mistaken reference to the other testator. *Guardian Trust & Executors v Inwood* [1946] NZLR 614: *Re Brander* [1952] 4 DLR 688. If there were a general power of rectification (see Chapter 7) this type of mistake could also be overcome by resort to it.

9. Re Wozciechowiecz [1931] 5 WWR 283.

10. In Estate of Kolodnicky (1981) 27 SASR 374. Of the 52 applications made in the first 9 years of operation of the South Australian dispensing power (discussed below), 14 were in this category information supplied by South Australian Registrar of Probates.

11. Letter dated 18 December 1985 from Mr Noel J Foley, Deputy Registrar, Probate Division in the Commission.

12. Law Reform Committee Report on The Making and Revocation of Wills, (1980) Cmnd 7902 para 2.3 and Annex 2.

13. Where a solicitor fears the possibility of being sued by a disappointed beneficiary alleging that the deficient execution was the responsibility of the solicitor there may be a positive disincentive upon the solicitor to declare such fact to the world.

14. (1975) pp60-61.

15. Law Reform Commission of Western Australia. Discussion Paper on Wills: Substantial Compliance (1984) para 1.10.

16. Twenty-eighth report of the Law Reform Committee of South Australia Relating to the Reform on the Law on Intestacy and Wills (1974) pp10-11.

17. See the new s12(2) of the Northern Territory Wills Act, which was inserted by the Wills Amendment Act 1984.

18. It commenced to operate on 29 January 1976 and applies to the wills of persons dying on or after that date regardless of when the will was executed or altered: In the Estate of Standley (1982) 29 SASR 490: In the Estate of Kolodnicky (1981) 27 SASR 374.

19. The information set out in this paragraph was supplied by Mr A Faunce-de Latine, Registrar of Probate in the South Australia Supreme Court.

20. Most have been in the last four years, suggesting that the availability of the provision was not generally known in its early years of operation and/ut that practitioners were cautious about invoking it.

21. In the Estate of Standley (1982) 29 SASR 490: In the Estate of Possingham (1985) 52 SASR 227.

22. In the Estate of Williams (1984) 56 SASR 423 at 433.

23. In the Estate of Graham (1978) 20 SASR 198.

24. In the Estate of Williams (1984) 56 SASR 425: In the Estate of Roberts (1985) 38 SASR 524.

25. In the Estate of Graham (1978) 2f) SASR 198 at 205: In the Estate of Williams (1984)56 SASR 423 at 453-4.

26. In the Estate of Kolodnicky (1981) 27 SASR 574: lint the Estate of Dale (1985) 52 SASR 215: In the Estate of Kelly (1983)32 SASR 413.

27. In the Estate of Kelly (1983) 32 SASR 413, 34 SASR 370: In the Estate of Smith (1985)38 SASR 30.

28. In the Estate of Standley (1982) 29 SASR 490.

29. In the Estate of Williams (1984) 56 SASR 423.

30. In the Estate of Standley (1982) 29 SASR 490.

31. In the Estate of Lynch (Matheson J of the Supreme Court of South Australia. unreported, 15 October 1985).

32. The Israeli law and practice is discussed in the report referred to in note 2 at pp.44-46. The Manitoban provision was inserted following the report of the Manitoba Law Reform Commission on “The Wills Act” and the Doctrine of Substantial Compliance (1980).

55. Substantial Compliance with the Wills Act (1975) 88 *Harvard Law Review* 489 at pp500-l.

34. *Id* at p531.

35. Crumbling of the Wills Act: Australians Point the Way (1979) 65 *American Bar Association Journal* 1192 at p1194.

36. Note 33 above at p513.

37. Nelson and Statck, Formalities and Formalism: A Critical Look at the Execution of Wills (1979) 6 *Pepperdine Law Review* 331 at p332. As to the presumption of due execution. see *Re Bladen* [1952] VLR 82 at 85 and Hardingham, Neave & Ford, Wills and Intestacy in Australia and New Zealand (1983) at p42.

38. Report on the Law Relating to Wills (QLRC 22) at p7.

39. [1985] 1 Qd R516.

40. This comment is based on the fact that Thomas J singled out In the Estate of Graham (see note 23 above and accompanying text) as a South Australian authority exemplifying the differences in the two Acts.

41. [1985] 1 Qd R 513.

42. *Graham's Case* (cf note 41) was hailed by Professor Laugbein as a “great milestone in the progress of probate law” when “for the first time a common law court excused a testator’s failure to comply strictly with the wills act formalities”: Crumbling of the Wills Ace Australians Point the Way (1979) 65 *American Bar Association Journal* 1192 at p1192. Professor Langbein used the word “substantial” in the sense of complying in substance as in opposed to form (Substantial Compliance with the Wills Act (1975) 88 *Harvard Law Review* 489 at p490) whereas in the two cases discussed it seems tr, have been interpreted as meaning a substantial or large amount.

43. We have drawn, in part. from the discussion in the Western Australia Law Reform Commission’s Discussion Paper Wills: Substantial Compliance (1984) paras 4.5-4.7 and in the Manitoba Law Reform Commission Report on “The Wills Act” and the Doctrine of Substantial Compliance (1980) pp21-24.

44. See note 42.

45. Such a power exists in Queensland, South Australia Northern Territory, and Manitoba (see Part II of this chapter and its introduction has been recommended by the Law Reform Commission of Tasmania (Report on Reference in the Law of Wills (1985) pill): and the Law Reform Commission of British Columbia (The Making and Revocation of Wills (1981) p54). Its introduction has been canvassed by the Law Reform Commission of Western Australia (see note 45 above).

46. See the Lord Chancellor’s Law Reform Committee Report on the Making and Revocation of Wills (1980) Cmnd 7902 pp3-4. The Victorian Chief Justice’s Law Reform Committee has recently stated its concurrence with such views: Execution of Wills (1984) para 13. Sec also W F Ormiston. Formalities and Wills: A Plea for Caution (1980) 54 *ALJ* 451.

47. Laugbein, note 35 above at p525.

48. Many of the South Australian cases have involved judicial determination of the ambit of the dispensing power. According to the South Australian Registrar of Probate the introduction of s12(2) in the Wills Act has not imposed an onerous burden on the officers of the Probate Registry: letter to Commission 22 January 1985. Most of the cases to date have been dealt with *ex parte*. In Israel, where a limited dispensing power has been available since 1965, the experience has been that probate litigation has lessened because advocates are aware of the Court’s

dispensing power and thus attach less importance to defects of form: see material cited in the Law Reform Commission of British Columbia Report on the Making and Revocation of Wills (1981) pp44-46.

49. See *Beaumanis v Praulin* (1980) 25 SASR 423: In the Estate of Smith (1985) 58 SASR 50.

50. See para 6.58.

51. The South Australia Law Reform Committee was concerned about such would-be testators (note 16 above at pill but proceeded on the basis that any record they might leave, through unattested, would qualify for the application of the dispensing power.

52. Substantial Compliance with the Wills Act (1975) 88 *Harvard Law Review* 489 at 1518.

53. As occurred in *In the Estate of Williams* (1984) 55 SASR 423. See also In the Estate of Roberts (note 24 above).

54. Cf n8.

55. The South Australian section has been construed as applying to alterations : see n21.

56. Cf Wills, Probate and Administration Act, 1898. section 17(5)(a). Doubts have been expressed as to whether the South Australian provision may not apply to such documents: cf Hardingham, Neave and Ford. note 57 above pp25-56. A document which does no more than validly evidence an intention to revoke a will is not admitted to probate (*id* at p129 n54).

57. Cf s17(5)(a) of the Wills, Probate and Administration Act. 1898 which is set out at para 2.36. Such documents are not admitted to probate (note 56 above).

58. Manitoba Report, (see note 51) at pp27-28: British Columbia Report. see note 2, at pp5 5-54.

59. *Re Johnston* [1985] 1 Qd R 516 at 519.

60. The principles are discussed in detail in *Phipson on Evidence* 15th ed (1982) at para 24-75ff: *Cross on Evidence* 2nd Australian ed (1978) at para 18.62ff and cf W F Ormiston. note 46 above at pp454-456.

61. *Gould v Lakes* (1880) 6 PD 1.

62. *Phipson,* note 60 above at para 24-79.

63. *Id*, at para 24-882, 24-82.

64. Report *on the Law Relating to Succession* (1978) QLRC 22 at p7.

65. Rule 61 of in the Rules of the Supreme Court (Administration and Probate Act), 1984. That rule confines the Registrar's jurisdiction to estates ins here the gross value of the estate does not exceed $10,000. We consider that any monetary limit is arbitrary and would need regular review to keep up with inflation, and that the requirement of consents tp the application is a sufficient protection to justify vesting in the Registrar a jurisdiction in with no monetary limitation.

66. Supreme Court Rules, Part 61 mile 2A.

67. See *In Will of Pearce* (1945) 46 SR (NSW) 71: In Will of Steward [1964] VR 179: *Re Muirhead* [1971] p265 and Re Grey Smith [1978] VR 596. There is some difficulty in reconciling the cases and they are discussed in Mason & Handler: Wills, Probate and Administration Service *(New South Wales)* (1985) para 6077. Reference may also be made in ss40D, 90(2) and 92 of the Wills, Probate & Administration Act, 1898 as to the protection of executors who distribute in on the basis of the validity of a particular grant of Probate and in ignorance of claims that would arise under another document.

68. This paragraph in the penultimate draft of this Report was specifically drawn to the attention of those to whom that draft was submitted (see para 1.9). No one indicated any difficulty with it.

7. Rectification of Wills

I. THE EXISTING LAW

7.1 Where the form of a document does not truly reflect the stated intentions of its party or parties, the equitable doctrine of rectification enables the court to correct the document to express those intentions. By this doctrine, words which have been mistakenly omitted can be added and words which have been mistakenly included can be omitted or altered. The principles are well settled and accepted. The possibility of this remedy operating to overthrow written agreements long after their execution is controlled by the requirement that a party seeking rectification must provide convincing proof of error and clearly establish what form the document was intended to take.

7.2 The Court has power to correct mistakes in wills, but, as we indicate below (paras 7.5-7.9), that power is more circumscribed than the equitable doctrine of rectification, and there have been many cases where clearly proved mistakes in wills have gone unrectified. The judicial armoury for dealing with such mistakes has two main approaches.

7.3 First, a court required to construe words in a will may disregard their literal effect where it is clearly apparent that a literal interpretation would defeat the intention conveyed by the document as a whole.[1]

> In *Tatham v Huxtable* the testator empowered his executor to distribute the balance of his estate among certain persons and "others not otherwise provided for who, in my opinion have rendered service meriting consideration by the Testator". The words "in my opinion" clearly conflicted with the words" by the Testator and the High Court held that, upon a consideration of the will as a whole, the testator intended to refer to the executor's opinion. Thus the will was to be construed as if "in my opinion" read "in his opinion".

This doctrine does not however allow the Court to receive extrinsic evidence directed to prove that words appearing in a will admitted to probate had been inserted by mistake: the mistake must appear on the face of the will when construed as a whole (with assistance of evidence of surrounding circumstances if ambiguity in the will justifies resort to such evidence).

7.4 Secondly, in considering whether to grant probate to the whole or part of an allegedly testamentary document the Probate Court can omit words or clauses which were not intended to be included by the testator. In this case extrinsic evidence is admissible to show that the instrument does not represent the testator' s intentions and that words were inserted which were not known and approved by the testator.[2] Thus, a revocation clause has been excluded where there was clear evidence of the testator's intention not to revoke an earlier instrument.[3] Similarly, a particular word or group of words inserted through error can be omitted where it is clear that the testator did not intend the will to include such words and where the presence of those words alters the testator's true intention.[4] Under this jurisdiction, the court may omit words which the testator did not intend to be in the will at all, but cannot omit them simply because the testator misunderstood their effect (see also paras 7.7-7.8).

Limitations on Power to Correct

7.5 There are however at least four serious limitations upon the power of the court to correct testator's mistakes. First, it is generally accepted that the court has no power to *add* or *alter* words when admitting a will to probate, even if there is clear evidence that the omission of the correct word or words was unintentional.[5] One example of the irrationality of this limitation is that a legacy of "$50" which should have read "$500" cannot be corrected, whereas a legacy of "$500" which should have read "$50" can be altered by omission of the last "0". Various reasons have been offered for this abnegation of a jurisdiction[6] otherwise freely exercised in relation to transactions between living people, and none are satisfactory.[7] It has been said that to assume jurisdiction to rectify a will would contravene the statutory requirement that wills be in writing[8] yet rectification is available in relation to other instruments required by law to be in writing or under seal.[9] Another reason put forward is that "the testator may have read his will in the actual form and have been satisfied with it";[10] but there is no irrebuttable presumption of knowledge and approval flowing from a testator having read the will before signing[11]

and many documents apart from wills are rectified where there is clear evidence of a relevant error even though they were perused before execution. Despite these doctrinal criticisms, the rule is well-entrenched and we shall proceed on the basis that legislation is required if it needs to be changed.

7.6 A second limitation lies in the truncated manner in which the court will rectify mistakes by omitting words The Probate Division of the Supreme Court of New South Wales handles all proceedings relating to the validity of wills, whether or not such proceedings are contested. In the course of deciding whether all or part of a document represents the testator's last "will" in the sense of being a document to which the testator freely assented, the court may have to interpret the document. But in exercising its "probate" jurisdiction, the court does not provide any binding interpretation of the will which is admitted to probate. If an executor is uncertain about the meaning of a clause in the will or if a dispute about such a matter arises between beneficiaries, such issues are determined in other, later proceedings.[12] Instances have occurred where words have been omitted from probate without there being a definitive interpretation of the remaining words, thus leaving open to disputation in later proceedings the proper construction of those portions of the document admitted to probate. Words inserted by mistake have been excised in circumstances where the probate court was conscious that it was thereby creating an ambiguity[13] or leaving a disposition devoid of operation and content.[14] This was done in the belief that a judge later called upon to construe the will might be able to interpret it in such a manner that the testator's true intention can be given effect. In our view this shadow-play is a highly unsatisfactory manner of remedying a demonstrated error, particularly when it is borne in mind that the evidentiary rules relating to the interpretation of wills often operate to exclude evidence of mistake that was admissible at the probate stage.[15]

7.7 The third limitation is that where the error is a mistake of law or error in drafting being matters in which the draftsman was empowered by the testator to use his or her own judgment, the testator is bound by the mistake.[16] One example is where the testator instructs his or her solicitor to draw a will containing a gift in favour of children and the solicitor uses the word "issue" in a context where it has its legal meaning of descendants. This limitation has worked harsh injustices.[17]

7.8 The fourth limitation on the court's power to rectify by omitting words or phrases when admitting a will to probate, lies in the court' s refusal to do this where the result would be to alter the sense of the remaining words.[18] For example:

> In *Re Horrocks*[19] a gift was made in favour of objects described as "charitable or benevolent". The word "or" rendered the gift invalid because it was void for uncertainty and application was made to strike out the word. It is clear that a gift in favour of "charitable benevolent" or "charitable *and* benevolent" objects would have been valid. The application was rejected in that the word "benevolent" had been chosen by the testator's draftsman, to whom she had committed the task of drafting the will and by whose choice of word she was in the circumstances bound, and the word "of' could not be deleted without making the words "charitable" and "benevolent" qualify one another so that neither would then carry its full meaning.
>
> In *Re Hemburrow*[20] the testatrix's intentions and instructions were to prepare a will including a clause: "I give.., the whole of my real estate and the residue of my personal estate" upon certain trusts. The words "the residue of my personal estate" were omitted by a clerical error and the will signed without the testatrix detecting the mistake. An application to admit the document to probate omitting the word "rear" from the clause in question was refused. One of the grounds of the decision was that even if the mistake were clear the court, by omitting the word "rear", would be altering the sense of the testamentary document and remaking the will of the testatrix even though the omission of the word would have effectuated the testatrix's actual intention.[21]

Whilst these cases are probably soundly based in terms of precedent,[22] they have not escaped academic criticism.[23] They illustrate an unsatisfactory state of the law, where some slips are remediable and others not, depending upon the words chosen by a draftsman in purported compliance with the testator's instructions.[24]

7.9 Underlying much of the discussion in these cases is a firm conviction that very clear proof ought to be necessary before the terms of a will read by or to a testator and executed as his or her "last will" can be set aside. So great was the strength of the presumption of knowledge and approval flowing from such event that it was originally considered to be incapable of being displaced by contrary evidence, although it is now generally

accepted that the presumption may be displaced if there is clear and compelling evidence.[25] One reason underlying this general approach is the concern that the admission of extrinsic evidence may result in drafts or deliberative documents overriding what were intended to be later and final expressions of a testator's "will". Another has been concern about the confusion and uncertainty that would arise from any different rule. It is in our view essential that the strength and limitations of such arguments should be recognised in any consideration of a change to the rule and the extent of such change.

II. REFORMS PROPOSED OR ENACTED ELSEWHERE

United Kingdom

7.10 Following an extensive review by the Lord Chancellor's Law Reform Committee,[26] a recommendation that the equitable doctrine of rectification should be applied to wills, passed into law as s20 of the Administration of Justice Act 1982 (which came into operation on 1 January 1983). The key subsection provides:

> 20(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.

Other subsections preclude application being made after six months from grant of probate, except with the permission of the court, and provide certain protection to executors from the operation of a rectification order. We shall discuss the effect of this provision below (paras 7.16-7.17).

Tasmania

7.11 The Law Reform Commission of Tasmania has made similar proposals, whilst stressing that only specific evidence (such as a written memorandum, draft will or typist's copy) of the testator's intentions should be admissible.[27]

Queensland

7.12 The Queensland Law Reform Commission considered rectification of wills in its Report on *The Law Relating to Succession* (1978)[28] and recommended legislative reform which was enacted as s3 1(1) of the Succession Act 1981 (Qld).

> 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.

Like the English Act there is a six month time limitation from date of local grant, subject to a power in the court to direct otherwise.[29]

7.13 We do not favour the form of s31(1) of the Queensland Succession Act because arguably it imports the unreasonable limitations and qualifications of the existing jurisdiction to omit words, particularly the fourth limitation discussed at para 7.8. We could contemplate situations where the insertion of particular words would alter the sense of words in the will when executed. Rectification in such circumstances would probably be precluded by the continued operation of the law through cases such as *Re Horrocks* (para 7.8).[30]

7.14 Each of the three Reports referred to recommended that rectification be available only where the substance of the wording intended by the testator can be clearly shown.[31] Such a requirement is not spelt out in the English

or Queensland enactments, although the word “map” presumably entitles the court to withhold any remedy if it is not clear what remedy is appropriate.

III. RECOMMENDATIONS

7.15 The sorry progression of judicial breast-beating about the inequity of the present rules[32] and the reported instances where they have defeated testator’s intentions without apparently serving any useful function is clear evidence of a need for some reform in this area. How far should it go? Proper analysis requires various categories of mistakes[33] to be identified.

A. Categories of Mistakes

7.16 Section 20(1) of the Administration of Justice Act 1982 (UK) (para 7.10) offers the remedy of rectification in two specified situations, neither of which is defined. The first, “clerical error”, is probably confined to mistakes arising in the mechanical process of writing or transcribing.[34] It would include wills where a legacy wrongly read “$50” instead of “$500” (cf para 7.5) or where the wrong person is named as a beneficiary and, in each case, the error occurred in the course of reading the testator’s instructions or reducing them to written form. It would include such a slip whether made by the testator, the testator’s solicitor or a typist. It would also encompass a situation regularly encountered in the law reports where a husband and wife mistakenly sign the mirror-wills prepared for the other.[35]

7.17 The second situation, “failure to understand the testator’s instructions”, is, as the Committee’s Report makes plain,[36] confined to the case where an adviser is interposed. eg where a solicitor was instructed to leave property to X but, failing to understand what the testator wanted, draws the will in such a way as to leave the property to Y. The “testator’s intention is apparently frustrated solely because his solicitor has failed to ascertain what it is”.[37]

7.18 But the two situations specified in the English Act are not the only forms of mistake that occur in drafting wills. Should a statutory power of rectification go further? In our view it is possible to identify at least five further situations where mistake can vitiate the true intentions of a testator.[38]

(a) where the testator, doing his or her own drafting fails to appreciate the legal effect of the words used. (For example the testator may use the expression “personal property” in a will that reveals no evidence of what he or she intended by that term. it will then be construed according to its legal meaning regardless of the testator’s actual belief on the matter).

(b) where the testator, using a (professional) adviser, communicates his or her instructions in such a way that the adviser understands them, and the adviser fails to appreciate the legal effect of the words he or she chooses to give effect to the instructions and the testator signs the will believing that the words chosen reflect in law his or her expressed instructions. (For example, the testator tells the solicitor that he or she wants a portion of the estate to pass to his or her children; and the solicitor (believing that he or she is giving effect to the instructions) chooses the word “issue” in a context where it has its legal meaning of descendants.[39]

(c) where the testator’ swill is uncertain as to what he or she meant, and his or her true intentions are unascertainable, even by resort to extrinsic evidence.

(d) where the testator’s will is uncertain as to what he or she meant, but, if extrinsic evidence is admissible, such uncertainty can be dispelled.

(e) where there is a vacuum in that the testator never had any intention relevant to the situation which actually occurred.

7.19 Categories (c) and (e) may be readily disposed of. If either “mistake” were to be remedied it would in effect involve the court in making the will for the testator. This would require the court to impute to the testator an intention which it cannot be shown that he or she in fact had. We do not suggest that the court be given power to intervene in such circumstances.

B. Possible Reforms

7.20 The United Kingdom Law Reform Committee considered categories (a) and (b) referred to in para 7.18 as a single type of mistake-situation.[40] The Committee recommended against the availability of rectification as an appropriate remedy "where it cannot be shown that the words of the will are not those which the testator meant to use, or intended to be used on his behalf. To go beyond that is to pass into the wider realm of the testator's purpose".[41] It was pointed out that there can be no rectification of a contract if it correctly embodies the words agreed upon by the parties even if there were some misapprehension as to the meaning or effect of those words.[42]

7.21 We disagree with this approach and are prepared to go further than the recommendations of the United Kingdom Committee. In our view the remedy of rectification ought to extend to established cases of mistake in both categories (a) and (b). There are already clearly established judicial restraints on the availability of rectification which are, in our view, a sufficient protection against fruitless and ill-conceived applications, or applications designed in effect to make a will for a testator whose own views cannot be clearly ascertained.

7.22 We consider that it is dangerous to analogise in this area from the law of contract. A bilateral arrangement such as a contract necessarily creates situations where an unexpressed reservation of a negotiating party may have to yield to the expressed statements of the parties.[43] A will on the other hand does not involve an element of negotiated bargain, but is rather intended to be the expression of the true intention of its maker.

7.23 It should be noted that, at least in the area of revocation clauses, there is a body of authority which holds that ignorance of the legal effect of a revocation clause is sufficient to save provisions which the testator did not in truth intend to revoke.[44] Consequently, the general application of this approach to all testamentary provisions would not be a dramatic leap.

7.24 Another relevant matter is that it is well established that a trust instrument such as a voluntary settlement may be rectified, even after the death of the settlor, where there is sufficiently clear evidence of a relevant mistake and of the true intentions of the settlor. Significantly for present purposes, it is also well established that the court may rectify the wording of a document so that it expresses the settlor's true intention even where the words of the document were purposely used by someone who mistakenly considered that they bore a different meaning from their correct meaning as a matter of true construction.[45] This will apply whether or not the settlor used a professional intermediary, although circumstances will seldom arise where there is sufficiently clear evidence of a relevant mistake if the settlor (or for that matter testator) did his or her own drafting. One example of this jurisdiction is *Kent v Brown.*[46]

> A settlor instructed a solicitor to prepare a declaration of trust embodying the creation of certain absolute interests subject to various life estates. Because the document prepared by the solicitor and executed by the settlor omitted the technical words "and their heirs" after the relevant gift it was considered that the deed on its true construction gave merely life estates to the intended remaindermen. The settlor was dead but the court was satisfied as to the relevant mistake. It is clear that the settlor and his solicitor were *ad idem* as to the settlor's intentions and that the court considered the error to be other than of a clerical or copying nature.[47] After a detailed review of the authorities Roper J ordered that the declaration of trust be rectified by inserting the words "and their heirs" in the appropriate place.

Had the document in *Kent v Brown* been a will, it would not have been rectified under the English Act because the error was not a clerical error. We see no reason why the principles applied in *Kent v Brown* should not extend to wills.

