The Law Commission welcomes your comments on this paper.

These should be forwarded to:

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by Thursday, 14 November 1996.

Use of submissions

The Law Commission's processes are essentially public, and it is subject to the Official Information Act 1982. Thus copies of submissions made to the Commission will normally be made available on request, and the Commission may mention submissions in its reports. Any request for the withholding of information on the grounds of confidentiality or for any other reason will be determined in accordance with the Official Information Act.

Miscellaneous Paper/Law Commission Wellington 1996

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Preface

The Law Commission

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

The Succession Project

In 1993 the Law Commission, with the approval of the Minister of Justice, undertook a project to reform the law of succession.

The purpose of the project is to review, reform and develop

- the Wills Act 1837 (UK)
- the Law Reform (Testamentary Promises) Act 1949
- the Family Protection Act 1955
- the Matrimonial Property Act 1963, and
- the Administration Act 1969.

The ultimate aim is to have a new Succession Act drafted in plain language which will

- provide for all these succession laws in one statute
- simplify the law
- enable better effect to be given to the intentions of will-makers, and
- take account of the diversity of New Zealand families.

The project has three main aspects: these are reviews of the law relating to:

- *Wills and administration (including the law of intestacy):* This paper forms part of the work that the Commission is undertaking in this area. Work on this aspect of the project is proceeding in conjunction with the Queensland Law Reform Commission reference (from the Standing Committee of Attorneys-General of Australia, SCAG) to make more uniform the succession laws of Australian States and Territories.
- *Testamentary claims:* The subject of *Succession Law: Testamentary Claims - A Discussion Paper* (1996, NZLC PP24). The Draft Testamentary Claims Act 199- proposed in that preliminary paper is the first part of a new Succession Act.
- *Succession as it applies to Maori families:* This is an area of intense interest to Maori.

The Commission has engaged Professor Pat Hohepa and Dr David Williams as consultants to advise on this aspect of the project, and is consulting with Maori at regional and national levels.

The Commission has decided not to publish a formal discussion paper on the reform of the law of wills because of the technical nature of much of the debate. This paper is being published in the Commission's new miscellaneous publications series, in the hope that practitioners and interest groups will provide comment.

Nevertheless, some of the issues involve important policy questions and the Commission may wish to issue further papers on these at a later stage.

Throughout the paper, the Commission indicates its support for a number of the proposals and raises further questions about others. These views are tentative and will be reconsidered in the light of the responses received.

Submissions or comments on this paper should be sent to the Director, Law Commission, P O Box 2590, Wellington, if possible, by Thursday 14 November 1996.

Any initial inquiries or informal comments can be directed to Nigel Christie (Telephone: 04-473 3453. E-mail: NChristie@lawcom.govt.nz).

INTRODUCTION

1 As part of the Law Commission's work on the review of the Wills Act 1837 (UK) and subsequent amendments it has been participating in the work of the Uniform Wills Project that is underway in Australia. This paper is based on the research done for the Uniform Succession Project and also within the Commission.

New Zealand's involvement in the Uniform Wills Project

2 Last year New Zealand was invited, through the Law Commission, to participate in, and comment on, the process of the reform of wills law in Australia. This invitation was extended bearing in mind a possible advantage in making similar reforms within our own laws. It is clearly desirable that the laws relating to succession generally, and wills in particular, should have a high degree of congruence between New Zealand and Australia. The movement between New Zealand and Australia, in terms of the number of persons living in the opposite country to their birth or domicile, is considerable. There is also an increased level of contact between the two countries in relation to commerce and trade since the advent of the Closer Economic Relations (CER) agreement. For these reasons it is seen as important to maintain a coherency in policies where property is involved.

3 Some of the New Zealand legislation also shares with the various Australian statutes a similar origin. It has been said that "Many parts of the wills legislation of Australia's states and territories have for a considerable period of time seemed either outmoded or otherwise inadequate."[1] This same sentiment can be expressed in relation to the wills legislation of New Zealand which, in the main part, is contained in the Wills Act 1837 (UK).

Origin of the Uniform Wills Project

4 The Uniform Wills Project evolved from a decision made by the Standing Committee of Attorneys-General of Australia in 1991 to work towards uniform succession laws among the Australian States and Territories. In 1992, the Attorney-General for Queensland gave a reference to the Queensland Law Reform Commission to co-ordinate the project. All States and Territories in Australia are participating in the project with each participating agency consulting within their respective jurisdictions on the identified issues.

5 In 1995, the Queensland Law Commission published Issues Paper 1, The Law of Wills (WP 46). A subsequent paper on wills, Uniform Succession Laws: Wills (MP 15) was published in February 1996. The latter uses the proposed Victorian Draft Wills Act 1994 ("the Victorian Draft") as the basis for discussion. The principal proposals made through the Uniform Wills Project are contained in the Victorian Draft and the Law Commission in New Zealand sees considerable advantage in using those provisions as the basis for its work in the area of wills.

The Victorian Draft Wills Act 1994

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1 Crago, *Reform of the Law of Wills*, [1995] 25 West Aust L Rev 255, 255.

6 The Victorian Draft is a 'plain language' document which is "likely to become ... at least the model for new uniform wills legislation throughout Australia. ... Many of the provisions of the draft Act are uncontroversial, and embody in plain language the existing statute law; others would enact desirable and, in some cases long-overdue, reforms." [2]

7 As a complete statutory regime governing the law of wills it would incorporate numerous significant changes or extensions to existing provisions. The most significant of these deal with: [3]

- provision for 'statutory wills' for incapacitated people: clause 6 (see, in New Zealand, the provisions of the Protection of Personal and Property Rights 1988 ss 54 and 55);
- execution formalities, including gifts to interested witnesses: clauses 9 and 11 (new to New Zealand);
- the effect of divorce on wills: clause 13 (see, in New Zealand, the Wills Amendment Act 1977, s 2);
- admissibility of extrinsic evidence in the construction (rectification) of wills: clause 23 (new to New Zealand);
- effect of dispositions to unincorporated societies: clause 34 (a new provision to New Zealand, but compare with the Charitable Trusts Act 1957 s 61B); and
- a required survivorship period for all will gifts: clause 36 (new to New Zealand).

*General Policy Issue*s

8 Traditionally, the requirements of strict formality in the execution of a will have resulted in some wills not being admitted to probate because of lack of adherence to the intricacies of those formalities. Also, wills are admitted to probate where the formalities have been adhered to, but the will does not accurately reflect the true intentions of the testator. It is suggested that there is room to relax the strictness of the formalities without foregoing the protection for which those formalities either were designed, or evolved.

9 In dealing with that question, it is apparent that there are conflicting views about what the law should do. One view sees the will as a *formally executed document* which is an essential step in directing the disposition of property, and the other view sees the will as the medium by which the *intentions* of the testator are expressed. These two views need to be balanced. The expression of intention of the testator is the focal point, and should not be unreasonably confined by an insistence on technical validity and strict verbal precision.

10 It is still important to acknowledge that a set procedure should be followed in order to retain the protection that the formalities can give. The purposes of the current rules are listed by Langbein [4] as:

- evidentiary: "The primary purpose of the Wills Act has always been to provide the

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2 Crago, supra n1, 256.

3 Crago, supra n1, 256.

4 Langbein, "Substantial Compliance with the Wills Act" in [1975] 88 Harv L Rev 489, 492-497.

court with reliable evidence of testamentary intent and of the terms of the will;" [5]

- channelling: The formulation and communication of the thought of the testator by means of defined and recognisable channels; [6]

- cautionary: The formality of will-making is a way of impressing upon the testator the seriousness of the task that he or she is performing; [7] and

- protective: The formalities help to ensure that the testator is not placed under the duress or undue influence of others, or that the will is not subject to fraud. [8]

11 There are two key areas for consideration:

- Should the courts have a discretionary dispensing power to enable them to admit to probate wills which have not been executed in strict compliance with the formalities?

- Should the courts have more power to admit extrinsic evidence so they can construe, or even change, the terms of wills which do not adequately express the will-maker's probable intent?

The material to be considered

12 In this paper the Commission seeks comment on whether the reforms proposed by the Victorian Draft Wills Act 1994 might be introduced into New Zealand. Subject to qualifications mentioned in each chapter, the Commission is inclined to support the reforms. However, the present conclusions are tentative only. The comments received will be influential in settling recommendations to be made in the Commission's final report on the law of succession. The Commission would also be interested in suggestions about other areas, relating to the law of wills, where reform is possible.

13 The proposals in this paper fall into three categories:

- proposals which deal with the general policy issues already discussed;

- other proposals to amend the Wills Act 1837 (UK) and its New Zealand amendments;

- proposals which will simplify the existing law without changing its substance.

Their purpose is to set out in very brief form the reasons for the proposals and the issues they raise. A set of blank forms which may be used to make comprehensive comments is attached.

14 There is a bibliography at the end of the paper. If, for the purpose of making a submission, you would like access to any of the unpublished material listed there, this can be arranged.

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5 Ibid, 492.

6 Ibid, 493.

7 Ibid, 494.

8 Ibid, 496.

CHAPTER 1

PRELIMINARY MATTERS AND CAPACITY

Chapter 1 - Preliminary Matters and Capacity

Cl.1	Purpose	Procedural
Cl.2	Commencement	Procedural
Cl.3	Definition	Some new elements
Cl.4	What property may be disposed of by will	Some new elements
Cl.5	Minimum age for making a will	Some new elements
Cl.6	Wills for persons without testamentary capacity	Some new elements

Purpose

> Clause 1 of the Victorian Draft Wills Act 1994 provides:
>
> The purposes of this Act are to reform the law relating to the making, alteration and revocation of wills and to make particular provision for:
> (a) the formalities required for the making, alteration and revocation of wills and the dispensation of those requirements in appropriate cases;
> (b) the making of wills by minors and persons lacking testamentary capacity;
> (c) the effects of marriage and divorce on a will; and
> (d) the construction and rectification of wills.

Formalities and execution

15 See discussion in *Chapter 2 - Executing a Will*.

Minors

16 See discussion below in cl 5.

Effects of marriage and divorce

17 See discussion in Chapter 5 - Marriage and Divorce.

Construction and rectification

18 See discussion in Chapter 8 - Construction of Wills and Miscellaneous Matters.

Commencement

> Clause 2 of the Victorian Draft Wills Act 1994 provides:
>
> This Act comes into operation on a day to be proclaimed.

Date of assent

19 Not an issue which goes to substance.

Definition

Clause 3 of the Victorian Draft Wills Act 1994 provides:

In this Act -

> "Court" means the Supreme Court and in relation to an estate the value of which does not exceed the jurisdictional limit of the County Court, the Supreme Court or the County Court.
>
> "Disposition" includes -
> (a) any gift, devise or bequest of property under a will;
> (b) the creation by will of a power of appointment affecting property; and
> (c) the exercise by will of a power of appointment affecting property;
> and "dispose of" has a corresponding meaning.
>
> "Document" means any paper or material on which there is writing.
>
> "Minor" means any person under the age of 18 years.
>
> "Probate" includes the grant of letters of administration, where the context allows.
>
> "Will" includes a codicil and any other testamentary disposition.

Court

20 It is noted that the proposed provision refers to the Supreme Court and the County Court. It is assumed that in New Zealand the courts having jurisdiction would be the High Court (in place of Supreme Court) and Family Court (in place of County Court).

21 It is expected that jurisdiction in testamentary claims cases will be exercised principally by the Family Court (a division of the District Court).[9] It would seem to make sense to vest the entire probate and administration of estates jurisdiction in that court as well. Comments on this suggestion would be welcomed.

Document

22 The Victorian Draft Wills Act cl 3 defines a document in terms of writing only. The principal rationale for the formalities in general and therefore the particular requirement that the will be in writing, is "to prevent fraud, forgery and coercion".[10] Another principle behind this

9 See *Succession Law: Testamentary Claims* (1996, NZLC PP24), paras 333-337;
See also *The Structure of the Courts* (1989, NZLC R7), paras 5, 295, 307-308, 312-313, 315.

10 Maxton, *Nevill's Law of Trusts, Wills and Administration in New Zealand*, (8th ed, Butterworths, Wellington, 1985), 244.

requirement is the assumption that to put ideas in writing helps to "ensure that the testator's intentions are thought out and expressed with clarity". [11]

23 The Evidence Amendment Act (No 2) 1980 s 2(1), however, gives a wider definition, defining a document as:

> (a) Any writing on any material;
> (b) Any information recorded or stored by means of any tape-recorder, computer, or other device; and any material subsequently derived from information so recorded or stored;
> (c) Any label, marking or other writing that identifies or describes any thing of which it forms part, or to which it is attached by any means;
> (d) ... ;
> (e) Any photograph, film, negative, tape, or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced.

Proposed provision

24 A wider definition would allow the inclusion of different methods of producing and recording a will (such as audio or video tape, or computer) in line with advancing technology. The key issue would then become the accuracy and reliability of that record. There may be certain formalities to be followed in order that a will produced in such a manner can be 'proven'.

25 A wider definition would also give rise to the possibility of the incorporation into law of other forms of will such as the holograph will, the nuncupative will, and the notarised ('self-proving') will. Once again, the issue becomes one of whether the will can be 'proven'.

Disposition

26 The terms included under this definition will be dealt with separately under Chapter 8 - Construction of Wills and Miscellaneous Matters.

Minor

27 See discussion of cl 5 below.

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11 Maxton, supra n10, 244.

What Property May Be Disposed Of By Will?

Clause 4 of the Victorian Draft Wills Act 1994 provides:

(1) A person may dispose by will of property to which he or she is entitled at the time of his or her death.

(2) A person may dispose by will of property to which the personal representative of that person becomes entitled by virtue of the office of personal representative after the death of that person.

(3) It does not matter if the entitlement of the person or of the personal representative did not exist at the date of the making of the will or at the date of death.

(4) "Property" in this section includes -
(a) any contingent, executory or future interest in property; and
(b) any right of entry or recovery of property or right to call for the transfer of title of property.

(5) A person may not dispose by will of property of which the person was trustee at the time of death.

Property

28 The Wills Act 1837 s 3 outlines the property that may be disposed of by will. The section is lengthy and complex and grants the power to dispose of all property in law or in equity at the time of death or subsequent to death. The proposed Victorian Draft Wills Act cl 4 serves to clarify:

· the type of property which may be devised by will;

· the ability of the testator to devise property which accrues to the estate of the testator after the testator's death;

· the inability of the testator to dispose of property of which he or she was trustee at the time of death.

29 The provision raises an issue regarding the interpretation of a will and whether it in fact exercises a power of appointment (see cl 28, paras 165-171).

Proposed provision

30 The Commission supports the adoption of a clear provision written in plain language.

Capacity To Make A Will

Clause 5 of the Victorian Draft Wills Act 1994 provides:

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

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

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

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

(5) Before making an order under this section, the Court must be satisfied that -
- (a) the minor understands the nature and effect of the proposed will, alteration or revocation and the extent of the property disposed of by it; and
- (b) the proposed will, alteration or revocation accurately reflects the intentions of the minor; and
- (c) it is reasonable in all the circumstances that the order should be made.

(6) A will or instrument making or altering a will made pursuant to an order under this section -
- (a) must be executed as required by law and one of the attesting witnesses must be the Registrar; and
- (b) must be deposited with the Registrar under section 5A of the Administration and Probate Act 1958.

In contemplation of marriage

31 See discussion in Chapter 5 - Marriage and Divorce.

Minors

32 The Australian debate is predominantly around whether or not the age at which a person ceases to be a minor should be lowered from 18 to perhaps 16. The Tasmanian Law Reform Commission and the New South Wales Law Society, for example, have submitted that the age

should be lowered to 16. However, the New South Wales Law Society has also suggested that if this were the case, then it may be appropriate for a certificate to be issued by a suitable person to the effect that the young person understands the will and the effect of making a will. The New South Wales Law Reform Commission and the Queensland Public Trustee have objected to the lowering of the age on the basis that the general age of majority is 18, and that the Court has the power to approve the making of a will by a person under the age of 18 where appropriate.

33 The Wills Amendment Act 1969 s 2(4) provides that a person may make a will when they attain the age of 18 years. This provision expressly overrides the Age of Majority Act 1970 s 4 which states that the general age of majority is 20 years.

34 The Wills Amendment Act 1969 s 2 also provides that persons under the age of 18 years may have will-making capacity if:

· they are or have been married;

· they are over the age of 16 years and gain the approval of the Public Trustee or the District Court;

· they are a 'privileged person' as defined by the Wills Amendment Act 1969 s 3(1).

35 In considering what is a suitable age for a person to attain the capacity to make a will, it is necessary to examine the underlying policy issues. On the general level these appear to be two-fold:

· the need of the individual to be able to make a will; and

· the ability of the individual to make a will.

36 Whether an individual has a need to make a will rests on three main criteria:

· Does the individual own sufficient property of significance that it can be deemed necessary for a will to be made in relation to that property?

· Is the individual in a position whereby, if a will was not executed, the property would be in danger of passing inappropriately?

· Is the individual in a situation where he or she is still a member of a family unit and/or is supported by his or her guardians?

37 Whether an individual has the ability to make a will also rests on two criteria:

· Does the individual have the ability to understand the nature and 'solemnity' of a will?

· Does the individual have the ability to recognise and withstand pressures of duress, undue influence?

38 It has been argued that more persons are gaining increased amounts of property at a younger age than has been the case in the past. Consequently, it is necessary to consider the possibility that they should be entitled to make provision for distribution of that property through testamentary disposition. Conversely, it must also be considered how important, in all the circumstances, that entitlement might be. If a person is still living in the family home and is still supported by guardians, the need may not be seen as imperative.

39 Currently, where the Public Trustee or the District Court grant approval for the making, alteration or revocation of a will, they must be satisfied that the minor understands the effect of the will or its alteration or revocation.[12] In considering the granting of probate of a will, consideration must be given to the formalities of execution[13] and whether the testator, of whatever age, has understood the nature and 'solemnity' of making a will. It is suggested that a person of age 16 or 17 years may not automatically have this ability. There is room for argument that for this age group each case should be assessed on its own merits.

