THE CONTEMPORARY VALIDITY OF SECTION 18 WILLS ACT 1837

Section 18 of the Wills Act 1837 it now 139 years old. Lindsay McKay argues that this is old enough, and that what he describes as this tyrannical relic of a by-gone age should be given a prompt burial in the grave already dug for it by changed social circumstance and the family protection legislation.

I. INTRODUCTION

The legislative provision which saves wills made in contemplation of marriage[1] from the voiding effect of s. 18 of the Wills Act 1837 refuses to be beaten into submission. In the decade immediately following its enactment in the United Kingdom,[2] some states of Australia,[3] and New Zealand[4] it prompted a considerable volume of cases and commentary wherein judges and commentators strove to define its requirements and effect.[5] Those efforts were largely unsuccessful, principally because the judiciary in different parts of the Commonwealth reached, in almost every case, conflicting results on the various issues raised by the provision. Then, for New Zealand, came *Burton* v. *McGregor*,[6] and the provision's most vexing difficulty — the "fiancée" issue — seemed to be resolved in this jurisdiction at

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1. In New Zealand, s. 13 of the Wills Amendment Act 1955, first enacted by the Law Reform Act 1944. The section provides, *inter alia*,
   "(1) Notwithstanding anything in section 18 of the principal Act or in any other enactment or rule of law, a will expressed to be made in contemplation of a marriage shall not be revoked by the solemnisation of the marriage contemplated."
   That part of s. 18 of the Wills Act 1837 (U.K.) relevant to this essay provides "Every will made by a man or woman shall be revoked by his or her marriage".
2. In s. 177 of the Law of Property Act 1925. The Act was first passed in 1922, but its operation was delayed for three years for, *inter alia*, the purpose of "consideration".
3. The State statutes considered hereinafter are Queensland (s. 3, Law Reform (Wills) Act 1962); New South Wales (s. 15, Wills, Probate and Administration Act 1898-1973); Victoria (s. 16, Wills Act 1928). All three, and that of the United Kingdom *supra* note 2, follow the pattern of the New Zealand provision.
4. Note 1.
5. Most of the cases are discussed in the decision of Megarry J. in *Re Coleman* [1975] 2 W.L.R. 213 or that of Adams J. in *Burton* v. *McGregor* [1953] N.Z.L.R. 487. See too: *Note*, 47 L.Q.R. 469; Fridman, *Wills in Contemplation of Marriage* 27 Aust. L.J. 550. For more recent commentary see note 15, *infra*.
6. Note 5.

least: controversially, and probably incorrectly,[7] but resolved all the same.

Now what little certainty the section possessed is under attack on two fronts. First, in the case of *Re Coleman*[8] Megarry J. disagreed with the decision of Adams J. in *Burton* v. *McGregor* on the sufficiency of the word 'fiancée" as a basis for invoking the saving provision. That holding is unsettling enough in itself. But the learned judge raised of his own motion a further and quite novel issue which must inevitably provide fuel for the fires of future litigation. In a *dictum* which, if earlier adopted would have caused the invalidity of wills otherwise held to satisfy the saving clause,[9] he suggested that in the absence of a general declaration which repeats the statutory formula the *whole will* must be made in contemplation of marriage — a suggestion which must[10] be interpreted as a positive rule that the substantial majority of the property must go to the fiancée to satisfy the provision. Secondly, two recent Australian decisions, *Keong* v. *Keong*[11] and *In Re Foss*,[12] have challenged[13] the validity of the one point upon which there *was* some measure of agreement throughout the Commonwealth, namely, that evidence of intention is not admissible to prove the contemplation

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7. Not in the opinion of Mahon J. in *Crawley* [1973] 1 N.Z.L.R. 695, however, who followed *Burton* v. *McGregor:* all other courts before which the issue has arisen have reached a conclusion contrary to *Burton*. See e.g. *Re Langston* [1953] P. 100; *Re Chase* [1951] V.L.R. 477; *Re Coleman*, note 5. With respect, the argument of Megarry J. in the latter case, which concludes "in ordinary parlance a contemplation of marriage is inherent in the very word fiancee", note 5, at 218, seems clearly correct.
8. Note 5.
9. See e.g. *Re Chase* [1951] V.L.R. 477, which Megarry J. explicitly suggests was incorrectly decided for this reason at [1975] 2 W.L.R. 213, 220.
10. By necessary implication from the judge's suggestion that the two-thirds of the estate given to the fiancée in *Re Chase*, note 9, was inadequate to meet this criterion.
11. [1973] Q.L.R. 516 (S.C.); 522 (F.C.).
12. [1973] 1 N.S.W.L.R. 180.
13. Though with different degrees of explicitness. In the *Foss* case Helsham J. confronted the question directly, as he had to, for two totally conflicting authorities were before him. In *Simpson* (Myers J., 17 December, 1958, Unreported) it was held that extrinsic evidence was not admissable to show the will was *in fact* made in contemplation of marriage. In *Gray* (Roper C.J., 28 November, 1951, Unreported) the court asserted the right to examine extrinsic evidence to isolate the testator's intention. Helsham J., favouring the latter approach, construed the will before him "in the light of surrounding circumstances", note 12, at 183. This is in direct conflict with e.g. the assertion of Adams J. in *Burton* v. *McGregor*, note 5, at 491. In the *Keong* v. *Keong* case neither court explicitly alluded to the conflict between their own approach and that of the other authorities. Such a conflict does, however, clearly exist. Compare e.g. the approach of Kneipp J. at [1973] Q.L.R. 516, 524, with that of Megarry J. in *Coleman*, note 5, at 219. Compare it too with the "orthodox" approach in the Canadian case of *Re Pluto* (1969) 6 D.L.R. (3d) 541 (B.C.).

component. That challenge also invites review of many, perhaps most,[14] of the earlier decisions and may preface the development of a far wider area of application for the provision than has traditionally been supposed. It must also preface, as with *Coleman*, yet a further period of uncertainty and controversy.

Commentary has already been provoked by the *Coleman* case:[15] more will undoubtedly follow, for the decision has effectively rewritten the contemplation of marriage clause and must necessitate a reappraisal of the entire body of existing case law. Commentary deserves to be provoked by *Keong* and *Foss* as well, for their significance is scarcely less profound. In all probability, however, any future debate on either topic will follow the pattern of earlier commentary and analyse the language, the policy and the decisions of the saving clause itself. In the writer's opinion that is too narrow a basis to take. For the most significant issue raised by the section is not that of its own purport or its own prerequisites but rather the legitimacy of the provision it is intended to supplement — namely, s. 18 of the Wills Act 1837.[16] That the label "supplementary" is a valid one is beyond question: the saving clause has no independent *raison d'etre* of its own and its only purpose is to mitigate against the hardship created by the dominant provision.[17] If it is not performing that function adequately, or if its application is attended by such judicial controversy as to render orderly and regular reliance on it difficult, we ought logically to examine the validity of s. 18 with as much care as has been afforded its saving clause in the past. To conduct such an examination is the object of this paper.