C. Our Recommendations

7.25 For the reasons stated in the preceding paragraphs, we do not favour restricting the power of rectification to the two categories mentioned in the English Act. The English provision has been criticised as unduly restrictive[48] and we see no reason why a jurisdiction exercised in relation to the miscued intentions of deceased settlors should not equally apply to wills. The existing law's stringencies in relation to proof of circumstances giving rise to a right to rectification are an appropriate safeguard. No order would be able to be made unless there were clear evidence of what the testator's intentions were, and this would meet the objections of those who would argue that

the power would become a means whereby the court made wills for testators who had not made up their own minds. We recommend that **rectification of a will should be available wherever the Court is satisfied that the will is so expressed that it fails to carry out the testator' s intentions.** Such a change may well engender some litigation However the old rules tended to encourage the court to make unnecessarily fine judicial distinctions rather than seek the proper discovery and implementation of the testator's true intentions. One side-effect of our proposed reform (if adopted) would be the reduction in cases where a disappointed beneficiary sues the solicitor involved,[49] thereby removing the anomalous situation of the disappointed beneficiary proving as part of his or her case against the solicitor that someone else was not intended to be the beneficiary but being unable to prevent that person receiving the unintended gift.

7.26 We do not recommend that any particular rules be introduced as to standard of proof or the evidence admissible to prove relevant mistake. In our view the approach currently adopted by the equity court works satisfactorily. This requires that "convincing proof" must be advanced that the written document does not embody the final intention of the parties and that the omitted ingredient must be capable of proof in clear and precise terms.[50]

7.27 We recommend **the introduction of two ancillary provisions imposing a time limit on making applications for rectification and giving protection to executors.**[51]

> There should be a time limit upon applications in order to give reasonable security to executors and beneficiaries and to exclude stale claims. Since it is likely that executors and beneficiaries would be in a position to perceive the existence of some problem shortly after the deceased's death we suggest that the period should be eighteen months from the date of death, subject to a power in the Court to permit an extension for "sufficient cause".[52] This will permit if not encourage rectification proceedings to be brought concurrently with the application for probate, but will allow late claims, eg at the suit of disappointed beneficiaries who are ignorant of the existence of the will.
>
> Executors should also be protected if they distribute on the basis of the executed will subject to giving notices in the usual manner and form,[53] although the rights of a newly created beneficiary to recover on the basis of the rectified will from an overpaid beneficiary should be preserved.

IV. POSTSCRIPT: INTERPRETATION OF WILLS

7.28 In para 7.18 we referred to mistakes in category (d), where the testator's will is uncertain as to what he or she meant but, if extrinsic evidence is admissible, such uncertainty can be dispelled. This raises a more difficult issue. Here the operative mistake is the creation of an unintentional ambiguity of expression which is capable of resolution if the court is free to look behind the will to extrinsic evidence. Whether the true object of interpretation of a will is to discover the meaning of the words used or the intention of the testator or something in between,[54] the courts have devised rules about when extrinsic evidence is available as an aid to construction There are several reasons why some limit should be placed on the availability of extrinsic evidence as an aid to interpretation.

> Some testators say different things to different people as to their; testamentary intentions or dispositions, whether out of malice, forgetfulness, confusion or the desire to placate a particular would-be beneficiary.
>
> A written will is designed to be the considered expression of testamentary intent whereas resort to material outside the words used runs the risk that the testator's preliminary views may supplant his or her final instructions.
>
> Many technical words used commonly in wills(eg "issue", " next of kin") have acquired particular meanings leading to a probability that their use was intended to incorporate such meanings.

7.29 Having regard to our terms of reference and the detail with which we would need properly to set out our reasoning, we do not intend to discuss the complex and virtually irreconcilable principles of will construction and the proper limits of admissibility of extrinsic evidence.[55] The matter has been dealt with in detail by the Lord Chancellor's Law Reform Committee[56] and the Victorian Chief Justices Law Reform Committee.[57] The majority recommendation of the former Committee and the recommendation of the latter was that all extrinsic evidence

should be admissible in order to assist in the interpretation of a will, except direct evidence of the testator's dispositive intention.[58] Such a recommendation would reverse those cases (and the law is far from uniform in its application) in which extrinsic evidence of material facts is excluded even where it would:

> (a) establish the special meaning or significance which the testator was accustomed to attach to any word, name or expression used in the will; or
>
> (b) establish as well as resolve any equivocation[59] in a will, notwithstanding that the ambiguity is not apparent on the face of the will.

These views were reflected in Victoria by the enactment of s22A(1) of the Victorian Wills Act 1958 which states:

> 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.

However, the amended which was introduced by s21 of the Administration of Justice Act 1982 (UK) is more limited. That section 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;
>
> (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.

The provision is, in a sense, more limited than the Victorian section because of the need first to find a peg in s21(1) upon which to hang the broad mantle of extrinsic evidence allowed by s21(2).

7.30 In our view the two reports amply demonstrate the need for some reform in this area. We incline to the view that the English legislation is a more appropriate model for New South Wales than the Victorian, particularly in the light of the broad remedy of rectification which we recommend in para 7.25. That remedy is, in our view, the better vehicle in which to allow the testator's "true" intention to be sought at large outside the will itself. Whilst there is a need o allow greater resort to extrinsic evidence, including evidence of the testator's intention, than the present law allows in the interpretation of wills, the "pegs" provided in s21(1) of the English Act mean that the written will itself is the clear starting point in the quest for the testator' s intentions.

7.31 Finally we would endorse the suggestion that it would be desirable if the Supreme Court Rules were framed so as to discourage the present practice of almost invariably separating probate hearings from proceedings involving the construction of wills.[60] Whilst the rules of evidence to be applied and the parties involved may differ, there will in our view be cases where it is appropriate that the probate court itself conclusively construe the will (particularly where there is a question about the need for rectification). Obviously there will be cases where it is inappropriate to raise issues of interpretation and join the necessary parties for such proceedings, because the will in question may not ultimately be admitted to probate. But in other cases it would be convenient to allow construction issues to be raised and determined concurrently with the probate issues or at a later stage in a single probate-construction proceeding We therefore recommend that **the Supreme Court Rules should provide that a claim relating to the validity of a will and other claims (including claims for the rectification or interpretation of a will) may be joined in the one proceeding unless it would cause undue inconvenience or cost.**

FOOTNOTES

1. Key v Key(1853) 4 DeG M & G73 at 84-85 (43 ER 435 at 439): *Tatham v Huxtable* (1950) 81 CLR 639 at 645,651.

2. See, generally Hardingham, Neave & Ford. *Wills and Intestacy in Australia and New Zealand* (1983) para 316; *Theobald on Wills* 14th ed pp38-39; Re *Fenwick* [1972] VR 646 at 651. Naturally, this power to refuse probate of the whole or part of a will extends to wills affected by fraud.

3. See eg *Re Phelan* [1972] Fain 33; *Re Luck* [1977] WAR 148.

4. See eg Re *Bryden* [1975] Qd R 210 (solicitor's mistake in dictation): *Perpetual Trustee* Co *v Williamson* (1929) 29 SR (NSW) 487 at 490 (draftsman misread testator s handwritten instructions): *Re Morris* [1971] P 62 (draftsman's slip led to revocation of clauses in earlier will not intended to be touched): *Re Reynette-James* [1976] 1 WLR 161 (typists error).

5. See cases cited in Theobald, note 2 above, p38 n76: *Tatham v Huxtable* (1950) 81 CLR639 at 651. Cf Re Tait [1957] VR 405.

6. The jurisdiction to rectify wills by inserting words was exercised before the passing of the Wills Act 1837: see *Fawcett v Jones* (1810) 3 Phill 434 (161 ER 1375) (including argument of counsel): *Harter v Harter* (1873) LR 3 P& D 11 at 14, 19.

7. The Lord Chancellor's Law Reform Committee which considered the topic of rectification of wills reviewed the stated reasons and concluded that it was" unable to discover any satisfactory reason for holding that the doctrine of rectification should not apply to wills": *Interpretation of Wills* (1973) Cmnd 5301 para 10.

8. *Earl of Newburgh v Countess Dowager of Newburgh* (1820) 5 Madd 364 at 365 (56 ER 934 at 935): *Harter v Harter* (1873) LR 3 P & D 11 at 17.

9. As to the rectification of *inter* vivos transactions required by law to be in writing. see *Craddock v Hunt* [1923]

2 Ch 136 and *United States of Australia v Motor Trucks Ltd* [1924] AC 196.

10. *Re Bywater* (1881) 18 Ch D 17 at 22.

11. *Re Morris* [1971] P 62: *Re Fenwick* [1972] VR 646.

12. One reason for this division of jurisdiction is that the parties to probate proceedings may not be the same as the parties to construction proceedings.

13. Eg *In Goods of Walkley* (1893) 69 LT 419.

14. Re Morris [1971] P62.

15. Hardingham, Neave and Ford. note 2 above, para 1101.

16. *In the Estate of Beech* [1923] P46: *Perpetual Trustee* Co *v Williamson* (1929) 29 SR(NSW) 487: *Re Horrocks* [1939] p 198 at 216: *Osborne v Smith* (1960) 105 CLR 153 at 159.

17. See eg Collins *v Elstone* [1893] P 1 (testatrix who wished to revoke one provision in earlier will was misinformed by her draftsman as to the effect of a general revocation clause and executed a will containing such a clause: held. that the testatrix must be taken to have known and approved of the words of revocation chosen): and *Re Walker (deceased)* [1973] 1 NZLR 449. For a criticism of *Collins Elstone* on a narrower ground. namely that it failed to apply generally accepted principles requiring proof of actual intent to revoke. see Geddes and Rowland. Revocation by later will relevance and proof of intention (1984) 58 ALJ 186 at pp 187-8.

18. *Ebert v The Union Trustee Company of Australia Ltd* (1960) 104 CLR 346 at 351; *Osborne v Smith* (1960) 105 CLR 153 at 159-162: *Re Horrocks* [1939] P 198. Cf *Re Morris* [1971] P 62.

19. [1939] P 198. The decision is strongly criticised by Lee, Correcting Testators' Mistakes: *The Probate Jurisdiction* (1969) 33 *Conveyancer* 322 at pp329-334. The particular gift would now be saved in New South Wales by s370 of the Conveyancing Act, 1919.

20. [1969] VR 764.

21. *Id,* at 765-766. See *also Harter v Harter* (1873) LR3 P& D 11 and cf *Re Cogan* (1912) 31 NZLR 1204.

22. Cf *Re Morris* [1971] P62 at 79-81.

23. See Hardingham, Neave and Ford. note 2 above. Pp 72-73, 77-83: Lee. Correcting Testators' Mistakes: *The Probate Jurisdiction* (1969)33 *Coneeyancer* 322: Maxton, Rectification of Wills: A Case for Reform (1984) *NZLJ* 142. American law reflects a similar pattern, although there are some recent signs of change. The traditional reluctance to rectify and its stated rationale is soundly criticised by Langbein & Waggoner, Reformation of Wills on the Ground of Mistake: Change of Direction in American Law? (1982) 130 *U Penn LR* 521.

24. An eminent authority in this field described the leading Australian Case, *Osborne e Smith* (1960) 105 CLR 153 as concluding that "as a mere omission could not result in an instrument which gave effect to the testatrix' s intentions, the court could only refuse probate of the whole and the deceased died intestate. In the result, there was in existence a duly executed instrument and clear findings as to what was really intended. but nothing was admitted to probate". See F C Hutley QC later Hutley JA. in Reconstruction of the Law of Succession (1973) 15 *Journal of the India Law Institute* p428.

25. See, generally Hardingham, The Jurisdiction of Courts of Probate to Rectify Errors in Wills (1972) 46 *ALJ* 221 at pp 221-226.

26. Note 7 above.

27. Report on *Reform in the Law of Wills,* (1983), Report No 35, p12.

28. (1978), QLRC 22, pp19-20.

29. Succession Act 1981, s3 1(2).

3. [1939] P198.

31. United Kingdom Report, note 7 above, para 25: Tasmanian Report, note 27 above. p12; Queensland Report, note 28 above, p20.

32. Eg *Re Morris* [1971] P62 at 82; *Re Reynette James* [1975] 3 All ER 1037 at 1043.

33. Cf the analysis of the Lord Chancellor's Law Reform Committee, note 7 above, pp 8-11.

34. See *The Queen v Commissioner of Patents; Ex parte Martin* (i953) 89 CLR 381 at 406.

35. See Hardingham, Neave & Ford. note 2 above. p76.

36. Note 7 above. paras 20-22.

37. *Id.* para 21.

38. Cf the Lord Chancellor's Law Reform Committee, note 7 above. paras 18, 22-25. Our discussion draws substantially upon the material in these paragraphs, although there are some differences in our conclusions.

39. Sec para 7.7.

40. Note 7 above para 22.

41. *Id,* para 23.

42. *Id,* para 25, citing *Frederick E Rose (London) Ltd v William H Pim Jnr* & Co *Ltd* [1953] 2 QB 450.

41. *Taylor v Johnson* (1983) 151 CLR 422 at 428-430.

44. The authorities are not uniform but the statement in the text represents the weight of modern authority see Ceddes & Rowland. Revocation by later will: relevance and proof of intention (1984) 58 *ALJ* 186 at pp 187-189.

45. *Re Butlins Settlement* [1976] 1 Ch 250 at 260-1. See also, Langbein & Waggoner, note 23 above at pp525-6.

46 (1942) 43 SR(NSW) 124. An appeal to the High Court was dismissed: see 66 CLR 670.

47. See 41 SR(NSW) at 126.

48. Mithani, Rectification of Wills (1983) *Law Societys Gazette* 2589; Maxton, *op cit*, note 23 above.

49. For a review of the cases, see C Bates, Liability of Solicitors for Negligence to Beneficiaries under a Will (1985) 59 *ALJ* 327. The argument that the existing reluctance to rectify leads to the unjust enrichment of unintended beneficiaries is persuasively advanced by Langbein & Waggoner. *loc cit,* note 23 above.

50. *Joscelyn v Nissen* [1970] 2 QB 86; *Pokallus* e *Cameron* (1982) 43 ALR 243 at 247.

51. Cf United Kingdom Administration of Justice Act 1982, section 20(2)and (3). In this context “executor” includes a person to whom letters of administration cta have been granted.

52 Cf Family Provision Act, 1982, s16(3). Note that in the English Act the period of six months dates from when representation is first taken out.

53. Cf Wills Probate & Administration Act, 1898, s92 and Family Provision Act, 1982, s35(1).

54. See authorities cited in Hardingham, Neave & Ford. note 2 above, para 255 n 14.

55. For such a discussion, see Hardingham, Neave & Ford. note 2 above. chapter 11 and the Nineteenth Report of the Lord Chancellor’s Law Reform Committee on *Interpretation of Wills,* Cmnd 5301.

56. Note 55.

57. *First Report Concerning the Construction of Wills* (1978). For a general discussion of the Victorian position, see IJ Hardiogham. Reading a will in context s22A of the Wills Act (1984) *Law Institute Journal* 91.

58. At present direct evidence of the testator’s dispositive intention is only receivable in cases of equivocation: *Re Cullen* [1946] VLR 47. This exception is preserved by s22A(1) of the Victorian Wills Act.

59. An equivocation exists if a description of an object or subject in a will is applicable to two or more persons or things: *Theobald on Wills* 14th ed p214.

60. See Hardingham, note 25 above at p234. There is English authority that the decision of the probate court is not binding upon the Chancery Division in relation to a matter of construction, *Re Hawksley’s Settlement* [1934] Ch 384.

8. Gifts to Interested Witnesses

I. THE PRESENT LAW AND ITS HISTORICAL BACKGROUND

8.1 A witness who is a creditor of the testator or the spouse of such a creditor is today competent to witness and pursue payment of his or her debt.[1] But, except in the case of privileged testators,[2] gifts[3] to an attesting witness or the spouse of an attesting witness are void. This is the result of section 13(1) of the Wills, Probate and Administration Act, 1898 which provides:

> Where any beneficial gift is given or made by will to a person who attests the execution of the will or to his spouse the gift shall be void so far only as concerns him or his spouse or any person claiming under either of them, but the person so attesting shall be admitted as a witness to prove the execution of the will or to prove the validity or invalidity of the will, notwithstanding the gift.

In this chapter the expression “interested witness” is used to mean an attesting witness who receives a gift under the will.

8.2 Section 13(1) is an adoption of section 15 of the English Wills Act 1837. It might be thought that such provision was enacted as a safeguard to impede those who seek to obtain testamentary benefits for themselves or their spouses by improper means. But the section’s original rationale is to be found in the old law of evidence regarding the competency of witnesses.[4] Section 5 of the Statute of Frauds 1677 provided that gifts by will of land should be void “unless attested and subscribed in the presence of the... devisor by three or four credible witnesses; or else they shall be utterly void and of none effect”. The rules of evidence determined “credibility” and, until the mid-nineteenth century, evidence affected by interest was automatically rejected by the courts. If a witness was” interested” in the sense of being a creditor or beneficiary, he or she was not” credible” and if as a result a will was insufficiently witnessed, the will was invalid. Credibility was to be determined at the time of probate and not at the time of will-making. It therefore became established practice that if a gift to a witness or debt in favour of a witness was renounced or released before probate this would remove the disqualification of interest. The witness thereby became competent to swear to the will and was, for the purpose of the statute, credible. One drawback of this practice was that the witness was open to bribery from either the intestate heir or those interested in maintaining the will.

8.3 However this subterfuge whereby an attesting witness could become “credible” by renouncing his or her legacy or debt before application for probate was condemned in 1746[5] and it was declared that” the true time for.., credibility is the time of attestation”.[6] The solution to the ensuing crisis which “threatened to shake most of the titles in the kingdom that depended on devises by will”[7] was the enactment of Lord Hardwicke’s Act in 1752.[8] The Act contains the rules now be found in sections 13 and 14 of the New South Wales Wills, Probate and Administration Act, namely that a witness is “credible” because any disposition in his or her favour is invalidated, and that a creditor-witness whose debt is charged on the estate may give evidence and recover payment At that stage however gifts to the spouse of a subscribing witness were not brought within the scope of the Act.

8.4 The Wills Act 1837 re-enacted the provisions of the 1752 Act and extended the invalidating effect of witnessing to any disposition in favour of the spouse of an attesting witness. It also enlarged the exception in favour of creditors to include those of all classes.[9]

8.5 The Real Property Commissioners whose report led to the enactment of the Wills Act 1837 seemed to think that the automatic avoidance of gifts in favour of attesting witnesses was a blunt and rather arbitrary instrument,[10] but they declined to recommend any change on the grounds that they were not at liberty to suggest alternatives to what they saw as “the general rules of evidence”. But although the rule that a witness was incompetent to give evidence by reason of interest was abolished in the mid-nineteenth century, the statutory avoidance of gifts in favour of attesting witnesses survived its evidentiary origins.

II. FUNCTION AND EFFICACY OF THE RULE RELATING TO ARRESTING WITNESSES

8.6 The gradual and now complete removal of the historical rationale of the rule has not had the effect of leading to its abolition Many consider that the rule serves a useful “protective” function.[11] Amongst the reasons advanced[12] is the claim that the rule protects testators from duress, influence or fraudulent conduct:

> by obliging testators to involve totally disinterested persons in the will-making process; and
>
> by ensuring that witnesses have no incentive to misrepresent the circumstances of execution or the testamentary capacity of the testator.

8.7 But many have questioned the efficacy of the rule in providing any real protection They point to the cases where the rule has worked inequitably in defeating a testator’s intention to provide for particular beneficiaries. As long ago as 1833 the English Real Property Commissioners stated:

> It may be thought that the laws on this subject require alteration It may be urged. that the persons by whom a testator is most usually surrounded when he executes his will, are friends and servants whom he naturally wishes to be witnesses, because he can rely upon their knowledge of his capacity, and their inclination to support his will, and at the same time they are among the persons to whom he is desirous of leaving some token of his remembrance; that the law which excludes the testimony of such persons can have no effect in preventing fraud, for the bribe can be given to a dishonest witness as effectually by a sum of money or a security (which a jury may not be able to discover) or by a codicil, as by a bequest in the will that where there is a gift to an honest witness, the amount of his interest will appear, and might be taken into consideration by the jury that the present law has very little of the effect intended by it, that the difference between the interest of a witness who has received his bribe, and of one who expects it, is very slight, and that the provision of the statute which makes void the legacy, is unjust to him, and never is, and it never will be taken advantage of by respectable parties; 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 upon honest witnesses.[13]

The view that the rule “is likely to operate more frequently against innocent parties who have accidentally fallen foul of its provisions, than set back wrongdoers”[14] has been asserted by several modern commentators.[15] Indeed, the cases where testators, even acting with the benefit of legal advice, have executed wills using the spouse of a beneficiary as a witness[16] suggest that people are not generally aware of the rule. This lack of awareness means it is unlikely to act as a deterrent to fraud.

8.8 The rule has been interpreted narrowly by the courts,[17] suggesting judicial doubt as to its general efficacy. Nevertheless there continue to be cases where the irrebuttable presumption of invalidity embodied in the rule defeats gifts which were clearly untainted by impropriety.

8.9 In our view the rule in its present form should be repealed. Its unyielding and unnecessary harshness is too blunt an instrument for serving the proper functions of wills formalities. We agree with the following comment about its English counterpart, section 15 of the Wills Act 1837:

> That section 15 does provide some such protection is an article of faith rather than knowledge. It is not to be denied that it can operate towards the desired result of keeping the testator’s will free from contamination, but this is not enough if in fact it does more harm than good.[18]

We also agree with the following comments by a sub-committee of the Victorian Chief Justice’s Law Reform Committee:

> The legal difficulties therefore, which the legislation invalidating gifts to attesting witnesses was originally intended to overcome ceased, more than a century ago, to require the continuance of it in force. Moreover this legislation, since it strikes down in into every gift to every attesting witness, is obviously calculated to inflict much haphazard injustice. It takes no account of whether the witness ought, in justice, to have been provided for in the will. And it draws no distinction between a witness who has used improper means to obtain testamentary benefits, and one whose only fault has been ignorance, either of the existence of the legislation, or else of the inclusion, in the will, of the gift in his favour. Furthermore, as a fraudulent witness-beneficiary may ordinarily be expected to be informed on each of these two matters, the legislation, in those

cases in which it operates to bring down a gift, will usually be found to be doing an injustice to an honest witness by defeating a proper exercise of testamentary power in his favour.[19]

8.10 In the next two sections we shall turn to the question whether any modified version of the rule should be enacted.

III. OPTIONS FOR REFORM

A. Simple Repeal of the Rule

8.11 Bearing in mind the criticisms of the rule and its doubtful efficacy, it is not surprising that some have seen the appropriate solution to be the simple repeal of the rule. This would permit the witness to receive his or her bequest unless the will is challenged on the usual grounds of lack of capacity, absence of knowledge and approval or undue influence. This option has been enacted in South Australia[20] and by the framers of the United States Uniform Probate Code.[21]

8.12 We do not favour this option for various reasons.[22]

We consider that there should remain an impediment to fraudulent or improper practices by the retention of some provision which acts as an inducement to use two disinterested witnesses.

It is almost impossible to prove a case of undue influence because (unlike the situation with *inter vivos* transactions) there are no presumptions of influence in relation to will-making and it is only influence amounting to fraud or coercion that is regarded as “undue” in probate.[23]

B. Substitute the Intestate Benefit

8.13 Another option is to permit an interested witness or an interested spouse of a witness, who would be entitled to take upon intestacy, to take the share of the estate which that person would have taken upon intestacy or the provision made in the will (whichever is the lesser). This proposal has been adopted in Victoria[24] and proposed in Tasmania.[25]

8.14 We do not favour this option[26]

It is arbitrary because it takes no account of the circumstances of the particular case.

It does nothing for the witness who is not an intestate successor.

To the extent that the general rule (or some adaptation of it) should be retained, the Victorian solution detracts from the ability to detect fraud. A fraudulent relative may take advantage of such a provision to take a portion of the estate without dispelling the suspicion arising out of his or her attestation of the will. He or she may “lie in the weeds” and assert rights under the will if it appears that the fraud will remain undiscovered. There is little merit in awarding a consolation prize to a person whose fraud is unsuccessful or whose actions are such that he or she cannot prove lack of influence.

The Family Provision Act, 1982 will provide relief in some deserving cases of dispossessed beneficiaries.