40 Currently, when a minor applies for approval to make a will, that approval may be granted in relation to that occasion only. It has been suggested that amendment could be made which grants the Court discretion to declare a minor to have on-going testamentary capacity instead of merely to authorise a minor to make a specific will or testamentary provision. Such capacity would be granted subject to the same tests of general capacity as any other adult and so could be rebutted by evidence in relation to any specific will or other testamentary provision. This would have the advantage of allowing the minor to alter or revoke a will without having to reapply to the Court for approval on each occasion.

41 It is noted that cl 5(2)(c) of the Victorian Draft permits revocation upon divorce by a minor who has been married, but does not permit the making of a new will under this provision (although a minor could make a will under cl 5(3)). The current New Zealand provisions would permit the making of a will by a divorced minor as 'a person who has been married' (Wills Amendment Act 1969 s 2).

Proposed provision

42 There is a query with regard to the role of the Public Trustee (see para 34 above). In some respects the proposed provision is more extensive than the current New Zealand provision. If the power to approve the making of a will by a minor is to be vested in a body outside the courts, perhaps also the same power could be granted to bodies other than the Public Trustee. Comments would be welcomed on this matter.

43 The Commission supports the provisions outlined in the Victorian Draft, but suggests that consideration be given to the suggestion in para 40.

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12 Wills Amendment Act 1969 s 2(3).

13 Although these are under consideration as part of the wider discussions in relation to this paper.

Wills for persons without testamentary capacity

Clause 6 of the Victorian Draft Wills Act 1994 provides:

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

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

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

Leave of the Court

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

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

… cont'd

Applications for leave: making the application

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

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

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

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

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

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

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

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

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

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

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

… cont'd

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

Application for leave: the orders of the court

(7) On hearing an application for leave the Court may -
(a) refuse the application;
(b) adjourn the application;
(c) give directions, including directions about the attendance of any person as witness and, if it thinks fit, the attendance of the person on whose behalf approval for the making of the will is being sought;
(d) revise the terms of any proposed will, alteration or revocation;
(e) grant the application on such terms as it thinks fit; and
(f) if it is satisfied of the propriety of the application, allow the application for leave to proceed as an application to authorise the making, alteration or revoking of the will, and allow the application.

Application for authorisation of making of statutory will

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

Rules of Court

(9) Rules of Court may authorise the Registrar to exercise the powers of the Court -
(a) without limit as to the value of the interests affected, in all cases in which all persons with a legitimate interest in the application, including persons who have reason to expect a gift or benefit from the estate of the person for whom the statutory will is to be made, consent; and
(b) even if there is not consent, in all cases in which the value of the interests affected does not exceed a sum specified in the Rules.

Within six months after death

44 New Zealand does not currently have a provision such as that outlined in cl 6(3). There is no provision for the making, alteration or revocation of a will after the death of a person who lacks testamentary capacity. The only provisions available for the making of a will on behalf of a person who lacks testamentary capacity are discussed in paras 52-56.

Wills for persons who lack testamentary capacity

45 Wills legislation in New Zealand does not define what constitutes capacity. The nature of capacity has been determined by the Courts. As a general rule, the will-maker must possess testamentary capacity when the will is executed.

46 It has been stated that "no disorder of the mind shall poison his affections, pervert his sense of right or prevent the exercise of his natural faculties" and "that no insane delusion shall influence his will".[14] There is, however, no requirement that the testator has exercised sound judgment in the distribution of property.[15] The general test for capacity was laid down in the case of *Banks v Goodfellow* where it was stated that a person "must be of sound and disposing mind and memory" [16] so that they can:

· understand the nature of the business in which they are engaged;

· recollect the property being dispo sed of;

· recollect the persons who are the objects of the dispositions;

· recollect the manner in which the property is to be distributed.

47 If a will appears rational there is a rebuttable presumption that it has been made by a person of competent understanding.

48 If a will appears irrational there is a rebuttable presumption that the will-maker was incapable and the will is void.

49 It is possible to persuade the court that a person who is generally of unsound mind had a lucid interval at the time the will was executed, or that a person who was generally sane lacked a capacity at the time the will was executed.

50 There is also a further exception to the requirement of sound mind at the time of execution. Where it can be shown that a will-maker who is of sound mind has given instructions to another person for the preparation of a will, and the will is prepared according to those instructions, the will shall be held to be valid even if the will-maker lacks capacity at the actual time of execution. [17]

51 In general, there is no ability for a person to delegate the will-making power to another. The Wills Act 1837 (UK) permits another person to sign the will on behalf of and by the direction of the testator. However, there is no ability to confer a power of attorney which would delegate a general will-making power.

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14 *Banks v Goodfellow* (1870) LR 5 QB 549, 565.

15 *Bird v Luckie* (1850) 8 Hare 301, Wigram VC: "No man is bound to make a will in such a manner as to deserve approbation from the prudent, the wise or the good. A testator is permitted to be capricious and improvident, and is moreover at liberty to conceal the circumstances and the motives by which he had been actuated in his dispositions."

16 *Banks v Goodfellow* (1870) LR 5 QB 549, 556.

17 *Parker v Felgate* (1883) 8 PD 171.

52 The Court does however have the power to authorise the making of a will by certain persons subject to a property order under the Protection of Personal and Property Rights Act 1988. Under s 54(2) of that Act the Court may:

> "direct that a person subject to a property order may make a testamentary disposition only by leave of the Court; and, in such a case, a testamentary disposition made without leave of the Court shall be ineffective for all purposes."

53 The Court may also authorise the making of a will on behalf of a person who is subject to a property order. The Protection of Personal and Property Rights Act 1988 s 54 grants the Courts the discretion to authorise the making of a new will for a person who has made a will without the requisite testamentary capacity.

Section 54(5) states:

> "If it appears to the Court that a testamentary disposition was made when the person was unable to manage his or her own affairs in relation to his or her property, the Court may cause enquiries to be made, in such a manner as the Court thinks fit, whether that testamentary disposition expresses the present desire and intention of the person."

Section 54(6) states:

> "If the Court is satisfied that the testamentary disposition does not express the present desire and intention of the person, a Court may, in any case where such a course is possible, cause the present desire and intention of the person to be ascertained to the Court's satisfaction, and may authorise the execution by the manager under section 55 of this Act of a new testamentary disposition of that person's estate in accordance with that present desire and intention."

Section 55(1) states:

> "Where the Court has given a direction under section 54(2) of this Act that a person subject to a property order may make a testamentary disposition only by leave of the Court, or the Court is satisfied that such a person lacks testamentary capacity, the Court may authorise the manager acting for that person to execute a will for and on behalf of that person in such terms as the Court directs."

54 Because under the proposed provisions the Court is attempting, as far as is possible, to ascertain the intentions of the testator, issues arise in relation to the introduction of extrinsic evidence. But also, the provisions above may provide the same result with regard to the disposition of the testator's property as would a claim under the current Family Protection Act 1955 or the current Law Reform (Testamentary Promises) Act 1949. Rights to claims under either of these Acts are not affected.

55 The provisions contained in South Australia's Guardianship and Administration Act 1993 s 43 are cited as being better drafted than those in the Victorian Draft, however, the Victorian Draft provisions are drafted more narrowly. The South Australian provisions state:[18]

> (1) Where at the death of a protected person or former protected person who died leaving a will it appears that, in the consequence of any dealing with the estate by an administrator, the share of any beneficiary in that estate under the will has been affected, the Supreme Court may, on application by an interested person, make such orders as it thinks just to ensure that no beneficiary gains a disproportionate advantage, or suffers a disproportionate disadvantage, of a kind not contemplated by the will, in consequence of the estate having been

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18 This version of the South Australia Guardianship and Administration Act 1993 is taken from a reprint which incorporates amendments as at 20 November 1995.

subject to administration under this Division.

(2) An order made by the Court under subsection (1) operates and takes effect as if it had been made by a codicil to the will of the protected person or former protected person executed immediately before his or her death.

(3) The Court must, on making an order under subsection (1), direct that a certified copy of the order be made on the probate (or letters of administration) of the will and may, for the purpose, require the production of the relevant document.

(4) An application under this section must be made within six months from the date of the grant in this State of probate or letters of administration unless the Court, after hearing such of the persons affected as the Court thinks necessary, extends the time for making the application.

(5) An extension of time granted under subsection (4) may be granted -
(a) on such conditions as the Court thinks fit; and
(b) whether or not the time for making an application under this section has expired.

(6) An application for extension of time must be made before the final distribution of the estate.

(7) A distribution of any part of the estate made before an application for extension of time will not be disturbed by reason of the application or any order made on the application.

(8) This section does not apply in respect of the will of a person who died before 1 January 1985.

56 It has been suggested that the power to authorise the making of a will on behalf of a person who does not have capacity be extended to a period lasting up to six months after the death of that person. Such a proposal needs further consideration and no decision has been reached by the Commission on the inclusion of such a provision.

Proposed provision

57 The Commission supports the continuation of the granting of a power to the Court to make, or authorise the making of, a will on behalf of a person who lacks testamentary capacity (as has been the case under the New Zealand law outlined above), and welcomes further discussion on the '6 months after death' proposal.

CHAPTER 2

EXECUTING A WILL

This Memo deals with:
(i) the provisions relating to the formalities of executing a will; and
(ii) the possibility of introducing a dispensing power in relation to those formalities.

Chapter 2 - Executing a Will

Cl.7	How should a will be executed?	Some new elements
Cl,8	Must witnesses know the contents of what they are signing?	Some new elements
Cl.9	When may a court dispense with the requirements for execution of wills?	NEW to New Zealand
Cl.10	What persons cannot act as witnesses to wills?	NEW to New Zealand

How should a will be executed?

Clause 7 of the Victorian Draft Wills Act 1994 provides:

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

Applicable New Zealand Legislation

58 The Wills Act 1837 (UK) s 9 and the Wills Act Amendment Act 1852 (UK) s 1 both apply in New Zealand with regard to the formalities for the execution of a will. The only current exception to this is for privileged persons as defined in the Wills Amendment Act 1955 (NZ).

In writing

59 The terminology of cl (7)(1)(a) is such that it denies the inclusion of any forms of documentary evidence other than writing. It may be appropriate to consider the use of the word 'document' within this provision. The term 'document' could be interpreted in line with the Evidence Amendment Act (No.2) 1980 s 2(1) which provides that a document includes:

> (a) Any writing on any material;
>
> (b) Any information recorded or stored by means of any tape-recorder, computer, or other device; and any material subsequently derived from information so recorded or stored;
>
> (c) Any label, marking or other writing that identifies or describes any thing of which it forms part, or to which it is attached by any means;
>
> (d) ... ;

(e) Any photograph, film, negative, tape, or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced.

60 This would give rise to the possibility of the incorporation into law of other forms of will such as the holograph will,[19] the nuncupative will,[20] and the notarised ('self-proving') will.[21] Some form of physical recording would still be necessary.

At the foot or end

61 The effect of the Wills Act 1837 (UK) s 9 is the same as for cl 7(1) of the Victorian Draft except that New Zealand retains the requirement that the will be "signed at the foot or end". This provision has been qualified by the Wills Act Amendment Act 1852 (UK) s 1 which deems that "at the foot or end" means "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". This same section also provides that no will shall be affected by the fact that:

· the signature does not follow immediately after the foot or end of the will; or

· a blank space intervenes between the final word of the will and the signature; or

· the signature is in the testimonium clause or attestation clause; or

· the signature is after or under the attestation clause; or

· the signature is after or under or beside the name(s) of the subscribing witness(es); or

· the signature is on a side or page or other portion of the paper(s) on which no disposing part of the will is written above the signature; or

· there was sufficient space on the bottom of the preceding side of the same paper to contain the signature.

Clause 7(2) of the Victorian Draft removes the necessity for these qualifications. It might be argued that these provisions fail to recognise the original rationale for these formalities, namely to preclude the possibility of further 'surreptitious' provisions being added by the testator or another person.

62 It is suggested also that the two terms "foot" and "end" have differing meanings with

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19 *Black's Law Dictionary* (6th ed, West Publishing Co, Minnesota, 1990), 732: "A will written entirely by the testator in his [or her] own hand and not witnessed (attested)".

20 *Black's Law Dictionary* (6th ed, West Publishing Co, Minnesota 1990), 1069:
(a) "An oral will declared or dictated by the testator in his [or her] last sickness before a sufficient number of witnesses, and afterwards reduced to writing".
(b) "A will made by the verbal declaration of the testator, and usually dependent merely on oral testimony for proof".

21 *Black's Law Dictionary* (6th ed, West Publishing Co, Minnesota, 1990), 1060:"A will executed by the testator in the presence of a Notary Public and two witnesses";
Langbein, "Substantial Compliance with the Wills Act" in [1975] 88 *Harv L Rev* 489, 493: A will "in which a notarized attestation clause dispenses with the need to produce the witnesses for probate unless the will is contested".

"foot" meaning the conclusion of the document in a spacial sense, and "end" meaning the final act in a temporal sense.

63 On balance, the Commission supports the more informal approach as provided by the Victorian Draft.

The requirement of two witnesses

64 Is it necessary that there be two witnesses? It appears that there is more than one reason for this safeguard. First, there is greater likelihood of at least one witness still being available at the time of application for probate should evidence as to the circumstances of the will-making be required. Second, the rule requiring two witnesses provides a greater safeguard against forgery and undue influence than would a rule requiring only one.[22] There has been a call for a provision to include the recognition of 'self-proving' wills whereby the signing of the will is notarised by one person of appropriate standing. Assuming the formalities of notarisation are carried out correctly, testamentary intention could be presumed.

65 Our tentative view on this matter is, that as there appears to be no pressing need to amend this provision, that it is preferable to retain the current requirements.

Two witnesses present at the same time

66 The requirement that both witnesses are simultaneously present at the time the testator signs (or acknowledges his or her signature) is designed to prevent forgery and fraud, and to ensure that the testator is fully aware of the seriousness of the occasion. However, there is no requirement that the witnesses sign in the presence of each other.[23] Currently, it is possible, so long as the testator has signed or acknowledged his or her signature in the presence of both witnesses at the same time, for the witnesses to attest on separate occasions so long as they do so in the presence of the testator. Following on from that, a question arises about whether both witnesses need to witness the same act. Is it necessary for the testator to sign or acknowledge in the presence of both witnesses at the same time, or could this be done serially?

67 In ordinary circumstances it would appear that there should be no problem in the witnesses signing serially. However, there are certain circumstances where problems could arise. For example, if there is a time-delay between the signing the testator may attempt to alter the provisions of the will before the second witness signs. Such alterations would fall outside the strict attestation requirements. Confusion could also arise regarding the date of execution. If dates are given with each signature, at what point would the will be deemed to have been executed?

68 The Commission accepts that there could be some advantage in permitting some form of serial witnessing but acknowledges that serial witnessing may give opportunity for confusion. There is also the question whether a new rule would quickly become known and accepted by the general public. On the balance it is contended that it is preferable that both witnesses be present

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22 Law Reform Committee of Great Britain, "The Making and Revocation of Wills", (1980, Report No 22), 5.

23 *Re Young* [1969] NZLR 454, 458: "However, it is not necessary for each witness to subscribe the will in the presence of each other";
McKenzie v McKenzie and Others [1927] 27 NZLR 461, 469: After lengthy deliberation of a range of cases and authorities, Cooper J concludes "I am therefore of the opinion on this point that the weight of authority and the terms of the statute indicate that the witnesses need not subscribe their names in the presence of each other."

at the same time for the signing or acknowledgement by the testator (the rule in *Re Colling*[24] is preserved). However, as in other cases of defective execution, validation by the court will be possible (see cl 9).

Powers of appointment

69 The effect of cl 7(5) of the Victorian Draft is that the requirements of the Will Act will override any formality provisions contained in the instrument which creates the power of appointment.

Porposed provision

70 The Commission agrees with this provision.

24 *Re Colling* [1972] 1 WLR 1440.

Must witnesses know the contents of what they are signing?

> Clause 8 of the Victorian Draft Wills Act 1994 provides:
>
> A will which is executed in accordance with this Act is validly executed even if a witness to the will did not know that it was a will.

New Zealand law

71 Prior to 1837 certain wills had to be 'published' (especially wills relating to realty). Under the Wills Act 1837 (UK) s 13 this requirement was expressly negatived with the provision that:

> **Publication of will not requisite -** Every will executed in manner hereinbefore required shall be valid without any other publication thereof.

'Publication' means that the witnesses need to know that the document is a will, and is achieved by the testator making a declaration in the presence of the witnesses that the document produced for signing is a will. This requirement was replaced by the requirement that the will be attested by two witnesses.

72 Where a testator signs his or her will in the presence of witnesses, and does indicate the purpose of the document, it is not necessary for the witnesses to know the contents of that will.

73 The Victorian Draft provision does not require any knowledge on the part of the witnesses that they are witnessing the signature of the testator to his or her will. In circumstances where the witnesses are not aware that the document is a will, it is assumed that they would be unable to give evidence as to the signatory's testamentary intent. They would merely be able to give evidence that they witnessed the act of signing (devoid of any evidence of intent), and of the perceived state of mind of the testator at that time.

Proposed provision

74 Clause 8 reflects the current law in New Zealand. The Commission supports the provision in that it is a clear expression of a well-established and logical principle.

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

Clause 9 of the Victorian Draft Wills Act 1994 provides:

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

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

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

(4) Rules of Court may authorise the Registrar to exercise the powers of the Court -
   (a) without limit as to the value of the interests affected, in all cases in which those affected consent; and
   (b) even if there is no consent, in all cases in which the value of the interests affected does not exceed a sum specified in the Rules.

New Zealand law

75 New Zealand still requires strict compliance with the formal rules of execution and does not provide any discretion to the courts by way of a dispensing power. A dispensing power conferred upon the courts would enable them to admit wills to probate where the Court is satisfied that the will is genuine despite its formal non-compliance.

76 Dispensing powers are designed to prevent the sort of injustice that can occur when a genuine will is rejected. They emphasise the testamentary intentions of the testator rather than the testator's compliance with the formalities of execution. On the other hand to introduce a dispensing power could lead to increased uncertainty, litigation, expense and delay. Because it is home made wills which most often fail because of execution problems, this could often be in cases where litigation could least be afforded. Conversely, there may be a decrease in the amount of litigation or a substitution of one form of litigation for another, rather than an over all increase.