II. THE HISTORY OF SECTION 18

The enactment of s. 18 in 1837 represented a new departure for the law of wills. Prior to that date the will of a *woman* was automatically revoked by her marriage[18] but that of a man survived it.[19] And while the position was attended with some judicial controversy, it seemed tolerably well-settled as at 1837 that a man's will would only be revoked by both marriage and the subsequent birth of a child. In

14. Indeed, perhaps *all* with the exception of *Pilot* v. *Gainsfort* [1931] P. 103, a long discredited decision (see e.g. *Theobald on Wills*. 13th Ed., para 143; *Burton*, note 5) which might arguably be defended on the basis of *Keong* and *Foss*. A power to consider extrinsic evidence as wide as that suggested would have saved virtually every will held not to satisfy the saving clause.
15. See MacKay, 125 New Law Journal 115; Edwards and Langstaff, *The Will to Survive Marriage* 39 Conv. (N.S.) 121.
16. The relevant part of the text of which is set out in note 1.
17. See the second reading speech of the Hon. R. Mason, sponsor of the Law Reform Bill 1944 (clause 7 of which contained the present s. 13), set out in *N.Z. Parliamentary Debates*, Vol. 267 (p. 141).
18. *Hodsden* v. *Lloyd* 2 Bro. Ch. 534; for a discussion of the policy behind this rule see *Page on Wills* 3rd Ed., Vol. 2, p. 513.
19. *Wellington* v. *Wellington*, 4 Burr. 2165; *Marston* v. *Roe* 8 Ad. & E. 14.

Wellington v. *Wellington*[20] the Chief Justice expressed the rule in this way:[21]

> "As to an implied revocation, from alteration of circumstances; it is now settled that as to personal estates, marriage and having a child is a revocation. . . . [The law is the same] as to devises of land."

What was *not* settled, however, was whether this rule operated as an irrebuttable presumption or alternatively was rebuttable on proof of a contrary intention. The Ecclesiastical Courts had long taken the latter view.[22] So too did Lord Mansfield, who in *Brady* v. *Cubitt*[23] termed the *Wellington* rule a "presumption" which "may be rebutted by every sort of evidence." The courts of both Common Law and Equity, however, tended to the opposite view, *Brady* v. *Cubitt* receiving explicit disapproval in *Holford* v. *Otway*[24] and the "irrebuttable" approach being adopted in *Lancashire* v. *Lancashire*[25] by Lord Kenyon.

For a time, the *Brady* v. *Cubitt* view appeared to be the prevailing one. In 1821, for instance, the editor of *Sheppard's Touchstone* felt able to assert with apparent confidence:[26]

> "So a will may be revoked by an alteration in the circumstances of the testator, as by marriage and the birth of a child; but this is merely a presumptive revocation, and therefore parol evidence may be admitted to show that there was not an intention to revoke",

and to dismiss the opposite view with an unelaborated reference to *Lancashire* v. *Lancashire*.[27] Such treatment clearly did not do justice to the substantiality of the controversy. Nor did it reckon with the strength — from the perspective of the common law judges — of the case against the *Brady* approach. One commentator put that case this way:[28]

> "[The *Brady* approach was seen as being out of sympathy with] the growing strictness of the law which governed other forms of revocation, the difficulty of justifying revocation by implication after the enactment of the Statute of Frauds, the strong tendency to require more than the testator's mere intention . . . to revoke a will . . . , and the great uncertainty as to property rights which would result if changes in domestic relation were [a] prima facie [revocation] only . . . ."

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20. *Ibid.*
21. *Ibid.*, at 2171.
22. See e.g. *Fox* v. *Marston* 1 Curt. Eccl 494; see too the discussion of Tindal C.J. in *Marston* v. *Roe*, note 19, at 55-59.
23. 1 Doug. 31.
24. 2 H. Bl. 516.
25. 5 T.R. 58.
26. 7th Ed., (Hilliard) Vol. II, 412.
27. Note 25.
28. *Page on Wills*, note 18, at pp. 499-500.

The Common Law judges took their stand, on precisely those grounds, in *Marston* v. *Roe*.[29] Speaking for all the Judges of England, Tindal C.J. disapproved of *Brady* v. *Cubitt*, and argued that the Touchstone view was proper — if at all — only in regard to wills of personality under the jurisdiction of the Ecclesiastical courts. He laid down that the presumption of revocation was absolute and could not be rebutted by evidence of a contrary intention. In his words:[30]

> "[It is] a principle of law, of which [I take] the foundation to be 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."

Any capacity the *Marston* decision may have had for settling the law was, at least in the United Kingdom,[31] short-lived. A few weeks after it was given the Wills Act 1837 came into force and with it, of course, the rule contained in s. 18 providing that marriage alone was sufficient to revoke a will and the implication in s. 19[32] that the subsequent birth of children was not. *Prima facie*, the Acts seems to represent an abrupt departure from the previous approach, for even though they had disagreed on the issue of the presumption's rebuttability all courts and all judges had agreed that the birth of a child was infinitely *more* significant than the taking of a wife — yet on its face the section seemed to change that emphasis. Let us then briefly examine the legislative history of s. 18 to see if that impression is borne out.

In the 1820s two Commissions were appointed by Parliament to examine the law of succession. The first, the Real Property Commission, was established in 1828 to investigate and report on, *inter alia*, the devising of realty; the second, the Ecclesiastical Commission, was appointed in 1830 to inquire into, *inter alia*, the bequeathing of personalty. The Commissions reported in April, 1833 and February, 1832 respectively and early in 1834 a Bill adopting most of the recommendations of the former was introduced into the House of Commons.[33] The Bill of 1834 was referred to a Select Committee but went no further during that session. In 1835 it was reintroduced and on that

29. Note 19.
30. *Ibid.*, at 58.
31. The decision had a more profound inflence in the United States, where it was followed in a number of State jurisdictions: see *Page on Wills*, note 18, pp. 500-501 and the authorities referred to in note 11 of that text. Most of the states have now placed in statutory form their individual approaches to the topic in issue. Some still follow *Marston* v. *Roe* in a statutory form. See *American Law of Administration* (3rd Ed.), Vol. I, pp. 152-163.
32. Which provision, as we shall see *infra*, was more significant in 1837 as a substantive matter than s. 18. Section 19 provided, and provides today: "No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances."
33. The report of the Commission is entitled Fourth Report of the Real Property Commissioners 1834. This aspect of the narrative and that outlined in the following paragraphs are taken principally from the speech of Lord Langdale in the House of Lords in 1836: see United Kingdom *Parliamentary Debates* Feb. 23, 1836, Columns 963-965.