C. Modification of the Rule

8.15 Alternative solutions could encompass the exclusion of the rule with reference to spouses,[27] superfluous witnesses[28], small gifts[29] and proper remuneration payable to professionals acting as executors or trustees.[30] It has also been suggested that the rule should be extended to the *de facto* partners of attesting witnesses[31] and professional advisers of the testator.[32] We shall refer to these options in the course of our general recommendations in section IV of this chapter.

D. Special Requirements for Attesting Witnesses Who are Beneficiaries

8.16 A solution which has found favour in Canada has been to retain the rule but to create an exception that would allow the gift to take effect if a judge is satisfied to an appropriate degree about the gift's propriety.[33] The Victorian legislation adopts a similar approach in that it provides that an interested witness may apply to take the gift in the will, in lieu of his or her intestate benefit: see para 8.13.[34] These solutions clearly put the onus of establishing the propriety of conduct on the witness claiming a benefit under the will However they express the test of propriety in ways which may be significantly different in their application

> In Ontario the Court has to be satisfied that the witness or spouse "did not exercise any improper or undue influence upon the testator";[35]
>
> In British Columbia the Law Reform Commission has recommended that the court be satisfied by the person seeking to uphold the gift that "the testator knew and approved of it";[36]
>
> In Victoria the Court has to be satisfied "that the entitlement of the applicant under the will was known to and approved by the testator and was not included in the will as the result of the exercise of any undue influence by any person".[37]

We shall discuss these proposals in the next section.

IV. RECOMMENDATIONS

8.17 For the reasons set out in para 8.9 we recommend the repeal of the rule in its existing form.

8.18 However we consider that the law of wills should retain a provision which will tend to protect testators by requiring interested witnesses to establish the propriety of their gift unless relieved by the written consents of the persons entitled to benefit from the avoidance of the gift. This will replace the existing rule of automatic avoidance with a more finely-tuned remedy. The approach we favour is the fourth one discussed above (para 8.16), but we would modify the structure of the remedy so that the interested witness should be able to initiate proceedings to prove the propriety of the gift if he or she is unable or unwilling to get the consent of those who would benefit from the gift's avoidance. We do not consider that estates should automatically be involved in the expense and trouble of litigation where a beneficiary is an interested witness, because in many cases the genuineness of the gift will be sufficiently obvious. Honest and deserving parties should not be forced unnecessarily to litigation in order to disprove improper conduct. Obviously minors or other legally incapable ("disable") persons will be unable to waive their rights and the interested witness will have no alternative but to initiate proceedings where they are involved.

8.19 If such proceedings are brought it is, in our view, appropriate that the executor should be the defendant, and that the attesting witness should have the onus of establishing the propriety of the gift. The executor has a concern to know the persons to whom the estate should be distributed, and his or her joinder as defendant in the application will obviate the necessity of searching out and serving all those who may be entitled to benefit from the avoidance of the gift in favour of the interested witness. Whilst the executor may choose to enquire as to the attitude of those persons about the application, he or she need not do so. Unless and until the question of the propriety of the interested witness's gift is established by appropriate consents or a court order, the executor should be at liberty to administer the estate on the basis that the interested witness's gift is invalid,[38] subject to the proviso that no part of the estate which was the subject of a gift in favour of an interested witness should be distributed prior to one month after the executor has notified that witness of his or her intention to do so. This proviso would allow the interested witness to take steps to obtain the appropriate consents or commence the necessary proceedings (including, where necessary, proceedings for an interlocutory injunction to prevent distribution) in order to preserve his or her position. We advert later (para 8.26) to a costs sanction which might be particularly appropriate in such cases where the estate might have been spared the cost of the application had the beneficiary chosen not to attest the will.

8.20 Since there will be cases where it is desirable that issues of the general validity of the will be determined concurrently with issues relating to the validity of specific gifts to interested witnesses, the Rules should, we suggest, make it plain that applications to establish the propriety of gifts may be determined concurrently with the application for probate. Indeed we would anticipate that the judicial discretion as to payment of costs would be

exercised in an appropriate case against persons who cause the estate to suffer two sets of litigation where one would suffice.

8.21 What should be the appropriate test of propriety? In our view the three models discussed in para 8.16 are all deficient We agree that the beneficiary whose gift is prima facie avoided on the ground that the beneficiary is an interested witness should have to establish that the testator knew and approved of the gift, but that is a matter which has to be proved before any part of a will is admitted to probate and it is something that is almost invariably established by reference to the strong presumption flowing from proof that the will has been read by or to the testator.[39] Nor have we any difficulty with a provision that would require the interested beneficiary to establish the absence of undue influence.[40] Our concern lies in the fact that, with the possible exception of the Ontario Act which refers to "improper or undue influence",[41] a propriety test which confined itself to undue influence as that concept is understood in probate matters would give virtually no protection at all. For the reasons stated in para 8.12 undue influence is virtually a dead letter in the probate field. We therefore suggest that, in this context, the interested beneficiary who has not the requisite consents should have to establish that that testator knew and approved of the gift, and that it was the free and voluntary disposition of the testator.[42]

8.22 Should the new provisions apply to interested witnesses with respect to all categories of beneficial gift? We think so. It would be very difficult to define a "small" gift and in any event consent to such gifts will probably normally be given So far as gifts in the form of a charging- clause in favour of a professional adviser are concerned, we see no compelling reason why general standards of conduct should be relaxed in favour of professional advisers.[43] Furthermore the Queensland model of exempting directions for the payment of "proper" remuneration gives rise to problems of definition.

8.23 Should the new provisions apply to superfluous witnesses, ie when there are at least two disinterested witnesses.? The presence of a third, interested witness, may arouse the suspicion of the court if knowledge and approval are put in issue but it should not trigger off the rights proposed to be created in this chapter. If a will is sufficiently attested by two disinterested witnesses there is, in our view, no sound reasons why additional witnesses who happen to be interested should be put in any different position than beneficiaries generally. The adoption of this proposal will also obviate the need to determine whether a superfluous signature was that of an attesting witness.[44]

8.24 Should the new provisions extend to the spouses, de facto spouses, or relatives of attesting witnesses, or to other categories of persons who might have some position of special advantage or whose existence as beneficiaries might detract from the disinterestedness of an attesting witness.? One problem with the existing rule is that it can be infringed without the witness being aware of doing so, since a witness need not be shown or told about the operative terms of the will.[45] But, unlike the existing law, what we propose is not a rule of automatic avoidance of gifts but simply one which requires the propriety of certain gifts to be established. We consider that the operation of the new interested witness provision which we propose should be extended to spouses.[46] Such persons are likely to have an identity of financial interest, if not also a legitimate expectation of succession. So far as de facto spouses are concerned, we acknowledge that there will be cases where such a relationship clearly existed and where the rationale underlying the extension of our proposed rule to legally married spouses would apply there also. However we perceive real difficulties of proof arising if the courts are to determine whether, at the time a will was made (which could be many years before death, a person was in a de facto relationship with an attesting witness. Furthermore, it would create a considerable burden on executors to have to enquire whether there existed a de facto relationship between an attesting witness and any beneficiary, yet such enquiry might need to be made if the executor were to avoid distributing an invalid gift (cf para 8.19). Because of these problems we do not recommend extension of our proposal to persons in de facto relationships (cf 10.23 below). Whilst it is hard to know where to draw the line - particularly since the new provision which we propose has sufficient flexibility to disregard the fact that some testators might remain ignorant of the extension to new categories other than legally married spouses - we suggest that other categories of beneficiaries should not be embraced.

8.25 We believe that nothing in this chapter would act as an encouragement to a person who knows he or she is a beneficiary to become an attesting witness. The uncertainty of that person s ultimate rights and the procedural steps he or she might have to follow would be sufficient to deter anyone aware of the legislative scheme from becoming an attesting witness.

8.26 Any legislative reform will have to be accompanied by rules of court which would stipulate how the attesting witness or spouse is to institute proceedings and provide how those proceedings are to be conducted. In addition we propose that rules of court indicate that, prima facie, the costs of any application be borne by the attesting witness. Obviously there will be cases where this is not appropriate, eg if the size of the gift and the relationship of the testator and beneficiary made it plain that the gift was a proper one. The court should retain power in such cases to throw the burden of costs upon the estate. However, in that event, there may be circumstances where it is appropriate that the burden of such costs order should be borne by one or more persons to the exclusion of others, eg where some of a class of beneficiaries are willing to assent to the gift in favour of the attesting witness and others unreasonably refuse. To cater for that eventuality the rules should confer discretion to order that the burden of any costs ordered against the estate may be borne by one or more persons to the exclusion of others.[47]

8.27 A written consent which would operate to save a gift in favour of an attesting witness or the spouse of an attesting witness (para 8.18-8.19) would in all probability constitute a "conveyance" dutiable under the Stamp Duties Act, 1910.[48] This result would be quite incongruous since the consent would merely operate to vest the gift in favour of the attesting witness or spouse of attesting witness whom the testator intended to benefit under the will It would also tend to operate as a disincentive to the relevant parties agreeing, in a proper case, to allow the gift to stand. For that reason we propose that the amendment should expressly exempt any such document from stamp duty.

8.28 We therefore recommend that

(a) section 13 of the Wills, Probate and Administration Act, 1898 should be repealed.

(b) in lieu, the Act should provide that a gift under a will in favour of a person who is either an attesting witness to the will or the spouse of such witness shall be void unless all the persons entitled to benefit from the avoidance of the gift, being *sui juris*, consent in writing to the distribution of the gift according to the will or unless the court is satisfied that the testator knew and approved of the gift and that it was the free and voluntary disposition of the testator.

(c) no part of an estate which is the subject of a gift avoided pursuant to (b) shall be distributed prior to one month after the executor has notified the first mentioned person in (b) of his or her intention to distribute.

(d) where there are at least two attesting witnesses who are not beneficiaries or the spouse of a beneficiary, a gift under a will shall not be avoided by the provision recommended in (b).

(e) in this recommendation, "gift" is defined as in the existing s13 of the Act, and "executor" includes administrator to whom letters of administration are granted with the will annexed.

(f) A written consent given pursuant to (b) should not be liable to duty under the Stamp Duties Act, 1920.

(g) rules of court should be formulated:

(i) to make plain that an application to the court pursuant to (b) may be determined concurrently with the probate proceedings relating to the will:

(ii) to provide that any proceedings pursuant to (b) shall be brought against the executor and to provide how such proceedings may be instituted and conducted;

(iii) to provide that, unless the court otherwise orders, the burden of the costs of proceedings pursuant to (b) shall be borne by the applicant; and

(iv) to provide that the court may, subject to the giving of such notice as it thinks fit, order that the burden of any costs ordered to be paid by the estate may be borne by one or more persons to the exclusion of others.

Competence of Witnesses

8.29 Section 12 of the Wills, Probate and Administration Act, 1898 provides:

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

The Law Reform Commission of Queensland reported that:

> It is probable that there is no need whatever to make any provision in a Succession Act regarding the competency of witnesses, as the general law of evidence would appear to be sufficient; but the dropping of the existing provision without replacement might be misunderstood and accordingly a short general provision has been included which leaves the matter of the competency of a witness to the general law of evidence, applicable in civil proceedings. We feel it proper, however, to repeat the recognised rule that a blind person may not be a witness to the execution of a will.[49]

For similar reasons the Commission also recommended the repeal of the Queensland counterpart of s14, which enables creditor-witnesses and executor-witnesses to prove execution of wills under which they might benefit These provisions were replaced, in the Queensland Succession Act 1981, by s14 which provides:

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

8.30 We agree, for the same reasons, and recommend that sections 12 and 14 of the Wills Probate and Administration Act, 1898 be replaced by a provision which enacts that any person competent to be a witness in civil proceedings in court, other than a blind person, may act as a witness to a will.

V. POSTSCRIPT: UNDUE INFLUENCE AND THE LAW OF WILLS

8.31 Gifts other than by will which are made in favour of persons who are in a relationship of influence over the donor will be set aside in equity unless the donee satisfies the court that no “undug’ influence has been used. For the purpose of this equitable doctrine, certain classes of relationship are presumed to be ones of influence (eg doctor and patient, solicitor and client, parent and child). In other cases the relationship must be established by evidence. But once the relationship is shown to be present the donee must satisfy the court that the gift was the independent and well-understood act of a person in a position to exercise a free judgment. The jurisdiction is broad and flexible and the court will look at all relevant factors, including the size of the gift, the presence or absence of independent advice, and the strength of the dominance in considering whether to allow the gift to stand.

8.32 But for gifts by will there are no presumptions of influence: persons wishing to challenge the validity of gifts by will on this ground must prove that the particular relationship between the testator and the beneficiary was one in which the latter exercised dominance. Furthermore, “undue” influence in the probate area means coercion. No amount of persuasion or pressure that falls short of inducing a testator to do that which he or she does not wish to do will suffice to invalidate the will.[50] The result is that undue influence in probate matters is virtually a dead letter.

8.33 Section 13(1) (para 8.1) and the proposals which we make in this chapter are, in one sense, blunt and limited attempts to give to the law of wills some of the controls which the equitable doctrine of undue influence provides over gifts by living persons. So too are the rules which the courts have developed to test whether a will prepared by a beneficiary has truly been known and approved by testator.[51] But these controls fall far short of the equitable doctrine.

8.34 The strict law of probate thus permits if not encourages pressure, particularly on the old and feeble. This has lead one of our consultants[52] to suggest that the equitable principles, including presumptions of influence, should be introduced into the law of wills. Of course beneficiaries are frequently and naturally the very persons who do have degrees of influence over testators, if only because they are persons who care for them in their declining

years. Testators would remain free to favour them, but the equitable rules would encourage the use of independent advisers to a greater degree than at present. Against this, the extension of the equitable rules into the probate area would undoubtedly lead to much litigation which would supplement the disputes under the Family Provision Act, 1982 which is the main vehicle through which allegations of "undue" influence are attempted to be ventilated at present. The Queensland Law Reform Commission has, in a different context, expressed the view that "it is... undesirable to offer too much scope for litigation in an area where family passions regrettably all too often override reasonable expectations".[53] Such comments may well apply to the suggestion discussed in this paragraph

8.35 With some hesitation the Commission has decided to make no recommendations in this area at this stage. They would probably go beyond the scope of the reference The Commission would however welcome further comments on this vexed issue.

FOOTNOTES

1. Wills, Probate and Administration Act, 1898 ss13(3) and 14(1).

2. *Id* s13(2). See chapter 11.

3. "Gift" is defined in s13(3) to include a devise, legacy, estate. interest or appointment of or affecting any real or personal estate, but does not include a charge or direction for the payment of any debt The disability extends only to a beneficial gift *Re Bernard* (1909) 9 SR(NSW) 417: *Re Kock* [1931] VLR 263.

4. The evidentiary origin of the statutory rules is discussed by Yale, Witnessing Wills and Losing Legacies (1984) 100 *LQR* 453.

5. *Holdfast, dem Anstey v Dowsing* (1746) 2 Strange 1253 (93 ER 1164). This decision led to great consternation: see generally, Yale, note 4 above.

6. 2 Strange 1253 at 1255 (93 ER 1164 at 1165).

7. Blackstone. *Commentaries* 4th ed (1876) vol II p332.

8. 25 Geo 2, c6.

9. Wills Act 1837, ss 14, 15, 16. These sections were adopted by New South Wales in 1840 by 3 Vict No 5.

10. See Fourth Report pp19-20.

11. As to the "protective" function in wills formalities, see para 2.48.

s12. See eg *Re Royce's Will Trusts* [1959] Ch626 at637; *Burns Philp Trustee* Co *Ltd v Elliott* [1976] 1 NSWLR 14 at 16; *In the Estate of Bravda* [1968] 1 WLR479 at 492: Lord Chancellor's Law Reform Committee Report on *The Making and Revocation of Wills* (1980) Cmnd 7902 para 2.15.

13. Fourth Report at pp19-20.

14. Davey, The Making and Revocation of Wills (1980) *Conveyancer* 64 at p76.

15. Gulliver & Tilson, Classification of Gratuitous Transfers (1941) 51 *Yale Law Journal* 1 esp at pp11-12: Mullady. The Prohibition Against Interested Witnesses Taking under the Will: An Outdated Doctrine (1972) 9 *Houston Law Review 1078;* Yale, note 4 above. esp at pp462-467.

16. See eg *Ross v Caunters* [1980] Ch 297.

17. See eg *Gurney v Gurney* (1855) 3 Drew 208 (61 ER 882): *In re Trotter* [1899] 1 Ch764. And *In the Estate of Bravda* [1968] 1 WLR 479 and *In the Will of Evans* [1964-5] NSWR 286.

18. Yale. Note 4 above at p465.

19. See Victorian Statute Law Revision Committee, *Report upon the proposals in the Wills (Interested Witnesses) Bill 1971* (1972) at p12.

20. Wills Act 1936, s17(1). This was enacted in 1972 following recommendations of the Law Reform Committee of South Australia in its Sixth Report on *Section 17 of the Wills Act 1936-1966.* The Committee also recommended various procedural reforms designed to assist any party wishing to have such a will proved in solemn form.

21. Uniform Probate Code, 1969. s2-505. The official comment suggests that any substantial gift in favour of a witness would be a suspicious circumstance allowing the gift to be challenged on the grounds of undue influence. For the reasons discussed in para 8.12 of our Report, such a provision would give little protection in view of the Australian concept of undue influence in wills.

22. We have drawn substantially upon the discussion by the Victorian Chief Justice' s Law Reform Committee in a document which is an appendix to the Victorian Statute Law Revision Committee's *Report upon the proposals contained in the Wills (Interested Witness) Bill 1971* at p12, and the Law Reform Commission of British Columbia in its *Report on The Making and Revocation of Wills* (1981) at p78.

23. *Hall v Hall* (1868) LR 1 P& D 418 at 482; *Parfitt v Lawless(1872)* LR2 P& D 462: Perry v Jones (Holland J 19.10.1983. unreported at pp38-40). The court will however look with considerable suspicion at cases where the person who prepared the testator's will receives a benefit under it. The evidence relating to knowledge and approval will be carefully scrutinised in such cases: see Hardingham, Neave & Ford. *Wills and Intestacy* in *Australia and New Zealand* (1983) para 304.

24. Wills Act 1958. s13.

25. Law Reform Commission of Tasmania *Report on Reform in the Law of Wills* (1983) Report No.35 pp 11-12. It is also a fairly common solution adopted by several of the American states: see Mullady. note 15 above.

26. Most of the reasons given are drawn from the Law Reform Commission of British Columbia *Report on The Making and Revocation of Wills* (1981) pp78-9.

27. This solution was discussed. but not recommended by the Lord Chancellor's Law Reform Committee in its *Report on the Making and Revocation of Wills* (1980) Cmnd 7902 para 2.16. It has been recommended by the Law Reform Commission of Tasmania in its *Report on the Reform of the Law of Wills* (1983) pp11-12.

28. See Queensland Succession Act 1981, s15(2); Victorian Wills Act 1958, s13(3)(c)(~ Western Australian Wills Act, s13(2): New Zealand Wills Amendment Act 1977, s3; United Kingdom Wills Act 1968, si. The need for such reform (if not encompassed by a wider reform is demonstrated by *In the Estate of Bravda* [1968] 1 WLR 479 where there were four attesting witnesses two of whom were beneficiaries. Those beneficiaries had their gifts avoided by the section One judge in that case described the conclusion he had reached as "monstrously unfair" (Russell U at 492) and all indicated that the application of the section clearly offended their sense of justice. Reform along the lines of the English Act was advocated by Helsham J (as he then was) in *In Estate of Stanley Wright* (unreported. 9 May 1974). It has been pointed out that the statutory reforms do not meet all of the problems arising out of *Bravda's* Case: Tiley. Attesting Witnesses - Some Remaining Problems (1968) 112 *Solicitors' Journal* 994.

29. This suggestion was discussed but rejected by the Lord Chancellor's Law Reform Committee in its *Report on The Making and Revocation of Wills* (1980) Cmnd 7902 para 2.16. The Victorian Statute Law Revision Committee suggested such a provision in relation to gifts of less than S500 *(Report upon the proposals contained in the Wills (Interested Witnesses) Bill 1971* (1972) para 11) but this suggestion was not adopted in the ensuing Victorian legislation.

30. See Queensland Succession Act 1981. S15(1).

31. The question was discussed without any recommendation in this Commission's *Report on De Facto Relationships* (1983) NSW LRC 36 pars 12.48.

32. This question was discussed without any recommendation by the Law Reform Commission of Tasmania in its Working Paper on *Reform in the Law of Wills: The Making and Revocation of Wills* (1981) by C M Bates at p16a.

33. Ontario Succession Law Reform Act, 1977. s12(3) (adopting the proposal of the Ontario Law Reform Commission in its Report on *The Proposed Adoption in Ontario of the Uniform Wills Act* (1968) pp31-32). A similar proposal has been made by the Law Reform Commission of Manitoba in its Report on *"The Wills Act" and the Doctrine of Substantial Compliance* (1980) p29 and the Law Reform Commission of British Columbia in its Report on *The Making and Revocation of Wills* (1981) pp79-80. A similar type of proposal was also made by Justice (the British Section of the International Commission of Jurists) in its report on *Home Made Wills* (1971) p7-8.

34. Administration and Probate Act 1958. Ss100-101.

35. Succession Law Reform Act, 1977, s12(3). The Law Reform Commission of Manitoba (note 33 above) has recommended the introduction of a similar provision

36. Note 33 above.

37. Administration and Probate Act 1958. s101(1). In an application the applicant shall not he entitled to rely on any evidentiary presumption to prove or assist in proving that the testator knew and approved of the contents of the will : s101(3). For a successful application under the section, see *Re Emanuel deceased* [1981] VR 113.

38. As in the present law, the void gift might be saved by the republication of the will by a codicil attested by other witnesses: *Anderson v Anderson* (1872) 13 Eq 381; *Re Silverston* [1949] Ch 270.

39. See Hardingham, Neave and Ford. Note 23 above para 303. The Victorian solution of depriving the interested witness of any evidentiary presumption to prove or assist in proving that the testator knew and approved of the contents of the will (see note 37 above) is in our view too harsh in that it is difficult to see how the witness could ever prove the matter without the benefit of the presumption, the witness may have no personal knowledge of the facts concerning the preparation of the will, and it maybe difficult to lead evidence on such matters after a lapse of time.

40. At present, the onus of proof lies upon a party alleging undue influence(Hardingham, Neave & Ford. Note 23 above pars 307).

41. Note 35 above.

42. We are indebted to the late Mr Justice Hutley for the formulation of the last mentioned requirement We recognise that the second limb of the test almost certainly encompasses the first, but feel it is appropriate that the two stages of the road to propriety should be clearly signposted.

43. Cf *Re Shannon* [1977] 1 NSWLR 210.

44. As to the complexity of such enquiry, see Hardingham, Neave & Ford. note 23 above para 217.

45. The witness need not even know that the document is a wilt *In Estate of Benjamin* [1934] 150 LT 417.

46. One submission which we received (from M J Hurrell) suggested that the existing rule about intended witnesses should be relaxed where one witness is the spouse of the testator and the will leaves the matrimonial home to that spouse. We would anticipate that such a gift would rarely be put in issue and that in all but extreme cases it would pass the propriety tests which we recommend. In our view it would unduly complicate the legislation to except such a gift automatically and we could conceive of circumstances where automatic exception would be undesirable.

47. Cf Supreme Court Act, 1970 s124(j): Supreme Court Rules Part 52 rule 57. Since the gift tainted by having been made in favour of an attesting witness is a residuary gift, any such new rule should extend to persons who are not themselves beneficiaries under the will.

48. Stamp Duties Act, 1920 s65.

49. *Report on the Law Relating to Succession* (1978) QLRC 22 at p9.

50. See authorities cited in note 23 above and Meagher, Gummow& Lehane. *Equity Doctrines & Remedies* 2nd ed (1984) chapter 15. .esp para 1507.

51. See Hardingham, Neave & Ford. note 23 above. para 304.

52. The late Mr Justice Hutley. See also the report on *Home Made Wills,* note 33 above. para 14.

53. *Report on the law relating to succession* (1978) p19.

9. Revocation by Marriage

I. THE PRESENT LAW AND ITS HISTORICAL BACKGROUND

9.1 Section 15 of the Wills, Probate and Administration Act, 1898 provides:

> 15(1) Every will made by any person shall be revoked by his marriage (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 his executor or administrator).
>
> (2) A will made after the commencement of the Conveyancing (Amendment) Act, 1930, which is expressed to be made in contemplation of a marriage, shall not be revoked by the solemnisation of the marriage contemplated.

