

E 31AD

Report 41

Succession Law
A Succession (Wills) Act

October 1997
Wellington, New Zealand

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.

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23 October 1997

Dear Minister

I am pleased to submit to you Report 41 of the Law Commission, *Succession Law: A Succession (Wills) Act*.

As you know this report is the Commission's third to you this year on succession law. The earlier two concerned *Homicidal Heirs* (NZLC R38) and *A Succession (Adjustment) Act* (NZLC R39). Our work is continuing on ways that greater effect might be given to decisions about succession to ancestral property by Māori.

As first contemplated the Commission's project to review the law of succession also included a complete review of the Administration Act 1969. The Commission is now inclined to defer this aspect of the work for these three main reasons:

- Much of the 1969 Act (which itself largely restates verbatim even earlier provisions) could with benefit be revised. (Section 76, for example, provides sensibly, but in language that today is difficult to follow, that "there shall be no escheat to the Crown for want of heirs or successors".) But interested parties informed us clearly that there are no serious current problems.
- The fact that no action has been taken to initiate parliamentary consideration of *A New Property Law Act* (NZLC R29, 1994) suggests that there is less political interest in updating systematically the statute book than there is in righting more particular wrongs.
- The intestacy provisions (see Part III of the 1969 Act) need to be kept under review. For example, if the provision to go to a widow or widower (the first \$90 000) was right when it was last fixed (in 1987), then it now needs reconsidering. But any such review must await policy decisions following our recommendations in *A Succession (Adjustment) Act* (especially those concerning the entitlements of widows and widowers and the equal rights of de facto partners).

In the meantime, however, we are proceeding to research the conceptual basis of the system of intestate succession.

The need for this research is illustrated by the case where spouses have separated and divided their property by agreement or court order, but not obtained a court order for separation (sought only rarely), or for the dissolution of their marriage. Distribution on an intestacy should give effect either to the duties, or to the assumed wishes, of the intestate deceased. In this case, the existing law does neither. If either spouse dies intestate, the survivor may

take a spouse's share on the intestacy as if the division had not occurred and against what we assume the intestate would have wished.

In this report, however, the Commission recommends

- preserving in local legislation the essence of the familiar provisions of the Wills Act 1837 (UK),
- eliminating anomalies and anachronisms, and
- expressing the law in language that is more contemporary and plain.

The Commission recommends that Parliament enact the Succession (Wills) Act set out in this report. We consider that the enactment of the draft Act would be welcomed by all who are familiar with the law in this area.

Yours faithfully

The Hon Justice Baragwanath
President

The Hon Douglas Graham MP
Minister of Justice
Parliament House
WELLINGTON

Preface

THE LAW COMMISSION has undertaken the succession project with the approval of the Minister of Justice.

The ultimate aim of the project is to have new succession legislation drafted in plain language which

- provides for succession laws in fewer statutes,
- simplifies the law,
- enables better effect to be given to the intentions of will-makers, and
- takes account of the diversity of New Zealand families.

The project has had these main aspects:

- *The effect of homicide on rights of succession*: In response to a request from the Minister in charge of the Public Trust Office, the Commission expedited its work on this topic and in a July 1997 report recommended that Parliament enact a Succession (Homicide) Act: *Homicidal Heirs* (NZLC R38, 1997).
- *Testamentary claims or succession adjustment*: In August 1996 the Commission released a major discussion paper on claims against dead people's property: *Testamentary Claims* (NZLC PP24, 1996). The present law and the changes the Commission proposed to it were summarised in a tandem plain language paper, *What Should Happen to Your Property When You Die?* (NZLC MP1, 1996). Having received and considered carefully a large number of submissions the Commission finalised its recommendations in a report released in August 1997: *A Succession (Adjustment) Act* (NZLC R39, 1997).
- *Succession as it applies to Māori families*: The Commission engaged Professor Pat Hohepa, Dr David Williams, and Mrs Waerete Norman as consultants on this aspect of the project: *The Taking into Account of Te Ao Māori in Relation to Reform of the Law of Succession: A Working Paper* (NZLC MP6, 1996). The Commission is continuing to consult with Māori on ways that Māori decisions about succession to ancestral property can be given greater effect.
- *Wills*: The subject of this report. New Zealand's existing law of wills derives mainly from the Wills Act 1837 (UK). This old Imperial Act has, however, been amended a number of times. This report recommends that the existing law be replaced by a single local Act in language that is more contemporary and plain.