occasion passed the Commons but was held up in a Select Committee of the House of Lords. In 1836 it was reintroduced in the latter chamber by Lord Langdale and, without apparent opposition, passed into law. The Bill proposed substantial changes to the law of both real and personal property testation, including a rationalisation and merger of the formerly diverse — often conflicting — rules relating to realty and personalty.[34] Among its clauses were the provisions later to be enacted as s. 18 and s. 19 of the Wills Act 1837. These were based upon the recommendation of the Real Property Commission which expressed dissatisfaction with both the substance and the uncertainties attending the then existing laws. The uncertainties? Principally the conflict, unresolved in 1834, between the approaches of Lord Mansfield in *Brady* v. *Cubitt* and Lord Kenyon in *Lancashire* v. *Lancashire*, of which conflict the view was expressed that it created "uncertainty of title" and lead to "litigation to a considerable extent".[35] In view of the judicial controversy noted above, that comment must be fair. And the substance? Principally it seems with examples such as the following, raised in the House of Lord in 1836 in support of the change in the law:[36]

> "The testator may by his will have provided for a future wife, or for future children; in that case he contemplated his change in circumstances which he made his will, and it would be absurd to hold the will revoked by that change. He may have an heir apparent at the times he makes his will and revoking the will by a subsequent marriage followed by the birth of a child would give all the real estate to that heir apparent, which could not be for the benefit of the children of the subsequent marriage."

This objection is obviously more difficult to fathom than the argument from uncertainty. The question is immediately posed: would not — and does not — s. 18 perpetuate those very same absurdities? The point is of significance, both substantively and for the purpose of isolating the paramount source of concern as it appeared to the legislature. It is considered in more detail in the following paragraphs.[37]

Several matters arising from this brief narrative require discussion. First, it should be stressed that s. 18 as ultimately enacted was *not* regarded by the legislators of the day as being founded on a desire or a need to protect the newly acquired wife of the testator, however much it may convey that impression to a modern day reader. The wife was regarded as being, in the usual course, adequately provided for by both dower and the marriage settlement — among the will-making classes at least — executed in her favour prior to the union.[38]

34. *Ibid.*, columns 966-967.
35. *Ibid.*, 977. See too the extracts from Lord Langdale's speech quoted *infra*, text accompanying note 45.
36. *Ibid.*
37. *Infra*, p. 254.
38. See *Page on Wills*, note 18, at p. 501; *American Law of Administration*, note 31, at p. 150; *Vanek* v. *Vanek* 180 Pac. 240; *Johnston* v. *Johnston*, 1 Phill. Ecc. 477, 478; Mitchell, *Revocation of Testamentary Appointments on Marriage* (1951) 67 L.Q.R. 351, 355.

That the legislature did not view s. 18 as making further, or better, provision for her is a conclusion logically compelled by the consideration that she was substantially disqualified from taking on any intestacy forced by s. 18[39] and there is no suggestion in the 1834-37 debates that the position should have been otherwise. Rather, the concern of Parliament appears to have been with the heir, a concern felt with as much force as that of the courts in the adoption and application of the earlier "revocation upon marriage plus the birth of a child" principle.[40] It is simply that the legislature of 1836 saw the interests of its darling as being better promoted by s. 18 and s. 19 than by either the *Brady* v. *Cubitt* or Lord Kenyon's *Lancashire* v. *Lancashire*[42] principles. That this assertion is historically justified would seem clear from the tenor of all the debates at the time. In the example quoted in the preceding paragraph, it is clearly the interests of the *children* that is of paramount conern: at an earlier stage of the three-year debate the Attorney-General voiced a similar sentiment and expressed the opinion that one aspect of the equitable rule was defective since "it could never be the intention of anyone that children begotten after the making of a will should have been intended to be disinherited."[43] In contrast, there is virtually a total lack of reference to the wife or of a need to protect her. The object of the legislature was to find a substitute for a rule whose beneficiaries were her offspring, and not she herself.

How then were s. 18 and s. 19 seen as affording better protection to issue than either definition of the earlier rule? The sponsors of those provisions forwarded, as we have seen, two arguments by way of substantiation.[44] Of those, it seems reasonably clear that the *uncertainties* of the existing law weighed considerably heavier than the supposed "injustices" of the marriage-plus birth of a child rule, and that the "better protection" which the Act was intended to provide was seen as being substantially achieved by simply *settling* those doubts and controversies. This view is supported by a number of considerations.

First, in his speech in the House of Lords in 1836 Lord Langdale stated:[45]

> "[Cases of considerable complexity have arisen] from which it is very doubtful whether the Courts will or will not consider

39. *Page on Wills, ibid.; Halsbury* 3rd Ed., Vol. 16, pp. 414-424. The proposition in the text was unqualifiedly correct as to realty (*Halsbury*, p. 423); as to personalty, the wife was in some cases entitled to one third (*Halsbury*, p. 415).
40. For an expression of those concerns see e.g. *Johnston* v. *Johnston*, note 38, at 467-469; *Marston* v. *Roe*, note 19, at 61-62.
41. Note 23.
42. Note 25.
43. Second Reading Debate of the Execution of Wills Bill 1834, reported in United Kingdom *Parliamentary Debates* Vol. 26, March 11, 1834, Column 854.
44. *Supra*, p. 251.
45. Note 35.

> particular circumstances sufficient to rebut the constructive revocation . . . and from this cause, uncertainty of title . . . [has arisen]."

On its face, that statement does not bear out the proposition asserted above. It is suggested however that it was at least in part *because* of the uncertainty described that Lord Langdale saw the "injustices" alluded to as arising. He prefaces the examples given with a statement that the testator's intention is often defeated.[46] He then gives the instances in question. From there he seems to tie all three together and establishes the causal connection between the injustices and the uncertainties by his phrase "*from which* [cases]." There is, in other words, a suggestion that it is the latter which, in part, occasions the former.

Secondly, and, it is suggested, more positively, there is support for the same view in an incident occurring after the passage of the 1837 Act. In 1838 Sir Edward Sugden — not a Member of Parliament in 1837[47] — moved in the Commons to suspend the coming into force of the Wills Act 1837 for three months. One of his objections to the Act was the "absurdity"[48] of s. 18 he saw in the following situation:[49]

> "[B]y the present Act, marriage of itself revoked the will, and although a man might have made a will in contemplation of his marriage, bequeathing certain property to his wife, yet as soon as he married, that very document which he had caused to be drawn up in anticipation of his marriage became null and void."