9.2 By the seventeenth century, under the general and ecclesiastical law of England, marriage in certain circumstances had the effect of revoking a will.[1] A woman's will was revoked by her marriage, because the law stated that on marriage she lost her capacity to make a new will or to change an earlier will.[2] However a man's will was not revoked merely on marriage, because his wife, not being the husbands heir at common law, could not benefit by the revocation of his will.[3] In the case of men, wills were only revoked by subsequent marriage coupled with the birth of children of that marriage. It was considered that the birth of a child caused such a change in a man's domestic circumstances that it was presumed by the law that he intended to revoke his prior will. The rule was evolved in order to protect his heir, not his wife.[4] If a man married and then made a new will, the subsequent birth of children did not revoke that will, as it was assumed that it was made in contemplation of there being children to the marriage.[5] When a man's will or marriage settlement provided for future children, the will was not revoked by the subsequent marriage and birth of children.[6] These rules relating to revocation were initially confined to personal property, but finally in 1771 it was held that they also applied to real property.[7]

9.3 For a considerable period the ecclesiastical courts held that the rules relating to the revocation by marriage of wills of males only constituted a presumption that could be rebutted on proof of a contrary intention.[8] However, the common law and equity courts took the view that the presumption was absolute and irrebuttable.[9] Finally, it was established in *Marston v Roe*[10] that the presumption could not be rebutted by contrary evidence. Tindal CJ pointed out

> [It is] a principle of law, of which the foundation [is] a tacit condition annexed to the will itself when made, that it should not take effect if there should be a total change in the situation of the testator's family.[11]

9.4 In 1833 these principles were considered by the Real Property Commissioners, who concluded that the rule relating to revocation by marriage of the will of a woman should continue, but that the rules relating to the wills of males should be abolished. It has been pointed out that the recommendation relating to women was justified because of their legal incapacity at that time.[12] With reference to men, the Commissioners concluded:

> If the hardship arising in individual cases, from the neglect of testators to alter their wills, is a sufficient reason for the continuance of the rule, the same principle would afford ground for extending it... It appears to us, that the law having entrusted to every man a power of testamentary disposition over his property, must rely upon its being exercised according to the testator's intentions and that no will ought to be set aside on conjectures respecting what the testator's intentions may have been in consequence of a change of circumstances.[13]

That was in line with earlier judicial criticisms of the rules. For example, in 1815 *Lord Ellenborough* had exclaimed:

> But where are we to stop? Is the rule to vary with every change which constitutes a new situation giving rise to new moral duties on the part of the parent?[14]

9.5 But when the reforms advocated by the Commissioners were debated in the English Parliament the main concerns about the existing legal rules were their uncertainty and confusion about the title to property arising from their operation. The recommendations of the Commissioners to confine automatic revocation to women's wills were not adopted and the following became section 18 of the Wills Act 1837:

> And be it further enacted, that every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power or appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the statute of distribution).

9.6 Before the Wills Act 1837 came into operation it was realised that s18 would lead to the revocation on marriage of wills which were in fact made in contemplation of marriage. Sir Edward Sudgen was highly critical of this anomalous situation[15] and he moved unsuccessfully in Parliament to suspend the coming into operation of the Act But it was not until 1925 that the law in the United Kingdom was altered by providing:

> A will expressed to be made in contemplation of marriage shalt notwithstanding anything in section 18 of the Wills Act, 1837, or any other statutory provision or rule of law to the contrary, not be revoked by the solemnisation of the marriage contemplated.[16]

9.7 The New South Wales Parliament adopted the English provisions of 1837 and 1925 in 1840 and 1931 respectively.[17]

II. OPERATION OF GENERAL RULE

9.8 The general rule enacted in s15(1) of the Wills Probate and Administration Act, 1898 is that marriage revokes an earlier will by operation of law. This rule is itself an exception to that prescribed in s16 which states that:

> No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

9.9 Marriage revokes all wills including privileged wills.[18] Since marriage revokes an earlier will by operation of law, irrespective of the testator's intention, it therefore revokes the will even where the testator has executed some agreement covenanting not to revoke. As the revocation occurs by operation of law, it does not constitute breach of the covenant by the testator not to revoke an earlier will.[19] A void marriage[20] and a voidable marriage which has been avoided during the testator's lifetime[21] does not bring about revocation.

III. THE RATIONALE OF THE GENERAL RULE

9.10 The brief historical introduction indicates that at least one of the factors that led to the creation of the general rule of revocation by marriage, ie the legal incapacity of married women, no longer exists. Nevertheless various arguments have been and continue to be advanced to support retention of the rule.[22] The principal arguments supporting retention are:

> Marriage represents a fundamental change in a person's life. Spouses acquire on marriage new personal and financial responsibilities which are likely to render inappropriate all or some of the provisions contained in an earlier will.
>
> Apart from wiping the slate clean, the rule is a protective device. By revoking old wills which otherwise may have survived accidentally and thereby bringing into play the rules applicable to intestate succession, the rule shields members of the testator's immediate family from oversight, mistake or misjudgment It is more likely that the deceased's intentions are achieved by the statutory imposition of an intestacy than by the preservation of an earlier will.
>
> Intestacy is preferable to forcing new spouses and children to assert their claims through applications under the family provision legislation because (i) distribution under intestacy is less costly than judicial resolution of the matter under such legislation, (ii) judicial resolution involves time, uncertainty and inconvenience; and (iii) the new spouse or children are forced to rely on judicial discretion and may not receive as much under the Family Provision Act as on intestacy.

The rule has been part of the law for a long time and is well known. If the rule were abolished, there is a danger that people aware of the rule but ignorant of its repeal would be misled into leaving prior wills unrevoked.

The rule forms part of the law in all other Australian jurisdictions and it is desirable to maintain uniformity in Australia on this topic.

Some of the harsh consequences of the operation of the rule can be removed by liberalising the exceptions to it.

9.11 The principal arguments for abolishing the general rule are:

The historical reasons for its enactment are no longer significant A married woman now retains her separate property on marriage, and the status, social and financial position of women has altered very considerably since the nineteenth century.

Spouses and children receive considerable protection under the Family Provision legislation, a creature of the twentieth century.

Revocation upon marriage is inconsistent with the general approach of giving effect, as far as possible, to the actual intentions of testators. The general rule operates without regard to the circumstances of the case and is a blunt instrument It will for example disinherit a crippled sibling of the testator in favour of the testator' s millionaire spouse.

There are cases where wills were not saved by the proviso in s15(2) even though there was clear evidence of the testator's actual intention that the will should survive an impending marriage. (Of course such criticism does not necessarily lead to the abolition of the general rule, but may suggest that the proviso needs reformulating).

The rule operates to revoke whole wills and thus disinherits legatees who may have no rights on intestacy or under the Family Provision Act, 1982.

A surviving spouse might become entitled to far more on intestacy than is required to meet his or her needs.

A testator might die intestate because he or she failed to realise that marriage revoked an earlier will. The general rule is far from universally known.

The rule will frequently apply arbitrarily and unfairly, by revoking provisions of wills which

protect the testator's children of an earlier marriage;

protect a spouse under a prior marriage,

favour relatives, friends or charities, whom the testator intends to benefit without adversely affecting the legitimate claims of the new spouse or children,

appoint executors, trustees, and guardians of minors,

provide directions for the use of parts of the testator's body for medical or research purposes.

(With the rising incidence of divorce and remarriage the possibility of the problems referred to in the first two instances are increasing.)

The existence of the rule and its "justification" on the grounds of fundamental change of circumstances provokes the question why it does not apply to *de facto* marriages, the birth or adoption of children, separation, divorce or the death of a spouse or children.

The protection afforded by the Family Provision legislation to spouses, children and other dependents of the testator is a more useful, exhaustive, accurate, and discriminating means of achieving a just solution, covering all the persons and objects whom the testator should legitimately benefit, than is achieved by the application of the general rule.

IV. WILLS EXPRESSED TO BE MADE IN CONTEMPLATION OF MARRIAGE

9.12 Before turning to consider the various options for reform, we pause to consider the operation of s15(2) of the Wills, Probate and Administration Act, 1898. In some respects it modifies the rigours of the general rule, although its precise scope and application still cause difficulties for the courts.

9.13 According to si 5(2), it is only a will which is *"expressed* to be made in contemplation of *a* marriage" that is saved from revocation by the solemnisation of "the marriage contemplated". The considerable body of case law discussing this provision[23] is wracked with disagreement. All authorities appear to agree that something must appear on the face of the will to indicate contemplation of a particular marriage and that in the absence of such an indication in the will extrinsic evidence is not admissible to show that the testator had an actual intention to marry present at the date of the will.[24] But dispute rages as to whether a will expressed[25] simply in favour of "my wife "X"[26] or "my fiancee X"[27] saves the will from revocation upon the subsequent marriage of the testator to X In some of the cases wills were held to be revoked although there was clear *extrinsic* evidence of an actual intention to marry being present at the date of the will, and not surprisingly these conclusions have been accompanied by expressions of judicial disappointment that the intentions of testators have been thus defeated.[28] More recently, courts in New South Wales and Queensland have decided that if there is some expression in the will arguably referable to a contemplated marriage (such as a gift in favour of "my fiancee X" or "my wife X", where X was not then the testator's wife), extrinsic evidence may be admitted. This extrinsic evidence can be used to assist in "construing" the will, to see if it expresses the requisite contemplation of a particular marriage.[29]

9.14 This recent stream of cases goes a long way towards ensuring that wills deliberately but not explicitly made in contemplation of a particular marriage are saved from revocation by the operation of the general rule. But they still depend on the court finding some expression in the will giving rise to an ambiguity of construction Furthermore, it must be observed that doubts have been expressed about the correctness of this approach, particularly in regard to the "to my wife X" category.[30]

V. OPTIONS FOR REFORM

9.15 An almost bewildering range of options presents itself for reform of the law in this area. The options include:

make no change

abolish the general rule and the exception in s15(2)

modify the exception, either directly or by expanding the admissibility of extrinsic evidence

save the will from revocation by marriage, but engraft a statutory legacy in favour of the new spouse and children[31]

restrict the general rule to the testator's first marriage[32]

abolish the general rule to preserve gifts in favour of children of former marriages but not in favour of former spouses (who would need to rely upon property settlement and maintenance rights given on divorce or rights under the Family Provision Act)[33]

restrict the general rule to the revocation of disparitive parts of wills[34]

extend the general rule to other situations reflecting a substantial change in the testator's circumstances, such as birth of children, commencement of a *de facto* relationship, separation, divorce.

9.16 Law reform agencies that have considered the matter in recent years have divided on the appropriate response, and this divergence of views reflects the response of the consultants retained by this Commission and those who responded to the draft report which was circulated for comment. The retention of the general rule has been advocated by the Lord Chancellor's Law Reform Committee;[35] the Queensland Law Reform Commission,[36] the Tasmanian Law Reform Commission,[37] and the Victorian Statute Law Revision Committee;[38] although in each case subject to the clarification or liberalisation of the exception. On the other hand the American Uniform Probate Code contains no ground of revocation by marriage (although there is one for revocation by divorce). The Law Reform Commission of British Columbia was divided on the issue, the majority favouring retention of the general rule with modification of the exception, the minority favouring abolition, and the Commission indicated that its final views would await the outcome of deliberation on that jurisdiction's equivalent of the Family Provision Act.[39]

9.17 In each Australian jurisdiction the general rule applies; there is a proviso about wills in exercise of a power of appointment; and there is an exception in relation to wills expressed to be made in contemplation of a marriage. There is one qualification to the last mentioned matter in that the Queensland Succession Act 1981 contains a provision in the following terms:

> 17(1)...extrinsic evidence, including evidence of statements made by the testator, is admissible to establish that an expression contained in the will is an expression of contemplation of that marriage.

This provision was recommended by the Queensland Law Reform Commission to assist in resolving the sorts of difficulties that are discussed in para 9.13.[40]

9.18 The Victorian Wills Act 1958 allows two additional provisos or exceptions to the general rule. Section 16(2) provides:

> A will shall not be revoked by a marriage of the testator if -
>
> (a) ....
>
> (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.

Whilst s16(2) (c) saves a will from revocation by marriage if it contains a gift (of whatever size) in favour of someone whom the testator later happens to marry, s16(3) causes the remaining dispositive provisions of the will to fall into residue and to be distributed upon intestacy. It provides:

> 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.

This ensures that the spouse will receive such portion of that residue as he or she would have been entitled to if the will had been actually revoked upon the marriage, in addition to what passes to the spouse pursuant to s16(2)(c).

VI. RECOMMENDATIONS

9.19 Of all the matters dealt with in this Report we have found this the most difficult. Our five principal consultants were sharply divided in their views. In the draft report circulated in late 1985 (see para 1.9) the Commission indicated that its then view (by majority) was that a will should not be automatically revoked upon marriage and that si 5 of the Act should be repealed. The main reasons that then appealed to us were that the protection given

by the Family Provision Act, 1982 is a more finely-tuned remedy than the automatic revocation provided by the general rule, and that it was inappropriate that those testators who are ignorant of the general rule should die intestate, contrary to their actual intentions.

9.20 The expression of this tentative view in the draft report evoked a strong negative response from quarters whose experience and interest in this area are worthy of considerable respect, notably the Law Society of New South Wales, the Family Law Council and the trustee companies. That response has led the Commission to the conclusion that the general rule providing for revocation of a will by marriage contained in s15(1) of the Wills, Probate and Administration Act, 1898 should be retained. Whilst recognising the force of the arguments supporting abolition of the general rule, the Commission considers that the following reasons justify this conclusion.

> Marriage represents a fundamental change in a person's life and the new personal and financial responsibilities acquired on marriage are likely to render inappropriate all or some of the provisions contained in an earlier will. It is therefore likely that upon marriage a testator would wish to revoke an earlier will, if he or she thought about the matter.
>
> If the will is not revoked automatically, those close relatives who would take on intestacy need to make a claim under the Family Provision Act, 1982. To many non-lawyers litigation is a fearful prospect, to all, it is fraught with uncertainty. It should be remembered that the entire burden of costs of litigation under the Family Provision Act, 1982 is usually borne by the estate. Most estates of married persons are comparatively small and consist of little more than the matrimonial home.
>
> Whilst some beneficiaries under wills revoked by marriage will be unable to bring claims under the Act (notably charities), most who would have specific need which ought to have been satisfied by a testator and which is not met by the rules of intestate distribution will be eligible claimants.
>
> The existing rule is the norm in Australia and is fairly widely known If it were repealed (in one state alone) there would be likely to be testators who believed their wills were revoked on marriage, whereas the repeal of the rule would leave the wills intact No doubt time and an extensive program of public education could alleviate this, but we would presume that there would continue to be several testators who would order their affairs on the basis of the continuation of the old rule.

9.21 The exception contained in s15(2) of the Act (which is set out at para 9.1 and discussed in paras 9.12-9.14) requires amendment. Except in cases where the court has been prepared to perform a gymnastic feat of "construction", its narrow scope has on occasions defeated the deliberate intentions of unwitting testators. We therefore recommend that:

> (a) Section 15 of the Wills, Probate and Administration Act, 1898 should be amended so as to provide that a will made in contemplation of a marriage, whether or not that contemplation is expressed in the will, shall not be revoked by the solemnisation of the marriage contemplated. This would allow extrinsic evidence to be given of the testator's intention to exclude the general rule. Such a provision would entrench the recent judicial developments referred to in para 9.13 and extend them in that the will itself need contain no indication of the relevant intention We consider that to allow extrinsic evidence only for the purpose of "construing' some provision in the will is unduly restrictive and encourages fine and unreal distinctions. This comparatively liberal approach to extrinsic evidence is in line with the views elsewhere expressed in this report (see paras 6.33-6.35, 7.21. 7.23, 10.32), and indicates that we consider that a modern court is quite able to deal with disputed issues of fact of this nature in the comparatively few cases that will arise. To require evidence of the necessary intention invariably to be found in the will would, in our view, operate on occasions to defeat the actual and provable intentions of certain testators (cf Chapter 3).
>
> (b) Section 15 should also provide that a will expressed to be made in general contemplation of marriage shall not be revoked by the solemnisation of a marriage. This would mean that a testator who is shown to have turned his or her mind sufficiently to the matter to have intended that the will should survive a particular marriage or marriage generally and expressed this intention in the will should not have that intention defeated by the general rule. The present exception is confined to an expressed contemplation of a particular marriage (para 9.13). The main thrust of many of the proposals contained in this Report has been to effectuate the actual intentions of testators where they are clearly evidenced. The Family Provision Act,

> 1982 should be the vehicle whereby such intentions are liable to be set aside, not a rule as to automatic revocation which is so framed as to allow some types of proved intention to be effectuated and other types to be frustrated. We have however, in this particular recommendation, continued the old requirement that the contemplation should be expressed in the will itself. The reason is that it might otherwise be possible to negate the general rule in virtually all cases, particularly where younger single testators are involved, simply by showing that, in a vague sense, the testator contemplated that he or she might get married sometime.

9.22 We mentioned in para 9.18 a further exception to the general rule which has been enacted in the Victorian Wills Act. That allows a will which may have been made with no expressed contemplation of any marriage to be saved if the testator later marries provided that the will contains a gift in favour of the person whom he or she marries; and states that any dispositive provision not in favour of that person falls into residue to be distributed upon intestacy. The substance, although not the form, of such legislation was proposed by the Victorian Chief Justice's Law Reform Committee for the following reasons:

> A testator may make a will in favour of a woman at a time when marriage between them is not in contemplation She may, to take some illustrations, be his business partner, or his mistress, or they may be working together in charitable or other activities. If later they should marry each other it is not at all likely that the provision so made will, by reason of that change of circumstances, be too great or inappropriate in kind. It may need to be supplemented by the widow's share, as on an intestacy in the remainder of the estate, or by an order under the Testator's Family Maintenance legislation But for the widow to have the benefit of the particular form of disposition selected by the testator may be of great importance to her, and it seems an unwarranted interference with the testator's wishes to enact, as s16 does, that the provision made for her shall, in such cases, fall with the rest of the will.[41]

We do not consider that any such provision is necessary in New South Wales. When the Victorian Committee made its proposal the spouse of an intestate who was survived by issue[42] was only entitled to $10,000 plus one-third of the remainder of the estate.[43] There was thus the real possibility that the gift intended by the will revoked by the marriage would pass to the other persons entitled to take on intestacy as well as the need to supplement the intestate provision in favour of the spouse by the gift in the will. In contrast, the current law in New South Wales is much more generous to the spouse of an intestate. Here the surviving spouse is entitled to the household chattels, $100,000 and one-half of the balance together with certain rights designed to secure the matrimonial home.[44] This means that the spouse is very likely to receive ample provision upon intestacy, and is certain to receive well over one-half of the estate. The latter result means that it is unlikely that any gift intended by the will that is revoked will pass to anyone other than the spouse and that the spouse will almost invariably obtain administration of the estate and with it control over any discretion as to appropriation of assets. Added to this are the rights under the Family Provision Act, 1982 in those cases where the rights on intestacy are inadequate or defeat proper expectations to particular assets. An additional reason for declining to recommend adoption of this Victorian model is that, without a complicated "hotchpot" proviso,[45] the surviving spouse who took what the will provided plus the statutory rights on intestacy might well get much more than the deceased could ever have intended and thereby deprive other persons of any proper share in the estate.

9.23 Since the revocation of wills on marriage is the general rule in Australia, it is, in our view, highly desirable that steps should be taken to draw this fact to the attention of persons contemplating marriage. We commend this matter to the Family Law Council with a suggestion that it be raised with the Commonwealth authorities administering the Marriage Act 1961.

FOOTNOTES

1. The principles and their historical derivation are discussed in Graunke and Beuseher, The Doctrine of Implied Revocation of Wills by Reason of Change in Domestic Relations of the Testator (1930) 5 *Wis LR* 387: Durfee, Revocation of Wills by Subsequent Change in the Condition or Circumstances of the Testator (1942) 40 *Mich LR* 406; McKay, The Contemporary Validity (If Section 18 Wills Act 1837 (1975) 8 *VUWER* 246.

2. *Hodson v Lloyd* (1789) 2 Bro CC 534 at 544 (29 ER 293 at 298).

3. Durfee, note 1 above at p 407. Wives were considered as having been adequately protected by their entitlements to dower and by marriage settlements which were frequently executed before marriages.

4. McKay. note 1 above at pp251-252.

5. *Doe dem White v Barford* (1815) 4 M & 5 10 (105 ER 739).

6. *Ex parte Ilchester* (1803) 7 VesJr 348 (32 ER 142).

7. *Christopher v Christopher* (1771) Dick 445 (21 ER 343).

8. Fox *v Marston* (1837) 1 Curt 494 (163 ER 173); *Brady v Cubitt* (1778) 1 Doug 31(99 ER 24).

9. *Goodtitle dem Holford v Otway* (1795) 2 H BI 516 (126 ER 679); McKay, note 1 above at p249 *Doe v Lancashire* (1792) 5 TR 49 (101 ER 28).

10. (1838)8 Ad & El 14(112 ER 742).

11. *Id* at 58 (ER at 758).

12. Victorian Statute Law Revision Committee. *Report upon the proposals contained in the Wills (Interested Witnesses) Bill 1971* (1972) at p14.

13. Page 32 of the Fourth Report

14. *Doedem White v Barford* (1815)4 M & S10 at 12 (105 ER 739).

15. He criticised it in his *Essay on the Law of Wills* p196 (cited by the Victorian Law Review Committee. note 12 above).

16. Law of Property Act 1925, s177.

17. The 1837 English Act was adopted in New South Wales in 1840 by 3 Vie No 5. The 1925 English reform was adopted by the Conveyancing (Amendment) Act, 1930 which came into force on 1 January 1931.

18. *In Estate of Wardrop* [1917] P 54.

19. *In re Marsland* [1939] 1 Ch 320; *Clausen v Denson* [1958] NZLR 572.

20. *Warter v Warter* (1890) 15 PD 152; *Re Dawson* (1948) 65 WN(NSW) 91. As to what is a void marriage, see para 10.21.

21. *Re Roberts* (1978) 1 WLR 653.

22. Discussions of the arguments pro and con may be found in Appendix C of the Victorian Statute Law Revision Committee *Report upon the proposals contained in the Wills (Interested Witnesses) Bill 1971* (1972): Law Reform Commission of British Columbia, *Report on the Making and Revocation of Wills* (1981) pp71-73: Lord Chancellors Law Reform Committee, *Report on the Making and Revocation of wills* (1980) Cmnd 120 7902 Part III; Tasmanian Law Reform Commission, *Working paper on Reform in the Law of Wills* (1981) by G M Bates. Strong arguments are advanced against the rule by F C Hutley. The revocation of wills by marriage (1950) 23 *ALJ* 601; McKay, note 1 above; and Phelps, Revocation of wills by marriage - an outmoded relic (1954) 7 *Oklahoma LR* 307.

23. The cases are discussed in Hardingham, Neave & Ford. *Wills and Intestacy* (1983) para 603.

24. *Eg Sallis v Jones* [1936] P43; *Re Hamilton* [1941] VLR 60.

25. In *Re Coleman* [1976] Ch 1 it was held that the *whole* will must be expressed to be in contemplation of marriage. This conclusion has been widely criticised. see eg Lord Chancellor's Law Reform Committee, note 22 above at para 3.18.

26. See *Re Coleman,* note 25 above at 5-6 and authorities cited by Hardingham, Neave & Ford. note 23 above at p124 nn 32-33.

27. See the authorities cited by Hardingham, Neave & Ford. note 23 above at p123 n31.

28. Eg *Re Taylor* [1949] VLR 201 at 202. In that case O'Bryan J suggested legislative reform by the addition of a further proviso, namely that marriage should not operate as a revocation of any testamentary disposition made in favour of the person whom the testator has married.

29. *In the Will of Foss* [1973] 1 NSWLR 180; *Re Keong* [1973] Qd R 516; *Burns Philp Trustee Company Ltd v Layer* [1984] 3 NSWLR 41.

30. Cf *Re Coleman* [1976] Ch 1 and the doubts expressed in Hardingham, Neave& Ford. Note 23 above p125. In *In Will of Foss.* note 29 above. Helsham J chose between two conflicting unreported judgments: see [1973] NSWLR 180 at 182-3.

31. This solution was considered and rejected by the Lord Chancellor's Law Reform Committee. note 22 above at para 3.4. We too reject it mainly on the basis of its rigidity.