Many people and organisations helped the Commission to complete the work in this report. In October 1996 we released a consultation paper, *Wills Reforms* (NZLC MP2, 1996). It was circulated widely among those professionally concerned with the preparation of wills and the administration of deceased estates. Six groups of interested legal practitioners in various parts of the country were invited to consider and comment on the proposals. We also acknowledge particularly the help of these people and organisations:

- AH Angelo, Professor of Law, Victoria University of Wellington/Te Whare Wānanga o te Upoko o te Ika a Maui
- GC Baker, Solicitor, Fielding
- N Cox, Solicitor, Auckland
- MFL Flannery, Solicitor, Lower Hutt
- WA Lee, former Commissioner of the Queensland Law Reform Commission
- PE Martyn, Solicitor, Wellington
- Ministry of Justice/Te Manatū Ture
- New Zealand Law Society
- Directorate of Legal Services, Ministry of Defence.

Nicola Peart, Senior Lecturer in Law at the University of Otago/Te Whare Wānanga o Otago, conducted a critical review of a draft of this report. The work on which the report is based was set in train by a former member of the Commission, Professor Richard Sutton, and a Commission researcher, Nigel Christie. Assistance in completing this report was received from a Commission researcher, Ross Carter.

The Commission acknowledges and expresses gratitude to each of these people and organisations. Those we consulted predominantly supported the sections of the draft Act we recommend as non-controversial improvements to the existing law. We emphasise, however, that this report expresses the Commission's views, and not necessarily those of the people and organisations who have helped us.

Introduction

Definitions and principles

- 1 **A** WILL IS A STATEMENT by a will-maker (*testator* or *testatrix*) of how the will-maker wants his or her property (*estate*) to be dealt with when he or she dies. Two governing principles of the law of wills are
 - that a will-maker's ascertainable intentions should be upheld, but also
 - that great care should be taken in determining whether what is claimed to be an expression of a will-maker's wishes is genuinely so, because when a will operates (on a will-maker's death) he or she is no longer present to speak for himself or herself.

Before the Wills Act 1837 (UK)

- 2 Until early in the seventeenth century the English law of wills was shaped by a sharp divide between the rules relating to land and those governing other types of property – a distinction resulting from the importance of land tenure in the feudal system. Succession to real property was the concern of the common law courts, and succession to personal property the concern of the ecclesiastical courts. From the seventeenth century, the Court of Chancery supplanted the role of the ecclesiastical courts in supervising the administration of deceased estates of personalty once probate had been granted.

The Wills Act 1837 (UK)

- 3 Uniform rules governing the execution of wills of realty and personalty were imposed by the Wills Act 1837 (UK). That Act remains in force in New Zealand to this day (see s 3(1) and the First Schedule to the Imperial Laws Application Act 1988). Despite amendments to accommodate changing social conditions (eg, in 1977 a provision was added about the effect on a will of the will-maker's divorce), the 1837 Act remains the foundation stone of New Zealand's law of wills. It seems that the provisions of the 1837 Act are at least generally understood by people with no legal

training, and that it works well. We consider that fundamental change would be neither necessary nor wise.

A SUCCESSION (WILLS) ACT

- 4 The Law Commission considers that there is no need to change radically the substantive law of wills. We recommend a new Wills Act, however, because
- if restated in language that is more contemporary and plain, the law of wills could be more readily understood and applied, and
 - in some minor respects the substantive law of wills can usefully be modernised.

The need for law in language that is more contemporary and plain

- 5 We do not need to labour this point.¹ Our main functions include advising on ways in which the law of New Zealand can be made as understandable and accessible as practicable. In our work we must also consider practicable simplifications of the expression and content of the law.²
- 6 Two short examples are likely to suffice. Take first the definition of “will” in the interpretation section of the 1837 (UK) Act:

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.

By contrast, *section 4* of the draft Act (Definitions) provides more directly that

Will includes a codicil and any other testamentary disposition.