In a sense this was a prophetic utterance of course, since it was this very difficulty that was later to force the enactment of the "contemplation of marriage" saving clause. The Government spokesman of the day cannot, however, be accused of ignoring the obvious sense of Sugden's accusation: rather, he saw it but found it insufficiently weighty to counter the benefit of the absoluteness of the s. 18 direction. In reply to Sugden the Attorney-General asserted:[50]

> "[A]ll judges would with one voice condemn the [uncertainties of] the present law. A marriage ought either not to revoke a will under any circumstances or it ought in all cases to invalidate it. It [is] indispensably necessary to lay down a rule and the legislature [has] accordingly declared that a marriage in all cases should make a will previously executed void."

This rejoinder places s. 18 in more realistic perspective than the debates surrounding the passage of the Wills Act 1837 itself. Gone is

46. *Ibid.*
47. See United Kingdom *Parliamentary Debates*, December 4, 1838, Column 530.
48. *Ibid.*, column 529.
49. *Ibid.*
50. *Ibid.*, column 536.

any reference to the substantive injustices of the *Wellington* rule. Emphasis is placed only on the *uncertainties* of the then existing law — uncertainties arising both from the Mansfield/Kenyon controversy and the threshold issue of ascertaining what the testator's intention has been in any event vis a vis the effect of his marriage on the earlier will.[51] So viewed the legislative exercise was similar in motivation at least to that judicial one being conducted at almost the same time, as the Judges of England deliberated *Marston* v. *Roe*. Some degree of mutual influence is suggested.

Thirdly, there is the consideration to which reference has already briefly been made. If the injustices of the pre-1837 position referred to by Lord Langdale[52] *were* substantive in character then it is doubtful whether it could be said of s. 18 and s. 19 — as Lord Langdale *did* say in relation to the absurdities *he* had in mind — that it effectively removed them. For example: if it is "unjust" that an heir apparent should benefit to the exclusion of children of a subsequent marriage, as Lord Langdale suggests it is,[53] then that injustice prevails under the code established by s .18 and s. 19 with every bit as much force as that under, for instance, the rule in *Lancashire* v. *Lancashire*,[54] for both rules revoke the pre-marriage will and both as a consequence send the property the way of the heir apparent. Lord Langdale's remarks only make sense if they are construed — as it has earlier been suggested they may, perhaps should, be[55] — as an objection to the uncertainties of the existing law and as implying that a given testator may guess wrong in predicting the approach of the Court that determines the validity of his will. These three considerations necessitate the assertion that s. 18 was passed with at least the principal object of providing a single and authoritative rule for testators to follow.

Why then was that rule framed in terms of marriage alone rather than marriage followed by the birth of a child? The answer does not emerge clearly from the debates, but it may have been no more than this: marriage was itself an occasion for the rearrangement of property interests; many wills executed at that time made provision for future children;[56] an intestacy at *that* point of time, by virtue of s. 18, did not

51. An issue which troubled the courts and, as a consequence, the Commissioners and legislators to a degree almost as substantial as the fact of the controversy itself. See the reference to the "three day argument" before "fourteen judges" in the case of *Fox* v. *Marsden* referred to by the Attorney General in support of the approach in s. 18 and s. 19, note 47, at column 536.
52. *Supra*, text accompanying note 36.
53. *Ibid.*
54. Note 25.
55. *Supra*, text accompanying notes 45 and 46.
56. An impression confirmed by a review of both the cases (virtually by definition, every case which arose for decision under the old rule made some provision for future children, for if it did not there would have been no basis for an assertion that the presumption was rebutted) and the legislative debates. In the latter regard see e.g. the speech of Lord Langdale, note 33, column 977; the speech of Sugden, note 47, column 529. See too the discussion *supra* surrounding the attempt of Sugden to

jeopardise the wife[57] or future children (because they *were* "future"); an intestacy at the birth of a child, by virtue of the *Wellington* rule, did in cases of an heir apparent at the time of the subsequent marriage. In short, s. 18 harmed no-one and benefitted a few when compared to the earlier principle. That of course is to suggest that *substantively* the change effected by s. 18 was not great and was not *in itself* likely to have been seen as giving rise to a "need" for legislation. That is, however, a conclusion directly supported by the conclusions of the immediately preceding paragraphs.

One further matter should be referred to to round out this aspect of the analysis. The controversies of the decade up to 1838 took place against a background of freedom of testation. While early in its history England was no stranger to the notion of forced shares of both legal and religious persuasion, those constraints had largely disappeared[58] at the time of the events with which we are concerned, and in their place had been erected the principle that legally and substantively at least[59] a testator would do with his property what he wished.[60] The qualification "legally at least" must of course be stressed. All the indications are that even in the late Georgian and early Victorian days of the early 19th century — years we are apt to view as among those wherein the freedom of testation principle raged rampant — there was in the minds of both the legislators and the judiciary the clear, often explicit, notion that a man was morally obligated in the most compelling terms to provide for his children in the "regular" "normal" and "proper" way. We have already seen the expression of incredulity on the part of the Attorney-General in 1838 to the rhetorical suggestion that a testator could ever intend not to provide for his children;[61] that is typical of a sentiment appearing over and over again in both the cases and the debates when the s. 18 issue or ones related to it were under discussion.[62] Accordingly, while

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delay the coming into operation of the 1837 Act: the fact that his case vis a vis s. 18 was founded on the basis quoted would seem to substantiate the assertion in the text.

57. Who could not take on an intestacy whenever it was forced: see note 39 and the text thereto.
58. See the discussion in the 16th Ed. of *Blackstone's Commentaries*, Vol. II, pp. 490-493. There is some suggestion that even as late as 1825 (the date of this edition) there may have been some minor and localised aspects of *custom* which limited dispositive powers over certain chattels: (at 493). Blackstone does conclude however that as a general proposition "the old common law [is] now abolished throughout all the kingdom of England". *(Ibid.)*.
59. Subject of course to the requirements of form and any quasi-substantive effect the *Wellington* v. *Wellington* principle may have been responsible for.
60. Note 58.
61. Note 43 at column 855.
62. Clearly the *assumption* in the parliamentary debates is that the will-making power will be exercised responsibly and that the function of the legislature is to facilitate it (e.g. by resolving the *Brady/Lancashire* controversy) rather than to check or limit its exercise in substantive respects. See e.g. the entire speech of Lord Langdale sponsoring the Wills Bill in the Lords in 1836, particularly his introductory comments, note 33, columns 967-970; and his plea for testators at columns 981-982.

it was never suggested by either source that freedom of disposition be limited, it is equally apparent that it was the clear expectation that that freedom would be exercised "responsibly" and "properly". In this sense the purpose of the exercise was to isolate a means whereby that "proper" exercise could be facilitated, a mechanism whereby mistakes, mis-apprehensions and acts of forgetfulness could be countered in the most satisfactory "justice"-promoting way. For it was cases in the latter category rather than those of gross abuse or manifest neglect that created the principal concern.