32. This solution was considered and rejected by the Lord Chancellor' s Law Reform Committee. note 22 above at para 3.5. We too reject it on the basis that a later marriage is not always different in kind from a first marriage and much depends on the duration of each marriage, the circumstances of their termination and whether there were any children.

33. This solution was discussed in the Tasmanian Law Reform Commission's Working Paper, note 22 above at pp35-36, but not adopted by the Tasmanian Law Reform Commission in its *Report on Reform in the Law of Wills* (1983) para 3.

34. This solution would meet some of the criticisms referred to in para 9.11 but is not favoured by this Commission because it offers only a piecemeal and somewhat arbitrary solution.

35. Note 22 above. Part III.

36. *Report on the Law Relating to Succession* (1978) QLRC 22 p11.

37. *Report on Reform in the Law of Wills* (1983) p14.

38. Note 22 above at p15.

39. Note 22 above at p73.

40. Note 36 above at pp11-12. The recommendation was made to ensure that the views expressed in *Re Keong* [1973] Qd R 516 age not displaced by the later contrary, views of Megarry J in *Re Coleman* [1976] Ch 1. See para 9.13.

41. Appendix C of the *Report upon the proposals contained in the Wills (Interested Witnesses) Bill 1971* (1972).

42. Where there is no issue. no problem arises because the surviving spouse is entitled to the whole estate on intestacy unless (in New South Wales) his or her rights are displaced by those of a de facto partner.

43. Administration and Probate Act 1958 (Vie), ss50, 52(1)(a).

44. Wills, Probate and Administration Act, 1898, ss61A, 61B. 61D.

45. Such a proviso would. in affect require the surviving spouse to compensate the residue with the value of the gift in the will before dividing the residue between that spouse and the other persons entitled on intestacy.

10. Revocation by Divorce

I. INTRODUCTION

10.1 In 1837 the doctrine of implied revocation of wills by change of circumstances (para 9.2) was abolished and, in what is now to be found in s16 of the Wills, Probate and Administration Act 1898, it was enacted that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances. Marriage was the only exception. The possibility of revocation of a will or gift by divorce was not even adverted to by the Real Property Commissioners in 1837. This is not surprising since it was not until 1857 in England that a marriage could be dissolved save by Act of Parliament.

10.2 In 1984 over 43,000 marriages in Australia were dissolved.[1] Whilst issues of custody of children and property settlement can lead to protracted and bitter litigation, it is possible to dissolve the marriage itself by a short and simple legal process as soon as the prescribed ground exists. Often this takes place without the benefit of general legal advice.

10.3 Under the present law divorce does not effect a revocation of all or any part of a will made previously by one of the married partners. Thus, a will making provision for a testator s named spouse takes effect according to its terms unless the testator duly revokes it Indeed a gift in a will made to someone simply referred to as “my wife” or “my husband” does not lapse or fail though the marriage is dissolved,[2] although the will will be revoked if the testator remarries.

II. SOME PROPOSALS AND MODELS FOR REFORM

10.4 In a number of jurisdictions, legislation has been proposed or enacted which operates in some way to revoke either a gift in a will or the will itself in the event of the divorce of the testator”

> a gift to the ex- spouse may lapse;
>
> the will may be treated as if the ex-spouse had pre-deceased the testator;
>
> the appointment of the ex-spouse as executor or trustee may be revoked; or
>
> the whole will may be revoked.

In most cases, annulment of marriage is a further ground for triggering off those consequences.

10.5 Before turning in detail to the ways and means of effecting a change in this aspect of the law, we shall briefly consider the trend in other jurisdictions and the arguments for and against change.

A. United States of America

10.6 Section 2-508 of the Uniform Probate C ode which was promulgated in 1969 provides:

> If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, conservator, or guardian, unless the will expressly provides otherwise. Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent [deceased], and other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the decedent. If provisions are revoked solely by this section, they are revived by testator’s remarriage to the former spouse. For purposes of this section, divorce or annulment means any divorce or annulment which would exclude the spouse as a surviving spouse within the meaning of Section 2-802(b). A decree of separation which does not terminate

the status of husband and wife is not a divorce for purposes of this section No change of circumstances other than as described in this section revokes a will.

A number of states have adopted this provision.[3]

B. New Zealand

10.7 In 1973 the New Zealand Property Law and Equity Reform Committee reported *On the Effect of Divorce on Testate Succession.* The Committee was divided in its recommendations, but the majority favoured a reversal of the presumption that a divorce does not affect the testator's testamentary intentions. In their opinion the existing presumption would accord with reality in the majority of situations. The Committee recommended that the former spouse should be deemed to have died so that dispositions and appointments to that spouse would lapse. It was proposed that the law should however recognise a testator's expressed desire to make a testamentary disposition in favour of a spouse notwithstanding a forthcoming divorce. These recommendations were adopted in substance in section 2 of the Wills Amendment Act, 1977.[4]

C. Canada

10.8 In 1977, the Ontario Law Reform Commission reported on *The impact of Divorce on Existing Wills.* The Commission considered the case for and against altering the existing law, concluding:

> Often the need for law reform, and the best remedy for present injustices, is clear and compelling In this area of the law, however, much can be said against change as well as in favour of it. On balance, we believe that in most cases testators would not wish to benefit their ex- spouses as generously once they are divorced, as would be the case if the marriage was still subsisting. Occasionally the opposite would be the case, but we believe such situations to be rare indeed Reversing the presumption that a divorce has no effect whatsoever on the will of one of the spouses, would bring the law closer to popular expectations.[5]

Pursuant to that Commission's recommendation the Ontario Succession Law Reform Act was amended in 1977[6] to provide:

> 17(2) Except when a contrary intention appears by the will where, after the testator makes a will his marriage is terminated by a judgment absolute of divorce or is declared a nullity,
>
> (a) a devise or bequest of a beneficial interest in property to his former spouse;
>
> (b) an appointment of his former spouse as executor or trustee; and
>
> (c) the conferring of a general or special power of appointment on his former spouse,
>
> are revoked and the will shall be construed as if the former spouse had predeceased the testator.

Provisions to similar effect have been enacted in other provinces of Canada.[7]

D. England

10.9 Section 18A was added to the Wills Act 1837 by the Administration of Justice Act 1982 (UK). It provides:

> 18A. (1) Where, after a testator has made a will a decree of a court dissolves or annuls his marriage or declares it void -
>
> (a) the will shall take effect as if any appointment of the former spouse as an executor or as the executor and trustee of the will were omitted; and
>
> (b) any devise or bequest to the former spouse shall lapse, except in so far as a contrary intention appears by the will.

(2) Subsection (1) (b) above is without prejudice to any right of the former spouse to apply for financial provision under the Inheritance (Provision for Family and Dependants) Act 1975.

(3) Where -

(a) by the terms of a will an interest in remainder is subject to a life interest; and

(b) the life interest lapses by virtue of subsection (1)(b) above,

the interest in remainder shall be treated as if it had not been subject to the life interest and, if it was contingent upon the termination of the life interest, as if it had not been so contingent

The section came into operation on 1 January 1983 and does not affect wills of testators dying before that date.[8] Recommendations along these lines had been made in 1956 by the Royal Commission on Marriage and Divorce[9] and in 1980 by the Lord Chancellor's Law Reform Committee.[10]

E. South Australia

10.10 In South Australia the Law Reform Committee in its Report *Relating to the Effect of Divorce upon Wills* (1977) concluded that "for property to be given by will to a person from whom the testator or testatrix is divorced, if the will or testamentary instrument was executed before the divorce, will almost always frustrate the actual desires of the deceased in relation to his or her property".[11] The Committee proposed various amendments to the South Australian Wills Act, 1936 but to date no legislation has been passed on this topic.

F. Queensland

10.11 Revocation by divorce or by annulment of marriage is presently recognised in one Australian jurisdiction In Queensland, s18 of the Succession Act 1981 provides:

(1) The dissolution or annulment of the marriage of a testator revokes -

(a) any beneficial disposition of property made by will by the testator in favour of 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 subsection (1) of this section is concerned the will shall take effect as if the spouse had predeceased the testator.

This provision was recommended by the Law Reform Commission of Queensland in its Report on *The Law Relating to Succession* (1978).[12]

G. Tasmania

10.12 The Law Reform Commission of Tasmania in its *Report on Reform in the Law of Wills* (1983) has also recommended a change on the ground that the present law, which assumes the divorced testator would still wish to benefit his ex- spouse no matter how long it is since they separated, would surely not be the testator's intention in the majority of cases where, in the emotional stress of a divorce, the will is often forgotten. However, unlike most other jurisdictions, the solution preferred by that Commission is the revocation of the entire will.[13] This recommendation was adopted by the Tasmanian Wills Amendment Act 1985.

H. New South Wales

10.13 The 1981 annual convention of regional law societies of New South Wales passed the following resolution:

That the Law Society of New South Wales should press for the law relating to wills to be amended to provide that upon any decree of dissolution of marriage being granted by the Family Court of Australia, then the wills

of the parties to the action be automatically invalidated upon such decree becoming absolute, unless the Will is made in contemplation of the decree of dissolution of marriage.

It may be noted that this approach was similar to that advocated by the Law Reform Commission of Tasmania (para 10.12). However, following a report prepared by Mr A M Houen, a member of the general legal committee of the Council of the Law Society,[14] the President of the Society wrote to the then Attorney General the Hon F J Walker QC MP on 9 March 1982 stating:

> While the Council has at this stage neither adopted nor rejected the resolution of the 1981 Annual Convention of Regional Law Societies, there is certainly a strong body of opinion that serious and urgent consideration should be given by Government to amending the Wills, Probate and Administration Act, 1898 in accordance with the trend which has been followed in the USA Canada and Queensland and which appears to have been foreshadowed in the UK by the Royal Commission on Marriage and Divorce.

III. SHOULD THERE BE CHANGE?

10.14 Despite the collective strength of the case for reform represented by these proposals, we pause to consider the arguments against the adoption of a general rule that a gift or appointment should be revoked in the event that the marriage between the testator and the beneficiary/appointee is dissolved.[15]

> There is no proof that succession by inadvertence happens more often than that a gift to a divorced spouse is left standing intentionally Unless this can be shown, there is no case for reform.
>
> The law should not protect forgetful or inadvertent testators, but should favour conscious testation. If anyone is to suffer it is better that inadvertent testators should do so rather than those who intend to benefit a former spouse but who are ignorant of the change in the law that would be brought about by a proposal such as the one under contemplation.
>
> The introduction of such a new general rule is not likely to become better known by the community than the general rule dealing with revocation by marriage, and is likely to cause hardship for at least a proportion of testators who do not know of the change.
>
> Whilst marriage involves a positive duty to provide for one's spouse, divorce involves no corresponding duty not to provide for one's ex-spouse The will is bound, under the existing law, to be revoked by a subsequent marriage.
>
> The need to make a new will is less likely to be overlooked on divorce than it is on marriage. Experienced lawyers acting in divorce proceedings do advise their clients regarding the need to revise their wills.
>
> Some divorced testators fail to revoke earlier wills, simply because they do continue to feel some responsibility towards the former partner and intend the will to remain on foot. The proposed change would tend to defeat their expectations much as the existing rule about automatic revocation on marriage can defeat many testators.
>
> There is no compelling reason for singling out divorce or annulment as the only situations of change of circumstances in which wills should be revoked by operation of law.
>
> If revocation on divorce should be introduced, it should also apply to the permanent separation of persons formerly living in a de facto matrimonial situation, in order to place those persons on an equal footing with married persons.
>
> The Family Provision Act, 1982 provides a more useful exhaustive, accurate and discriminating means of dealing with actual cases of hardship in that it allows the testator's dependants to assert claims in priority to the divorced spouse.

10.15 As the Ontario Law Reform Commission has pointed out, questions as to whether the law should be changed and, if so, in what way are difficult:

> because they involve an implicit clash between two principles, both of which have a valued place within the laws firstly, the principle that people should be free to dispose of their estates in any way they think best, and secondly, the principle that neither injustice nor windfall benefits should result from carelessness or neglect. Achieving a balance between these two competing principles requires a careful examination of both the need for reform and the possibility that the remedy may be more extreme than the ill it seeks to cure.[16]

10.16 Despite the arguments we have just summarised, we are persuaded that the law should be changed and that termination of marriage should operate to revoke gifts by will in favour of the former spouse as well as the appointment of such a person as executor, trustee or guardian We agree with the general statements of the Law Reform Commission of Ontario set out in para 10.8 and otherwise adopt generally the views expressed in the reports of the various law reform agencies to which we have referred in part II of this chapter. Termination of marriage represents a fundamental change in a person's life which, more often than not, renders inappropriate provisions in favour of the former spouse in wills made during the marriage. Though reported instances of difficulty with the existing law are few,[17] an increasing number of people are getting divorced in Australia and many of them do so without seeking any legal advice. They may not therefore be alerted to the need to revise an earlier will or may mistakenly believe that the divorce will automatically revoke an earlier will.[18] We believe that most testators, if they thought about it, would not desire to benefit their former spouses under their wills (at least, not as generously as had been intended before the divorce) and would be horrified at the thought of them administering their estates.

10.17 The respective property rights of the parties are usually resolved once and for all in the property settlement that accompanies or follows the dissolution of marriage. The Family Court is required, as far as practicable, to make such orders as will finally determine the financial relationships between the parties to the marriage and avoid further proceedings between them".[19] The 1983 amendments to the Family Law Act ensure that proceedings for maintenance and property settlement can, in appropriate cases, be instituted or continued despite the death of one of the spouses and that orders can be made and enforced against deceased estates.[20] The need to alter the existing law relating to divorce is heightened by the proposal we made in the last chapter. The effect of the alteration can be mollified, in cases of particular need, by the Family Provision Act, 1982 which allows a former spouse to apply for provision out of an estate.[21]

10.18 We do not agree with the suggestion of the Law Reform Commission of Tasmania[22] that divorce should lead to the revocation of the entire will. A similar proposal was aptly described as "an act of legislative overkill, which could well cause more hardship and injustice than the present law".[23] Such a solution would substitute the rules of intestate succession for the entire set of testamentary provisions contained in the will, subject in each case to any order made in favour of an "eligible person"[24] under the Family Provision Act, 1982. Whilst some wills can be expected to contain gifts in favour of members of the divorced spouse's family as unwelcome to the testator as gifts to the divorced spouse, this would be the exception rather than the rule. Total revocation would strike down a wide range of gifts including careful provisions made by a testator for the benefit of the children of an earlier marriage or small bequests to deserving friends and charities. It would also strike down a new will made by either of the spouses after separation and before divorce, even if quite deliberately no provision was made in it for the other spouse.

10.19 We would also reject two other alternatives that have been suggested or debated else where.[25] The first is the repeal of section 16 (see para 10.1) and the enactment of a provision that a will is revoked by any change in the testator' s circumstances. Whilst this is the position in some American jurisdictions, it is unsatisfactory because of the uncertainty it would re- introduce into the law of revocation of wills - the very thing which s16 was designed to eliminate. The second alternative solution we reject is to give the court a power to modify the will or to declare it revoked by the divorce. In one sense the court has a power along these lines under the Family Provision Act, 1982, but such jurisdiction is only available at the suit of a class of "eligible persons" and in limited circumstances. The second alternative would confer a much broader discretion on the court without any guidelines for its exercise. Since the only person who will be directly affected by the general proposal we make (the former spouse) can obtain redress under the Family Provision Act, 1982 in an appropriate case, we consider our proposed solution to be a more finely-tuned instrument.

IV. DETAILED RECOMMENDATIONS

A. Termination of Marriage

10.20 In para 10.16 we recommend that termination of marriage should operate to revoke gifts by will in favour of the former spouse and to revoke his or her appointment as executor, trustee or guardian We recommend that termination of marriage be deemed to occur on the happening of any of the following events:

when a decree of dissolution becomes absolute;[26]

when a decree of nullity is made (see para 10.21); or

where there is an annulment in certain cases (see para 10.22).

In the balance of this chapter the term “former spouse” will include any spouse whose marriage or putative marriage has terminated by these means.

10.21 The Family Law Act 1975 provides for decrees of nullity of marriage on the ground that the marriage is void.[27] A void marriage is no marriage at all, whether or not a decree declaring it void has been pronounced.[28] However it is frequently desirable that the situation should be formalised by a judicial decree. In addition the Family Law Act vests the court with jurisdiction to make appropriate orders as to custody, maintenance and property settlement ancillary to the decree of nullity itself. In our opinion most persons who wish in fact to put an end to their void “marriages” would avail themselves of the remedy of decree of nullity. Accordingly we recommend that such a decree should be a relevant event indicating termination of marriage for the purposes of the rules we propose. It has been common elsewhere to provide that the making of a decree of nullity is such an event.[29]

10.22 Prior to the commencement of the Family Law Act 1975, a marriage was “voidable” on a number of grounds, and a voidable marriage could be ended by decree of annulment. However, this is no longer the law, and so we do not propose adding annulment to the list of relevant events, so far as Australian law is concerned.[30] However, the notion of “voidable” marriage is still used in other jurisdictions and the annulment of such a marriage may have legal consequences so far as Australia is concerned.[31] It is necessary to deal with the situation where a testator’s marriage has been annulled overseas where this has a bearing upon succession rights relating to New South Wales. For this reason we would add, as a further relevant event, the annulment of a marriage effected in accordance with the law of an overseas jurisdiction where such annulment would be recognised in Australia pursuant to s104 of the Family Law Act 1975.

10.23 We do not propose that these amendments should extend to the termination of de facto relationships. In chapters of our *Report on Be Facto Relationships* (1983) we discussed and rejected a proposal that de facto relationships should be equated with marriage. We favoured an approach that involved examining specific areas of the law to determine whether there were significant injustices calling for reform. Apart from the essential differences between marriages and de facto relationships, we can see real difficulty in defining and determining when a de facto relationship has come to an end (cf para 8.24).

B. Transactions affected

10.24 On the termination of marriage beneficial gifts in favour of a former spouse would be revoked “Gift” should have the meaning defined in s13(3) of the Wills, Probate & Administration Act, 1898.[32]

10.25 Similarly, the testamentary appointment of the former spouse as executor, trustee or guardian should be treated as omitted from the will on termination of marriage. These two proposals need some further consideration in the area of secret trusts and we shall deal with this matter later (para 10.36).

10.26 The American Uniform Probate Code (para 10.6) provides that termination of marriage revokes any provision conferring a general or special power of appointment on the former spouse. A power of appointment is a form of gift whereby the person given the power (the donee) may decide who is entitled to receive the property given A general power of appointment is akin to a gift in favour of the donee since it enables the donee to appoint in favour of himself or herself. A special power of appointment (eg to such charitable organisations as X may appoint) precludes the donee from appointing in his or her favour.[33] Clearly a general power of appointment should be equated with a gift for the purposes of the rule under consideration and we propose that “gift” should be defined accordingly (cf para 10.24). It is arguable that a special power of appointment is more akin to the

appointment of the donee as executor or trustee and that the gift itself should not fail on the termination of the donee's marriage to the executor. However, in the comparatively rare cases where powers of appointment conferred by will are now encountered there is usually to be found a gift over in default of appointment. Following the American model, we think that it is appropriate that the special power of appointment itself should be revoked where the spouse is donee of the power. This, we believe, is more likely to accord with the intention of the testator if he or she had turned his or her mind to the question of the effect of the termination of marriage upon the will.

C. How would the revocation of gifts be effected?

10.27 A variety of legal means have been enacted or proposed elsewhere to give effect to the intended revocation of a gift in a will in favour of a former spouse.

10.28 The English Act (para 10.9) provides simply that the gift to the former spouse "shall lapse" except in so far as a contrary intention appears in the will. The draftsman of the section may have thought that this gave effect to the Law Reform Committee's recommendation (by majority) that gifts to the former spouse should be treated as if he or she had predeceased the testator,[34] but the Court of Appeals recent decision in *Re Sinclair*[35] illustrates the unfortunate consequence of the choice of the single term "lapse". In that case the testator provided that" if my said wife shall predecease me or fail to survive me... then I give.., the whole of my estate... unto the Imperial Cancer Research Fund". He divorced his wife who survived him. In a contest for the estate between a relative who was the testator' s next of kin on intestacy and the Fund, the former prevailed. It was held that "lapse" simply meant "fail" and that there was nothing in the section which would justify the court in equating failure by reason of divorce with failure by reason of death during the testator's lifetime. Thus neither of the events provided in the will as giving rise to the substitutionary gift in favour of the Fund in fact occurred and the estate devolved as on intestacy. Although the Court concluded that had the testator been here now he would probably have wished his estate to go to the Fund,[36] it was not prepared to read the word "lapse" as having any broader effect than already stated. We agree with the view of a commentator[37] that this conclusion is unfortunate and ought to be avoided in the framing of the legislation.[38]

10.29 The most commonly adopted mode of effecting the revocation of a gift in favour of a former spouse has been to provide that, on termination of marriage, the gift is revoked *and* the will is to be construed as if the spouse had predeceased the testator. This is the approach adopted in the Queensland (para 10.11) and Canadian (para 10.8) legislation as well as in the American Uniform Probate Code (para 10.6). The rationale for adopting this dual approach is explained by the Law Reform Commission of Queensland:

> In order to make the consequences of the revocation clear, so far as beneficial dispositions to the spouse are concerned, it is desirable to provide that dispositions should have effect as if the spouse had predeceased the testator. This would ensure that if, for instance, a life interest were left to a wife, the effect of a 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 his will to take effect in the event of the prior death of his wife, that substitutional provision would still take effect, as this would presumably best accord with the testator's intentions.[39]

Clearly such an approach avoids the problem of the English section as interpreted in *Re Sinclair* (para 10.28) and would have lead to the preferable result in that case of the Fund succeeding to the estate.[40]

10.30 However the will should only be construed as if the ex-spouse predeceased the testator in respect of property which is the subject of a revoked gift to the ex-spouse. This is the approach taken under the Queensland (para 10.11) and American (para 10.6) models, and is necessary to ensure that the interests of other, deserving beneficiaries are not affected. This could happen, for example, where there is a gift to someone other than the ex- spouse which is conditional upon the ex-spouse surviving the testator. If the will as a whole were given effect as if the ex-spouse had predeceased the testator, such a gift would fail. Indeed, we agree with the recommendations of the South Australian Law Reform Committee that the amendment should be framed so as not to operate in such a way as to make any class of beneficiaries under the will close earlier than it would have done if the gift had not been revoked.[41]

D. Savings

10.31 We have considered a provision modelled on the American Uniform Probate Code (para 10.6) that if a gift or appointment is revoked solely by operation of the section it should be revived by the testator's remarriage to the former spouse. However we do not recommend that such a saving be enacted In view of the general rule that former wills are to be revoked on marriage unless it is clear that they were intended to survive the marriage (see Chapter9), any specific revival rule along these lines would cause unnecessary complications.

10.32 In each of the models we have drawn upon (except Queensland: para 10.11) termination of the marriage does not affect gifts or appointments where a contrary intention is expressed in the will. Clearly testators should be able to exclude the operation of the statutory rule which we suggest, eg to enable appropriate wills to be made as part of a proposed property settlement accompanying dissolution of marriage. However there is no compelling reason in principle why the proof of a contrary intention should be restricted to expressions in the will.[42] The legislation which we propose overrides an earlier expression of intention to benefit a spouse, and replaces it with what may be described as a rule of thumb. If the purpose of this is to approximate more closely the testator's likely real intentions, it does not seem necessary to restrict proof of the testator's real intentions to formally expressed intentions - especially since the testator probably never knew of the rule. It should be possible to use statements of the testator as evidence of his or her intention. Such a stance would be consistent with the use of this type of evidence in ascertaining the testator' s true intentions in other areas.[43] Whilst the admissibility of evidence of intention outside the will itself, including evidence of statements by the testator, will create uncertainty, this is the necessary price to pay to ensure that a testator's real intentions are not frustrated. Although there is a danger of fraud, the courts are well used to weighing evidence and are alert to the danger. We consider that these arguments are sufficiently cogent to justify a recommendation that the general rule should be rebuttable by any evidence, including evidence of statements made by the testator, which establishes to the satisfaction of the court that the testator did not at the time of the termination of marriage intend the proposed general rule to apply (cf para 9.2 1(a)).