¹ It is demonstrated amply by contrasting the provisions of the draft Act (see pages 7–65) with those of the existing Act (see pages 69–99). The table on pages 66–67 compares the two Acts. This report refers to the draft Act provisions in full and in italics, eg, *section 1*.

² Law Commission Act 1985 ss 5(1)(d) and 5(2)(b).

A second example is s 13 of the 1837 Act:

13 Publication of will not requisite

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

This section can be understood only if it is appreciated that the term “publication” was intended to mean a declaration by the testator to witnesses that the document shown to them was the testator’s will. This meaning would be provided for more directly by *section 9* of the draft Act:

9 Will valid despite witness not knowing document witnessed was a will

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.

Formalities for making and revoking a will

- 7 We recommend no fundamental change to the requirement that a will should be signed or acknowledged in the presence of two witnesses together at the same time each of whom signs in the presence of the testator.
- 8 This requirement has two main purposes. One is cautionary: to help the will-maker appreciate that the document being solemnly signed, if left unchanged, will when the will-maker dies determine who gets the will-maker’s property. The other main purpose is probative: to ensure that what is put forward after the death of the will-maker is in fact a genuine expression of the testator’s testamentary intentions.
- 9 We recommend changes to the existing law only to permit these two purposes to be achieved in more ways. For example:
 - There seems no reason why the formalities should not be dispensed with if the testator’s intention that the document should operate as a will can be established by other means: *section 10*.
 - Similarly, the court should be able to uphold a disposition to an interested witness if satisfied that the testator intended the provision freely and voluntarily: *section 11(2)(c)*.
 - If the testator had the necessary will-making intention it should no longer be essential that his or her signature be at the foot or end of the will, a perennial trap for do-it-yourself will-makers: *section 8(2)*.

- 10 *Section 17* of the draft Act defines slightly more widely than does the present law the acts effective to revoke a will. Under the present law dissolution of a marriage disentitles a former spouse from entitlement under a will or on an intestacy. A separation order disentitles a spouse from benefits on an intestacy, but there is no comparable provision in relation to entitlements under a will. *Section 19* removes this anomaly.

Minors' wills

- 11 The substantive changes to the existing law are that approval for a minor (any person under 18 years of age: *section 4*) to make a will may be granted generally rather than only for a specific proposal. The right to grant these approvals would be confined to the Family Court. The Public Trustee's right to grant these approvals would not be continued: *section 6*.

Construction and rectification

- 12 The rules for the use of extrinsic evidence are widened by the provisions of *section 24*, and *section 28* permits rectification where the court is satisfied that the writing does not record correctly the testator's intentions.

Informal will-making

- 13 *Part 6* of the draft Act provides for informal will-making by members of the Armed Forces, seafarers at sea, and prisoners of war. Essentially, *Part 6* would re-enact the Wills Amendment Act 1955, but it includes a modernised definition of **privileged person** (supplied by the Directorate of Legal Services of the New Zealand Defence Force). We note that *Part 6* does not follow the trend in Australia against informal wills for the Armed Forces (New South Wales, for example, has abolished the special rules permitting informal will-making). Arguments in favour of abolishing the Armed Forces' privilege include that:
- it is the policy of the Armed Forces to facilitate formal will-making;
 - informal wills may increase the incidence of fraud;
 - there is less need for informal will-making if, as we recommend, courts are empowered to dispense with strict compliance with the formal requirements for a valid will; and

- operational service is not the best context for calm and well-advised will-making.
- 14 As against these arguments, the New Zealand Defence Force is clear in its view that provision for informal will-making by the Armed Forces should remain. A member of the Armed Forces may be given short notice of dangerous active service. If he or she learns at the same time of a change in a relationship with an intended beneficiary, he or she may need to make, amend, or revoke a will urgently. In these circumstances it would appear unreasonable to require him or her to satisfy the usual formalities. The same arguments apply, perhaps even more strongly, to the circumstances of prisoners of war. The privilege for civilian seafarers is no less ancient than that of the Armed Forces and, if one is to be retained, so should the other.

Gifts to unincorporated bodies

- 15 *Section 37* of the draft Act provides that gifts to unincorporated associations that are not charities should be treated as augmenting those associations' general funds.