III. SECTION 18 TODAY

It is against the background of this debate and these assumptions behind it that the "propriety" and "utility' of s. 18 today must be judged. From that background it seems legitimate to extract five principles:

(a) The principal purpose behind the passage of the section was to resolve the *Brady* v. *Cubitt*[63] and *Lancashire* v. *Lancashire*[64] controversy and bring certainty into the law;

(b) The preoccupation of the legislature was with the protection of children born to a marriage rather than with the protection of the mother of those children;

(c) S. 18 was to an apparently minor degree regarded as a more satisfactory method of protecting children than a statutory adoption of *Marston* v. *Roe*;[65]

(d) The legislature foresaw the "contemplation of marriage" difficulty but chose not to provide for it since it reintroduced, in conflict with consideration (a), uncertainty into the law;

(e) S. 18 was intended to operate in the context of — legally viewed and no further — freedom of testamentary disposition.

It is at once apparent that the preoccupations and values of both the courts and legislature in 1837 are far from identical with those of today. Indeed, it is difficult to see in any of these five considerations any substantial degree of contemporary relevance. As to (a), the specific problem area of the law behind it is now a matter of historical interest alone, and s. 19[66] would now prevent its reoccurrence quite apart from s 18. As to (b), our policy-makers still, of necessity, have a weighty interest in protecting the security of children: the abolition of dower[67] and the democratisation of the testation process have,

63. Note 23.
64. Note 25.
65. Note 19.
66. Set out in full, note 32.
67. Real Estate Descent Act 1874.

however, forced the legislature to create or extend other[68] measures for the protection of the family generally which more directly impinge on substantive freedom of disposition, with the result that we now look directly *to the will* to secure that protection. As to consideration (c), whatever the merits of this view at the time, the judiciary now have far more positive and direct mechanisms to fulfil this objective.[69] As to (d), as early as 1922[70] the United Kingdom legislature opted for the contrary view in the light of the apparent injustices and absurdities created by the 'certainty" of the absolute rule. And as to consideration (e), the development and expansion of the "moral duty" criterion of Family Protection legislation has necessarily thrown considerable doubt on the "freedom of testamentary disposition" principle, even defined in a narrow and strictly legal character.[71]

As both a summary and a starting point, then, we may say this: once, as in 1837, the *formal* framework of the testation process was vitally significant as the only legal constraint on dispositive conduct. In such a context s. 18 was obviously of great importance, as was the *Wellington* principle before it. Today the judiciary is much better armed and need not rely *exclusively* — the qualification is inserted to prevent a charge of pre-judgment alone — on inflexible, one-shot provisions to achieve the same end.[72] The questions are accordingly posed: are the preoccupations and the approach of legislature in 1837 totally without weight and significance as a result? And if they are, are there any further and independent grounds upon which s. 18 might be justified?

A. Section 18 as a Protective Device

The principal purpose of the provision, as we have seen, was to protect members of the testator's family from oversight, mistake, or misjudgment. As such a device, however, it was and is of a peculiar and anomalous character. It did not *force* a disposition in their favour. It did not, on a broader level, force any disposition at all. Pressure in those respects came from general societal expectation and that alone.[73] The only positive attribute of the section arose in those limited number of cases in which s. 18 forced a revocation and a subsequent will was not made prior to death. In other words, its affirmative aspect was that of forcing an intestacy.

In both these negative and positive respects it was and is a

68. E.g. the preference efforded the surviving spouse under the present Administration Act 1969 (and past Acts of a similar character, though to a lesser degree), and the preferential treatment generally received by a spouse in a Family Protection Act application — see *Russell* v. *Dunn* (1907) 9 G.L.R. 509, 510 per Williams J; *Rush* v. *Rush* (1901) 20 N.Z.L.R. 249; Inglis *Family Law* 2nd Ed., Vol. I, p. 297.
69. See the discussion of the Family Protection Act 1955, *infra.* p. 261.
70. In the Law of Property Act 1922; see further, note 2.
71. See generally Inglis, note 68, 283 *et seq.*
72. Whether it need rely on s. 18 at all is discussed *infra.* p. 262.
73. *Supra,* p. 255.

far less potent provision than the Family Protection Acts which are to be found today in most countries[74] where s. 18 or provisions analogous[75] to it have been applied. It is quite true that literally speaking they customarily do not "force" dispositions either: in reality however wills are usually drawn up with the necessity of honouring the Acts "moral duties" in mind and if they are not so drafted the will is reformed to secure that compliance. At the end of the process there clearly *is* a mandatory dispositive code underlying the legislation which is lacking in s. 18 and the Wills Act generally. As to the one positive aspect of s. 18 — the intestacy issue — the Family Protection legislation must also rank as a substantially more powerful mechanism. As a remedial measure the ordering of an intestacy is akin to delicate surgery performed with blunt or jagged scalpels. This assertion will be elaborated upon presently.[76]

B. Section 18 as a Declaration of Societal Expectation

It might be argued as follows. It is quite correct that s. 18 has little positive effect. But it stands as a useful and significant declaration to the public at large that testators "should" — perhaps even "are morally obligated to" — regard their marriage as an act which imposes upon them important new obligations which demand the reappraisal of any earlier testamentary dispositions. One can have no quarrel with the concluding aspect of the hypothetical, for no doubt we are not so far removed from the concerns and sentiments of the legislators of the 1830s to have abandoned a collective moral judgment that the family *should* be provided for.[77] Nor would many object to the notion that the legislature may legitimately employ its edicts in the form of statements of belief or principle — somewhat as it has done in the Status of Children Act 1969 — even though that statement does not in itself capture or manifest the complete social[78] or legal[79] reality in question. There are however three further considerations which throw doubt upon the propriety of these arguments in the context of s. 18.