10.33 The English model (para 10.9) expressly reserves the former spouse's rights to apply under that country's equivalent of the Family Provision Act Under the New South Wales Family Provision Act, 1982 an order takes effect as if the provision had been made in a codicil to the will of the testator.[44] In the case of an order in favour of a former spouse it could possibly be argued that our proposed amendment would strike down such codicil. We suggest therefore that the new section should be expressed to operate without prejudice to any right of the former spouse to apply for an order for provision under the Family Provision Act, 1982.

10.34 Gifts by will which are avoided by operation of law can be "revived" by the subsequent republication of the will in particular circumstances. Thus, a gift to an attesting witness can be saved from the impact of section 13 (para 8.1) if the will is subsequently republished by an independently attested codicil.[45] Similarly, a will which is revoked by the subsequent marriage of the testator is republished by the execution of a codicil to that will, thereby "reviving" gifts and other applicable provisions in the will.[46] The legislation which we propose should be framed so as to preserve the possibility of a gift or appointment in a will which is revoked on the termination of marriage being saved by the republication of the will after the relevant event by a will or codicil which evinces no intention to delete or modify the gift or the appointment.

10.35 Nothing we have proposed is intended to affect the operation of a contract made between the subsequently divorced spouses concerning the making or non-revocation of a will. In our view the interference with such arrangements is best left to the working out of an appropriate property settlement by the Family Court of Australia or to be dealt with in the context of proceedings under the Family Provision Act.[47] The question arises whether it is necessary to make special provision to achieve this saving It has been held that a contract not to revoke a will is not broken by the subsequent marriage of the promisor because the revocation is regarded as resulting from operation of law and not from the act of the party.[48] Since it is possible that such reasoning might apply by analogy to revocation of gifts by divorce, despite some American authority to the contrary,[49] we think it desirable that the saving of beneficial gifts made in accordance with contracts binding on the testator be clearly expressed in any legislation implementing our recommendations. This has been done in New Zealand.[50]

E. Secret trusts

10.36 A fully-secret trust arises where a gift is made in absolute terms on the face of the will but the testator, before or after the date of the will, communicates to the legatee an intention that the legatee hold the gift in trust and the legatee accepts the trust or acquiesces in it. A half-secret trust differs from a fully-secret trust in that the

will declares that the property is given to the beneficiary on trust though the trusts are not expressed in the will, but have likewise been communicated to the beneficiary by the testator before or at the time the will was made. In each case the secret trust operates outside the will.[51] The fact that a secret trust is said to operate outside the will means that the effect of certain formalities and statutory rules about wills can be avoided. For example, such a trust will be enforced in certain cases even though it was made orally. In addition, where the will gives property to X and there is evidence that a secret trust binds X to give a gift to Y then even though Y is an attesting witness, Y can still take the gift this avoids the application of the current rule preventing interested attesting witnesses taking their gift and occurs because it is said that Y takes under the trust, not under the will.[52] In para 10.24 we recommended that on the termination of marriage beneficial gifts in favour of a spouse would he revoked. The term "beneficial gift" is contained in s13(1) of the Act (para 8.1) and we would anticipate that the existing law interpreting that provision would be imported into the construction of our proposed new provision if a similar expression were used (see para 10.24). On this reasoning, where the testator left a gift to X but there was a secret trust created in favour of Y (his or her spouse), our proposals in their present form would not lead to the revocation of s beneficial interest in the event that Y and the testator were subsequently divorced But they would, in a different case, lead to the revocation of a gift by will to Y (the testator's spouse) even though that gift was subject to a fully- secret trust in favour of X in the event that Y and the testator were subsequently divorced: Ys gift would be a "beneficial gift" for the purposes of s13(1) even though held in trust for X under the secret trust.

10.37 As far as we are aware secret trusts are not encountered frequently in New South Wales and the instances of secret trusts involving spouses who subsequently divorce will he very few indeed. This factor inclines us to the view, which we recommend, that no provision be made in the legislation relating to secret trusts because such provision would add undue complexity to an otherwise comparatively simple piece of legislation. If a contrary view were taken, the expression "beneficial gift" should be defined to include a gift outside the will under a secret trust in such a way that the gift to the named legatee would be saved if such gift were held by that legatee pursuant to a valid secret trust and the gift to the beneficiary under the secret trust would be revoked even though such beneficial gift was made outside the will itself. One would also, in such case, need to ensure that the provision deeming a married beneficiary who divorces the testator to have predeceased the testator did not operate to strike down secret trusts assumed by that beneficiary in favour of third persons: the risk of such trusts failing lies in the fact that it is likely that where a secret trustee predeceases the testator the secret trust fails.[53]

F. Summary of recommendations

10.38 For the foregoing reasons we recommend that in lieu of the existing rule that **termination of marriage does not in itself affect provisions in a will made in favour of a spouse:**

(a) on the termination of marriage any beneficial gift by will in favour of a former spouse (which expression includes putative spouse) and any power of appointment conferred on a former spouse shall be revoked, and the testamentary appointment of a former spouse as executor, trustee or guardian shall be treated as omitted from the will.

(b) in addition to the result specified in (a), on the termination of marriage any property prevented from passing beneficially to the former spouse or putative spouse shall pass as if that person predeceased the testator, but no class of beneficiaries under the will is to close earlier than it **would have done if the gift had not been revoked.**

(c) "termination of marriage" means:-

(i) the dissolution of the testator's marriage (upon the decree becoming absolute);

(ii) the annulment of the testator' s marriage effected in accordance with the law of an overseas jurisdiction where such annulment would be recognised in Australia pursuant to section 104 of the Family law Act 1975; or

(iii) the making of a decree of nullity in relation to a void marriage in which the testator was a putative spouse.

(d) the result specified in (a) and (b) should not occur -

(i) where the court is satisfied by any evidence, including evidence of statements made by the testator, that the testator did not at the time of the termination of marriage intend that such result should occur; or

(ii) where the gift or testamentary appointment is contained in a will which is republished after the termination of marriage by a will or codicil which evinces no intention to affect the gift or testamentary appointment.

(e) the result specified in (a) and (b) should not affect:

(i) any right of the former spouse to apply for an order for provision under the Family Provision Act, 1982; or

(ii) beneficial gifts made in accordance with contracts binding on the testator.[54]

(f) in these recommendations "gift" has the meaning contained in the existing s13 of the Act.

FOOTNOTES

1. Figures released by the Australian Bureau of Statistics in May 1985.

2. In re DeWing [1955] VLR 238.

3. As at 1 September 1982 14 of the United States had enacted the Code in its original or amended form Handbook of the National Conference of Commissioners on Uniform Stare Laws and Proceedings (1982) p472.

4. The legislation departs from the form proposed by the Committee particularly in relation to the manner whereby the revocation is to be effected. It was extensively criticised by R J Sutton. Legislation The Wills Amendment Act 1977 (1979) 8 NZUL Rev 413.

5. Report at p4.

6. See now Succession Law Reform Act RSO 1980 c488, s17(2).

7. Eg British Columbia (Wills Act, 1979, s16): Manitoba (See now Wills Act SM 1982-83-84. c31. Section 18(2)); and Saskatchewan (Wills Amendment Act. 1981. s3). The Law Reform Commission of British Columbia considered various criticisms of the form of the section in its Report on The Making and Revocation of Wills (1981) at pp69-71 but deferred making any specific recommendations for change.

8. Administration of Justice Act 1982. ss73(6) and 76(11).

9. Cmd 9678 paras 1187-1192.

10. Cmnd 7902 paras 3.26-3.38. There was a minority view recommending against change (paras 3.35-3.38).

11. Fourty-fourth Report at p4.

12 At p12. The form of the Queensland section is criticised by Preece, The 1981 Queensland Succession Law Reform, (1983) The Queensland Lawyer 108 at pp132-133.

13. Report at pp 14-15

14. Set out in (1982) *Law* Society Journal p404.

15. The arguments against change arc cogently advanced by Mr C J Rowland of the Australian National University in an unpublished paper, Revocation of Wills by Divorce: Is There a Need for Reform. Whilst the

Commission has rejected Mr Rowland's central argument (against change) it has drawn upon other parts of the paper in formulating its proposals It may be noted that this paper was written before the Family Provision Act, 1982 which allows a former spouse to make application for maintenance.

16. Report on The Impact of Divorce on Existing Wills (1977) at p1.

17. Unreported instances are mentioned in various reports of law reform agencies. See also Perpetual Executors & Trustees Association u/Australia *Ltd v* Vine [1955] VLR 200: Re Brechin [1973] 38 DLR (3d) 305; Goldfield, Shore and Canada Trust Company *v* Kosloesky [1976] 2 WWR 553.

18. One very experienced solicitor who wrote to the Commission (Mr J D Steed) pointed out that he has made a practice of dealing with divorcing parties to find out whether they have made a will and, if so. whether they wish to change it. Almost invariably they wish to change their will. The majority indicated that they had forgotten about their will and were grateful for being reminded of the need to make a new will. The minority (but forming quite a substantial overall percentage) indicated that they believed that divorce would automatically revoke the will and that on divorce their children would inherit their whole estate as next-of-kin: letter 30 July 1985 from Connah Steed & Co.

19. Family Law Act 1975, s81.

20. The statutory amendments and case law are summarised by Evatt CJ in Smith *v* Smith (1984) FLU 91-525 at pp79,239-79,243. Occasionally orders are made requiring a spouse to make provision in a will in favour of the other spouse as a part of or conditional upon final relief being granted: Broun and Fowlet, *Australian Family Law and Practice* CCH para 38-700. Where such orders are to be put into effect before the decree becomes absolute care will have to be exercised to frame the will in such a way as to overcome the general rule of revocation on divorce embodied in our proposal if our recommendations are adopted. As to rebutting the rule which we propose, see para 10.32.

21. Family Provision Act. 1982, s6(1) (definition of "eligible person").

22. See para 10.12 of this Report.

23 Ontario Law Reform Commission Report on The Impact in Divorce on Existing Wills (1977) at p6.

24. Sec note 21.

25. Further reasons which we would respectfully adopt. for the rejection of these two alternatives are given by the Law Reform Committee of South Australia in its Fourty-Fourth Report Relating to the Effect of Divorce Upon Wills (1977) at pp5, 6.

26. As to when a decree of dissolution becomes absolute, see Family Law Act 1975 (Comm), s55.

27. Section 51. The grounds upon which a marriage is void are set out in Part III of the Marriage Act 1961.

28. Ross Smith v Ross Smith [1963] AC 280 at 315-316.

29. This appears in the New Zealand (para 10.7), Ontario (para 10.8) and English (para 10.9) model.

30. In para 13.1 we propose that the amendments suggested in this Report should apply in the case of deaths occurring after the commencement of the Act. In strict logic, one might provide that annulments in Australia prior to 1975 where the party to the former marriage dies after our proposals become law ought to be included. However the likelihood of such events occurring in circumstances where there is an unrevoked will predating the annulment seems so small that we have disregarded it in our recommendations.

31. Succession to movable property of a testator domiciled in New South Wales at his or her death and to immovable property situated in New South Wales is determined by New South Wales law, and the testator concerned may be someone whose voidable marriage has been annulled overseas in circumstances that the annulment would be recognised in Australia Section 104(3) of the Family Law Act 1975 provides inter alia that a

dissolution or annulment of a marriage effected in accordance with the law of an overseas jurisdiction shall be recognised as valid in Australia where certain conditions apply.

32. See chapter 8, note 3.

33. See generally Halsbury's Laws of England 4th ed vol 36 para 806.

34. See note 12.

35 [1985] 2 WLR 795; (1985) 1 All ER 1066. The case on appeal is discussed by A Mithan. The Effect of Dissolution and Annulment of Marriage on Wills- Re Sinclair (1985) *Law* Society's Gazette 2922. Cf also Re Doland's Will Trusts [1970] 1 Ch 267.

36. *Ibid* at 803 (WLR) and 1072 (All ER).

37. A Mithan, The Effect of Dissolution or Annulment of Marriage on Wills (1984) *Law* Society Gazette at p 3324. Further compelling reasons supporting this view are advanced by R T Oerton, The Effect of a Testator's Divorce on his Will (1985) 129 Solicitors' Journal 646.

38. The New Zealand legislation is, in our view, subject to the same criticism in that it uses the technique of declaring gifts "null and void" on the happening of a relevant event Wills Amendment Act. 1977, section 2(2) (a).

39. Report on *The Law Relating to Succession* (1978) at p12.

40. The Law Reform Commission of British Columbia has suggested (note 8 above) that the Canadian model (see para 10.8) contains two potentially inconsistent notions which it describes as revocation and deemed lapse. We respectfully doubt this, and are confident that provisions such as the Canadian (para 10.8) and Queensland sections (para 10.11) would be construed so as to avoid any repugnancy. It seems to us that the provision striking down the gift would be treated as applying to the position of the donee and that the provision about construction of the will to the respective rights of other parties.

41. Report Relating to the Effect of Divorce upon Wills (1977) at p8. Cf Wyndham v Darby (1896) 17 LR(NSW) Eq 272.

42. We have drawn substantially upon the arguments advanced by Mr C J Rowland in his paper referred to at n15.

43. Re Resch's Will Trusts [1969] 1 AC 514 at 547-8. See, generally para 5.4 of this Report Cf also the willingness of the courts to go beyond the will in determining whether there is an expression of contemplation of a marriage sufficient to displace s15(1) of the Wills, Probate and Administration Act. 1898): see para 9.1. Section 17 of the Queensland Succession Act 1981 goes further and provides that extrinsic evidence, including evidence of statements made by the testator, is admissible to establish that an expression contained in the will is an expression of contemplation of a particular marriage.

44. Family Provision Act. 1982, s14.

45. Re Trotter [1899] 1 Ch 764.

46. Cooper v Cooper (1856) 1 Ch R 217. See also *Perkins v Michelthwaire* (1714)1 P Wms274 (24 ER 386) and Re *Jackson* (1964) 82 WN(NSW) (Pt 1) 62.

47. Cf Section 22(4)(f) of the Family Provision Act, 1982.

48. Re *Marsland* [1939] 1 Cl 820; Clausen v Denson [1958] NZLR 572.

49. Rookstool v Neaf (1964) 377 SW 2d 402.

50. Wills Amendment Act 1977, s2(3)(a).

51. See, generally Jacobs' *Law of Trusts in Australia* 4th ed paras 711-724.

52. Re Young [1951] Ch 344. Sec also Re Gardner [1923] 2 Ch 2 IC which holds that (unlike a legacy which will lapse if the legatee predeceases the testator a beneficiary under a secret trust acquires an interest from the date of communication. with the result that the share of such a beneficiary dying between then and the death of the testator does not lapse.

53. There are conflicting authorities n the point see Pettit, *Equity and the Law of Trust* 4th ed (1979) p98.

54. The recommendations embodied in this chapter of the Report when it was disseminated in draft form (see para 1.9) were invariably endorsed. In particular the Family Law Council indicated its support for the proposals: letter to Commission 20 November 1985.

11. Privileged Testators

I. PRESENT LAW

11.1 Section 3 of the Wills, Probate and Administration Act, 1898 defines “privileged testator” to mean:

> (a) a soldier of any country or a member of an air force of any country, being in either case in actual military service;
>
> (b) a member of a naval or marine force of any country, being so circumstanced that, if he were a soldier, he would be in actual military service; or
>
> (c) a mariner or seaman being at sea.

It will be seen that each arm of the definition involves proof of a particular status (eg soldier and activity (eg being in actual military service). There is an extensive case law expounding the scope of each status and activity.[1] A testator maybe privileged regardless of his or her age. We discuss the law relating to wills made by minors, other than privileged testators, in Chapter 12.

11.2 Various sections of the Act spell out the “privileges”, doing so in the form of relieving persons from compliance with particular formalities generally imposed upon testators. Thus the wills of privileged testators do not have to be in writing or executed in the presence of witnesses, or otherwise in the manner and form prescribed by sections 7 and 8;[2] nor do the formalities prescribed for alterations[3] or revival[4] apply to privileged testators Privileged testators may revoke their wills simply by declaration of an intention to do so;[5] and the avoidance of gifts to attesting witnesses does not apply to the wills of those privileged testators who choose to involve attesting witnesses in their will-making.[6]

11.3 A will made by a privileged testator remains valid and effective until it is properly revoked. The termination of the testator’ s privileged status will not effect a revocation[7] This can mean that long after a war probate can be granted to a letter containing a testamentary provision where it was written by a privileged testator during hostilities.

11.4 Another section of the Act confers the right to make a will upon minors who have the status to qualify them as privileged testators but who are precluded from enjoying the full “privileged” because of the absence of the relevant activity. Thus, a soldier of any country, a member of a naval marine or air force of any country or a mariner or seaman may make a will notwithstanding that he or she is a minor,[8] but such person will have to comply with the statutory formalities for due execution unless, at the time of making the wilt he or she was also “in actual military service” or otherwise acting so as to qualify as a privileged testator.[9]

II. SOME HISTORICAL AND COMPARATIVE MATERIAL

A. Roman Law

11.5 The Roman law of succession was complex and the execution of wills involved rigid formalities or rituals.[10] But from the time of Julius Caesar soldiers and sailors were granted the special privilege of being entitled to make a valid will without any formalities.[11] It included making a written will with no witnesses oran oral will whose contents could be proved by one witness (during some periods at least two witnesses were required). The Emperor Trajan legislated that a person benefiting under a privileged military will could not prove its contents as the single witness. Initially, soldiers on active service were entitled to make military wills, but Justinian restricted the privilege to the period of actual military service whilst in camp.[12] Such a will remained effective during the period of military service and for one year after the soldier’s honourable discharge. A military will became ineffective immediately upon a dishonourable discharge. The privilege extended to “the secretaries and orderlies of officers, and camp followers had the privilege when on expedition”.[13] Seamen were entitled to the privilege whilst members of the naval forces and on board a ship.

B. English and Australian Law

11.6 Despite the introduction of statutory formalities into the law of wills in 1540 (para 2.1), soldiers and seaman retained their privileged status. The reason seems to be a combination of the view that these classes of men were more ignorant than the general populace, and the view that the risks undertaken by them merited the conferral of certain privileges. In 1590, Henry Swinburne wrote:

> For as much as soldiers being better acquainted with weapons than books, are presumed to have so much the less knowledge in the laws of peace, by how much they are the more expert in the laws of arms. For as much also as noble warriors, in the defence of their country, do often times undertake perilous enterprises, wherein they lose their lives or their limbs; and seldom escape without wounds or bodily hurt As well therefore in regard of their small skill, in our peaceable laws on the one side; as in recompense of their great perils and hurts in furious and cruel battles, on the other side: They enjoy many notable privileges, and benefits in the making of their testaments (especially by the Civil Law) which are not allowed unto others.[14]

11.7 Chapter 22 of the Statute of Frauds 1677[15] expressed this privilege from compliance with the general formalities imposed by that Statute in the following manner:

> Provided that notwithstanding this Act any soldier being in actual Military Service or any Mariner or Seaman being at Sea may dispose of his Moveables, Wages and Personal Estate as he or they might have done before the making of this Act.

11.8 The current English legislation, the Wills Act 1837, codified the law of wills formalities and virtually repeated the provision contained in the Statute of Frauds:

> that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act.[16]

This formulation was adopted in several Australian jurisdictions. To remove doubts the Act was amended (in the United Kingdom in 1918 and in New South Wales in 1940[17]) to extend the privilege to testators under twenty-one, and ensure that it applied in relation to real as well as personal estate. It also was extended to "any member of His Majesty's naval or marine forces, not only when he was at sea but also when he was so circumstanced that, if he were a soldier, he would be on actual military service". When the relevant provisions of the New South Wales Act were recast in 1970,[18] no change of substance was enacted other than the extension of the privilege to members of the naval, marine and air forces of any country.[19]

11.9 The existing provisions relating to privileged testators in the different Australian States and Territories have been correctly described as "divergent to the point of bewilderment.[20] There is no common definition of privileged testator (see Appendix D) and there are material differences in the extent of the privileges available.[21]

III. DIFFICULTIES WITH THE PRESENT LAW

A. Determining who is a privileged testator

11.10 Extensive litigation has been spawned by the need to construe and apply the bald terms of the definition of privileged testator. With technological developments in warfare and the continued trend towards "total war" more and more people arguably qualify for inclusion as privileged testators. The courts have had to decide issues such as whether "soldier" includes army doctors, nurses, chaplains, or members of the reserves; whether a person is in "actual military service" when in training awaiting embarkation, a prisoner of war, or a member of a peace keeping or occupying force.[22] There is every reason to believe that, in the unfortunate event of Australia being involved in further hostilities, the application of these provisions would continue to give rise to litigious disputation.

B. Proof of the will

11.11 Since privileged testators may make oral wills and there is no requirement that the terms be reduced to writing or otherwise recorded,[23] vast opportunities for mistaken or perjured evidence arise. These are naturally exacerbated if the statements sought to be probated were made during armed conflict, in which event the

attention of the relevant witness or witnesses may be expected to have been distracted. For such reasons the wills of privileged testators serve very poorly the important evidentiary and channelling functions to which we drew attention in Chapter 2.

C. Construction of the will

11.12 In addition, the permitted informality allows oral or written statements that can throw up difficult questions of construction At least some of these would be avoided if the law required the testator to reduce his or her wishes to writing with the "ritual" usually attendant upon compliance with the general execution formalities.

D. Proof of testamentary intention

11.13 More significantly, the informality attaching to privileged wills has brought with it difficulties in determining whether particular written or oral statements were made with the necessary intention to operate as a will (testamentary intention). That has caused uncertainty and considerable litigation. This is not surprising when it is considered that oral statements as casual as "I want to leave everything to Miss Tipton[24] have been admitted to probate. Where privileged testators are concerned, the courts have held that it is not necessary that the deceased believed that he or she was making a will.[25] It is enough that the deceased intended deliberately to give expression to his other wishes as to the disposition of property in the event of his or her death.[26]

11.14 The cases disclose difficulties in dealing with expressions of past conduct or future intention, contained in diverse styles of communication or uttered on a variety of occasions, when attempting to distinguish between those held to be testamentary and those which were held to be ineffective.[27] Generally expressions of future intention and even instructions for the preparation of a will have been held effective. For example, a statement that "Of course, should we ever leave New Zealand, I will make a will leaving all to you"[28] and a document described as a "memorandum of my intended will"[29] have each been admitted to probate. In *Godman v Godman*[30] Lord Sterndale MR said:

> The testator did not purport nor did he in my opinion intend to effect that alteration by means of the letter alone, but he contemplated the preparation and execution of a formal document, probably a codicil, for that purpose. There is however as I have shown ample authority for the proposition that a document which is in terms an instruction for a more formal document may be admitted to probate if it is clear that it contains a record of the deliberate and final expression of the testator's wishes with regard to his property. If a long time has elapsed since the writing of the informal document, and if, during that time, the testator had opportunities of obtaining the formal document of which he did not avail himself, that affords evidence that he had changed his mind; but if he dies very soon without having had such opportunities, the presumption is that the document is the last expression of his wishes.[31]

11.15 The uncertainty created by these propositions is self-evident It is instructive to contrast statements that have been held to be non- testamentary In *In the Estate of Knibbs,*[32] the statement "If anything ever happens to me, Iris will get anything I have got", was not effective as a privileged will, because it was made in the course of casual conversation between the barman of a ship and a fellow employee at the closing time of the bar. Another basis on which such statements may fail was expressed by Lord Sterndale MR:

> A document or a conversation which is such that it only speculates on the wishes of the person making the statement, or writing the document, is not sufficient It must be something which is, in however informal a manner, an expression of his wishes as to the disposition of his property.[33]

11.16 It appears to us to be highly unsatisfactory that testators can be held to have made a testamentary statement or instrument even though they were unaware of the consequences of the statement or instrument and even though there was no testamentary intention (in the usual sense) at that time. There is no cogent basis for relaxing the usual requirement that testators should engage in a rational and conscious will- making exercise, even when making a privileged will.

E. Alteration and Revocation

11.17 Similar lack of formalities and looseness as to proof of intent attach to the alteration or revocation of a will when the testator is privileged Thus, a draft and unexecuted will, prepared by a fellow prisoner of war who was a lawyer, was held to be valid as a privileged will and to have revoked an earlier will.[34] Unattested alterations, which appear on a will which was executed whilst the testator was privileged, are presumed to be effective and to have been made during the continuance of the privilege.[35]

11.18 These rules create the rather undesirable consequence that a formally executed will may be revoked by informal oral statements, including statements made without clear proof that the deceased believed he or she was involved in revoking a will.