77 There are possibilities other than a dispensing power. These include a relaxation of the rules of execution with an associated requirement that the relaxed rules be adhered to strictly.

78 In relation to dispensing powers various questions could arise. For example:

- Should the dispensing power be based totally on the testator's intention, or should it be based in 'substantial compliance' with the formalities of execution?

- Would it be preferable to consider 'inconsequential defect' rather than 'substantial compliance'?

- What should the standard of proof be for either of these?

- Are all the formal requirements equal in importance to each other or are some more important than others? (For example, the requirements that: the will be in writing; the will be witnessed by two witnesses; both witnesses witness the will at the same time; the will be signed at 'the foot or end')

- Consequently, should some of the formalities be deemed essential for a minimum standard to be achieved with others being seen as variable? (For example, should it be deemed essential that: there be two wtinesses, that both witnesses are present at the same time?)

- How should the threshold for substantial compliance (inconsequential defect) be measured? (For example, should there be a requirement that certain formalities are adhered to while others are not so necessary, or that a percentage/proportion of the formalities to be adhered to?)

- Is the degree of compliance required affected by the circumstances surrounding the making of the will?

- If this is the case, what should be the rules regarding the admission of extrinsic evidence?

However, these questions do not arise if the only consideration before the Court is whether it is satisfied that the will-maker intended that the document should be the will.

Proposed provision

79 The Commission currently supports, in principle, the introduction of a general dispensing power (as opposed to any regime based in 'substantial compliance' or 'inconsequential defect'). In relation to such a power the following should apply:

- that the key issue is the intention of the testator "... that the testator intended the document to constitute his or her will ...");

- that the dispensing power should be applicable to any execution, alteration or revocation of a testator's will by the testator;

- that the standard of proof should be the civil standard ("... if the Court is satisfied ...");

- that the Registrar should have the authority to operate under this power where the will is not contested, or the estate is under a certain value.

NB: New South Wales advises that this power has been exercised by its Registrar of Probate where probate is uncontested and relates to an estate of value less than $30,000. In that jurisdiction there have been 684 such applications (of 896 applications in total) and from those

there have been only three appeals.

80 The Commission therefore supports the introduction of a provision such as that outlined in the Victorian Draft.

What persons cannot act as witnesses to wills?

> Clause 10 of the Victorian Draft Wills Act 1994 provides:
>
> A person who is unable to see and attest that a testator has signed a document may not act as a witness to a will.

Capacity of witnesses

81 The Wills Act does not stipulate who cannot act as witnesses to a will. It is suggested that witnesses "must be physically present and mentally capable of performing their function".[25]

82 There is conflict as to whether a blind person can witness a will but Maxton states that "a blind person ought to be able to witness a will as long as the same safeguards exist as when a blind person makes a will".[26] For example, where the testator is blind, the will must be read over to him or her before the signing so that the testator had knowledge of its contents. A statement to this effect should be included in the will, or an affidavit supplied to the court when probate is sought. Maxton's inference is, therefore, that the blind witness must be made aware of what is happening, and a statement to this effect included in the will, or that an affidavit be supplied.

83 There is a contrary view. The key purpose of being a witness to the signing of a will is to be able to give testimony at the time of probate relating to actual signature of, and to the "full and active consent" of, the testator. "[W]here the witnesses cannot see, have no opportunity of seeing, the signature, it is immaterial what the testator says, there cannot be an acknowledgement". [27]

Proposed provision

84 The Commission suggests that a witness must be capable of being physically and mentally present and capable at the time of the signing of a will, and therefore would support the introduction of the provision as outlined in the Victorian Draft Wills Act 1994 cl 10.

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25 Maxton, supra n10, 250.

26 Maxton, supra n10, 250.

27 *In the Goods of Gunstan* (1882) 7 PD 102, 114; affirmed in New Zealand by *Patterson v Benbow* (1889) 7 NZLR 673.

CHAPTER 3

REVOCATION, ALTERATION AND REVIVAL

NB: Issues of revocation relating to marriage and divorce are dealt with in Chapter 5.

Chapter 3 - Revocation, Alteration and Revival

Cl.14	How may a will be revoked?	Some new elements
Cl.15	Can a will be altered?	Essentially re-drafting
Cl.16	Can a revoked will be revived?	Some new elements

How may a will be revoked?

> Clause 14 of the Victorian Draft Wills Act 1994 provides:
>
> The whole or any part of a will may not be revoked except -
>
> (a) under section 5, 6 or 9 or by the operation of section 12 or 13; or
>
> (b) by a later will; or
>
> (c) by some writing declaring an intention to revoke it, executed in the manner in which a will is required to be executed by this Act; or
>
> (d) by the testator, or some person in his or her presence and by his or her direction, burning, tearing or otherwise destroying it with the intention of revoking it.

The draft provision

Provisions (a), (b) and (c) above appear to cause no concerns.

85 The references to sections 5, 6, 9, 12 and 13 are references to the respective clauses of the Victorian Draft Wills Act 1994. These are discussed in Chapters 1, 2, and 5 but in summary they are as follows:

· Clause 5 - the granting of the capacity to make, alter or revoke a will to a minor;

· Clause 6 - the power to make wills for persons without testamentary capacity;

· Clause 9 - the power of the Court to dispense with will-making formalities;

· Clause 12 - the effect of marriage on a will;

· Clause 13 - the effect of divorce on a will.

The current law in relation to revocation

86 For a will to be revoked by destruction the will must be destroyed either:

· by the testator:

· with the intention that destruction is for the purpose of revocation; or

· by another person:

· at the discretion of the testator;

· in the presence of the testator;

· with the intention *on the part of the testator* that destruction is for the purpose of

revocation.

87 Thus, a will is not revoked if destruction results from:

· an accident;

· a misapprehension;

· a fit of madness on the part of the testator.

88 A will may be revoked in part, where that part can be revoked without disabling the entire will. For example, if the signatures of the testator or the witnesses are destroyed, the will may fail.[28] But if certain provisions are destroyed the Court may decide whether the testator intended to revoke the entire will or only the portion actually destroyed. [29]

89 Problems have arisen in a variety of instances with regard to what constitutes destruction of a will. The term has been interpreted strictly with the effect that there are instances where the Courts have admitted to probate wills that the testators have considered to have been revoked by destruction.

90 A clear example of the intention of the testator being thwarted by the strict requirements of revocation can be seen in the case of *Bell v Mathewman*[30] in which the testator wrote "cancelled July 22, 1910" on the face of the will and signed it. He also drew two lines through his signature and placed an "X" over the witnesses' attestation. The Court stated:

> "This will must be granted probate, unless it can be regarded as 'otherwise destroyed' by the attempted cancellation.
> "What the testator did, in writing 'cancelled', stating the date, signing his name beneath the words and figures, and drawing lines through his signature across the signatures of the three witnesses, was, I find, done with the intention of revoking the will.
> "Notwithstanding the act so deliberately done *animo revocandi*, I am of the opinion that the cancellation intended must, upon authority, be held to be ineffective."

91 In *Cheese v Lovejoy*,[31] the testator wrote "revoked" on the reverse of the will and threw the will out. The will was recovered from the wastepaper and produced to the Court after the testator's death. The Court held that the destruction of the will was inadequate to satisfy the requirements of the Wills Act 1837 s 20.

92 Even where the act of destruction is clear, the proof of destruction of a particular will may not be so straightforward.

93 In *Rawlins v Hulme*,[32] the testator made a will in 1975. He made another will in 1981. In 1989 he went to his brother-in-law and declared that his will was not what he wanted and that he was going "to do away with it and make a new one". The will was torn into pieces and thrown away. The brother-in-law never saw the contents of the document. The Court was provided with an original of the 1975 will, and a photocopy of the 1981 will signed only by the

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28 *In the Goods of Morton* (1887) 12 PD 141.

29 *Re Everest* [1975] 1 All ER 672.

30 *Bell v Mathewman* (1920) OLR 364

31 *Cheese v Lovejoy* (1877) 2 PD 251.

32 *Rawlins v Hulme* 262 Ga 730, 425 SE 2d 861 (1993).

testator and not witnessed. At the trial Court it was held that the testator died intestate as he had expressed a "clear and convincing" intent to revoke his will. The Appeal Court reversed that decision on the basis that the 1981 will was not properly witnessed and therefore did not revoke the 1975 will, and that there was insufficient evidence to show that the testator had destroyed the 1975 will as the Court had the original copy before it.

94 It was suggested at the Uniform Succession Laws Project Committee Meeting (20 May 1996) that the definition of symbolic acts of destruction be widened to include acts such as 'crumpling up', or writing 'cancelled' across the face of the will.

95 It was further suggested that the basis for ascertaining revocation be the Court's assessment of the intentions of the testator to the extent that 'the Court is satisfied that the testator intended that his/her will be revoked'. This may entail the admissibility of extrinsic evidence.

Dependent Relative (Conditional) Revocation

96 There are instances when a testator intends the revocation of a will to be conditional on (for example):

· the valid execution of a subsequent will; or

· the revival of an earlier will, revoked by the will he/she is now destroying; or

· the accuracy of his/her belief as to the intestacy rules.

If the condition is not met, the will which was subject to the intended revocation retains its effect.

97 For example, in *McKenzie v Thomas*,[33] there were two validly executed wills. The residuary clause in the second will was incomplete. The testatrix had intended the residuary provisions of the first will to be copied into the second will. It was held that the "revocatory clause in the second will was dependent upon the provision in the first will which the testatrix intended to make but did not perfect ... accordingly both wills should be admitted to probate omitting two clauses from the first will and the revocatory clause from the second". [34]

Implied Dependent Relative (Conditional) Revocation

98 Where a disposition of certain property has appeared in a will, and a further valid disposition of the same property appears in a subsequent will, there has been an implied revocation of the first disposition. However, if the second disposition fails to have effect, the first disposition will be deemed not to have been revoked. [35]

Construction

99 In both the above situations, the outcome is dependent on the proper construction of the

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33 *McKenzie v Thomas* [1968] NZLR 493.

34 *McKenzie v Thomas* [1968] NZLR 493, 493.

35 *In the Estate of Southerden* [1925] P 177, 185.

later will or codicil. Revocation by destruction is a matter of act and therefore evidence as to the testator's intention is admissible. Revocation by a later will or codicil is a matter of construction and evidence of the testator's intention is admissible to assist only in interpretation.

Proposed provision

100 The Commission supports the concept of intention being the central hallmark of revocation. This concept relates closely to the dispensing power discussed in relation to the execution of wills. It is clear, however, that issues of admissibility of extrinsic evidence arise with regard to the proof of the testator's intentions (these will be discussed in Chapter 9).

Can a will be altered?

Clause 15 of the Victorian Draft Wills Act 1994 provides:

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

(2) Sub-section (1) does not apply to an alteration to a will if the words or effect of the will are no longer apparent because of the alteration.

(3) If a will is altered, it is sufficient compliance with requirements for execution, if the signature of the testator and of the witnesses to the alteration are made -
   (a) in the margin, or on some other part of the will beside, near or otherwise relating to the alteration; or
   (b) as authentication of a memorandum referring to the alteration and written on the will.

New Zealand law

101 The Wills Act 1837 s 21 states that:

> "No obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in the manner as hereinbefore is required for the execution of the will; the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will."

102 Clause 15 of the proposed Victorian Draft Wills Act covers the same points as the Wills Act 1837 s 21, but does so with much more clarity and in keeping with the concept of giving effect to the intentions of the testator. Issues such as whether or not an alteration has been made before or after execution are matters of evidence and have been clarified through case-law.

103 It has been suggested that cl 14 covers the issues raised by cl 15(2). While there is arguably some overlap, especially in relation to conditional revocation, it appears that cl 14 deals with lack of clarity in terms of effect of the new provisions, whereas cl 15 deals with a lack of clarity in relation to the annotation of or obliteration of parts of the will.

Proposed provision

104 The Commission supports the structure and wording of cl 15.

Can a revoked will be revived?

> Clause 16 of the Victorian Draft Wills Act 1994 provides:
>
> (1) A will or part of that will that has been revoked is revived by re-execution or by execution of a codicil showing an intention to revive the will or part.
>
> (2) A revival of a will which was partly revoked and later revoked as to the balance only revives that part of the will most recently revoked.
>
> (3) Sub-section (2) does not apply if a contrary intention appears in the will.
>
> (4) A will which has been revoked and later revived either wholly or partly is to be taken to have been executed on the date on which the will is revived.

New Zealand law

105 Under the Wills Act 1837 (UK) s 22, revival is achieved by re-execution of the document which the testator intends to be revived. Or, revival may be achieved by way of the proper execution of a codicil which shows an intention to revive.

106 The purpose of the doctrine of revival is that a will which has been revoked, and has therefore lost its validity, can have that validity restored.

107 This cannot be the case, however, if a will has been revoked by destruction. Where a will has been destroyed a new testamentary instrument must be executed to give effect to the testator's intentions:

> "Wills revoked by destruction are incapable of revival. The legislation has been construed as working on the premise that an instrument exists which may be the subject of revival".[36]

108 Revival, like revocation, is incremental unless the intention to do otherwise is expressed very clearly.

Example 3.1:

1 January 1991	Will #1 executed
1 January 1992	Will #1 revoked in part (Provisions A, B, C)
1 January 1993'	Will #1 revoked as to balance (Provisions E, F, G)
1 January 1994	Will #1 revived

In this example only the balance (Provisions E, F, G) will be revived unless clear intentions are

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36 Hardingham, Neave, and Ford, *Wills and Intestacy in Australia and New Zealand* (2nd ed, Law Book Company Ltd, Sydney, 1989), 182: citing *Hale v Tokelove* (1850) 2 Rob Eccl 318; 163 ER 1331; *Rogers v Goodenough* (1862) 2 Sw & Tr 342; 164 ER 1028; *Re Reade* [1902] P 75.

expressed that the entire will is to be revived. [37]

109 The revocation of a later will does not revive an earlier will unless a document is executed which expressly provides for that revival.

Example 3.2:

1 January 1993	Will #1 executed
1 January 1994	Will #2 executed and therefore Will #1 revoked
1 January 1995	Will #2 revoked

The mere act of revocation of Will #2 does not revive Will #1. Will #1 will only be revived if:

- Will #2 is revoked by a properly executed document which also expresses an intention to revive Will #1; or

- A properly executed document specifically expresses an intention to revive Will #1.

110 In *Re Dear*[38] the testatrix made a will and a first codicil on 3 February 1942. She made a second will and second codicil (with a different solicitor) on 26 June 1950. She then made another codicil in which it was stated that it was the second codicil to the first will of 3 February 1942. After the death of the testatrix, the 1950 will and codicil were available, and the 1962 codicil to the first will was available, but the 1942 will and first codicil were never found. It was held that "a reference in a codicil to an earlier will by its date was insufficient to revive the earlier will when there was a later will in existence which revoked earlier testamentary documents but raises and ambiguity",[39] and that "[b]efore a testamentary writing can be held to have revoked another testamentary writing there must be clear cut and stringent proof of an intention to revoke". [40] Probate was granted to the 1950 will and codicil and the 1962 codicil.

111 A revived will is deemed to have been made as at the time of its revival. [41]

Proposed provision

112 Under the definitions section of the Victorian Draft cl 3 the term 'will' is defined as including a codicil and any other testamentary instrument. A codicil which has been revoked may also be revived in the same way as a will may be revived.

113 The Commission agrees with the provisions of cl 16 but considers that they raise further issues in relation to extrinsic evidence (see Chapter 9).

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37 Wills Act 1837 (UK) s 22, *In bonis Reynolds* (1873) 3 P & D 35.

38 *Re Dear* [1975] 2 NZLR 254.

39 *Re Dear* [1975] 2 NZLR 254, 257.

40 *Re Dear* [1975] 2 NZLR 254, 267.

41 Wills Act 1837 (UK) s 34.

CHAPTER 4

INTERESTED WITNESSES

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

> Clause 11 of the Victorian Draft Wills Act 1994 provides:
>
> A person who, or whose spouse, witnesses a will is not disqualified from taking a benefit under it.

New Zealand Law

114 A person who is named in the will as a beneficiary can be a competent witness without affecting the validity of the will, however, such a witness will be deprived of any benefit they would otherwise have received under the will. The only exception to this is where the will is duly executed without the need for that person to act as a witness (that is, there are two other competent witness in addition to the beneficiary).

115 The meeting of the Uniform Succession Laws Project Committee (20 May 1996) suggested that the above provision be omitted in its entirety.

116 The Project Committee suggest that, in order to allow the Court to balance the substantive fairness of the provision, it could be made wider to apply to all who are involved in the preparation of the will. Such a provision could be worded as follows:

> (1) Where a person -
> (a) prepares or causes to have prepared or is concerned with the preparation of a will for a testator; or
> (b) is present at the execution of the will; and
> (c) is given a benefit by the will,
> the gift is null and void so far only as it concerns that person or that person's spouse or any person claiming under them unless subs (2) applies.
>
> (2) A beneficial gift given or made by will is not made void by this section if the interested person satisfies the Court that the benefit was fair in all the circumstances.

117 This principle has been supported already in New Zealand case law in *Tanner and Others v Public Trustee and Others* ,[42] in which it was held that:

- the suspicion of the Court is aroused where a person who prepared a will takes a benefit under it;[43] and the person who is instrumental in framing a will has to show the righteousness of the transaction. [44]

118 It has been suggested also that it may be appropriate to narrow the provision further by inserting the words "as a witness" into cl 1(b) so that that provision reads: "is present as a witness at the execution of the will".

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42 *Tanner and Others v Public Trustee and Others* [1973] NZLR 68.

43 *Tanner and Others v Public Trustee and Others* [1973] NZLR 68, 90-91.

44 *Tanner and Others v Public Trustee and Others* [1973] NZLR 68, 89.

Proposed provision

119 The Commission supports the introduction of the provision given in para 116 above with a preference for the addition of the qualification noted in para 118.

CHAPTER 5

MARRIAGE AND DIVORCE

What is the effect of marriage on a will?