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74. The State jurisdictions of the United States are conspicuous exceptions. While the concept of the New Zealand Act has been pressed for by many commentators, no State has as yet adopted it. New York, for example, rejected it in 1965 on the basis that it would inevitably provoke litigation. As a consequence, all States retain dower and/or the concept of a forced share as a method of protecting the surviving spouse. See generally Gulliver *et al*, *Gratuitous Transfers* (West, 1967) p. 107 *et seq* especially pp. 161-175; Scoles and Halbach, *Decedent's Estates* (Little, Brown 1973) pp. 73-100.
75. For some of the refinements on s. 18 adopted in other common law jurisdictions see note 81 and the text to which it relates.
76. See *infra*, p. 260 *et seq*.
77. Indeed, the existence of the Family Protection Act 1955 may be seen as an even stronger — and certainly more explicit — commitment to such a view.
78. As in the case of the Status of Children Act.
79. As is the case of the statutes relating to the testation process: s. 18 cannot of course be considered in isolation from the Family Protection Act 1955.

The first is that the provisions of the Family Protection Act would seem to portray far more exhaustively and — as a factor of that — more accurately, the actual societal standpoint on the issue in question than does the baldly expressed and non-positive language of s. 18, which of course contains nothing on its face to prevent the execution of precisely the same will as that revoked by it at the outset. Secondly, the utility of s. 18 as a declaration of the type hypothetically alleged would seem to be substantially limited by s. 19,[80] a provision hardly calculated to convey the notion that wills *should* be re-evaluated in the light of changed family circumstances. It does after all seem axiomatic that marriage is but *one* of the important changes that an individual may take upon himself and but one of the occasions when he "should" reappraise his will. Yet the birth of children, his separation, his divorce or the *death* of his wife or children — all matters which receive express treatment in jurisdictions other than ours[81] — receive no mention in the statute. It is true that they receive no mention in the Family Protection Act either: yet the broad phraseology of the latter at least prevents any prospect of the impression arising that, in accordance with some loose application of the *expressio unius* rule, marriage and marriage alone is the only change that warrants attention.

The third consideration is this: one must be highly sceptical of whether either s. 18 specifically or the Wills Act generally have achieved that state of widespread public knowledge necessary to establish the factual assertion which underpins the argument supposed. This submission as to the Wills Act generally would seem to be clearly substantiated by the host of invalid holographic wills which litter the reports in both this country and in England; and as to s. 18 specifically, by an observation of Haslam J. in the recent case of *Re Downing*.[82] Referring to the particular testatrix's knowledge of the provisions of the Wills Act the learned judge commented:[83]

> "This will was revoked by operation of law on [her] marriage to the defendant, and she did not ever make another will. It is clear from the affidavits that the deceased was not aware of this legal consequence . . . and that she thought that her will . . . still remained operative."

And went on to suggest:[84]

> "Although s. 18 of the Wills Act 1837 (U.K.) has been reprinted in our statutes in New Zealand . . . it is understandable that the deceased should have remained in ignorance of its existence and effect.'

Haslam J. did not specify anything about the testarix in question which would serve to separate her off from the general will-making

80. The terms of which are set out. Note 32.
81. See generally Gulliver, *Gratuitous Transfers*, note 74; *Page on Wills*, note 18 at pp. 501-08.
82. [1975] 1 N.Z.L.R. 385.
83. *Ibid.*, 387.
84. *Ibid.*

public: we can accordingly assume that his observations were intended to have general application. And if that deduction is fair the learned judge's comments would seem to suggest that the provisions of s. 18 are far from achieving that state of universal or even common knowledge necessary to make the "public guidance" and "societal declaration" argument a valid one.

What other arguments then may be raised in favour of s. 18?

C. The Desirability of Intestacies compared with Family Protection applications

It has already been suggested that the only positive aspect of s. 18 arises in the event of revocation without the execution of a subsequent will.[85] It is now necessary to consider whether, in regard to cases falling within that class, the intestacy provisions of the Administration Act 1969 are a more satisfactory basis for distribution than a Family Protection Act application. If they are, then there would remain to s. 18 a residuary area of application which might be seen as functionally justifying its continuation.

Distribution under the intestacy code is, we may assume, generally less expensive than distribution under probate following a will's reform by the Supreme Court under the Act. That is a not inconsiderable advantage. Not is it the only one. In those cases in which the pre-marriage will is in the light of his changed circumstances totally "improper" — the "harsh", "unfair" or "manifestly abusive" will — there is often little if any of the testator's dispositive intentions that can be or should be saved in the wills reform. In such situations the Administration Act code of distribution would appear to be as satisfactory as any for the generality of cases and the alternative mechanism largely a waste of both time and expense.

It is suggested however that it is in only a minority of cases of s. 18's overall operation that the question in issue may be disposed of in such fashion. Though these submissions are impressionistic — there is no point in litigating cases in which s. 18 applies since there is virtually no escape route from it in the ordinary case — it is suggested that most wills revoked by it will *not* fall within a category deserving the description of "totally unjust" or "manifestly unfair". Many, it may be supposed, will be reasonably appropriate to meet the moral duties owed. Most will probably come *some* way towards their fulfilment, even if reform of a minor order is required to meet the Family Protection Act obligations fully. After all: however ignorant testators as a class may be of the existence and effect of s. 18 they are not, also a class, ignorant of the needs and expectations of the members of the nucleur family of which they are a part. A will revoked by s. 18 which in a given testator's mind continues to govern his dispositions after marriage is, in all likelihood, one which contains provisions in

85. *Supra*, p. 257.

favour of his former fiancée and present wife. Or it is a will of the *Downing*[86] variety in which the will makes provision for children of a former marriage in circumstances wherein it seems reasonable to let the second spouse "prove" himself or herself before the claims of the children are ousted by a disposition in his or her favour.[87]

If these assumptions are correct, what is their significance? Simply this. There is a notion in the general body of our succession law that the courts should, if possible, lean away from decisions which force testators into an intestacy. One Lord Justice put it this way:[88]

> "I approach this question [89] from the point of view that this man clearly wanted to make this disposition; and that any court should give effect to his wishes if it is at all possible to do so."