11.19 A further matter to be noted is that, unlike the position in Roman law, the will of a privileged testator remains effective until altered or revoked, for an unlimited period. There are reported instances of informal wills of privileged testators being admitted to probate when the testator died over 20 years after having made the relevant will.[36]

IV. EXAMINING THE RATIONALE FOR THE PRIVILEGE

11.20 Some commentators have argued that there is no longer a rational basis for conferring the status of privileged testator upon a segment of the community.[37]

11.21 In the past the privileges conferred on this class of testators have been justified on various grounds:

- the relatively low level of education of privileged testators,
- the unavailability of consultation and professional advice to military personnel, especially when they were on campaign or in combat (they were said to be *inops consilii,* ie without advice);
- the high risk of death faced by testators when in combat or at sea in comparison with the community generally,
- the privilege is conferred as a reward and incentive to engage in a socially beneficial occupation (cf para 11.6);
- soldiers and others facing battle need the comfort of knowing that, should they not return, arrangements have been made for their affairs;
- the need to ensure that minors who were called upon to serve in a military capacity and thereby risk early death had the “adult” privilege of making and revoking wills.

11.22 Many of these reasons, if ever fully justified, are quite inappropriate to modern conditions of warfare, service in defence or merchant marine forces, or sea travel. The concept of a special class of persons who alone are exposed to the dangers of active service is no longer true. Many civilians are placed in positions that would call forth one or more of the justifications enumerated in the previous paragraph, and not necessarily in time of war (eg policemen, firefighters). Sea travel in peace time is relatively free from danger. The general level of literacy and education in the community as a whole is markedly higher than in 1677. Will-making is nowadays regarded as a relatively simple activity and the ready availability of printed will forms attests to a widespread belief in the community that there is no necessary need for skilled advice. Now that persons over 18 can make wills the need for conferring a privilege upon infant testators who are to go to war has largely passed and, in any event, s6 of the Wills, Probate and Administration Act, 1898 expressly allows wills to be made (subject to compliance with due formalities) by minors who are soldiers, members of a naval, marine or air force, mariners or seamen In any event the modern rules governing succession of persons who die intestate when coupled with the Family Provision Act, 1982 tend to ensure that the failure to make or revoke a will does not necessarily defeat the proper moral and social obligations of deceased persons.

11.23 It has in our view truly been said that “the privilege is not that of the soldier necessarily, but rather that of other persons who have kept letters written to them from friends in the Army.[38] The case law referred to in paras 11.13,11.16 illustrates that the informality of many wills of privileged testators creates difficulties of proof and

determination of testamentary intent and construction: the evidentiary and channelling functions are served very poorly.[39] A further consequence of the existing law is that "on the death, at whatever time, of any person who wore uniform in the war, it will be open to anyone brazen enough to be undeterred by the risk, to assert that the deceased once made a verbal will in his favour, or a will on a scrap of paper, since lost, and this will be possible even where the deceased made a solemn will before entering the uniformed force."[40] Similarly, the will of a person made in the course of a casual conversation hardly serves the cautionary or ritual function.

11.24 If the general statutory formalities serve useful functions in the interests of testators and the administration of justice generally, the question should be asked, "why are these benefits withheld in the case of the wills of privileged testators?" To point to history, when circumstances have changed so much, is hardly an adequate answer. We agree with Jeremy Bentham who suggested in the early nineteenth century that it was not correct to regard it as a privilege to be absolved from formalities in will-making.

> 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.[41]

11.25 We made enquiry as to the practice of the Australian Defence Forces in relation to assisting persons in the armed services to make will.[42] In each of the three Services, recruits have access to legal officers who provide general advice about the need to make wills and assist in the preparation of drafting of wills. When executed the wills are held in safe custody until the members' discharge.[43] On this basis service personnel are better served than their civilian counterparts Given the complexities of modern warfare, we would doubt that these standards would fall unless a future war were so catastrophic as to lead to virtually general mobilisation, in which event the need for confining the privilege to particular classes of testators would no longer apply anyway.

11.26 In view of these "privileged" enjoyed by the modern service man and woman, it maybe questioned to what extent the law should facilitate informal testation. One argument that has been advanced is the need to ensure that persons in the heat of battle (eg in the trenches or on a landing vessel and about to attack) have the facility to vary a will not then held by them. Of course it is possible to revoke a will by the execution of another document In any event, whilst it is possible to think of cases of genuine hardship, we consider that, on the whole, the law should not encourage or facilitate will-making in such circumstances. At such time the testator's witnesses are unlikely to be very attentive and the testator himself may have an imperfect knowledge of his family and friends or may indeed be prone to exaggerated views and misconceptions about the true state of affairs "back home".

11.27 Whilst it may also be argued that the law should enable persons who are wounded and facing imminent death to make, alter or revoke wills without undue complication, we do not think that the members of the armed services are, in this regard, any differently placed than their civilian counterparts who in time of peace or war may wish to make, alter or revoke wills. Indeed it is likely that those who would be witnesses to "death-bed" wills made by members of the armed services in combat are likely to be more distracted than persons similarly placed in relation to persons dying in peace time. Our general views about oral or holograph wills are set out in Chapter 4. In view of the dubious benefit of the "privileges" discussed in this chapter, and taking into account our recommendations about a general dispensing power, we do not consider that this factor outweighs the general arguments against allowing "privileged" testation.

11.28 The retention of the privilege by sailors simply because they are "at sea" has little to commend itself, bearing in mind that it has been construed as extending to wills made on board ships permanently stationed in a harbour.[44] The modern sailor seldom endures special risks and has the advantages of communication which leave him or her in no different position than many other classes of workers in remote occupations.

11.29 Various law reform agencies have considered the issue. Whilst pointing to anomalies in the present law, they have generally recommended in favour of retention of the present law. In the United Kingdom the Law Commission expressed the view in its 1966 Working Paper entitled *Should English Wills be Registrable?*[45] that there would be no question of taking away or reducing these important and ancient privileges. The Latey Committee on the Age of Majority reported in 1967 that the privilege should simply apply to all members of the armed forces regardless of age or whether they were on "actual military service.[46] The Committee adverted to the practical problem of servicemen forgetting to revoke privileged wills after leaving the service, but preferred simply to urge military authorities to remind members of the services about the revocation of wills when leaving the services.[47] In its 1978 report on *The Law Relating to Succession,* the Law Reform Commission of

Queensland doubted the value of these special privileges, originally allowed when soldiers were illiterate and lacked access to legal advice. However, the Commission's ultimate recommendation was that the privilege be extended to prisoners of war and internees.[48] The Queensland Act was amended accordingly.[49] In 1980 the Lord Chancellor's Law Reform Committee in the United Kingdom heard evidence from several witnesses who thought that privileged wills were no longer necessary or justified, but ultimately "on balance" recommended the retention of the privilege in its present form.[50] In its extensive report on *The Making and Revocation of Wills* in 1981, the Law Reform Commission of British Columbia described the law in this area as "needlessly complex and idiosyncratic".[51] It recommended the abolition of the privilege with reference to mariners and seamen at sea.[52] Finally it may be noted that under the American Uniform Probate Code published in 1969 the privilege is abolished.

11.30 The broad options for reform are:

abolition of the privilege;

narrowing of the benefits of the privilege, e.g. by excluding oral wills, by requiring some form of certification, or by providing for automatic revocation some time after the cessation of the privileged status;

curtailing the privilege, eg by excluding mariners;

broadening the privilege, eg by excluding the vague concepts of "actual military service" and "at sea";

extending the privilege to civilians placed in emergency situations;

clarifying aspects of the privilege.

No doubt there are other alternatives.

V. RECOMMENDATION

11.31 Before stating our recommendation, four preliminary matters should be addressed.

11.32 First, the need for uniformity. Several authors and Law Reform Commissions have raised this issue, suggesting that in a federation such as Australia there is a need for uniformity between States and Territories. Whilst there are some valid arguments in favour of uniformity, the fact remains that in Australia there is a large measure of lack of uniformity (para 11.9). There has been some reluctance in several jurisdictions to alter the status quo, not-withstanding appreciation of the lack of an adequate rationale for allowing privileged wills, although the moves in other states to introduce some sort of general dispensing power applicable to all classes of wills (see Chapter 6) may be seen as a trend towards uniformity in an area that is not entirely unrelated to privileged wills (cf para 11.34). Furthermore, if as we think, the privilege is rather illusory and in any event serves poorly the proper interests of testators and the administration of justice, the time has come for New South Wales to show the way in proposing a clear-cut reform.

11.33 Secondly, whether the privilege should be extended. There appears to be no cogent reason for extending the privilege to other situations of danger, and there would be the practical difficulty of legislating adequately to cover relevant situations without giving rise to unnecessary opportunities for legal disputes. If the rationale for privileged wills is unsound, as we argue, then the privilege should either be abolished or be extensively restricted.

11.34 Thirdly, if our recommendation for the introduction of a general dispensing power (Chapter 6) is adopted, then all classes of testators will be given the opportunity, in an appropriate case, to make informal yet valid wills. Subject to the threshold requirement of a document (see para 6.28) no departure from the standard formalities will be fatal if the court can be satisfied that the particular will of the particular testator represents his or her testamentary intentions.

11.35 Fourthly, we have obtained and had regard to the views of the Australian Defence Forces in the course of formulating our views.[54] The attitudes of the three Services, when initially approached, as to the need for the privilege differed considerably, although each opposed abolition because of the need to accommodate the

exigencies of a wartime situation It was pointed out that the present peacetime facilities for will-making may not be available in time of crisis. Some of the reasons expressed for opposition to abolition (eg that witnesses may be dead or untraceable and that serving minors ought to be able to make wills) suggested a lack of understanding of the present law relating to the wills of civilians[55] and minors serving in the armed forces.[56] But the basic objection initially voiced to outright abolition - the desirability of giving serving members a right of testation without regard to statutory formalities when they are placed in the stresses of combat - was a significant one. Nevertheless, we believed that the reasons given by us in paras 11.22-11.28 for adopting the position that all testators and their beneficiaries should be placed in the same position, with recourse to the judicial dispensing power in appropriate cases of non-compliance with statutory formalities, outweighed the initial objections of the armed services. As we pointed out in para 1.9, our draft Report which contained this chapter in virtually identical form to the final form now appearing was submitted to the Military Law Sub-Committee of the Department of Defence with whom we had previously consulted to ascertain the views of the Australian Defence Forces. 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 (para 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 6.35-6.37).[57]

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

11.37 The question of what, if anything, should be done about privileged wills existing at the commencement of the legislation which we propose, or any" privileged revocation effected before then, is dealt with in para 13.3.

FOOTNOTES

1. See, generally Hardingham, Neave & Ford. Wills *and* Intestacy in Australia and *New* Zealand (1983) paras 403-404: and Harland. *Law of Minors* (1974) chapter 12.

2. Section 10.

3. Section 18(2).

4. Section 19(2).

5. Section 17(3)(c). noting that this must be done while the testator is privileged.

6. Section 13(2).

7. In Will of Thompson (1910)10 SR(NSW) 406. Indeed if the testator ceases to be privileged revocation must be effected by the usual means.

8. Section 6(2)(b)(c) and (d).

9. Since the commencement of the Minors (Property and Contracts) Act. 1970 s10 has been confined to the form of wills: see New South Wales Law Reform Commission Report on Infancy in Relation to Contracts and Property (1969) p101 n56.

10. E Schulz, *Classical Roman Law,* at pp240-243.

11. This topic is covered in more detail in Leage Roman Private *Law.* 3rd ed (1961) at pp242-243; R W Lee, *The Elements of Roman Law,* 4th ed (1956) at p190.

12. Institutes of Justinian, Book II Title XI para 287.

13. Wahlen, Soldiers' and Sailors' Wills: A Proposal for Federal Legislation (1948) 15 *University of Chicago Law Review* 702 at p704.

14. A Brief Treatise of Testaments *and* Last Wills. para xiii.

15. The draftsman of the relevant section of the Statute of Frauds claimed to have obtained for English soldiers the full benefit of the testamentary privileges of the Roman army but the propriety of looking to the civil law as an interpretative aid has been severely challenged: Re Booth [1926] P 120; Re Wingham [1949] P 187: Potter, Soldiers Wills (1949) 12 *Mod Law Review* 183 at p184.

16. Section 11. This was adopted in New South Wales in 1840 and became s10 of the 1898 Act.

17. Wills (Soldiers and Sailors) Act (UK); Trustee and Wills (Emergency Provisions) Act. 1940. (NSW) s13.

18. By the Minors (Property and Contracts) Act. 1970 which commenced to operate on 1 July 1971.

19. See the New South Wales Law Reform Commission Report on Infancy in Relation to Contracts and Property (1969) p100 n 52. See also note 9 above.

20. Queensland Law Reform Commission. Report on the *Law* Relating to Succession (QLRC 22) (1978) p10.

21. See Hardingham, Neave and Ford, note 1 above, paras 405-406.

22. See generally the authorities referred to in note 1 above.

23. In contrast with the old law relating to nuncupative wills generally see paras 2.3-2.4

24. In re Lowe [1949] VLR 169.

25. *Ibid, In the Estate of Knibbs* [1962] 2 All ER 829; *In the Estate of Lewis* [1974] 2 NSWLR 323 at 330-331.

26. In the Goods of Spicer [1949] P441.

27. See generally Hardingham, Neave and Ford. note I above. para 409.

28. In re Martin [1917] NZLR 219, in a letter from a soldier to his parents.

29. *Barwick v Mullings* (1829) 2 Hagg Eec 225 (162 ER 842).

30. [1920] P 261.

31. *Id,* at 271.

32. [1962] 2 All ER 829.

33. *In Estate of Beech* [1923] P46 at 61.

34. *In* Re Wakeling [1946] VLR 295.

35. In the Goods of Newland [1952] P 71.

36. Re Booth 119261 P 118; Re Ward [1966] QWN 15. Mellows, *The Law of Succession* (1983) 4th ed at p79 suggests that the period for which privileged wills remain effective should be limited to twelve months after the testator has ceased to be on actual military service or at sea.

37. A L Goodhart in (1949) 65 LQR at 7 and 300; F C Hutley, Privileged Wills(1949) 23 *AL]* 118; Potter. Soldiers Wills(1949) 12 Mod LR 183; Wahlen, Soldiers' and Sailors' Wills. A Proposal for Federal Legislation (1948) 15

University of Chicago Law Review 702; Davey, The Making and Revocation of Wills (1980) *Conveyancer* 64 at pp70-72.

38. Potter, note 37 above at p190.

39. Cf chapter 2.

40. Potter. note 37 above at p190.

41. Works. Bowring's ed, Vol 6, p472 (quoted by A L Goodhart in (1949) 65 LQR at p7.

42. The information summarised in this paragraph was made available in a letter to the Commission dated 11 June 1985 from Air Commodore C 1 Pound of the Department of Defence, Canberra.

43. In the Air Force 15000 of the 23000 currently serving members have lodged wills: *ibid*. Cf para 4.7 of this Report.

44. *In the Goods of M'Murdo* (1868) LR 1 P & D 540. In relation to the wages and personal effects of deceased seamen the Minister may decline to deliver them up if the will is not in writing and executed with certain formalities. Seamen Act, 1898 (NSW). s64; Navigation Act 1912 (Comm) s157.

45. Para 40.

46. [1967] Cmnd 3342. para 417.

47. *Id.* para 418.

48. Report at pp10-11.

49. Succession Act 1981. s16.

50. Report on The Making and Revocation of Wills Cmnd 7902 para 2.21.

51. At p22. See also Appendix H of that Report.

52. *Ibid*.

53. As to the quasi-privilege afforded to a soldier *et al* to make wills (in due manner and form) notwithstanding that he or she is a minor (para 11.4) we make recommendations in the next chapter.

54. On 29 January 1985 the Commission requested the Chairman of the Military Law Sub-Committee of the Department of Defence to provide certain statistical and other information and to express views on various options for reform including abolition of the privilege entirely imposition of certain minimum formalities and provision that privileged wills should be revoked automatically after a certain period or event. The Chairman, Air Commodore G J Pound responded by letter dated 11 June 1985 providing information and views that had been obtained from the various legal Directorates within the Services.

55. The death or unavailability of an attesting witness does not affect the validity of the will of a non- privileged testator. Indeed the presumption of regularity means that such a will, if apparently duly executed, is afforded validity without enquiry into matters such as the order of signing which might reveal irregularities.

56. See para 11.4 of this Report

57. Letter dated 13 January 1986 from the Chairman of the Military Law Sub-Committee. Department of Defence, Air Commodore G J Pound.

12. Minors

I. STATUTORY PROVISIONS IN NEW SOUTH WALES

12.1 The testamentary capacity of minors is dealt with generally in s6 of the Wills, Probate and Administration Act, 1898:

> 6. (1) Subject to subsection (2), a will made by a minor shall not be valid.
>
> (2) A valid will may be made by -
>
> (a) a married person;
>
> (b) a soldier of any country;
>
> (c) a member of a naval, marine or air force of any country;
>
> (d) a mariner or seaman;
>
> notwithstanding that he is a minor.
>
> (3) This section applies to a will made after the commencement of the Minors (Property and Contracts) Act, 1970.

"Minor" is defined in s3 to mean a person under the age of 18 years.

12.2 The effect of the Act in relation to minors may be summarised as follows:

The minimum age for testamentary capacity is, in general, 18 years;

A minor can make a will executed in accordance with the usual statutory formalities whilst married or otherwise having the status mentioned in section 6(2);[1]

After a minor has ceased to be married or to otherwise have the status mentioned in s6(2), the minor can revoke a will but lacks capacity to make another will until he or she attains majority or again acquires testamentary capacity in accordance with s6(2), eg by remarrying;

A minor can make a will, without complying with the statutory formalities, if the minor is a privileged testator when the will is made;[2]

A minor can alter his or her will either

without complying with the formalities prescribed in si 8(1), whilst the minor is a privileged testator;[3] or

(so it would appear) in accordance with the formalities prescribed in s18(1), whilst married or otherwise having the status mentioned in s6(2);[4]

A minor can revoke his or her will by any of the means mentioned in s17(3).[5]

12.3 This legislative scheme was the result of recommendations made by this Commission in 1969 in its *Report on Infancy in Relation to Contracts and Property.* The recommendations were made by the Commission in the course of reviewing the law of contract and property as it affected minors. Since that report the testamentary capacity of minors has been considered by law reform agencies in other jurisdictions, and the adequacy of the current legislation can be evaluated in the light of various proposals and legislative solutions which were not considered by the Commission in 1969.

12.4 In the preceding chapter we recommended that no class of persons should have the status of being privileged testators. If that recommendation is implemented it would still leave s6 (para 12.1) intact, since the persons referred to in s6(2)(b) (c) and (d) are not "privileged testators" as defined in s3.[6] Thus the situation, unless otherwise altered, would be:

the minimum age for testamentary capacity would be, in general, 18 years;

a minor could make a will in accordance with the usual statutory formalities whilst married or otherwise having the status mentioned in s6(2);

after the minor has ceased to be married or to otherwise have the status mentioned in s6(2) he or she could revoke that will but would lack capacity to make another will until he or she attains majority or again acquires testamentary capacity in accordance with that subsection;

a minor could probably alter his or her will in accordance with the formalities prescribed in s18(1), whilst married or otherwise having the status mentioned in s6(2);

a minor could revoke his or her will by any of the means mentioned in s17(3), except that mentioned in s17(3)(c).[7]

II. ISSUES FOR POSSIBLE REFORM

12.5 Because of our other recommendations and the passage of time, we have reconsidered this Commission's recommendations made in 1969 in the *Report on In fancy in Relation to Contracts and Property*.[8]

12.6 The issues which we shall consider in relation to the testamentary capacity of minors are:

should the minimum age for testamentary capacity be reduced below 18?

should a minor be entitled to make a will with judicial approval?

should the exceptions to the testamentary incapacity of minors referred to in s6(2) be varied?

should a minor's power to alter a will be clarified?

III. SHOULD THE MINIMUM AGE FOR TESTAMENTARY CAPACITY BE REDUCED BELOW 18?

12.7 In our *Report on In fancy in Relation to Contracts and Property* we discussed the reasons for preferring that the general age of majority should be 18. Assuming no change in the provision allowing a minor who is a married

person to make a will we do not favour any lowering of the general age of capacity.[9] Eighteen is accepted throughout Australia as the age of majority and any case for stepping out of line in such a significant matter would need to be very persuasive. The unmarried minor wishing to make a will and having the maturity and means justifying doing so, will, in the foreseeable future, be sufficiently exceptional to be left to the *ad hoc* solution proposed in the next section We therefore recommend that **the minimum age for testamentary capacity should not be reduced below 18.**

IV. SHOULD A MINOR BE ENTITLED TO MAKE A WILL WITH JUDICIAL APPROVAL?

12.8 In New Zealand a minor aged over 16 years may make a will with the approval of the Public Trustee or a Magistrate's Court.[10] The Law Reform Commission of British Columbia has proposed that the Supreme Court be empowered to grant a minor of any age general testamentary capacity.[11]

12.9 Whilst a minor in New South Wales may obtain an order granting capacity to participate in any civil act where the Supreme Court considers it is for the benefit of the minor[12] the term "civil act" does not extend to making a will.[13] There is presently no power of judicial dispensation to allow minors to make wills. A minor therefore will die intestate, unless he or she has one of the statuses mentioned in s6(2) and chooses to make a will. Subject to any order made pursuant to the Family Provision Act, 1982, the unmarried intestate minor's estate will devolve upon parents or, failing the existence of surviving parents, the brothers and sisters of the minor, or failing the existence of a surviving brother or sister upon other close relatives.[14]

12.10 There may be situations where it would be appropriate that a minor should be able to make a will varying the statutory order of intestate distribution. For example, a minor may be entitled to a substantial award of damages or otherwise be or become the owner of considerable assets. It may be quite inappropriate that the whole estate should devolve upon the minor's surviving parents to the exclusion of a sibling or even some other person to whom a moral duty may be owed. Whilst we do not favour any general reduction in the age of testamentary capacity, a judicial power to grant such capacity (and to control it) would be appropriate. Unlike the New Zealand model we see no reason why the right to seek such approval should be confined to minors of any specific age, although obviously the age of the applicant will be a relevant factor in the court's consideration of a particular application. This jurisdiction should be confined to the Supreme Court because the parental jurisdiction of the Crown in respect of minors traditionally has been exercised by the Supreme Court and because the jurisdiction is a novel one.[15]

12.11 In our view the judicial power should be confined to approval in advance of a specific will and ought not to be so wide as simply to confer testamentary capacity on the minor. We appreciate the practical arguments to the contrary that have been advanced,[16] but consider that the exercise of such an exceptional power ought to be closely controlled and that in any event the court generally would be unwilling to give a general authority to a minor even if it had power to do so.[17] It must be remembered that a minor, despite his or her maturity, is likely to be subject to what would be regarded as relationships of influence than is an adult. The possibility of undue influence can be considered by the court where there is a specific will, and the minor's reasons for any particular disposition can be explored.

12.12 We therefore recommend that **the Supreme Court should be invested with jurisdiction to grant capacity to a minor of any age to make a specific will subject to such conditions as the Court thinks fit.**

V. SHOULD THE EXCEPTIONS TO THE TESTAMENTARY INCAPACITY OF MINORS BE VARIED?

12.13 Professor D J Harland[18] has criticised the New South Wales legislation and suggested that capacity should be granted to any minor who is *or has been* married, in accordance with section 12 of the Wills Amendment Act 1955 (NZ).[19] This extension would overcome the problem of loss of capacity where a minor is divorced or the spouse of the minor dies before the minor attains 18 and the minor does not otherwise have testamentary capacity. If a minor is considered to have sufficient maturity on marriage to have testamentary capacity, it is anomalous and illogical that termination of the marriage should restore the former disability. Indeed, the termination of marriage and the possibility that there may be children born to the former marriage may make it important for the minor to alter (rather than simply revoke) a will made during marriage or make a completely fresh one. This need maybe heightened by the automatic revocation of portions of a former will by virtue of the

recommendations which we make in chapter 10. It is therefore recommended that **section 6 of the Wills, Probate and Administration Act, 1898 should be amended to allow a valid will to be made by a minor who is or has been married.**

12.14 The question of whether, in addition, a minor should be able to make a will in contemplation of marriage is somewhat complex The purpose of the exception to the existing general rule that a will is revoked by marriage (discussed in para 9.13) is to allow a testator to make a will anticipating a significant change in the testator's circumstances and to avoid the unnecessary revocation of a will premised on an impending marriage when the marriage takes place. The provision presupposes that, prior to marriage, the testator in question has testamentary capacity. This will not usually be the case with a minor, although a minor who does have testamentary capacity prior to marriage (for example, a member of the defence forces or a mariner or seaman could make a valid will expressed to be in contemplation of a marriage, and the will would continue to be effective once that marriage occurred. However, we favour allowing a minor, who has the capacity to marry and lacks testamentary capacity, to make a will in contemplation of a particular marriage without having to apply for judicial approval, provided that the will is valid only if the marriage contemplated takes place. "A provision enabling a will to be made in contemplation of such a marriage recognizes that many young newlyweds maybe understandably lax about attending to the making of a will after their marriage."[20] The cost involved in requiring a minor contemplating marriage to seek judicial approval of a will premised on the marriage would be avoided by this proposal which assumes that a minor contemplating marriage who decides to make a will has thereby indicated adequate proof of his or her maturity and understanding of the significance of the step about to be taken. We therefore recommend that **a will made by a minor who has the capacity to marry but otherwise lacks testamentary capacity should be valid where the will is made in contemplation of a particular marriage and that marriage takes place.** The contemplation of marriage need not, on our proposal, be expressed in the will (cf para 9.21). However this would, we assume, normally be so expressed in those comparatively rare cases where a minor resorts to this newly- proposed power to make a will.