> Clause 12 of the Victorian Draft Wills Act 1994 provides:
>
> (1) A will is revoked by the marriage of the testator.
>
> (2) Despite sub-section (1) -
>
> (a) a disposition to the person to whom the testator is married at the time of his or her death; and
> (b) any appointment as executor, trustee, advisory trustee or guardian of the person to whom the testator is married at the time of his or her death; and
> (c) the exercise by will of a power of appointment when, if the testator did not exercise the power, the property so appointed would not pass to the executor or administrator or the State Trustee under section 19 of the Administration and Probate Act 1958 -
>
> is (sic) not revoked by the marriage of the testator.
>
> (3) A will is not revoked by the marriage of the testator if it appears from the terms of the will, or from those terms taken together with circumstances existing at the time the will was made, that the testator contemplated marrying and intended the will to take effect in that event.

Policy

120 The provisions relating to revocation upon marriage are based in the following premises:

· Marriage is so important an event in relation to succession that it is likely to destroy the whole basis on which a prior will was made, in that:

- those who may benefit from the prior will may no longer be the appropriate persons to do so; and

- those who should be entitled to benefit from the will, in all likelihood, will not be included.

· Most married testators would prefer their estates to devolve under the rules of intestacy rather than under the terms of a will made before their marriage which they had failed to alter or revoke.

121 The objective of a rule of revocation must be to assist the testator achieve that which he or she wishes to achieve. Consequently, there are situations where automatic revocation may not be deemed to be appropriate, and an absolute rule of revocation will not achieve the stated objective.

The effect of marriage under current New Zealand law

122 Under the Wills Act 1837 s 18 the general rule is that a will of either a man or a woman is revoked by marriage. There are several exceptions to this general rule which include that:

- wills expressed to be made in contemplation of marriage are not revoked when the particular marriage that is in contemplation takes place; [45]
- revocation does not occur when a marriage is void; [46]
- revocation does not occur when a marriage is voidable and is voided during the testator's lifetime.[47]

123 Reasons for the retention of the general rule of revocation upon marriage include that:

- marriage represents a change in circumstances of the testator associated with new personal and financial responsibilities which may not be reflected in the earlier will;
- revocation of an earlier will protects the intentions, or the probable intentions, of the testator and dispositions to spouse and children from oversight, mistake or misjudgment on the part of the testator;
- intestacy arising from revocation is preferable to forcing spouses and/or children to bring claims under the Family Protection Act 1955 because: intestacy is cheaper (particularly when the estate is small and will be diminished by such expense); judicial resolution involves time, uncertainty and inconvenience.

124 Reasons for the abolition of the rule of revocation include:

- a general rule of revocation can be inconsistent with the approach of giving effect, so far as is possible, to the intentions of the testator;
- when an entire will is revoked, the rule operates arbitrarily and unfairly, and may revoke provisions that do not disadvantage the legitimate claims of a new spouse or children;
- when an entire will is revoked, beneficiaries who have no claim under intestacy provisions are disinherited against the wishes of the testator;
- a testator might die intestate because they were not aware that marriage revoked all prior wills.

125 There are several possibilities which need to be canvassed in relation to the revocation upon marriage. These include:

- an absolute rule of revocation upon marriage;
- an absolute rule of non-revocation upon marriage;

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45 Wills Amendment Act 1955 s 13.

46 *Mette v Mette* (1859) 1 Sw & Tr 416, 164 ER 792; *In the Will of Montgomery* (1873) 4 AJR 5; *Warter v Warter* (1890) 15 PD 152.

47 *In the Will of Swan* (1871) 2 VR (IEM) 47; *Re Kreutz* (1890) 4 QLJ 16; *Re Roberts* [1978] WLR 653.

- a general rule of revocation unless the will is made in contemplation of a particular marriage;

- a general rule of revocation unless the will is made in contemplation of marriage in general (a will-maker may see the need to plan ahead and look to protect property under as yet unascertained future circumstances and may be making a will in contemplation of the prospect of future marriage rather than marriage to a particular individual);

- a general rule of non-revocation by marriage but automatic revocation within a reasonable time period subsequent to marriage (for example, 12 months);

- the deeming of a will made by the testator while in a de facto relationship, where the partners to that relationship later marry, to be a will made in contemplation of a (particular) marriage;

- a rule that a will not be revoked upon marriage but that a statutory provision be used to superimpose a legacy in favour of the testator's spouse (and possibly their children) which must be met before distribution of what remains to the named beneficiaries;

- a rule that, in the case of a remarriage, the will continues to operate in respect of children of a former marriage but not the former spouse. This would presumably give rise to a claim under the Family Protection Act 1955 (or the Testamentary Claims provisions proposed in NZLC PP24, 1996) by the children of the later marriage;

- a rule that the will be deemed to be a will made in contemplation of marriage if it contains a provision for the person the testator marries. This may give rise to inconsistencies such as 'double dipping' although such inconsistencies could be legislated for (provision countering 'double dipping' are included in the Testamentary Claims provisions in NZLC PP24, 1996, section 66, page 199);

- beneficiaries of a revoked will could be given eligibility to claim against the estate under the Family Protection Act 1955;

126 Where the rule is that a will is not revoked when it is made in contemplation of marriage the question arises as to how that contemplation is to be proved. The Wills Amendment Act 1955 s 13 requires that the contemplation be expressed in the will. The Victorian Draft Wills Act 1994 provides that extrinsic evidence be permissible to prove that contemplation. The Commission supports the admissibility of extrinsic evidence.

127 There is a question whether, if a revocation provision is retained, such a provision should be widened to include considerations of a wider range of significant events, such as the birth or adoption of a child, or the death of a child or spouse.

Proposed provision

128 The Commission questions the general rule that a will should be revoked upon marriage. If the rule is retained, the Commission supports the contention that wills made in contemplation of marriage should not be revoked. This issue is more than merely technical, however, and has important social policy implications. The Commission may wish to publish a more extensive paper on this issue at a later date.

What is the effect of divorce on a will?

Clause 13 of the Victorian Draft Wills Act 1994 provides:

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

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

(3) For the purposes of this section, the termination or annulment of a marriage occurs, or shall be taken to occur -
   (a) when a decree of dissolution of the marriage pursuant to the Family Law Act becomes absolute; or
   (b) on the making of a decree of nullity pursuant to the Family Law Act in respect of a purported marriage which is void; or
   (c) on the termination or annulment of the marriage, in accordance with the law of a place outside Australia if the termination or annulment is recognised in Australia in accordance with the Family Law Act.

(4) In this section -

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

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

Policy

129 The provisions relating to revocation upon the dissolution of marriage are based in the following premises:

· they assist in the finality of a relationship (that is, support the 'clean break' principle);

· ensure that former spouses do not gain in the future simply because formal revocations

of wills were not executed (during a time of possible emotional turmoil).

Dissolution

130 Under the Wills Amendment Act 1977 s 2, a will is revoked upon an order for dissolution of marriage in relation to any dispositions made in favour of, and therefore to the benefit of, the other partner to the former marriage. The will is to be read "as if that other partner had died immediately before the person making the will". [48]

131 The will shall not be revoked upon dissolution where:

· the testator has expressed such an intention; [49]

· subsequent to dissolution, the testator has made a codicil which expressly shows an intention that the benefit is still to be conferred on the former partner; [50]

132 Where a will is "confirmed or ratified or in any manner revived" by codicil it shall be deemed to have been made at the time it was first made and not at the time when it was confirmed or ratified or revived. [51]

133 "Where a will or any part thereof is re-executed, it shall be deemed to have been made at the time when it was re-executed, and not at the time when it was first made". [52]

134 Arguments against a rule which revokes a will on dissolution include that:

· to presume that a testator does not wish their former spouse to benefit under the will is to speculate as to the testator's wishes. It may be more logical for the presumption to fall the opposite way, that is to presume that the testator did wish the former spouse to benefit under the will. Evidence could then be adduced to rebut this presumption.

· the law should apply a presumption that assumes a conscious testation rather than inadvertence or forgetfulness.

· a rule of revocation assumes that dissolution takes away a positive duty to provide for a former spouse whereas this may not be the case;

· the need to revise a will is more likely to be known at dissolution than it is at marriage as the parties will be more focused on property arrangements;

· inconsistencies arise between the provisions for de jure married and de facto couples

135 Arguments in favour of revocation upon dissolution include that:

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48 Wills Amendment Act 1977 s 2(2)(c).

49 Wills Amendment Act 1977 s 2(3)(b).

50 Wills Amendment Act 1977 s 2(3)(c).

51 Wills Amendment Act 1977 s 4(a).

52 Wills Amendment Act 1977 s 4(b).

- it can be assumed that testators generally would not wish their former spouses to benefit at all, or as generously, subsequent to dissolution;

- property issues are usually dealt with at, or immediately following, the point of dissolution. For a surviving former spouse to benefit greatly under a will may amount to a double benefit.

- any injustice to a former spouse resulting from revocation can be remedied by a claim for maintenance against the testator's estate under the Family Proceedings Act 1980 ss 64 and 77, and extensive rights to claim support and to institute a property division under the Commission's proposed Testamentary Claims Act.

136 In the sense that dissolution of marriage is a significant life-changing event, it is logical that consideration be given to the issue of revocation upon dissolution. The Commission suggests, however, that the central concern must be to ascertain the intentions of the testator. An arbitrary revocation rule may not achieve this objective, although it may be more coherent than the rule revoking a will upon marriage.

Separation

137 Although separation is not a point of consideration in the Victorian Draft Wills Act 1994, it is felt that comment on this may be appropriate.

138 Currently, where a married couple are separated pending dissolution, any will made by either party remains active. This means that although a couple may be contemplating a dissolution of their marriage their wills are not revoked.

139 Such a situation is logical in that, because the marriage is still intact, there will have been no arrangements made with regard to distribution of property. However, it may be that each party would wish to reconsider certain aspects of their testamentary dispositions.

140 This can be compared with the situation on an intestacy. Where one party dies intestate while a Separation Order is in force, the property of the deceased "shall devolve as if the survivor had predeceased the intestate". [53]

Proposed provision

141 The Commission raises the issue of whether there may be a need for provisions relating to wills during a period of separation in contemplation of dissolution, although it is accepted that retaining the rule of revocation upon dissolution may be clearer and safer. The Commission welcomes further comment on this issue.

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53 Family Proceedings Act 1980 s 26(1).

CHAPTER 6

WILLS TO WHICH FOREIGN LAWS APPLY

Please Note:

Prof. A.H. Angelo, Faculty of Law, Victoria University of Wellington, is preparing a paper on the Foreign Laws and Conflict of Laws aspects of this project, and this will be addressed separately.

The paper is not included with this document.

However, the proposed provisions of the Victorian Draft Wills Act 1994 have been given here along with a list of current relevant New Zealand legislation and some international conventions.

Any comments or accounts of relevant experience would be welcome

Wills to which foreign laws apply

Clause 17 of the Victorian Draft Wills Act 1994 provides:

When do requirements for execution under foreign law apply?

(1) A will is to be taken to be properly executed if its execution conforms to the law in force in the place -
  (a) where it was executed; or
  (b) which was the testator's domicile or habitual residence, either at the time the will was executed, or at the testator's death; or
  (c) of which the testator was a national, either at the date of execution of the will, or at the testator's death.

(2) The following wills are also taken to be properly executed:
  (a) A will executed on board a vessel or aircraft, if the will has been executed in conformity with the law in force in the place with which the vessel or aircraft may be taken to have been most closely connected having regard to its registration and other relevant circumstances; or
  (b) A will, so far as it disposes of immovable property, if it has been executed in conformity with the law in force in the place where the property is situated; or
  (c) A will, so far as it revokes a will or a provision of a will which has been executed in accordance with this Act, or which is taken to have been properly executed by this Act, if the later will has been executed in conformity with any law by which the earlier will or provision would be taken to have been validly executed; or
  (d) A will, so far as it exercises a power of appointment, if the will has been executed in conformity with the law governing the validity of the power.

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

Wills to which foreign laws apply

Clause 18 of the Victorian Draft Wills Act 1994 provides:

What system of law applies to these wills?

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

(a) If there is a rule in force throughout the place which indicates which system applies to the will, that rule must be followed; or

(b) If there is no rule, the system must be that with which the testator was most closely connected either -

(i) at the time of his or her death, if the matter is to be determined by reference to circumstances prevailing at his or her death; or

(ii) in any other case, at the time of execution of the will.

Wills to which foreign laws apply

Clause 19 of the Victorian Draft Wills Act 1994 provides:

Construction of the law applying to these wills

(1) In determining whether a will has been executed in conformity with a particular law, regard must be had to the formal requirements of that law at the time of execution, but account may be taken of a later alteration of the law affecting wills executed at that time, if the alteration enables the will to be treated as properly executed.

(2) If a law in force outside Victoria is applied to a will, a requirement of that law that special formalities must be observed by testators of a particular description or that the witnesses to the execution of a will must have certain qualifications, is to be taken to be a formal requirement only, despite any rule of that law to the contrary.

Wills to which foreign laws apply

142 Current relevant New Zealand legislation includes:

· Wills Amendment Act 1955 s 14 (appended to this paper);

· Judicature Act 1908 ss 5 and 16;

- Second Schedule to the Judicature Act 1908;
- Administration Act 1969 ss 5(2), 70, 71(2), 73 and 77;
- Family Protection Act 1955 ss 3 and 4(1);
- Te Ture Whenua Maori Act 1993 ss 108 and 109.

143 Reference may also be made to the:

- Hague Convention on the Law of Domicile;
- Hague Convention on Formal Validity of Wills 1961;
- Hague Convention on the Law Applicable to Trusts and their Recognition 1985;
- Hague Convention on the Law Applicable to the Estates of Deceased Persons 1989;
- Convention Providing a Uniform Law on the Form of an International Will, Washington 1973 (based on a UNIDROIT draft).

CHAPTER 7

THE ANTI-LAPSE RULE

The Anti-Lapse Rule

Clause 32 of the Victorian Draft Wills Act 1994 provides:

Dispositions not to fail because issue have died before the testator -

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

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

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

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

New Zealand law

144 The Wills Act 1837 provided that a will which contained dispositions to issue of the testator who predeceased the testator should take effect as if the death of that issue had occurred immediately after the death of the testator. In effect, this meant that where, for example, the deceased issue had married and had children of their own, the property would vest according to the will of the deceased issue. This could well have the result that rather than the testator's property going to his or her grandchildren, it would more likely go to the daughter-in-law or son-in-law and the surviving grandchildren would take nothing.

145 The Wills Amendment Act 1955 s 16 (with subsequent amendments) now provides that surviving grandchildren of the testator should take their deceased parent's share *per stirpes*. No generation below the children of the deceased beneficiary (that is, grandchildren of the testator) can have the benefit of the statutory substitutional gift.[54]

146 The anti-lapse rule can be seen as an interference in the intentions of the testator, as it may be that the testator does not wish to benefit a particular grandchild. It may equally well be argued that the testator did not wish to benefit the son-in-law or daughter-in-law directly. It can

54 Hardingham, Neave and Ford, supra n36, 237.

be assumed, however, that the testator expected that their own children are likely to survive him or her and that the logical extension is that the grandchildren take where the child is not able to do so.

147 The following provisions in cl 32 follow the current provisions of the Wills Amendment Act 1955:

· The *per stirpes* rule applies.

· A contrary provision expressed in a will avoids the provisions in this clause.

148 The following provisions in cl 32 are additional to the provisions of the Wills Amendment Act 1955:

· The thirty day survival rule applies.

· The provision includes powers of appointment.

· The provision applies where children receive as individuals or as a class.

· The requirements of the anti-lapse rule are not fulfilled if some contingency (other than not reaching a certain age, or surviving testator) is not met.

And, the provisions of the Wills Amendment Act 1955 s 16(3)(a) and (b) would be eliminated in relation to:

· any specific bequest or specific appointment of any personal chattels; and

· any devise or bequest or appointment to any person as one of 2 or more joint tenants.

Proposed provision

149 The Commission supports the inclusion of cl 32, subject to consideration of the importance of retaining the present Wills Amendment Act 1955 s 16(3).

CHAPTER 8

CONSTRUCTION OF WILLS AND MISCELLANEOUS MATTERS

NB: Our proposals are, for the most part, limited to areas where there are already statutory rules about the construction of wills. The courts' general practices in construing particular types of wills provisions are not affected.

Chapter 8 - Construction of Wills and Miscellaneous Matters

Cl.20	What interest in property does a will operate to dispose of?	Essentially re-drafting
Cl.21	When does a will take effect?	Essentially re-drafting
Cl.22	What is the effect of a failure of disposition?	Essentially re-drafting
Cl.27	What does a general disposition of land include?	Essentially re-drafting
Cl.28	What does a general disposition of property include?	Essentially re-drafting
Cl.29	What is the effect of a devise of land without words of limitation?	
Cl.30	How are dispositions to issue to operate?	Some new elements
Cl.31	How are requirements to survive with issue construed?	Essentially re-drafting
Cl.24	What is the effect of a change in the testator's domicile?	Essentially re-drafting
Cl.25	Income on contingent and future dispositions3	Some new elements
Cl.26	Beneficiaries must survive testator by 30 days	NEW to New Zealand
Cl.33	Construction of residuary dispositions	NEW to New Zealand
Cl.34	Dispositions to unincorporated associations of persons	Some new elements
Cl.35	Can a person, by will, delegate the power to dispose of property?	Some new elements
Cl.36	What is the effect of referring to a valuation in a will?	NEW to New Zealand
Cl.37	Can a will be rectified?	NEW to New Zealand
Cl.66A	Who may see a will?	NEW to New Zealand

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

> Clause 20 of the Victorian Draft Wills Act 1994 provides:
>
> What interest in property does a will operate to dispose of?
>
> If -
>
> (a) a testator has made a will disposing of property; and
> (b) after the making of a will and before his or her death, the testator disposes of an interest in that property -
>
> the will operates to dispose of any remaining interest the testator has in that property.

New Zealand law

150 Prior to the Wills Act 1837 (UK) a testator could only dispose by will of that property that was his both at the time of execution of the will and at the time of death. If the nature of the testator's interest in any property described in the will was altered (for example, from fee simple to a life interest) the disposition became inoperative.

151 Under the Wills Act 1837 (UK) s 23 whatever interest a testator has in property at the time of death passes under the will.

Proposed provision

152 The proposed provision is drafted in plain language and does not alter the ability to dispose of any interest in property. The proposed provision is supported by the Commission.