Similar expressions of faith are legion in the cases,[90] and with respect, so they should be. On every occasion on which a will is struck down through its failure to comply with the requirements of form the legitimate aspirations of the testator are defeated and an intestacy — the distribution on which will seldom if ever accord precisely with those wishes — necessitated. Taking this notion then and applying it to the discussion in the foregoing paragraphs, the course of action clearly suggested is that if the assertions in those paragraphs are well-founded an application under the Family Protection Act is indeed a more preferable mechanism for countering the problem in issue than the alternative implicitly provided for by s. 18. The former device has flexibility as its central feature. It entitles the court to remedy the will, but obliges it to go no further in that remedial process than is necessary to ensure compliance with "moral duty".[91] It enables the "proper" will — such as that of *Re Downing* or that in which the fiancée is the sole or principal beneficiary — to be left intact; in other cases it enables the testator's intentions to be preserved as far as is consistent with his moral duty and thus is consistent with the admonition of Willmer L.J. to "give effect to his wishes if it is at all possible to do so."[92] In essence, the course proposed destroys no more than is

86. Note 84.
87. The clear implication in the judgment of Haslam J. in the *Downing*, note 82, case is that had the testatrix executed a will such as that suggested in the text then the second husband could not have brought a successful Family Protection Act application to set it aside — at least if the testatrix's death had occurred shortly after marriage. See note 82, pp. 387-388; p. 390.
88. *Re Bercovitz* [1962] 1 W.L.R. 321, at 326 per Willmer L.J.
89. The particular issue concerned the "foot or end thereof" requirement of s. 9 of the Wills Act 1837.
90. See e.g. the decision of Phillimore J. in the High Court in *Bercovitz* (reported in [1961] 1 W.L.R. 892, at 895); *Re Beadle* [1974] 1 ALL E.R. 493 per Goff J. at 495; *Re Davies* [1951] 1 ALL E.R. 920; *Re Colling* [1972] 1 W.L.R. 1440; *Re Downing*, note 82.
91. *Re Downing*, note 82, at 390; *Dillon* v. *Public Trustee* [1941] N.Z.L.R. 557 per Lord Simon at 560-61; *Inglis*, note 68, at p. 293.
92. Note 89.

necessary to give the necessary provision for the family. This, it is submitted, is a preferable course to the absolute and Draconian effect of s. 18.

IV. ARGUMENTS AGAINST s. 18

Thus far it has been indicated that the historical reasons for the enactment of s. 18 lack any appreciable degree of substantial modern significance; that the provision is of far less significance as a protective device than the provisions of the Family Protection Act; that it is of doubtful utility as a declaration of society's judgment on the matter to which it relates; and finally that it is *prima facie* inconsistent with the notion that effect should be given to a testator's wishes to as great a degree as possible. While those arguments were debated largely as negative aspects of s. 18, they all possess of course a positive thrust as well — namely, they suggest the repeal of s. 18 and the abandonment of its present area of operation to the Family Protection Act. The case in favour of the latter approach is made stronger by the consideration that s. 18 cannot on a broad level be considered in isolation from the former provisions in any event. It has already been suggested[93] that there are many changes in family fortune that are as significant or nearly as significant as marriage. Section 18 cannot of course resolve them or determine their effect on the overall validity or the propriety of specific dispositions: rather, they fall for consideration under the Family Protection legislation whereunder they are assessed in the light of other factors, some competing, some complimentary, as part of a unified and thoroughgoing judicial appraisal of propriety. It seems anomolous, it is suggested, to single out one factor from the group, remove it from consideration, and declare that that one — quite apart from and irrespective of the others — shall in and of itself effect a total revocation of the wishes of the testator. This course is at odds with the philosophy of the Family Protection Act and for that reason alone the case for its repeal seems a weighty one.

V. SECTION 13 WILLS AMENDMENT ACT 1955[94]

It remains to consider whether the saving provision remedies any or a sufficient number of the faults and anomalies of s. 18 to justify a different response.

It should first be established that s. 13 has *not* taken sufficient sting from the comments above to render their thrust capable of being dismissed as "theoretically" or "academically" sound "but of no practical significance". Why? For two reasons. First, one is entitled

93. *Supra*, p. 259.
94. For its provisions and a short note as to its history, see note 1.

to assume that the general ignorance prevailing with regard to s. 18[95] is mirrored at least as profoundly in regard to its saving clause. In other words, among the lay public the existence of the escape route is probably as unknown as the existence of the pitfall itself. And secondly, the saving clause has been and still is a provision of judicial and academic controversy of such a character as to render reliance upon it — even in professionally drafted wills — a somewhat doubtful course to advocate. As earlier indicated[96] the recent decisions in *Coleman*,[97] *Foss*[98] and *Keong*[99] have heightened those uncertainties. A brief analysis of these decisions is called for, both to substantiate that assertion and to illustrate the proposition with which this paragraph commenced.

In *Coleman* the testator, in a professionally drafted will,[100] gave almost half of his $80,000 estate to 'my fiancée Mrs. Muriel Jeffery". After his death the testator's fiancée — then his wife — sought to invalidate the will under s. 18.[101] Megarry J. held first, that the description "my fiancée" *was* sufficient to invoke the United Kingdom equivalent of s. 13[102] on the basis that "it seems to me that in ordinary parlance a contemplation of marriage is inherent in the very word 'fiancée'."[103] He went on to hold the will invalid, however, on the ground that (absent an explicit statement that the will was made in contemplation of marriage)[104] the saving clause only applies if a substantial majority of the property in a dollar sense is given to the fiancée. A substantial part — as on the facts of *Coleman* — will not suffice.[105]

The decision of Megarry J., as earlier indicated, has thrown s. 13 and analogous clauses in other jurisdictions into a state of near-total confusion. On the fiancée issue it is in conflict with *Burton* v. *McGregor*[106] and other New Zealand authority.[107] On the second, quantitative, issue, it is in conflict with the United Kingdom case of

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95. *Supra*, text to which notes 83 and 84 relate.
96. *Supra*, p. 247.
97. Note 8.
98. Note 12.
99. Note 12.
100. It is arguable from the number of this class of will that fail to satisfy the saving clause, or are only held to satisfy it after litigation, that the prevailing ignorance in regard to s. 18 and its supplementary provision is not limited to the lay will-making public.
101. The widow received more of the estate on intestacy. The factual posture is different in the majority of cases.
102. Note 97, at p. 218.
103. *Ibid.*
104. *Ibid.*, p. 219. See infra, note 112.
105. *Ibid.*, p. 219. Nor will two-thirds of the estate: see the comments of Megarry J. in relation to *Re Chase* [1951] V.L.R. 477 at p. 220.
106. [1953] N.Z.L.R. 487.
107. *Re Crawley* [1973] 1 N.Z.L.R. 695.

Langston[108] *vis a vis* the principle itself[109] and the Victorian decision of *Re Chase*[110] *vis a vis* its factual application.[111] As Megarry J. himself acknowledged, the second ground is a quite novel one; and, as he must have known, it must create future litigation in all the jurisdictions in question.