12.15 In para 11.36 we recommend that no class of persons shall have the status of being privileged testators. Under the Australian Defence Act 1903, no person is liable to be called up for service in time of war if under the age of 18.[21] However s6(2) of the Wills, Probate and Administration Act, 1898 is not confined to wartime and clearly encompasses a group of persons who may be under 18. But most will never be in a peculiarly hazardous employment situation, and this is particularly true in time of peace. In our view the reasons underlying our recommendation of the repeal of the status of privileged testator, coupled with the availability of the modern rules of intestate succession and the remedies available under the Family Provision Act, 1982 lead us to recommend that **section 6(2) (b)(c) and (d) should be repealed.**

VI. SHOULD A MINOR'S POWER TO ALTER A WILL BE CLARIFIED?

12.16 We have already noted the uncertainty of the existing Act in relation to the power of minors who have capacity to make a will pursuant to s6(2) to alter that will during the currency of such capacity (para 12.2). Such uncertainty arises from the fact that s6 allows such a minor to make a will (implicitly subject to compliance with the usual formalities) but s18 does not expressly provide for the minor to alter a will. Whilst presumably the greater encompasses the lesser, there is a doubt on the matter, particularly since other sections of the Act, notably sections 6(2) and 17(4), specifically extend to minors. These doubts would remain even if s6 is amended in the manner already proposed by us. We therefore recommend that **section 18 be amended by making it clear that it extends to alterations by minors made whilst they have capacity to make a will.**

FOOTNOTES

1. See para 11.4.

2. Sections 6 and 10 of the Wills, Probate & Administration Act, 1898.

3. Id. s18(2).

4. No section of the Act specifically so provides, but it is submitted that this follows by implication from s18(2).

5. Section 17(4). Section 17 is set out in para 2.36 of this Report.

6. Cf para 11.4.

7. Section 17(3) (c) provides that a will maybe revoked if at the time of the revocation the testator is a privileged testator. by his declaration of an intention to revoke the will.

8. LRC 6 (1969) esp at pp7-17.

9. We therefore depart from the recent recommendation of the Law Reform Commission of Tasmania in its Report on Reform in the *Law* of Wills (1983) that the minimum age be reduced to 16.

10. Wills Amendment Act. 1969 (NZ) s2.

11. Report on the Making and Revocation of Wills (1981) at pp1823.

12. Minors (Property and Contracts) Act. 1970, s26.

13. Ibid. s6(2).

14. Wills, Probate and Administration Act. 1898, s61B. It is assumed that the unmarried minor has no issue.

15. See Report referred to in n 8 at p95 n 24.

16. In its Report on the Making and Revocation of Wills (1981) the Law Reform Commission of British Columbia recommended (at pp20-21) against the New Zealand model and in favour of the wider type of authority. It argued that the Courts inquiry under legislation in the New Zealand mould would necessarily have to extend beyond an issue of the minors capacity to questions such as the extent of the minors property, his or her legal and moral obligations, the interpretation of the wording of the will put forward for approval in advance, and the tax implications of the proposed dispositions.

17. Cf the courts practice in exercising its jurisdiction under s81 of the Trustee Act. 1925 (NSW).

18. *The Law of Minors in Relation to Contracts and Property* (1974) at pp174, 175.

19. To similar effect is s9(1) of the Wills Act. 1918 (Tasmania).

20. Law Reform Commission of British Columbia Report on the *Making and Revocation of Wills* (1981) at p21.

21. Section 59.

13. Application of Reforms Proposed

13.1 Subject to two matters which we shall look at in a little more detail in the following paragraphs we propose that the amendments to **the Wills, Probate and Administration Act, 1898 suggested in this Report should apply in the case of deaths occurring after the commencement of the amending Act.** This would catch all wills coming into effect after that date. It would also mean that our proposals concerning revocation on divorce would apply even if the divorce took place prior to the amendment, provided the testator died after it.[1] We would adopt the reasoning of the Ontario Law Reform Commission in its *Report on the impact of Divorce on Existing Wills* (subject to the same humility that doubtless affected that Commission):

> We consider that the reforms we have proposed in this Report are so desirable that we would recommend that they apply to all wills of persons dying after any legislation implementing the reforms comes into force. We take the position that the amending provisions should have retrospective effect for a number of reasons. Firstly, this is consistent with the fundamental principle that wills, by their very nature, are ambulatory, and that the law in effect at the date of death of the testator should govern Secondly, if we have made out a case for reforming the law and if our basic premise, that testators should be deemed to prefer the invalidation rather than the retention of testamentary benefits conferred upon a former spouse, is sound, then there is no convincing policy reason for not making the statute retrospective in its operation. Since it may well be presumed, in the absence of clear evidence to the contrary, that legislation is intended for prospective operation only, the amending statute should contain an express provision clarifying the legislative intention on this point To make the legislation prospective only would be, in effect, to postpone reform for a generation or more, and there are no justifiable grounds for so doing.[2]

13.2 However, we recommend that **the power of rectification of wills proposed in Chapter 7 should be available in relation to wills whenever made which have not been admitted to probate when the amendment takes effect.** As the eminent consultant who suggested this provision[3] put it, “people do not rely upon the absence of a power of rectification in making their wills.” Unfortunately, it is not feasible to apply this proviso to the relaxation of will-making and revocation formalities, or the general dispensing power which we recommend. It would clearly disturb long - administered estates if wills submitted to probate many years ago, but rejected on the basis of the way the law then stood, were now to be admitted to probate.

13.3 Our recommendation in Chapter 11 that the status of privileged testator should be abolished would, coupled with that in para 13.1, have no impact upon any existing privileged wills which are subsequently submitted for probate in relation to the estates of testators who die before the amending Act[4] We considered whether the reasons which led to the recommendation in Chapter 11 should lead to a further proposal that all privileged wills that have not been admitted to probate should be invalidated regardless of the date of death of the testator. However our enquiries reveal that no privileged will has been lodged for probate in New South Wales for many years and, accordingly, we think it unnecessary to make any special provision in this regard. We are also of the view that wills which have been revoked in an informal but valid manner by privileged testators in the past should remain revoked. To do otherwise would create real difficulties in the likely event that the will thus revoked has been destroyed, and would be likely to thwart the testator’s intentions through invalidating what had been a valid revocation to no useful purpose. For similar reasons wills revoked by marriage prior to the commencement of the proposed reforms should not be revived.

FOOTNOTES

1. Cf *Re Jones* [1985] 2 Qd R 100; *Rookstool v Neaf* (1964) 377 SW 2d 402 at 409. See also chapter 10 note 29 of this Report.

2. Report at p10.

3. Ibis suggestion was made by the late Mr Justice Hutley in a letter to the Commission dated 11 July 1984.

4. Interpretation Act. 1897 s8.

Appendix A - Draft Legislation

Wills, Probate and Administration (Amendment) Bill 1986

A BILL FOR

An Act to amend the Wills, Probate and Administration Act 1898 with respect to the Cexecution, rectification and revocation of wills

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:

Short title

1. This Act may be cited as the" Wills, Probate and Administration (Amendment) Act 1986".

Commencement

2. (1) Sections 1 and 2 shall commence on the date of assent to this Act.

(2) Except as provided by subsection (1), this Act shall commence on such day as may be appointed by the Governor and notified by proclamation published in the Gazette.

Principal Act

3. The Wills, Probate and Administration Act 1898 is referred to in this Act as the Principal Act.

Amendment of Act No. 13, 1898

4. The Principal Act is amended in the manner set forth in Schedule 1.

Application of Act

5. (1) Except as provided by subsection (2), the Principal Act, as amended by this Act applies in relation to a will, whether made before, on or after the commencement of this Act, if the maker of the will dies after the commencement of this Act.

(2) Section 29A of the Principal Act, as amended by this Act, applies in relation to a will, whether made before, on or after the commencement of this Act, if the will is not admitted to probate or letters of administration with the will annexed are not granted, before the commencement of this Act.

Schedule 1

(Sec. 4)

Amendments to the Principal Act

(1) Section 3, definition of "Privileged testator -

Omit the definition

(2) Section 6 -

Omit the section, insert instead:

Will of minor

6. (1) Except as provided by sections 6A and 6B. a will made by a minor, other than a minor who is or has been married, shall not be valid.

(2) Nothing in this section invalidates a will validly made after the com-mencement of the Minors (Property and Contracts) Act 1970 and before the commencement of the Wills, Probate and Administration (Amendment) Act 1986.

(3) Sections 6A, 6B -

After section 6, insert:

Will of minor pursuant to leave of the Court

6A. (1) The Court may, subject to such conditions, if any, as it thinks fit, grant a minor leave to make a will the terms of which have been disclosed to the Court.

(2) A will made by a minor pursuant to leave granted tinder subsection (1) shall be valid.

Will of minor in contemplation of a marriage

6B. A will made by a minor who may marry and which is made in contemplation of a marriage shalt on the solemnisation of the marriage contemplated. be valid.

(4) Sections 7, 8 -

Omit the sections, insert instead:

Form and manner of execution of wills

7. (1) A will shall not be valid unless-

(a) it is in writing and is signed by the testator (orby some other person who signs the will in the presence and by the direction of the testator);

(b) it appears, on the face of the will or otherwise, that the testator intended by the signature to give effect to the will;

(c) the signature is made, or acknowledged by the testator, in the presence of 2 or more witnesses present at the same time; and

(d) at least 2 of those witnesses attest and sign the will in the presence of the testator(but not necessarily in the presence of any other witness), but no form of attestation shall be necessary.

(2) Without limiting the generality of subsection(1) (d), one witness may sign the will after the testator (or some other person who signs the will in the presence and by the direction of the testator) signs the will and before the testator acknowledges his or her signature or the signature of that other person and another witness may sign the will after the testator acknowledges his or her signature or the signature of that other person.

(5) Section 10 -

Omit the section

(6) Section 12 -

Omit the section, insert instead:

Competency of witness

12. Any person competent to be a witness in civil proceedings in a court, other than a blind person, may be a witness to the execution of a will.

(7) Section 13 -

Omit the section, insert instead:

Gifts to interested witnesses

13. (1) Except as provided by subsection (3), where any beneficial gift is given or made by will to a person who attests the execution of the will (such a person being referred to in this section as the interested witness) or to the interested witness's spouse, the gift shall be void so far only as concerns the interested witness or the interested witness's spouse or any person claiming under either of them, unless-

(a) all the persons who would benefit directly from the avoidance of the gift, having capacity at law to do so, consent in writing to the distribution of the gift according to the will; or

(b) the Court is satisfied -

(i) that the testator knew and approved of the gift, and

(ii) that the gift was given or made freely and voluntarily by the testator.

(2) The executor of an estate in relation to which a gift referred to in subsection (1) is made shall not, unless -

(a) all the persons to whom subsection (1)(a) applies have given the requisite consent; or

(b) the court is satisfied as to the matters referred to in subsection (1)(b),

distribute that part of the estate the subject of the gift before the expiration of one month after the date on which the executor notifies the interested witness or the interested witness's spouse, as the case requires, of the executor's intention to make the distribution

(3) A beneficial gift given or made by will shall not be avoided by subsection (1) where at least 2 persons who attest the execution of the will are not persons to whom any stich gift is 50 given or made or the spouses of any such persons.

(4) A consent referred to in subsection (1) (a) is not liable to duty under the Stamp Duties Act 1920.

(5) In this section -

executor includes a person to whom letters of administration are granted with the will annexed;

"gift" includes a devise, legacy, estate, interest or personal estate, but does not include a charge or direction for the payment of any debt.

(8) Section 14 -

Omit the section

(9) (a) Section 15(2) -

After “1930,”, insert “and before the commencement of the Wills, Probate and Administration (Amendment) Act 1986”.

(b) Section 15(3). (4) -

After section 15(2), insert.

(3) A will made on or after the commencement of the Wills, Probate and Administration (Amendment) Act 1986 in contemplation of a marriage, whether or not that contemplation is expressed in the will, shall lint be revoked by the solemnisation of the marriage contemplated.

(4) A will made on or after the commencement of the Wills, Probate and Administration (Amendment) Act 1986 which is expressed to be made in contemplation of marriage shall not be revoked by the solemnisation of a marriage of the testator.

(10) Section 15A -

After Section 15, insert.

Effect of termination of marriage

15A. (1) In this section -

“Family Law Act 1975” means the Family Law Act 1975 of the Commonwealth, as amended from time to time, or any Act, as so amended, made in substitution for that Act;

“former 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 marriage.

(2) For the purposes of this section, the termination of a marriage shall occur or be deemed to have occurred -

(a) when a decree of dissolution of the marriage pursuant to the Family Law Act 1975 becomes absolute;

(b) on the making of a decree of nullity pursuant to the Family Law Act 1975 in respect of a purported marriage which is void; or

(c) oil the annulment of the marriage in accordance with the law of a place outside Australia where the annulment is recognized in Australia pursuant to the Family Law Act 1975.

(3) Except as provided by subsection (4). where, after a testator has made a will, the testator’s marriage is terminated -

(a) any beneficial gift (including any devise, legacy, estate, interest or appointment of or affecting any real or personal estate, but not including any charge or direction for the payment of any debt) in favour of the former spouse of the testator and any power of appointment conferred on a former spouse shall be revoked;

(b) any appointment under the will of the former spouse of the testator as executor, trustee or guardian shall be taken to be omitted from the will; and

(c) any property which would, but for this subsection, 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.

(4) A beneficial gift or power of appointment shall not be revoked pursuant to subsection(3)(a), and an appointment shall not be taken to be omitted from a will pursuant to subsection (3) (b) where -

(a) the Court is satisfied by any evidence, including evidence (whether admissible before the commencement of the Wills, Probate and Administration (Amendment) Act 1986, 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.

(5) Nothing in this section affects -

(a) any right of the former spouse of a testator to make any application under the Family Provision Act 1982; or

(b) any direction, charge, trust or provision in the will of a testator for the payment of any amount in respect of a debt or liability of the testator to the former spouse of the testator or to the executor or administrator of the estate of the former spouse.

(11)(a) Section 17(1) -

After “15”, insert or “15A”.

(b) Section 17(3)(a) -

Omit” sections 7 and 8”, insert instead “section 7”.

(c) Section 17(3)(c) -

Omit the paragraph. insert instead:

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

(12) Section 18(2) -

Omit the subsection, insert instead:

(2) Subsection (1) applies to and in respect of an obliteration, interlineation or other alteration made in the will of a minor who may make a valid will tinder this Act in the same way as it applies to and in respect of an obliteration, interlineation or other alteration made in the will of a testator who is not a minor.

(13) Section 18A -

After section 18, insert

Certain documents to constitute wills, etc

18A. A document purporting to embody the testamentary intentions of a deceased person, notwithstanding that it has not been executed with the formalities required by this Act, shall constitute a will of the deceased person, an amendment of such a will or the revocation of stich a will, as the case maybe, if the Court is, having regard to the document and any other evidence relating to the manner of execution or testamentary intentions of the deceased person, including evidence (whether admissible before the commencement of the Wills, Probate and Administration (Amendment) Act 1986, or otherwise) of statements made by the deceased person, 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, as the case may be.

(14) (a) Section 19(1)(b) -

Omit" sections 7 and 8", insert instead "section 7".

(b) Section 19(2) -

Omit the subsection

(15) Section 29A -

After section 29. insert.

Power of Court to rectify wills

29A (1) If the Court is satisfied that a will is 50 expressed that it fails to carry out the testator's intentions, it may order that the will shall he rectified so as to carry out the testator's intentions.

(2) An application for an order under this section shall not, except as provided by subsection (3), be made after the expiration of the period of 18 months after the death of the testator.

(3) The Court may grant leave to make an application for an order tinder this section after the expiration of the period referred to in subsection (2) where the Court is satisfied that sufficient cause is shown for the application not having been made within that period.

(4) Nothing in this section renders the executor of the estate of a testator, where the executor has complied with section 92, liable for having distributed the assets, or any part of the assets, of that estate, after the expiration of the period referred to in subsection (2).

(5) Nothing in subsection (4) prevents a person who becomes a beneficiary in respect of assets of the estate of a testator by virtue of an order under this section from recovering the assets where the assets have, or any such part has, been distributed.

(16) Section 152A -

After section 152, insert.

Rules of Court

152A. (1) Rules of Court may be made tinder the Supreme Court Act 1970 regulating practice and procedure in respect of proceedings tinder this Act.

(2) Subsection (I) does not limit the rule- making powers conferred by the Supreme Court Act 1970.

Appendix B - Submissions Received

J M Axtens

J D G Bennett, Senior Assistant Secretary, The Law Society, London

B Brown, Secretary Supreme Court of New South Wales Rule Committee

W J Darwen, The Public Trustee of New South Wales

Family Law Council

A Faunce-de Laune, Registrar of Probates, Supreme Court of South Australia

J O C Fellows

Noel J Foley, Deputy Registrar in Probate, Supreme Court of New South Wales

The Honourable Mr Justice Grove, Supreme Court of New South Wales

The Honourable K J Holland QC

J Hurrell

L James, Registrar in Probate, Supreme Court of New South Wales

Professor J H Langhein

Law Society of New South Wales

G C Lindsay

N R Osner, Lord Chancellors Department England

Air Commodore G J Pound, Chairman of the Military Law Sub-Committee, Department of Defence

The Honourable Mr Justice Powell Supreme Court of New South Wales

J D Steed

Trustee Companies Association of Australia, New South Wales Council

The Union-Fidelity Trustee Company of Australia Limited

The Honourable Mr Justice Waddell, Probate Judge, Supreme Court of New South Wales

W J V Windeyer

Women’s Electoral Lobby

R Yeldham, Secretary to the Principal Registry of the Family Division of the High Court of Judicature, London

Appendix C - Reports of the Law Reform Commissions and Agencies Relating to Wills Considered by the Commission

Australia

Northern Territory	Law Review Committee, Report *Relating to the Attestation of Wills by interested Witnesses and Due Execution of Wills* (1979)
Queensland	Law Reform Commission, Report on *The Law Relating to Succession* (1978), QLRC 22.
South Australia	Law Reform Committee, Report on *Section 17 of the Wills Act, 1936-1966* (1969), SALRC 6.
	Law Reform Committee, *Report relating to the reform of the law on intestacy and wills* (1974), SALRC 22.
	Law Reform Committee, *Report relating to the effect of divorce on wills* (1977), SALRC 44.
Tasmania	Law Reform Commission, *A Working Paper on Reform in the law of wills: the making and revocation of wills,* by G.M. Bates (1981).
	Law Reform Commission, *Report on Reform in the Law of Wills,* (1983) Report No.35.
Victoria	Statute Law Revision Committee, *Report upon the proposals contained in the Wills interested Witnesses Bill 1971* (1972)
	Chief Justice's Law Reform Committee, *Report on the effect of marriage on wills* (1970).
	Chief Justice's Law Reform Committee, *Execution of Wills* (1984).

Western Australia	Law Reform Commission, Discussion Paper on *Wills: Substantial Compliance* (1984)
New Zealand	Property Law and Equity Reform Committee, *The Effect of Divorce on Testate Succession* (1973).
United Kingdom	The Law Commission. *Should English Wills be Registrable?* (1966), Working Paper No 4.
	Report of the Committee on the Age of Majority (1967), Cmnd. 3342.
	Lord Chancellor's Law Reform Committee, Report on *Interpretation of Wills* (1973), Cmnd. 5301.
	Lord Chancellor's Law Reform Committee, Report on *The Making and Revocation of Wills* (1980), Cmnd. 7902.
Canada	
British Columbia	Law Reform Commission. Report on *The Making and Revocation of Wills* (1981), LRC 52.
Manitoba	Law Reform Commission, Report on *The Wills Act and the Doctrine of Substantial Compliance* (1980), Report 43.
Ontario	Ontario Law Reform Commission. Report on *The Proposed Adoption in Ontario of the Uniform Wills Act* (1968).

Appendix D - The Definition of Privileged Testator in the Various States and Territories of Australia

1. The legislation (apart from that of New South Wales) is contained in the following statutes:
   Australian Capital Territory Wills Ordinance, 1968, section 16.

   Northern Territory Wills Act, 1938, sections 7, 7A.

   Queensland: Succession Act, 1981, section 16.

   South Australia: Wills Act, 1936, section 11.

   Tasmania Wills Act, 1840, section 11; Wills Act, 1918; Age of Majority Act, 1973, Schedule.

   Victoria Wills Act, 1958, section 10.

   Western Australia Wills Act, 1970, sections 17-19.

2. The following broadly indicates the classes of privileged testators in the various Australian jurisdictions:

   (1) Soldier [of any country (NSW)] in actual military service (NSW, Tas, Vic).

   (2) Member of the Military Forces of the Commonwealth (ACT, NT, SA).

   - who is in actual military service (ACT, NT)

   - who is on active service (SA)

   - during 1st and 2nd World War (Vic, Tas) or during Korean and Malayan conflicts (Vic).

   (3) Member of naval or marine force of any country, so circumstanced that if he were a soldier he would be in actual military service (NSW).

   (4) Member of Her Majesty's naval or marine forces when he is so circumstanced that if he were a soldier he would be in actual military service (Tas, Vic).

   (5) Member of the Naval Forces of the Commonwealth (ACT, NT, SA, Tas, Vic)

   - who is so circumstanced that if he were a soldier(Vic) a member of the Military Forces of the Commonwealth (ACT, NT, Tas,) he would be in actual military service.

   - who is on active service (SA).

   (6) Member of an air force, of any country, in actual military service (NSW).

   (7) Member of the Air Force of the Commonwealth (ACT, NT, SA)

   - who is so circumstanced that if he were a member of the Military Forces of the Commonwealth he would be in actual military service (ACT, NT)

   - who is on active service (SA).

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

place, or are believed to be imminent in relation to a war declared or undeclared or other armed conflict in which members of such armed forces are, or have been or are likely to be engaged" (Qld, WA).

(9) Any person who was engaged on war service as if such person were a soldier "being in actual military service" (Vic).

(10) "Persons subject to the Defence Act 1903-19 17, or that Act as amended, by virtue of section 1 17A of that Act or of that Act as amended who are so circumstanced that, if they were members of the Military Forces of the Commonwealth. they would be in actual military service" (ACT, NT).

(11) "Persons employed outside Australia as representatives of organizations rendering philanthropic, welfare or medical service to members of the Defence Force." (ACT, NT)

- persons engaged outside Tasmania (Tas), outside Victoria (Vic), during theist and 2nd World Wars (Tas, Vic), and during the Korean and Malayan conflicts (Vic), on work of any Red Cross Society or ambulance association or body with similar objects (Tas, Vic).

(12) "Prisoners of war or persons interned in a country under the sovereignty, or in the occupation. of the enemy or in a neutral country who became prisoners of war or were so intended as a result of war or war-like operations and were, immediately before their capture or internment, persons included in a class of persons specified in a preceding paragraph of this sub-section" (ACT, NT).

- Any person who is a prisoner of war or internee in an enemy or neutral country (Qld),

- Prisoner of war in the enemy s country or person interned in the country of a neutral power (Tas, Vic) during 1st or 2nd World Wars (Tas, Vic) and during Korean and Malayan conflicts (Vic).

(13) Mariner or seaman being at sea (NSW, Qld, Tas, Vic, WA).