When does a will take effect?

> Clause 21 of the Victorian Draft Wills Act 1994 provides:
>
> When does a will take effect?
>
> (1) A will takes effect, with respect to the property disposed of by the will, as if it had been executed immediately before the death of the testator.
>
> (2) Sub-section (1) does not apply if a contrary intention is shown in the will.

New Zealand Law

153 The Wills Act 1837 (UK) s 24 still applies in New Zealand and provides that the will shall:

> "take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

154 Section 24 is clearly excluded where the testator, for example, leaves a gift of property "of which I am possessed at the date of this my will."

155 It is less clear however if the testator leaves property "which I now possess" or "which I at present possess". In essence if the words "now" or "at present" are construed to be non-essential, they will be disregarded and the will speaks from the time of death. If they are held to be integral to the description of the gift then s 24 will be excluded. [55]

156 The effect of this section is that where the property to be devised is described in broad terms, the provision of s 24 will apply even where the property itself is specific in nature. For example, the term "all my property" will be classed as a general devise even though the items of which that property may be constituted may fluctuate between the time of the execution of the will and the death of the testator.

157 Where property has been described specifically and has then been exchanged for another article of a similar description between the time of execution of the will and the death of the testator, that property will not pass under the will.

158 Property may be described with a degree of specificity, but with sufficient generality that if it is replaced with other property of a similar nature between the time of the making of the will and the death of the testator, the replacement will pass under the will. [56]

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55 *Hepburn v Skirving* (1858) 32 LT (OS) 26: where the expressions were held to refer to property possessed at the time of death; *Re Willis* [1911] 2 Ch 563, *Re Champion* [1893] 1 Ch 101, *Wagstaff v Wagstaff* (1869) LR 8 Eq 229: where the expressions were ignored; *Re Edwards* (1890) 63 LT 481, *Re Fowler* (1915) 139 LT Jo 183: where the expressions were held to refer to property possessed at the time of execution of the will.

56 For example: *Re Atley* [1986] 2 NZLR 385.

159 The distinction amonst these categories of specificity, however, is sometimes difficult to gauge. In *Re Sikes*[57] the use of the term "my piano" was held to refer specifically to the piano that the testator owned at the time of writing the will, which was of a different type from that which she owned at the time of her death. The piano owned by the testator at her death did not pass under the will.

Proposed provision

160 It appears that this section is well understood, and has been given clear meaning by common law. The Victorian provision is essentially the same as the New Zealand provision and is supported by the Commission.

57 [1927] 1 Ch 364.

What is the effect of a failure of a disposition?

> Clause 22 of the Victorian Draft Wills Act 1994 provides:
>
> What is the effect of a failure of a disposition?
>
> (1) If any disposition of property, other than the exercise of a power of appointment, is ineffective, the will takes effect as if the property were part of the residuary estate of the testator.
>
> (2) Sub-section (1) does not apply if a contrary intention is shown in the will.

New Zealand Law

161 The relevant provision in New Zealand law is the Wills Act 1837 (UK) s 25. Under this section any specific disposition which is not effective will:

· pass under the residuary gift provisions in the will; or

· if there is no residuary provision, will pass to intestacy.

However, neither of the above will occur if a contrary intention is expressed.

Proposed provision

162 This is, in effect, the same provision as the Victorian Draft provision and is supported by the Commission.

What does a general disposition of land include?

> Clause 27 of the Victorian Draft Wills Act 1994 provides:
>
> What does a general disposition of land include?
>
> (1) A general disposition of land or of the land in a particular area includes leasehold land whether or not the testator owns freehold land.
>
> (2) Sub-section (1) does not apply if a contrary intention appears in the will.

New Zealand Law

163 The Wills Act 1837 s 26, which deals with the devise of copyhold, leasehold and freehold land, is still applicable in New Zealand. 'Copyhold land' was a tenure of land in England abolished after 1925 and originated from the system of manors.[58] It appears that this type of tenure has never had applicability in New Zealand, and therefore there is no need to retain this element of the provision in New Zealand law.

Proposed provision

164 Except for the provision relating to copyhold land, the Victorian Draft provision operates to the same effect as s 26 but has the advantage of clarity and contemporaneity. The Commission supports this provision.

58 *The Oxford Companion to Law* (Clarendon Press, Oxford, 1980), 289.

What does a general disposition of property include?

> Clause 28 of the Victorian Draft Wills Act 1994 provides:
>
> What does a general disposition of property include?
>
> (1) A general disposition of all or the residue of the testator's property, or of all or the residue of his or her property of a particular description, includes all the property of the relevant description over which he or she has a general power of appointment exercisable by will and operates as an exercise of the power.
>
> (2) Sub-section (1) does not apply if a contrary intention appears in the will.

New Zealand Law

165 Clause 28 of the Victorian Draft assumes that the particular power of appointment is exercisable by will (see cl 4 of the Victorian Draft). It helps the Court to decide whether a general disposition in a will has the effect of exercising the power. The corresponding provision in New Zealand is the Wills Act 1837 (UK) s 27.

166 Powers of appointment can be classified as:

· general - where the donee is treated as the absolute owner of the property and there is no separation of ownership and control;

· special (specific) - where the field of potential appointees is limited to a class called the class of objects of a power; and

· hybrid - where the donee may appoint to anyone except certain individuals or groups (for example, him or herself, his or her family, and the settlor).

167 There are two other classifications of powers which intersect with the above classifications. These are:

· the division of powers into powers vested in fiduciaries and non-fiduciaries; and

· the division of powers between trust powers and bare powers.

168 Obviously issues arise in relation to the nature of the power. If a special or hybrid power is vested in a fiduciary, then duties in respect of the exercise of that power will generally be more onerous than if it was vested in a person who is not in a fiduciary position. There is a question as to whether the earlier provision (see cl 4) excluded its application to fiduciary powers. In the Wills Act 1837 (UK) s 27, the wording "in any manner he may think proper" indicates that the donee of the power can deal with the property 'as their own', and therefore fiduciary powers are excluded from the operation of the provision.

169 The position of a non-fiduciary is less clear but it appears that his or her discretion is

limited by the equitable doctrine of fraud on a power. Fraud for this purpose is widely defined. The donee must not exercise the power dishonestly, capriciously or for improper purposes, such purposes being identified on the basis that the property "belongs" to those entitled in default of the exercise of power, subject to divesting upon a proper exercise of the power.

170 However, if the instrument creating the power permits it to be exercised by will, it is not necessary to rely on cl 4. The above provision could apply in such a case.

Proposed provision

171 The effect of this section is to include all property in respect of which the testator has a general power of appointment which he or she has not otherwise exercised.

172 Once again, the Victorian Draft is a simplified version of the Wills Act 1837 (UK) s 27 and has the same effect. The provision is supported in principle subject to consideration of para 171 above.

What is the effect of a devise of land without words of limitation?

> Clause 29 of the Victorian Draft Wills Act 1994 provides:
>
> What is the effect of a devise of real property without words of limitation?
>
> (1) A disposition of real property to a person without words of limitation is to be construed as passing the whole estate or interest of the testator in that property to that person.
>
> (2) Sub-section (1) does not apply if a contrary intention appears in the will.

New Zealand law

173 It was a common law requirement that words such as "to A and the heirs of his body" be used in order that a disposition of real property be effective. If these "words of limitation" were not used, the realty would pass only as a life interest and not as an estate in fee simple.

174 The Wills Act 1837 (UK) s 28 removed that requirement and provided that a will, even if no such words of limitation were used, is to be construed as passing the realty to the beneficiary as an interest fee simple or such interest as the testator had in the property. This provision is not relevant to leasehold interests which are classified as personalty not realty.

Other issues

175 There were two queries raised at the most recent Uniform Succession Laws Project Committee Meeting held in Melbourne, 20 May 1996. These related to 'estates tail', and to jurisdictions with deeds systems.

- 'Estates tail' were abolished in New Zealand by the Property Law Act 1952 s 16, with the result that "entailed interests, unless barred, devolve according to the general law in force".[59]

- It was also pointed out, at the Project Committee Meeting, that there may be no need for this provision where there is no deeds system. For example, this provision is necessary for New South Wales where a deeds system exists. While most land in New Zealand is registered under the land transfer system, it is estimated that there is still some (less than 1%) which is still under the deeds system. [60]

Proposed provision

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59 The Oxford Companion to Law (Oxford University Press, Oxford, 1980), 1205.

60 Information obtained from the Legal Section of the Land Titles Office, Wellington (15 August 1996).

176 In consideration of the above matters, the Commission supports the provision in principle, and its applicability within New Zealand.

How are dispositions to issue to operate?

> Clause 30 of the Victorian Draft Wills Act provides:
>
> How are dispositions to issue to operate?
>
> (1) A disposition to a person's issue without limitation as to remoteness must be distributed to that person's issue in the same way as if that person had died intestate leaving only issue surviving.
>
> (2) Sub-section (1) does not apply if a contrary intention appears in the will.

New Zealand law

177 It is unusual for New Zealand will-makers to leave property to their (or some other person's) "issue".[61] If they do, then (but for the corresponding s 29 in the Wills Act 1837), a question might arise whether "issue" means all living (or even future) children, grandchildren, etc, or only those issue who:

- are closest in line (that is, grandchildren can not take if their parent, a child of the testator, is still alive); and
- are living at the date of a will-maker's death.

This provision clarifies the situation by referring the reader to the intestacy rules under the Administration Act 1969 s 77.

"Issue" and the per stirpes rule

178 The traditional *per stirpes* rule, which operates on an intestacy, provides that the children of the deceased will take in equal shares. Where there is provision for grandchildren of the deceased to take under the will, they will take as representatives of their relevant parent:

> *Example 8.1*: The testator has three children (C1, C2, C3). C1 has one child (GC1). C2 has two children (GC2 and GC3). C3 has three children (GC4, GC5 and GC6). C3 predeceases the testator. Assuming there is provision for the grandchildren to take under the will, GC4 and GC5 and GC6 will take a one third share of C3's share. That is, they will each take one ninth.

179 There is a modified *per stirpes* rule which has been in place in Queensland, Australia, (Succession Act 1981 s 30(2)) which provides as follows:

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

61 For example: *Re Te Huango* [1993] 3 NZLR 77.

the remoter issue of that person.

180 This provides (unless a contrary intention is expressed in the will) that if any one child of the testator predeceases the testator then that child's children (the grandchildren) will take by representation. That is, a presumptive provision for the grandchildren will be read into the will.

> *Example 8.2*: C1 and C2 are living at the time of the testator's death but C3 has predeceased the testator. C3's children (GC4, GC5 and GC6) will take one third of the total relevant beneficial disposition in equal shares (one ninth per grandchild).

181 It also provides (unless a contrary intention is expressed in the will) that if *all* the testator's children predecease the testator then the grandchildren will take, not as representatives of the children, but as 'the nearest issue'. The great-grandchildren then become the 'remoter issue'. The grandchildren therefore take in equal shares:

> *Example 8.3*: If C1, C2 and C3 *all* predecease the testator, then the grandchildren (GC1, GC2, GC3, GC4, GC5 and GC6) will each take in equal shares of the total relevant disposition (one sixth per grandchild).

Proposed provision

182 While there are other possibilities (as outlined above) the Commission supports the proposed cl 30, but welcomes comment on whether the Queensland provision (or some variation of it) would be more likely to give effect to the will-maker's intentions. The Commission is still working on a review of the intestacy provisions and comments will also be relevant to those considerations.

How are requirements to survive with issue construed?

> Clause 31 of the Victorian Draft Wills Act 1994 provides:
>
> How are requirements to survive with issue construed?
>
> (1) If there is a disposition to a person in a will which is expressed to fail if there is either -
>
> (a) a want or a failure of issue of that person either in his or her lifetime or at his or her death; or
>
> (b) an indefinite failure of issue of that person -
>
> those words must be construed to mean a want or failure of issue in the person's lifetime or at the person's death and not an indefinite failure of his or her issue.
>
> (2) Sub-section (1) does not apply if a contrary intention appears in the will.

New Zealand law

183 The equivalent current provision in New Zealand is the Wills Act 1837 (UK) s 29.

Proposed provision

184 The proposed cl 31 is supported by the Commission.

What is the effect of change in the testator's domicile?

> Clause 24 of the Victorian Draft Wills Act 1994 provides:
>
> What is the effect of a change in the testator's domicile?
>
> The construction of a will shall not be altered by reason of any change in the testator's domicile after the execution of the will.

New Zealand law

185 This provision relates to Chapter 6. Relevant discussion will be found in Professor Angelo's paper referred to in that chapter.

Proposed provision

186 In principle the Commission supports this provision.

Income on contingent and future dispositions

> Clause 25 of the Victorian Draft Wills Act 1994 provides:
>
> Income on contingent and future dispositions -
>
> A contingent, future or deferred disposition of property, whether specific or residuary, includes any intermediate income of the property which has not been disposed of by the will.

New Zealand law

187 The Trustee Act 1956 (NZ) s 40[62] was virtually a copy of the Trustee Act 1925 (UK) s 31. The 1956 Act provides that the trustees, administrators and executors, of income on vested and contingent property being held in trust may apply the income from that property "for or towards his [the beneficary's] maintenance or education ... or his advancement or benefit" where that beneficiary is under the age of 20 years. However, when the beneficiary attains the age of 20 years such income must be paid over.

188 The purpose of such a provision ensures that the intermediate income does not fall into partial intestacy.

189 Further, this has been interpreted in *Re McKay*[63] in which the testator left all assets (to be converted to money where necessary) after expenses to be invested in trust and the income from investment to go to his widow during her lifetime, and to his sisters and sister-in-law after the death of his widow. After the death of the last sister (or the sister-in-law) all assets were to be paid to a charity. Three of the five sisters predeceased the widow. The issue became whether those who predeceased the widow "were intended to take, not a life interest, but an interest to be determined by the life of the last survivor".[64] It was held that "the testator intended each of the sisters and the sister-in-law to have a life interest only and that ... the survivors or survivor take only until the date when the charity is intended to benefit, namely, on the death of the last survivor".[65]

Proposed provision

190 The Commission supports the proposed provision in principle, but considers that these complex issues are already adequately covered by the Trustee Act 1956 and that there is no need to duplicate.

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62 See also the definition of 'trust' in Trustee Act 1956 s 2, which includes administration of a will.

63 *Re McKay* [1968] NZLR 131.

64 *Re McKay* [1968] NZLR 131, 133.

65 *Re McKay* [1968] NZLR 131, 135.

Beneficiaries must survive testator by 30 days

> Clause 26 of the Victorian Draft Wills Act 1994 provides:
>
> Beneficiaries must survive testator by 30 days -
>
> (1) If a disposition is made to a person who dies within 30 days after the death of the testator, the will is to take effect as if the person had died before the testator.
>
> (2) Sub-section (1) does not apply if a contrary intention appears in the will.
>
> (3) A general requirement or condition that a beneficiary survive the testator does not indicate a contrary intention for the purpose of this section.

New Zealand law

191 Ordinarily, a devise or bequest will lapse if the beneficiary dies before the testator. The Simultaneous Deaths Act 1958 s 3(1)(a) provides for circumstances where "2 or more persons have died at the same time or in circumstances which give rise to reasonable doubt as to which of them survived the other or others". In such a circumstance the testator will be deemed to have died immediately after the other or others. Section 3(1) includes provisions in relation to will property, donatio mortis causa, life and accident insurances, joint property, powers of appointment, and statutory substitutional gifts. [66]

Other issues

192 The proposed Victorian Draft Wills Act 1994 cl 26 effectively extends the period within which the deaths would be deemed to have been simultaneous, and therefore the period during which the simultaneous deaths provisions would continue to operate, to a period of 30 days beyond the death of the testator.

193 King[67] states that the new English Law Reform (Succession) Act 1995 s 1(1), which has a similar provision to the Victorian Draft but with a time of 28 days instead of 30, has the following effect:

> " ... the spouse of an intestate is not to take a share on intestacy unless he or she survives the intestate by 28 days. Where the spouse does not so survive, the intestate's property will be dealt with as if there had been no spouse. The Intestates' Estates Act s 1(4) has always produced this result in the case of simultaneous deaths. However, up to now there was a problem where one spouse survived the other by a short period. If the first spouse to die died intestate, his property could pass to his surviving spouse and then to the spouse's relatives to the exclusion of his own relatives, which was obviously

66 Simultaneous Deaths Act 1958 s 3(1)(b)-(h).

67 King, "Law Reform (Succession) Act 1995", [1995] Solicitors Journal 1252.

undesirable. Section 1(1) has no application to gifts made by will, so an express survivorship clause should still be included in all wills."

194 The American Uniform Probate Code §2.702 provides for a survival period of 120 hours. However, a survey in Queensland shows that this period does not bear relation to deaths by motor vehicle accident (which are the most likely cause of simultaneous death of family members). In figures relating to 390 deaths,[68] 377 victims died instantly or within 7 days, and the remaining 13 died within 19 days after the accident. There were no victims who died in more than 19 and less than 30 days. Furthermore, persons dying more than 30 days after the accident are not considered to have died as a result of that accident.

195 The New Zealand Land Transport Safety Authority informs us that New Zealand has the same definition of death as a result of a motor vehicle accident as does Queensland. In effect anyone who dies more than 30 days after a motor vehicle accident is deemed not to have died as a result of that accident. However, the figures show that by far the greater percentage (78.27%) of victims of motor vehicle accidents died either immediately or before being admitted to hospital. A further 19.71% died up to 14 days after the accident (making a total of 97.98%). Between 15 and 30 days after the accident a further 1.01% die (making a total of 98.99%). There are also figures which show that a further 1.01% died after the 30 days but in the period up to 137 days after the accident. While this group is not officially classed as having died as a result of the accident, it can be assumed that they received serious injury at the time of the accident and that their death may be attributable to the accident at least in part. There may also be others who died indirectly as a result of the accident but who are not considered to be part of the accident statistics. [69]

196 Under the Trustee Act 1956 s 48(2) and the Administration Act 1969 s 47(2) portions of the estate may be distributed prior to probate for "the maintenance, support or education of any person who is wholly or partially dependent on the deceased before the death of the deceased".[70] Such a provision would be necessary to ensure beneficiaries could be looked after financially during the proposed 30 day survival period.