For the purposes of this paper it is largely irrelevant whether the decision is "right" or "wrong".[112] What is significant is that it inevitably prefaces a period of uncertainty, during which period s. 13 and its Commonwealth equivalents must be regarded by legal advisors as unreliable escape-routes from the pitfalls of s. 18.[113]

Keong[114] and *Foss*[115] further the uncertainty, even if they operate to liberalise the ambit of the provision rather than restrict it as does *Re Coleman*. In *Keong* the testator left the bulk of his estate to a person described as "my wife Lorna Joan Keong". In fact, the testator and Lorna were not married but living in a *de facto* relationship. They did marry very shortly thereafter. The Supreme Court[116] and Full Court of the Supreme Court[117] of Queensland both held that the will was made in contemplation of marriage. The testator's intention, deduced from "all the facts and circumstances which were (or ought to have been) in the mind of the testator"[118] was relied upon heavily in both courts. On its specific holding the case is in conflict with *Re Taylor*[119] and *dicta* in both *Burton* v. *McGregor*[120] and *Re Coleman*. On the weight and emphasis afforded to the testator's intention, it is

108. [1953] P. 100.
109. The *Langston*, note 6, test (set out in *Coleman* at p. 220) emphasised to a far lesser degree the "expression" element of s. 177 and did not allude to the necessity that the *whole* will must manifest that: it was on the basis of the latter requirement that Megarry J. based his "substantially everything to the fiancée" rule.
110. Note 105.
111. *Ibid.*
112. It is nevertheless difficult to see how the learned judge can support the second aspect of his decision discussed in the text above. Given that, as he concedes, s. 177 may be satisfied by a formal declaration at the outset, "this will is made in contemplation of my marriage to [the person in fact married]"; given too, as he would *have* to concede, that such a formula will save the will quite apart from its substantive dispositions and *even if no disposition is made in favour of the fiancée at all* (see infra, p. 260 it is difficult to justify on either a logical or a commonsense basis why a different formula for expressing the contemplation requirement (i.e. the word fiancée) *must* be accompanied by a disposition of substantially everything to that person to satisfy the provision.
113. Not only for this reason: see *infra*, pp. 264-265.
114. *Keong* v. *Keong* [1973] Q.L.R. 516; 522.
115. [1973] 1 N.S.W.L.R. 180.
116. Lucas J.
117. Hanger, C.J., Matthews and Kneipp J.J.
118. The quotation was adopted by the Full Court from the judgment of Blackburn J. (for the Court) in *Allgood* v. *Blake* (1873) L.R. 8 Ex. 160 at 162.
119. [1949] V.L.R. 201.
120. Note 106, at p. 490.

in conflict with virtually every decision on the saving clause[121] — except *Re Foss*.

Re Foss is a decision of the Probate Court for the State of New South Wales. There, similar to *Keong*, the testator gave everything to "my wife (Mrs. P. Foss)." The parties subsequently married. Helsham J. held the will to fall within the saving clause on the basis:[122]

> "The expression 'my wife (Mrs. P. Foss)' looked at in the light of his engagement [to the future Mrs. Foss], his living apart from her, his impending marriage eight days off . . . , his age, and the circumstances of the making of the will . . . enable me to construe the will as being expressed to be made in contemplation of his marriage to the person who became his wife."

Foss supports *Keong*, but is, of course, in conflict with the body of authority to the same degree as its Queensland counterpart. As with the preceding discussion of *Coleman*, it is largely immaterial whether these Australian decisions are correct on some abstract notion of statutory interpretation, or even whether the more liberal approach they manifest will ultimately prevail. The point of greatest significance to this essay is that they heighten the already considerable degree of uncertainty attending the application of the provision.

These comments in themselves are perhaps sufficient to justify a negative response to the hypothetical queries with which this section commenced. There is, however, a further and it is suggested far more substantial ground in support of the same conclusion. Section 13 does not save wills in which "adequate" provision — judged at the probate stage — is made for the testator's former fiancée and present wife; it does not save wills which on a more general level are quite reasonable and appropriate to discharge the "moral duties" owed by the testator. This is, quite simply, because what it does save is a will *expressed* to be made in contemplation of marriage rather than one in fact made with that motivation.[123] And while the "expression" need not parrot the statutory formula[124] there must be *some* language capable of construction as being an "expression". Accordingly if A is engaged to B and makes a will under which B is the sole beneficiary, then marries B and dies without making a new will, the saving clause does not apply and an intestacy results.[125] On the other hand, the provision in no way depends upon a disposition in the then-fiancée's-now-wife's favour for its application. A testator may manifestly breach the moral

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121. The "orthodox" view was put by Megarry J. in *Coleman* in these words: "[E]xtrinsic evidence [is] not admissable merely for the purpose of ascertaining the testator's intention and showing that the will was made in contemplation of a marriage". Note 97, at 217. See too note 14.
122. Note 115, at 184.
123. See e.g. *Coleman*, note 115, at 217, 219.
124. At least if the *Chase* (note 105) and *Coleman (ibid)* view of the word "*fiancée*" is correct.
125. As e.g. in *Burton* v. *McGregor*, note 106.

duties he owes to his future wife yet avoid the effect of s. 18 by the appropriate statutory language.[126] So if A makes a pre-marriage will which leaves everything to charity and inserts the phrase "this will is made in contemplation of my marriage to [the name of the person he in fact marries]" s. 18 is inapplicable and the spouse must have recourse to a Family Protection Act application.

Both positive and negative aspects of the application of the provision in these ways are, it is suggested, unsatisfactory insofar as s. 13 might be seen as countering the thrust of the earlier commentary in relation to s. 18. As to the negative, unless *Re Coleman* is subsequently interpreted as requiring a quantitatively substantial disposition to the future spouse in all cases[127] it is obvious that, like s. 18, the saving clause cannot operate in isolation from the Family Protection Act in any event. Like its dominant provision, it proceeds on an *expectation* that the spouse will be provided for but, also like s. 18, it is of itself powerless to *insist* that that in fact be done.

As to its positive aspects, the requirement that the will contain language capable of construction as an *expression* of contemplation of marriage limits the area of its operation to such an extent that it is obvious that not all wills which *should* be saved — in whole or in part[128] — in fact survive marriage. In this respect too the saving clause seems subject to the same criticism as that levelled against s. 18 in the earlier discussion. There seems no question that the clause furthers rather than counters the unsatisfactory aspects of s. 18 that provided, in the writer's argument, a case for its removal.

VI. CONCLUSION

To repeal s. 18 and its saving clause is not calculated to invite a return to the confusions prior to *Marston* v. *Roe*.[129] Section 19 would ensure that marriage, along with birth of children, divorce, and other changes in family circumstances, fell to be considered under the Family Protection Act in the form of a unified and flexible reformation process. It is submitted that that process is a more desirable one than the fragmented and conceptually inconsistent one which presently arises from s. 18.

L. McKAY.

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126. See the discussion in note 112, *supra*.
127. An unlikely result perhaps, but one which seems as defensible and, perhaps again, more in accordance with prevailing societal expectations than the alternative stance taken by Megarry J. and discussed in note 112.
128. See the discussion *supra*, p. 261.
129. Note 19.