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68 Data, for the period 1 September 1992 to 31 August 1993, supplied to the Queensland Law Reform Commission by the Queensland Police Service.

69 These New Zealand figures were supplied by the Land Transport Safety Authority on 23 August 1996. The definition of road accident victims includes only those who died within 30 days of an accident. The figures are the combined figures for the 1993 and 1994 calendar years. The precise statistics supplied are as follows:

Time since accident	Number	Percentage	Cumulative Percentage
Immediately	933	78.27	78.27
Less than 24 hours	94	7.88	86.15
1 day	48	4.03	90.18
2 days	22	1.84	92.02
3 days	15	1.26	93.28
4 days	10	0.84	94.12
5 days	8	0.67	94.79
6 days	10	0.84	95.63
7 days	7	0.59	96.22
8-14 days	21	1.76	97.98
15-30 days	12	1.01	98.99
31-137 days	12	1.01	100.00
Totals	1192	100.00	100.00

70 Administration Act 1969 s 47(2).

Proposed provision

197 The Commission supports the introduction of a 30 day survival period and the correlative amendments to the Simultaneous Deaths Act 1958.

Construction of residuary dispositions

> Clause 33 of the Victorian Draft Wills Act 1994 provides:
>
> Construction of residuary dispositions
>
> (1) A disposition of the whole or of the residue of the estate of a testator which refers only to the real estate of the testator or only to the personal estate of the testator is to be construed to include both the real and personal estate of the testator.
>
> (2) If any part of a disposition in fractional parts of the whole or of the residue of the estate of a testator fails, the part that fails passes to the part which does not fail, and, if there is more than one part which does not fail, to all those parts proportionately.
>
> (3) This section does not apply if a contrary intention appears in the will.

Proposed provision

198 This provision would be new to New Zealand. The principle of the provision is that testators should not be held to the technical meanings of words which they use inadvertently, thinking them to sound appropriate, but which result in a partial intestacy. Subclause (1) is applicable only to the use by non-experts of the concepts of 'realty' and 'personalty' as applied to the residuary estate (for example, where the will has been drafted by the testator or a family member). Although the inadvertent use of these terms may happen only occasionally, the provision can be expected to cater for such a situation.

199 Subclause (2) has the effect of avoiding a partial intestacy and giving effect as closely as possible to the intentions of the testator, where no other preference has been expressed in the will.

> *Example 8.4*: Testator leaves the residue of his estate to X, Y, and Z "in equal shares". Z dies before him. At present, Z's share passes into an intestacy unless the court can, in the process of construction, imply a provision for cross-limitations.[71] Under subclause (2) there would be a statutory presumption that Z's share passed to X and Y.

200 The Commission supports the introduction of this provision.

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71 *Re Dawson* [1968] NZLR 115 following *In re Hudson*, *Hudson v Hudson* (1882) 20 ChD 406.

Dispositions to unincorporated associations of persons

Clause 34 of the Victorian Draft Wills Act 1994 provides:

Dispositions to unincorporated associations of persons

(1) A disposition -

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

(b) to or upon trust for the aims, objects or purposes to an unincorporated association of persons, which is not a charity; or

(c) to or upon trust for the present and future members of an unincorporated association of persons, which is not a charity -

has effect as a legacy or devise in augmentation of the general funds of the association.

(2) Property which is or which is to be taken to be a disposition in augmentation of the general funds of an unincorporated association must be -

(a) paid into the general fund of the association; or

(b) transferred to the association; or

(c) sold or otherwise disposed of on behalf of the association and the proceeds paid into the general fund of the association.

(3) If -

(a) the personal representative pays money to an association under a disposition, the receipt of the Treasurer or a like officer, if the officer is not so named, of the association is an absolute discharge for that payment; or

(b) the personal representative transfers property to an association under a disposition, the transfer of that property to a person or persons designated in writing by any two persons holding the offices of President, Chairman, Treasurer or Secretary or like officers, if those officers are not so named, is an absolute discharge to the personal representative for the transfer of that property.

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

… cont'd

(5) It is not an objection to the validity of a disposition to an unincorporated association of persons that a list of persons who were members of the association at the time the testator died cannot be compiled, or that the members of the association have no power to divide assets of the association beneficially amongst themselves.

New Zealand law

201 Under the present law gifts to unincorporated associations could be construed to mean one of three different things. Each of these constructions will have a different legal effect: [72]

- It may be construed as a gift to members of an existing association as joint tenants so that any member can sever his or her share and claim it whether or not that person continues to be a member of the association. In this case the gift is to a class of persons with the reference to the association serving only to designate the class, with the following effects:

  - if the will refers to members of the association as at the date of the testator's death where the association has ceased to exist before that date it would seem that in that case the gift would lapse because the class can not be ascertained;

  - if the gift is to the association as at some earlier date when the association existed, the gift will be effective in favour of those persons who were members at the relevant date and who survive the testator.

- It may be construed as a gift to an unincorporated association by way of a gift to the members at the testator's death, not as joint tenants, but subject to their respective contractual rights and liabilities to each other as members. Such a gift will accrue to other members on the death of any one member and thus be available to the corporate.

- It may be construed as a gift intended not to be at the disposal of the members for the time-being, but rather to be held in trust for and applied to the purposes of the association as a quasi-corporate entity. Such a gift will fail as an attempted non-charitable purpose trust whether or not the association exists at the testator's death.

Proposed provision

202 The proposed Victorian Draft Wills Act 1994 cl 34 appears to provide that gifts to unincorporated associations where their purpose is not charitable will have effect as "a disposition in augmentation of the general funds of the association".

203 Gifts to unincorporated associations whose purpose is wholly charitable are valid under the general law as charitable trusts. What is the position if the disposition is to an association whose objectives are partially charitable and partially non-charitable? It would appear from the Charitable Trusts Act 1957 s 61B that the disposition would have to be applied to charitable purposes only, if the gift would otherwise be invalid as a non-charitable purpose trust.

72 Hardingham, Neave and Ford, supra n36, 221-223.

However, in most instances, the above provision would make the gift into a valid one to the association as a whole and therefore s 61B would not be needed. But the drafting is not clear, and a specific reference to s 61B may be required in a New Zealand provision.

204 The Commission supports the provisions of cl 34 bearing in mind that the issue raised in para 203 may need further consideration.

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

> Clause 35 of the Victorian Draft Wills Act 1994 provides:
>
> Can a person, by will, delegate the power to dispose of property?
>
> A power or a trust to dispose of property, created by will, is not void on the ground that it is a delegation of the testator's power to make a will, if the same power or trust would be valid if made by the testator, by instrument during his or her lifetime.

New Zealand law

205 In general it has been the rule that a testator cannot delegate his or her will-making powers. This rule stems from the strict formalities of execution which stipulate that a will is not valid unless made by the testator or by another person at the direction of the testator. [73]

Proposed provision

206 The Commission supports the principle that a person should be able, in their wills, to create the same trust and general powers as they can during their lifetime. It therefore supports cl 35.

73 *Tatham v Huxtable* (1950) 81 CLR 639, 649.

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

> Clause 36 of the Victorian Draft Wills Act 1994 provides:
>
> What if the effect of referring to a valuation in a will?
>
> Except to the extent that a method of valuation is at the relevant time required under law in Victoria or any other jurisdiction, or is provided for in the will, an express or implied requirement in a will that a valuation be made or accepted for any purpose is to be construed as if it were a reference to a valuation of the property as at the date of the testator's death made by a competent valuer.

New Zealand law

207 There is currently no equivalent provision in New Zealand.

Proposed provision

208 This provision is designed to deal with the situation which has arisen now that estate duties have been abolished with the result that valuations of property are not routinely made on death. Will-makers sometimes assume that a valuation will be made, and make no express provision for it. The clause deals with that omission.

209 Note, however, that under the Arbitration Act 1908 s 2 a provision for third-party valuation is deemed to be a submission to arbitration.[74] The Law Commission has reviewed the arbitration provisions and in the proposed definitions section has omitted the term 'submission'.[75] This in effect removes the rule which says that provision for valuation by a third party is an implied submission to arbitration. The Commission's proposals became law on 20 August 1996.[76]

210 The Commission supports the introduction of the proposed cl 36.

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74 Arbitration Act 1908:

> **2. Interpretation** - In this Act, if not inconsistent with the context, -
>
> ...
>
> "Submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not, or under which any question or matter is to be decided by one or more persons to be appointed by the contracting parties or by some person named in the agreement.

75 (1993, NZLC R20), 128.

76 Arbitration Act 1996.

Who may see a will?

> Clause 66A of the Victorian Draft Wills Act 1994 proposes a new section which provides:
>
> Who may see a will?
>
> Any person having the possession or control of a will (including a purported will) of a deceased person must -
>
> (a) produce it in Court if required to do so;
>
> (b) allow the following persons to inspect and, at their own expense, take copies of it, namely -
>
> (i) any person named or referred to in it, whether as beneficiary or not;
>
> (ii) the surviving spouse, any parent or guardian and any issue of the testator;
>
> (iii) any person who would be entitled to a share of the estate of the testator if the testator had died intestate; and
>
> (iv) any creditor or other person having any claim at law or in equity against the estate of the deceased.

New Zealand law

211 There is currently no provision for any person to see the contents of a will even after the death of a testator. There are situations where it may be important for a person to see a will: [77]

- possible beneficiaries and other claimants could be placed in an invidious position because they do not know anything;
- a person with a claim under the family provision legislation may not be able to discover whether the testator has made provision for him or her by will and so will not be able to begin to consider whether to make a claim;
- an intestacy beneficiary may need to know whether the will lacks a valid residuary provision;
- a creditor may need to know whether the testator had assets, information which will be discoverable to a certain extent from the will.

212 There may also be issues arising from the provisions of the Privacy Act 1993 in relation to granting access to a will. Questions of professional privilege may arise where the solicitor who prepared the will now holds that will. It is less clear what the situation may be where a solicitor was not involved in the preparation of the will, but is now holding it on behalf of the

77 Queensland Law Reform Commission, (1996, Working Paper 46); New South Wales Law Reform Commission, (1996, Issues Paper 10) (Joint Publication), 96.

testator.[78]

Other issues

213 It was suggested at the Uniform Succession Laws Project Committee Meeting[79] that the provisions listed below need to be added:

· The following should be able to inspect the will *during the lifetime* of the testator:

  - The holder of any enduring power of attorney if, during the deceased's lifetime, they were managing property included in the estate.

  - A person appointed by Court Order to manage, during the deceased's lifetime, property included in the estate.

· The following additional persons should be able to inspect the will *after the death* of the testator:

  - The parent or guardian.

  - A person who held an interest in a prior will.

Proposed provision

214 The Commission supports the introduction of the Victorian provision in principle and welcomes comment on the proposed additions.

78 The New Zealand Law Society is currently preparing a set of guidelines regarding professional ethics in relation to the Privacy Act 1993. These will be circulated to practitioners when they are finalised.

79 Melbourne, 20 May 1996.

CHAPTER 9

RECTIFICATION

and

ADMISSION OF EXTRINSIC EVIDENCE

Memo 9 - Admission of Extrinsic Evidence in the Construction of Wills

Cl.37	Can a will be rectified?	Some new elements
Cl.23	Admission of extrinsic evidence in the construction of wills	NEW to New Zealand

Can a will be rectified?

> Clause 37 of the Victorian Draft Wills Act 1994 provides:
>
> Can a will be rectified?
>
> (1) The Court may make an order to rectify a will to carry out the intentions of the testator if the Court is satisfied that the will does not carry out the testator's intentions because -
> (a) a clerical error was made; or
> (b) the will does not give effect to the testator's instructions.
>
> (2) A person who wishes to claim the benefit of sub-section (1) must apply to the Court within six months from the date of the grant of probate.
>
> (3) The Court may extend the period of time for making the application if the Court thinks this is necessary, even if the original period of time has expired, but not if the final distribution of the estate has been made.
>
> (4) If a personal representative makes a distribution to a beneficiary, the personal representative is not liable if -
> (a) the distribution has been made under section 99B of the Administration and Probate Act 1958; or
> (b) the distribution has been made -
> (i) at a time when the personal representative has not been aware of any application for rectification or any application under Part IV of the Administration and Probate Act 1958 having been made; and
> (ii) at least six months after the grant of probate.

New Zealand law

215 A probate court has a common law duty to omit from probate material fraudulently, accidentally or inadvertently inserted in a will. And, in some jurisdictions (for example, Queensland) a probate court may insert material which has been "accidentally or inadvertently omitted from the will when it was made". [80]

216 A court of construction has not had a power to rectify by omitting words from, or adding words to, a will in order to give effect to a testator's intention. It may, however, achieve a similar effect by "ignoring words, transposing them, changing them (for example by reading 'and' for 'or'), or reading in words by necessary implication". [81]

217 The 'Golden Rule' bias against intestacy states that where the court has a choice as to the construction of words in a will, it should lean in favour of the construction which avoids an

80 Succession Act 1981 s 31(1) (Queensland): for example, *Re Jensen* [1992] 2 NZLR 506.

81 Hardingham, Neave and Ford, supra n37, 295.

intestacy:

> "Where a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce - that he did not intend to die intestate when he had gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy".[82]

New standards for rectification

218 It has been argued that the power to rectify a will should be modelled on the power to rectify a contract. However, it is also noted that the parties to a contract are usually available to give evidence before the court. Obviously, a testator is unable to do this.

219 To grant a far reaching power of rectification could also be seen as a destabilisation of the rules established by an accumulation of experience of the courts regarding what testators usually mean when they use certain forms of words.

220 Philosophically the concept of rectification is seen as a remedial provision enabling correction to be made to the will in line with the intentions of the testator. To grant a far reaching power may also be seen as going beyond the concept of rectification to become a re-writing of the will from a perspective outside that of the testator. But the power of rectification can be used as a means of:

- making the will-maker's incorrect expressions accord with the known intentions;
- filling gaps in the law of interpretation of wills;
- correcting occasional patent injustices.

Proposed provision

221 The Commission supports this proposal in principle and agrees that consideration be given to the matters raised in para 220. A more extensive provision is considered in the next few pages.

82 *Re Harrison* (1885) 30 ChD 390, 393 (Lord Esher MR).

Power to vary wills for operation in unforeseen circumstances

222 This section is based on the existing Australian Capital Territories legislation and the commentaries by Charles Rowland rather than the Victorian Draft Wills Act 1994:

> Wills Act 1968 (ACT) s 12A as inserted by the Wills Act Amendment Act 1991 (ACT) s8 provides:
>
> 12A Rectification
> (1) If the court is satisfied that the probate copy of the will of a testator is so expressed that it fails to carry out his or her intentions, it may order that the will be rectified so as to carry out the testator's intentions.
>
> (2) If the court is satisfied that circumstances or events existed or occurred before, at or after the execution by a testator of his or her last will, being circumstances or events—
> (a) that were not known to, or anticipated by, the testator;
> (b) the effects of which were not fully appreciated by the testator; or
> (c) that occurred at or after the death of the testator;
> in consequence of which the provisions of the will applied according to their tenor would fail to accord with the probable intention of the testator had he or she known of, anticipated or fully appreciated the effects of those circumstances or events, the court may, if it is satisfied that it is desirable in all the circumstances to do so, order that the probate copy of the will be rectified so as to give effect to that probable intention.
>
> NB: A further five subsections provide for time limits within which applications must be made, notification requirements and other procedural matters. This section also has to be read with s 12B, which permits the court to consider extrinsic evidence of the testator's intentions in interpreting the will.

What is the intended purpose of the provision?

223 Rowland states that the purpose of the provision is: [83]

> " ... to give the court power to save the intentions of the testator from 'shipwreck' where the circumstances at the time of the hearing are so different from those the testator contemplated at the time of making the will that the overall, underlying intentions of the testator — including the intentions which the testator would have had if he or she had contemplated the situation which has arisen — are likely to be frustrated if the words of the will are carried out in accordance with the ordinary rules of construction."

224 Underlying this therefore, there are two basic premises:

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83 Rowland, "The Construction or Rectification of Wills to Take Account of Unforeseen Circumstances Affecting their Operation - Part II", [1993] 1 APLJ 193, 206.

- that the application of a will in its literal meaning may lead to an intestacy;

- that the application of a will in its literal meaning may not reflect the testator's plans.

225 Rectification currently deals with the situation where the court is empowered to modify the text of a will document so far as is necessary to ensure that the will gives effect to the intentions of the testator. This is sufficient where the purpose of the provision is to deal with, for example, drafting errors.[84] There is no ability for the court to deal appropriately with unforeseen circumstances. This can lead to harsh situations.

Intention of the testator

226 Rowland distinguishes four different 'levels' of testator intention:

- *the intentions of the testator* - These intentions are those of the will-maker usually evidenced by a formally valid will. Testators may expressly or impliedly limit the operation of their particular intentions to certain events or circumstances. If those circumstances do not hold when the testator dies, the usual result is a partial or complete intestacy. Alternatively testators may state their particular intentions so that the intentions operate in any circumstances at his or her death, provided that if the testator's intentions are too uncertain or vague to be implemented then the estate is distributed on intestacy.

- *the overall, underlying intentions of the testator* - These intentions are more general and need to be ascertained by the court having regard to the structure of the will as a whole and the general trend of dispositions. Where permissible the court might also have regard to extrinsic evidence of the testator's intentions (see s 12B). This arises where a particular will disposition, in view of ignored, mistaken, unanticipated or misunderstood circumstances or events, is inconsistent with the structure of the will as a whole and with the testator's intentions as shown by extrinsic evidence. The admission of extrinsic evidence in these circumstances may affect the formal requirements and rules of construction of wills significantly.

- *intentions which the testator would have had (hypothetically) if he or she had contemplated particular circumstances* - Unlike the first two types of intentions, these intentions are hypothetical, not actual, though they may be based, to a degree, on consistency with the testator's intentions as evidenced by the will and extrinsic evidence. The provision confers a discretion on the Court as to the nature and degree of the inconsistency between a testator's stated will intention and "probable intention" which will permit variation. These features taken together suggest that the provision may invite courts to apply considerations like those in the testamentary claims area. In these cases there is potential for courts to vary wills to achieve not what testators actually wanted (which is unknown and perhaps unknowable), but what courts consider testators should have done.
  intentions which the testator may have had (hypothetically) in relation to unforeseen circumstances - This is similar to the third type of intention discussed above, but operates in relation to circumstances which the testator could not reasonably have been expected to contemplate, or to have seen the need to make provision for in the will.

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84 As would be covered by the Wills Act 1968 (ACT) s 12A(2)(b), or as dealt with in: *Re Walker* [1973] 1 NZLR 449, 451; *Re Lourie* [1968] 541, 543.

What constitutes an unforeseen circumstance

227 An example of what constitutes unforeseen circumstances in relation to this provision is that of murdering beneficiaries (that is, a beneficiary who has murdered the testator) and the effect of this on the construction of a will.

228 There is currently no legislation in New Zealand addressing this issue, although it is well-established through case-law. The general principle is in the rule of public policy that no criminal shall benefit from his or her crime. Therefore, no-one who has killed a testator and subsequently has been convicted of murder or manslaughter, nor any person claiming through them, can take under the deceased's will. [85]

229 There are some qualifications to this:

- Where the will is written between the wounding of and the death of the testator, the killer may be able to take. [86]

- Where property is jointly owned by the testator and the benficiary, the court has held that although the legal title passed to the beneficiary by survivorship, the beneficiary had to hold one half of the property as a constructive trust for the estate of the deceased. [87]

- Where the killer is held to have been insane at the time of the killing he or she will be able to take under the will as no crime has, in fact, been committed. [88]

230 The Property and Equity Law Reform Committee reported on this issue in substantial detail in 1976,[89] but to date none of the recommendations made by them have been acted upon. The Committee recommended that legislation be enacted because:

- it could foresee an increase in the number of manslaughter charges resulting from motor vehicle accidents; and

- it is "unsatisfactory for the Courts, in the guise of interpretation and by invoking a principle of public policy, to be left to do justice by overriding plain words in statutes and wills". [90]

Courts' power

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85 *In the Estate of Crippen* [1911] P 108.

86 *Lundy v Lundy* (1935) SCR 650.

87 *Re Pechar* [1969] NZLR 574.

88 *Re Houghton* [1915] 2 Ch 173;
This principle would also have applied in *Re Pechar* [1969] NZLR 574 except that the presumption of sanity was not rebutted.

89 Property Law and Equity Reform Committee, *The Effect of Culpable Homicide on Rights of Succession*, (1976).

90 Property Law and Equity Reform Committee, supra n78, 7.

231 The suggested power to the court to vary a will for operation in unforeseen circumstances operates in several stages: [91]

- the court must be able to determine the trend of the testator's intention;
- the court must be able to supplement that trend by reading the will and taking its terms and its scheme as far as they will go without frustrating the testator's underlying or basic intentions;
- the court must discover the hypothetical (putative) intention of the testator by utilising its own criteria of reasonableness and justice (the criteria of reasonableness and justice means that the court would be able to diverge from the trend of the testator's intention where the trend is capricious, cruel or unfair);
- the court must construe and apply the will in a sense which will carry out that hypothetical (putative) intention.

A provision for unforeseen circumstances

232 The Commission supports in principle the extension of the pwoers of rectification and welcomes comments on this point.

91 Rowland, "The Construction or Rectification of Wills to Take Account of Unforeseen Circumstances Affecting their Operation - Part I", [1993] 1 APLJ 87, 95.

Admission of extrinsic evidence in the construction of wills

> Clause 23 of the Victorian Draft Wills Act 1994 provides:
>
> Is extrinsic evidence admissible to clarify a will?
>
> (1) If -
> (a) any part of the will is meaningless; or
> (b) any part of the language used in a will is ambiguous on the face of it; or
> (c) evidence, which is not, or to the extent that it is not, evidence of the testator's intention, shows that any of the language used in a will is ambiguous in the light of the surrounding circumstances -
> extrinsic evidence may be admitted to assist in the interpretation of that part of the will or that language in the will, as the case may be.
>
> (2) Extrinsic evidence which may be admitted under sub-section (1)(b) includes evidence of the testator's intention.

New Zealand law

233 Historically, the grant of probate to a will has been "conclusive as to the words of the will".[92] This is a rule philosophically akin to the 'four corners' rule of contracts. This means that evidence of the intention of the testator apart from the contents of the will itself is inadmissible. The rationale for this rule is that to vary the terms of the will by the introduction of any evidence from outside the will would contradict the formal requirements for a valid will. There have been three accepted exceptions to this rule.

234 The fundamental rule is that where possible the words of a will must be construed according to their strict and primary meaning. However, if from the will it appears that the words may have been used in a different sense from the strict and primary meaning, they must be construed in that different sense [93] according to the following rules of exception.

235 The first exception[94] allows for the Court to ascertain the facts known to the testator at the time the will was made. It is an attempt to permit the Court to examine the will from the testator's perspective. The effect is that circumstantial evidence of the testator's intended construction of the provisions is available to the Court.

236 The second exception arises where an ambiguity is evident in the executed will. Maxton outlines this exception as follows: [95]

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92 Maxton, supra n10, 340.

93 The so-called "dictionary principle".

94 The so-called "armchair principle".

95 Maxton, supra n10, 342.

> "Where a will refers to a person or thing, and, prima facie that description seems clear but, when applied to the relevant surrounding circumstances it appears that the description fits two (or more) people (or things) with equal accuracy, then evidence of what the testator said he intended is admissible to determine which of the persons (or things) he had in mind."

237 The third exception is the admission of extrinsic evidence of intention in order to rebut certain equitable presumptions. If evidence is admitted with the intention of rebutting an equitable presumption, then permission must also be given for the admission of evidence to support the presumption. If there is no applicable presumption, the rule of inadmissibility applies.

238 The end result is that:

- if the Court is not permitted, under these rules, to consider extrinsic evidence, the will provisions need to be considered according to their face value; or

- if the Court is unable to give any meaning to a will provision with the aid of these rules, then the will must be held void for uncertainty.

Policy for change

239 It is proposed that the rules for the admissibility of extrinsic evidence be extended. The main purpose for this is to extend the amount of evidence available to ascertain the intentions of the testator. This is particularly important when we consider the implications of matters discussed in other Memoranda of the Uniform Wills Project:

- the granting to the Courts of a dispensing power (see Chapter 2);

- in relation to revocation generally (see Chapter 3);

- in relation to revocation on marriage and divorce (particularly in consideration of the words 'in contemplation of') (see Chapter 5);

- in relation to revival (see Chapter 3);

- in relation to alteration (see Chapter 3).

240 However, what must be considered is that a balance needs to be established between the fundamental principle that a will must be in writing, and the extent to which it is appropriate to compromise that principle where there is extrinsic evidence that the writing does not embody the testator's intention.

Australian Capital Territories

241 It has been suggested by the New South Wales Law Reform Commission and the Queensland Law Reform Commission,[96] that the version of this provision contained in the 1991 amendment to the Wills Act 1968 of the Australian Capital Territories is a preferred version. This provision, which is said to represent "a compromise between conservative and progressive

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96 Queensland Law Reform Commission, (1996, Working Paper 46); New South Wales Law Reform Commission, (1996, Issues Paper 10) (Joint Publication), 93.

voices",[97] is as follows:

> In the proceedings to construe a will, evidence, including evidence of the testator's dispositive intention, is admissible to the extent that the language used in the will renders the will, or any part of the will -
> (a) meaningless;
> (b) ambiguous or uncertain; or
> (c) ambiguous or uncertain in the light of the surrounding circumstances;
> but evidence of a testator's dispositive intention is not admissible to establish any of the circumstances referred to in paragraph (c).[98]

242 The Uniform Succession Laws Project Committee, at its May 1996 meeting, saw some merit in the Australian Capital Territories provision, but considered it to be somewhat weaker than the proposed Victorian Draft provision.

Proposed provision

243 The Commission supports, in principle, the introduction of the Victorian Draft proposal, but will welcome comment on whether the provision in para 241 is preferable.

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97 Queensland Law Reform Commission, (1996, Working Paper 46); New South Wales Law Reform Commission, (1996, Issues Paper 10) (Joint Publication), 93.

98 In relation to paragraphs (a) and (b): cf. *Re Lourie* [1968] NZLR 541, 542; cf. also *Re Jones* [1971] NZLR 796, 799-800.

APPENDIX

THE WILLS ACT 1837 (U. K.)
7 Will. IV and I Vict., ch. 26

Title

An Act for the amendment of the laws with respect to wills

1. Interpretation -- The words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; (that is to say),

The word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of [the Tenures Abolition Act 1660], or by virtue of an Act passed in the Parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and tenures in capite and by knight's service", and to any other testamentary disposition; and

The words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; and

The words "personal estate" shall extend to leasehold estates and other chattels real, and also to monies, shares of government and other funds, securities for money (not being real estates), debts choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein; and

Every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and

Every word importing the masculine gender only shall extend and be applied to a female as well as a male.

2. *Repealed as part of the law of New Zealand by s.15 of the Wills Amendment Act 1955.*

3. All property may be disposed of by will -- It shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon the heir at law or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this Act, if this Act had not been made; and also to estates pur autre vie, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

4, 5. *Repealed as part of the law of New Zealand by s.15 of the Wills Amendment Act 1955.*

6. Devolution of estates pur autre vie not disposed of by will -- If no disposition by will shall be made of any estate pur autre vie of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate pur autre vie, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

7. *Declared not to be in force in New Zealand as from 1 January 1970 by s.4 of the Wills Amendment Act 1969.*

8. *Repealed as part of the law of New Zealand by s.15 of the Wills Amendment Act 1955.*

9. Formal requirements of will -- No will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of 2 or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

10. Execution and validity of appointments by will -- No appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of

such power should be executed with some additional or other form of execution or solemnity.

11. - *Repealed as part of the law of New Zealand by s.11 (1) of the Wills Amendment Act 1955.*

12. *Declared not to be in force in New Zealand by s.11 (2) of the Wills Amendment Act 1955.*

13. Publication of will not requisite -- Every will executed in manner hereinbefore required shall be valid without any other publication thereof.

14. Will not to be void on account of incompetency of attesting witnesses -- If any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

15. Gifts to an attesting witness, or his or her wife or husband, to be void -- If any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.

16. Creditor attesting a will charging estate with debts to be admitted a witness -- In case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

17. Executor to be admitted a witness -- No person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

18. Revocation of wills by marriage -- 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 of 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 Distributions).

19. No will to be revoked by presumption from altered circumstances -- No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

20. Manner of revocation of will -- No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

21. Alteration in a will after execution, except in certain cases, to have no effect unless executed as a will -- No obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

22. Revoked will not to be revived otherwise than by re-execution or a codicil -- No will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof or by a codicil executed in manner hereinbefore required and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

23. Subsequent conveyance or other act not to prevent operation of will -- No conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect of such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

24. Wills to be construed to speak from death of testator -- Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

25. residuary devises to include estates comprised in lapsed and void devises -- Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

26. General devise of land to include copyhold and leasehold as well as freehold land -- A devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

27. General gift of realty or personalty to include property over which testator has a general power of appointment -- A general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

28. Devise of real estate without any words of limitation to pass the fee -- Where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.

29. Construction of words "die without issue" or "die without leaving issue", etc. -- In any devise or bequest of real or personal estate the words "die without issue", or "die without leaving issue", or "have no issue", or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise:
Provided that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live

to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

30. Devise of realty to trustees or executors to pass the fee, etc. -- Where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.

31. Trustees under an unlimited devise to take the fee in certain cases -- Where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

32. *Repealed as part of the law of New Zealand by s.15 of the Wills Amendment Act 1955.*

33. Gifts to children or other issue who leave issue living at the testator's death not to lapse -- Where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

34. Spent.

35. Act not to extend to Scotland -- This Act shall not extend to Scotland.

36. *Repealed as part of the law of New Zealand by s.15 of the Wills Amendment Act 1955.*

WILLS ACT AMENDMENT ACT 1852 (U.K.)
15 and 16 Vict., ch. 24

Title

An Act for the amendment of the Wills Act 1837

1. Position of testator's signature -- Where by [the Wills Act 1837] it is enacted, that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction: 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 said enactment, as explained by this Act, 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 circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to

contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said Act or this Act 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.

2. *Spent*

3. Interpretation of word "will" -- The word "will" shall in the construction of this Act be interpreted in like manner as the same is directed to be interpreted under the provisions in this behalf contained in [the Wills Act 1837].

4. Short Title -- This Act may be cited as the Wills Act Amendment Act 1852.

WILLS AMENDMENT ACT 1955
1955, No. 94

An Act to amend the law relating to wills

PART I
WILLS OF SERVICEMEN AND SAILORS

3. Interpretation -- In this Part of this Act, unless the context otherwise requires,--

"Allied armed force" includes any armed force which is co-operating with any part of the New Zealand armed forces, and any armed force for which the Government of New Zealand has agreed to raise or supply members:

"Commonwealth" means the British Commonwealth of Nations; and includes every territory for whose international relations any country of the Commonwealth is responsible:

"Emergency force" means any part of the New Zealand armed forces which is for the time being an emergency force in accordance with section 8 of this Act:

"Enemy" means an enemy within the meaning of [the Defence Act 1971]:

"Formal revocation", in relation to any will, means a revocation thereof made by a formal will or by some writing declaring an intention to revoke the same and executed in accordance with section 9 of the principal Act:

"Formal will" means a will made in accordance with section 9 of the principal Act:

"Informal will" means a will which is expressed in any form of words whether written or spoken and which is not made in accordance with section 9 of the principal Act:

["New Zealand armed forces" means the New Zealand Navy, the New Zealand Army, and the Royal New Zealand Air Force; and includes all persons for the time being subject to the law established by the Armed Forces Discipline Act 1971:]

"Prisoner of war" means a person belonging to the armed forces of a belligerent, or a mariner or seaman of a ship of a belligerent, who has been captured by the enemy of that belligerent in the course of operations of war on land or sea or in the air and is in consequence for the time being held captive by that enemy; and includes a person belonging to the armed forces of a belligerent who is for the time being interned in another country because he belongs to those forces:

"Privileged person" means a person who is declared by section 4 of this Act to be a privileged person.

4. Persons who are privileged under this part of this act in respect of making wills -- Without restricting the powers conferred by the principal Act or any other enactment, it is hereby declared that every person, whether male or female, shall be a privileged person for the purposes of this Part of this Act at any material date, if at that date,--

(a) New Zealand is engaged in any war and the person is outside New Zealand as a member of the New Zealand armed forces or of any Commonwealth or Allied armed forces which was raised or partly raised in New Zealand; or

(b) The person is--

(i) A member of any emergency force; or

(ii) A member of any part of the New Zealand armed forces, or of any Commonwealth or Allied armed force, who is serving in operations against an enemy; or

(iii) A member of any armed force who is in actual military service or who is so circumstanced that if he were a soldier he would be in actual military service; or

(iv) A mariner or seaman who is at sea; or

(v) A prisoner of war who was a privileged person immediately before his capture or internment.

Cf. Wills Act 1837, s.11 (U.K.); 1916, No. 13, s.34; S.R. 1939/276, reg. 6, S.R. 1952/184, reg. 4

5. Privileged persons may make informal wills -- (1) Subject to the provisions of this Part of this Act, any privileged person may make an informal will.

(2) Without limiting the general power conferred by subsection (1) of this section, it is hereby declared that, subject to the provisions of this Part of this Act, any privileged person may, by an informal will,--

(a) Dispose of the whole or any part of his real and personal estate which devolves in accordance with the law of New Zealand:

(b) Exercise any power of appointment that may in accordance with the law of New Zealand be lawfully exercised by a formal will:

(c) Revoke wholly or in part any previous formal or informal will:

(d) Appoint any person as guardian of his infant children:

(e) Make any other provision whatsoever which may lawfully be made by a formal will.

(3) It is hereby declared that any privileged person may revoke any previous formal or informal will by any words whether written or spoken declaring an intention to revoke the same.

(4) Subject to the provisions of this Part of this Act, all the provisions of the principal Act which have effect as part of the law of New Zealand (except section 9), and all the provisions of any other enactment relating to wills which has effect as part of the

law of New Zealand, shall apply to informal wills.

(5) Section 111 of the Maori Affairs Act 1953 shall not apply to any formal or informal will made under this Part of this Act by a privileged person who is a Maori, but nothing in this Part of this Act shall restrict the operation of section 114 of that Act.

(6) Notwithstanding anything to the contrary in any other enactment, an informal will may be proved upon such evidence as the Court may consider sufficient.

Cf. 1916, No. 13, s.34 (1); S.R. 1939/276, regs. 8, 9

6. Wills of minors who are or are about to become privileged persons and revocations thereof -- Notwithstanding anything to the contrary in section [2 of the Wills Amendment Act 1969],--

(a) An informal will made by a privileged person who is under the age of [18 years] shall be as valid as it would have been if the testator had been over that age:

(b) A formal will made by a testator who is under the age of [18 years] shall be as valid as it would have been if the testator had been over that age, if at the date of the making of the will the testator--

(i) Is a privileged person; or

(ii) Has received orders to train for or join any emergency force; or

(iii) Has received orders to train for or join any part of the New Zealand armed forces, or of any Commonwealth or Allied armed force which was raised or partly raised in New Zealand, for service outside New Zealand in connection with any war in which New Zealand is engaged; or

(iv) Has received orders to train for or join any part of the New Zealand armed forces, or of any Commonwealth or Allied armed force, for service in operations against an enemy; or

(v) Has received orders to join any ship as a mariner or seaman; [or]

[(vi) Is a member of the New Zealand Army or the Royal New Zealand Air Force and is deemed, under [[the Defence Act 1971]] to be on active service; or

(vii) Is a member of the Regular Field Force of the New Zealand Army:]

(c) A formal revocation of a will which depends for its validity on this Part of this Act, or a burning, tearing, or other destruction of any such will by or by direction and in the presence of the testator with the intention of revoking the same, shall, notwithstanding that the formal revocation, burning, tearing, or other destruction is made or occurs, or the direction is given, while the testator is under the age of [18 years], be as effective as a revocation of the will as it would have been if the testator had been over that age.

Cf. 1918, No 10, s.23; S.R. 1939/276, reg. 3; S.R. 1952/184, reg. 3

[6A. Evidence of privilege, etc.--

(1) A certificate in connection with any fact which has to be proved to establish that at any material date any person was a privileged person, or was entitled under paragraph (b) of section 6 of this Act to make a formal will while under the age of **[[**18 years**]]** shall, in the absence of proof to the contrary, be sufficient evidence of the matters stated in the certificate regarding that fact, if the certificate is given,--

(a) In the case of any person who at the material date was a member of the **[[**New Zealand Naval Forces**]]**, by an officer of **[[**those forces**]]**:

(b) In the case of any person who at the material date was a member of the New Zealand Army, by an officer of that Army:

(c) In the case of any person who at the material date was a member of the Royal New Zealand Air Force, by an officer of that Air Force:

(d) In the case of any person who at the material date was a mariner or seaman on any ship or had received orders to join any ship as a mariner or seaman, by an officer on that ship.

(2) Notice shall be taken judicially without further proof of the appointment and signature of any such officer.**]**

7. Modifications of principal act in relation to wills of privileged persons -- (1) Nothing in section 15 of the principal Act shall cause to be null and void any devise, legacy, estate, interest, gift, or appointment to any person who attests the execution of any will or to the wife or husband of any such person, if at the date of the execution of the will the testator was a privileged person.

(2) Notwithstanding anything to the contrary in section 20 of the principal Act, where any testator who is a privileged person, whether or not he has attained the age of [18 years], directs or authorises (either in writing or orally) any other person to burn or tear or otherwise destroy any will of the testator with the intention of revoking the same, any burning, tearing, or other destruction effected pursuant to the direction or authority shall (notwithstanding that it does not take place in the testator's

presence) be as effective to revoke the will as it would have been if it had taken place in his presence.

(3) Nothing in section 21 of the principal Act shall require any obliteration, interlineation, or alteration made in any formal or informal will to be executed in accordance with section 9 of the principal Act if the obliteration, interlineation, or alteration was made--

(a) By the testator or by some person in his presence and by his direction; and

(b) While the testator was a privileged person, whether or not he had attained the age of [18 years].

8. Declaration of emergency force -- The Minister of Defence may, by notice in the Gazette, declare that, from any date specified in the notice (whether the date is before or after the date of the commencement of this Act or before or after the date of the notice) any part of the New Zealand armed forces shall be, or shall cease to be, an emergency force for the purposes of this Part of this Act.

Cf. S.R. 1952/184, reg. 2

9. Will by oral declaration to become void unless testator dies within 12 months -- (1) Where any testator who dies after the commencement of this Act has (whether before or after the commencement of this Act) made a valid informal will which has not been validly revoked and which was not either expressed in writing and signed by the testator, or wholly written by the testator, at a time when he could make a valid informal will, the will shall not have any force or effect unless,--

(a) In a case where the testator was a prisoner of war when he made the will or became a prisoner of war within 12 months after he had made the will, the testator dies while he is a prisoner of war or within 12 months after he ceased to be a prisoner of war:

(b) In any other case, the testator dies within 12 months after he made the will.

(2) In this section the term "will" includes any words declaring an intention to revoke a will.

Cf. 1916, No. 13, s.34 (2)

10. Special provisions in respect of wills of seamen and naval ratings -- (1) Nothing in this Part of this Act shall affect the provisions of section 110 of the Shipping and Seamen Act 1952.

(2) The Minister of Defence, after considering a report from the [Secretary of Defence], may issue a certificate in respect of any informal will made either before or after the commencement of this Act by any rating of the New Zealand Naval Forces (whether for the time being employed therein or transferred for employment with any Commonwealth or Allied armed force) declaring that, unless the [High Court] (on application in solemn form made within 3 months after the date of the issue of the certificate) grants probate of the will, the will shall be invalid in respect of all money and effects of the rating on board his ship or in his personal custody, and of all wages, allowances, and other money due to him from [the Crown in respect of his service in the Naval Forces]; and where the Minister of Defence issues such a certificate in respect of any will and probate of the will is not thereafter granted on an application in solemn form made within 3 months after the date of the issue of the certificate, the will shall not have any force or effect to pass any such money, effects, wages, or allowances:

Provided that no such certificate shall be issued in respect of any will unless the Minister of Defence is satisfied that the validity of the will in respect of the said assets is to be determined according to the law of New Zealand.

Cf. Navy and Marines (Wills) Act 1865, Ss.5, 6 (U.K.); Navy and Marines (Wills) Act 1939, s.1 (U.K.)

11. Repeals, revocations, and savings -- (1) Section 11 of the principal Act and section 22 of the Statute of Frauds 1677 of the Parliament of England shall cease to have effect as part of the law of New Zealand.

(2) For the avoidance of doubt it is hereby declared that the following enactments of the United Kingdom Parliament shall not have effect as part of the law of New Zealand:

(a) The Navy and Marines (Wills) Acts 1865 to 1939:

(b) Section 12 of the principal Act and the enactments therein mentioned.

(3) The War Legislation Amendment Act 1916 and section 23 of the War Legislation and Statute Law Amendment Act 1918 are hereby repealed.

(4) The Soldiers' Wills Emergency Regulations 1939 and the Soldiers' Wills Emergency Regulations 1939, Amendment No. 2, are hereby revoked.

(5) Except as provided in section 9 of this Act, all wills which were made before the commencement of this Act shall, so far as they are subsisting or in force

immediately before the commencement of this Act, enure thereafter as fully and effectually as they would if this Part of this Act had not been passed:

Provided that this Part of this Act shall apply, and the enactments mentioned in subsections (1) to (4) of this section shall not apply, to any amendment or revocation of any such will if the amendment or revocation is made after the commencement of this Act.

(6) The Kayforce Wills Notice 1953 shall continue and have effect as if it had been given under section 8 of this Act.

PART II
MISCELLANEOUS

12. *Repealed by s.3 (1) (c) of the Wills Amendment Act 1969. See s.5 of that Act.*

13. Wills in contemplation of marriage -- (1) Notwithstanding anything in section 18 of the principal Act or 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.

(2) This section applies only to wills made on or after the 5th day of December 1944 (being the date of the passing of the Law Reform Act 1944).

(3) Section 39 of the Property Law Act 1952 is hereby consequentially repealed.

Cf. 1952, No. 51, s.39

14. Law which determines validity of will of movable property -- (1) Every will and other testamentary instrument made out of New Zealand by any person (whatever may be his domicile at the time of making the same or at the time of his death) shall, as regards movable property, be held to be well executed for the purpose of being admitted in New Zealand to probate if made as required by--

(a) The law of the place where the person was domiciled at the time of his death; or

(b) The law of the place where the same was made; or

(c) The law of the place where the person was domiciled when the same was made; or

(d) The law in force when the same was made in the place where the person had his domicile of origin.

(2) Every will and other testamentary instrument made within New Zealand by any person (whatever may be his domicile at the time of making the same or at the time of his death) shall, as regards movable property, be held to be well executed for the purpose of being admitted in New Zealand to probate if made as required by--

(a) The law of the place where the person was domiciled at the time of his death; or

(b) The law of New Zealand; or

(c) The law of the place where the person was domiciled when the same was made.

(3) No will or other testamentary instrument of any person shall, so far as it relates to movable property in New Zealand, be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason only of any subsequent change of domicile of the person making the same.

(4) In this section--

"Land" means land in New Zealand; and includes any estate or interest in land in New Zealand:

"Movable property" includes a mortgage of land, a rentcharge or annuity or legacy charged on land, and any interest in the proceeds of sale of land contracted to be sold or held upon trust for sale; but does not include a leasehold estate or interest in land.

(5) This section shall apply to all wills made on or after the date of the commencement of this Act. The validity of all other wills shall be determined as if this section had not been passed.

(6) Section 40 of the Administration Act 1952 is hereby consequentially repealed.

Cf. 1952, No. 56, s.40

15. Declaration that certain spent provisions of principal Act shall cease to have effect as part of law of New Zealand -- It is hereby declared that sections 2, 4, 5, 8, **[**32, and 36**]** of the principal Act shall cease to have effect as part of the law of New Zealand.

[16. Statutory substitutional gift --

(1) Unless a contrary intention appears by the will, where any person is a child or other issue of the testator to whom (whether as a named or designated person or as a member of a class) any property is devised or bequeathed or appointed in terms that would enable that person to take the property for any estate or interest not

determinable at or before the death of that person if that person survived the testator, and that person dies in the lifetime of the testator (whether before or after the testator makes the will) leaving any child or children living at the time of the death of the testator, the devise or bequest or appointment shall take effect as if the will had contained a substitutional gift devising or bequeathing or appointing the property to such of the children of that person as are living at the time of the testator's death and if more than one in equal shares.

(2) Without restricting the manner in which a testator may show an intention to negative the operation of subsection (1) of this section, it is hereby declared that that subsection shall not apply--

(a) To a devise or bequest or appointment to any person which is in any way expressed to be conditional on the person being alive at or after the time of the death of the testator or any time or event which in the events that happen is subsequent to the time of the death of the testator; or

(b) Where any devise or bequest or appointment is in any way expressed to be conditional on the fulfilment of any other contingency and that contingency has not been fulfilled before the time of the testator's death.

(3) **[[**Subsection (1) of**]]** this section shall not apply to--

(a) Any specific bequest or specific appointment of any personal chattels:

(b) Any devise or bequest or appointment to any person as one of 2 or more joint tenants.

(4) In this section--

"Appointment" means an appointment made by will in exercise of a general power of appointment; and also means an appointment made by will in exercise of a special power of appointment if every child in whose favour this section would operate is an object of the power; and the terms "appointed" and "appointing" have corresponding meanings:

[["Child",--

(a) In relation to a testator, means any child of the testator:

(b) In relation to any person to whom any property is devised or bequeathed or appointed as aforesaid, means a child of that person**]]**:

"Issue", in relation to a testator, means any issue. . . of the testator:

"Personal chattels" means personal chattels within the meaning of **[[**the Administration Act 1969**]]**:

"Property" includes any real and personal property, and any estate or interest in any property, and any debt, and any thing in action, and any other right or interest.

(5) *Repealed by s.12 (2) of the Status of Children Act 1969.*

(6) This section shall not apply to any will made before the 1st day of January 1959.

(7) For the purposes of the law of New Zealand, section 33 of the principal Act shall not apply to any will made on or after the 1st day of January 1959.

(8) For the purposes of this section every will which is re-executed or confirmed or revived by any codicil shall be deemed to have been made at the time when it was first made, and not at the time when it was re-executed or confirmed or revived.**]**

WILLS AMENDMENT ACT 1958
1958, No. 18

An Act to amend the law relating to wills

1. Short Title -- This Act may be cited as the Wills Amendment Act 1958, and shall, for the purposes of the law of New Zealand, be read together with and deemed part of the Wills Act 1837 of the United Kingdom Parliament.

2. *This section amended s.15 of the Wills Amendment Act 1955.*

3. *This section added s.16 to the Wills Amendment Act 1955.*

WILLS AMENDMENT ACT 1960
1960, No. 94

An Act to amend the Wills Act 1837

1. Short Title -- This Act may be cited as the Wills Amendment Act 1960, and shall, for the purposes of the law of New Zealand, be read together with and deemed part of the Wills Act 1837 of the United Kingdom Parliament.

2. This section amended s.16 (3) of the Wills Amendment Act 1955.

WILLS AMENDMENT ACT 1962
1962, No. 17

An Act to amend the law relating to wills

1. Short Title -- This Act may be cited as the Wills Amendment Act 1962, and shall, for the purposes of the law of New Zealand, be read together with and deemed part of the Wills Act 1837 of the United Kingdom Parliament.

2. This section amended s.6 (b) of the Wills Amendment Act 1955.

3. This section inserted s.6A in the Wills Amendment Act 1955.

WILLS AMENDMENT ACT 1969
1969, No. 40

Title
1. Short Title and commencement
2. Wills of minors
3. Consequential amendments

An Act to amend the law relating to wills

1. Short Title and commencement -- (1) This Act may be cited as the Wills Amendment Act 1969, and shall, for the purposes of the law of New Zealand, be read together with and deemed part of the Wills Act 1837 of the United Kingdom Parliament (hereinafter referred to as the principal Act).
(2) This Act shall come into force on the 1st day of January 1970.

2. Wills of minors -- (1) Every minor after his or her marriage or on or after attaining the age of 18 years shall be competent to make a valid will or revoke a will in all respects as if he or she were of full age.
(2) Every minor who is of or over the age of 16 years, but has never been married and has not attained the age of 18 years, may, with the approval of the Public Trustee or of a [District Court], make a will or revoke a will, and every will so made and every revocation so effected shall be valid and effective as if he or she were of full age.
(3) The approval required by subsection (2) of this section shall be given if the Public Trustee or the Court is satisfied that the minor understands the effect of the will or the revocation, as the case may be.
(4) Except as provided in section 6 of the Wills Amendment Act 1955 or in subsection (1) or subsection (2) of this section, no will made, and no revocation of a will elected, by a person under the age of 18 years shall be valid or effective.

3. Consequential amendments –
(1) (a) *This paragraph amended s.6 of the Wills Amendment Act 1955.*
(b) *This paragraph amended Ss.6 and 6A of the Wills Amendment Act 1955.*
(c) *This paragraph repealed s.12 of the Wills Amendment Act 1955.*
(2) *Repealed.*
(3) *Repealed by s.53 (1) of the Trustee Banks Act 1983.*
(4) *This subsection amended regulation 45 (1) of the Private Savings Banks Regulations 1964, reprinted S.R. 1975/241.*

4. Declaration that section 7 of the principal Act shall cease to have effect as part of the law of New Zealand -- As from the commencement of this Act section 7 of the principal Act shall cease to have effect as part of the law of New Zealand.

5. Application of sections 2 to 4 -- (1) Sections 2 and 4 and subsection (1) of section 3 of this Act shall apply to all wills made and to all revocations effected on or after the date of the commencement of this Act. The validity of all other wills and the effectiveness of all other revocations shall be determined as if sections 2 and 4 and subsection (1) of section 3 of this Act and section 17 of the Minors' Contracts Act 1969 had not been passed.
(2) Subsections (2) to (4) of section 3 shall apply to all nominations made and to all revocations, variations, and replacements effected on or after the date of the commencement of this Act. The validity of all other nominations and the effectiveness of all other revocations, variations, and replacements shall be determined as if subsections (2) to (4) of section 3 of this Act had not been passed.

WILLS AMENDMENT ACT 1977
1977, No. 55

An Act to amend the law relating to wills

1. Short Title and commencement -- (1) This Act may be cited as the Wills Amendment

Act 1977, and shall, for the purposes of the law of New Zealand, be read together with and deemed part of the Wills Act 1837 of the United Kingdom Parliament (hereinafter referred to as the principal Act).

(2) This Act shall come into force on the 1st day of July 1978.

2. Effect of divorce, etc., on wills -- (1) Where at the death of any person there is in force any absolute decree or order or any legislative enactment for the divorce of the person, or for the dissolution or nullity of the marriage of the person, and that decree or order or legislative enactment would be recognised by the Courts in New Zealand, any will of the person that was made before the decree or order or legislative enactment shall be read and take effect subject to the following provisions of this section.

(2) Subject to the following subsections of this section, in any such will of any person

(a) So far as it concerns the other partner to the former or purported marriage of that person and the executor or administrator of that other partner, the following shall be null and void:

(i) Any beneficial devise, legacy, estate, gift, or appointment of or affecting any real or personal property given or made by the will of that person:

(ii) Any direction, charge, trust, or provision in the will of that person for the payment of any debt that is charged by way of mortgage on any real or personal property that belongs to that other partner or that devolved by survivorship on that other partner; and

(b) The appointment of that other partner as executor or trustee or advisory trustee of the will of that person shall be null and void; and

(c) The will shall be read and take effect so far as concerns the real and personal property affected by any such devise, legacy, estate, gift, appointment, direction, charge, trust, or provision as if that other partner had died immediately before the person making the will.

(3) Subsection (2) of this section shall not apply to--

(a) Any direction, charge, trust, or provision in any such will of any person for the payment of any amount in respect of any debt or liability, including any liability under a promise within the meaning of the Law Reform (Testamentary Promises) Act 1949, of the maker of the will to the other partner to the former or purported marriage of that person or to the executor or administrator of that other partner:

(b) Any beneficial devise, legacy, estate, gift, appointment, direction, charge, trust, or provision in any such will of any person expressed to take effect notwithstanding this section, or notwithstanding or in contemplation of (as the case may be) the making of any decree, order, or legislative enactment for the divorce of the person, or for the dissolution or nullity of the marriage of the person:

(c) Any beneficial devise, legacy, estate, gift, appointment, direction, charge, trust, or provision in any such will of any person if, after the relevant decree or order or legislative enactment for the divorce of the person or the nullity of the marriage of the person, he has, by a codicil, expressly shown an intention that the devise, legacy, estate, gift, appointment, direction, charge, trust, or provision shall have effect notwithstanding this section or notwithstanding the making of the decree, order, or legislative enactment.

(4) For the purposes of this section--

(a) Where a will or any part thereof, is, by any codicil, confirmed or ratified or in any manner revived, it shall be deemed to have been made at the time when it was first made, and not at the time when it was confirmed or ratified or revived:

(b) Where a will or any part thereof is re-executed, it shall be deemed to have been made at the time when it was re-executed, and not at the time when it was first made.

(5) This section shall apply in relation to every will, whether made before or after the commencement of this Act, if the maker of the will dies after the commencement of this Act but not otherwise.

3. Restriction on operation of section 15 of principal Act -- (1) For the purposes of section 15 of the principal Act (which relates to the avoidance of gifts to attesting witnesses and their spouses), the attestation of a will by a person to whom or to whose spouse there is given or made any such disposition as is described in that section shall be disregarded if the will is duly executed without his attestation and without that of any other such person.

(2) This section applies to the will of any person dying after the commencement of this Act, whether the will was executed before or after the commencement of this Act.

Cf. Wills Act 1968, s.1 (U.K.)

4. Modification of principal Act in relation to wills of privileged persons -- (1) This

subsection amended s.7 (2) and (3) of the Wills Amendment Act 1955.

(2) This section shall apply in relation to any burning, tearing, or other destruction of a will if it takes place after the commencement of this Act, but not otherwise.

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