The source of the draft Act

- 16 In preparing the draft Act the Commission has drawn to a significant extent on work done in Australia. The Standing Committee of Attorneys-General of Australia resolved in 1991 to work towards uniform succession laws in Australia. In 1992 the Queensland Law Reform Commission was entrusted with co-ordinating this uniform succession laws project. As its contribution to the project the Victorian Parliamentary Law Reform Committee in 1994 published a report about *Reforming the Law of Wills*. The report included a draft Wills Act. In February 1996 the Queensland Commission published a miscellaneous paper (Miscellaneous Paper 15) using the Victorian draft as a basis for discussion. The very high quality of the Australian material, together with the desire to maximise the degree of uniformity between laws on each side of the Tasman, has led the Commission to adopt in large measure the Victorian draft. Unless related commentary or origin notes state otherwise, the sections of the draft Succession (Wills) Act derive from the version available to us of the Victorian work in progress.

RECOMMENDATION

- 17 The Commission recommends that Parliament enact the Succession (Wills) Act set out in this report.
-

DRAFT SUCCESSION (WILLS) ACT

Public Act . . . of 199–
Royal Assent: Day Month 199–
Comes into force: Day Month 199–

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The Parliament of New Zealand enacts as follows

- 1 Title**
This Act is the Succession (Wills) Act 199–.

PART 1
PRELIMINARY

- 2 Purposes**
The purposes of this Act are to reform and to restate in contemporary language the law relating to the making, amendment and revocation of wills and, in particular, to make provision for:
- (a) the formalities required for the making, amendment, and revocation of wills, and the dispensation with those requirements in appropriate cases;
 - (b) the making of wills by minors;
 - (c) the effects on a will of a marriage, a separation order, and a dissolution order; and
 - (d) the construction and rectification of wills.

Definitions: **will**, **minor**, s 4

Origin: *Wills Bill 1994 (Victoria)* cl 1

COMMENTARY

Section 2

- C1 *Section 2* sets out the draft Act's purposes: to restate the law of wills in contemporary language and to reform it in minor respects. It is based on but not precisely identical to the corresponding provision of the Victorian draft.

3 Commencement

This Act comes into force three months after the date on which it receives the Governor-General's assent and does not apply to the wills of persons dying before it comes into force.

Definitions: **will**, s 4; **month**, *Acts Interpretation Act 1924* s 4

4 Definitions

In this Act

court means the High 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 material on which there is writing;

minor means any person under the age of 18 years;

will includes a codicil and any other testamentary disposition.

Origin: *Wills Act 1837 (UK)* s 1; *Wills Bill 1994 (Victoria)* cl 3

5 Act binds Crown

This Act binds the Crown.

Note: See *Acts Interpretation Act 1924* s 5(k)

Section 3

- C2 *Section 3* prescribes the date when the statute comes into force. The previous law is preserved in respect of the wills of people dying before the draft Act comes into force.

Section 4

- C3 *Section 4* defines terms used in more than one Part of the draft Act.
- C4 **Minor** has a meaning different from that given by s 4 of the Age of Majority Act 1970.
- C5 To help courts ascertain efficiently will-makers' intentions in their necessary absence, **document** (used in *sections 9–10*) is defined more narrowly than in other contexts. In the draft Act the term document means only any material on which there is writing. Importantly under the existing law **writing** includes words printed, typewritten, painted, engraved, lithographed, or otherwise traced or copied: Acts Interpretation Act 1924 s 4 and compare the section 19 definition in *A New Interpretation Act* (NZLC R17, 1990), para 408. Under the draft Act courts would not therefore (except under *Part 6*) accept as a will a statement of intention that is not visible but recorded, for example, on audio tape.

Section 5

- C6 The Act will bind the Crown. It will apply, for example, to a will under which a will-maker left property to the Crown: *A New Interpretation Act* (NZLC R17, 1990), chapter IV.

PART 2
CAPACITY AND FORMALITIES

6 Capacity of a minor to make a will

- (1) A will made by a minor is not valid.
- (2) Despite subsection (1),
 - (a) a minor who is married, or has been married, may make, amend or revoke a will, and
 - (b) a minor may make a will in contemplation of a marriage (and may amend or revoke such a will) but the will is of no effect if the marriage contemplated does not take place.
- (3) Despite subsection (1), a minor may
 - (a) with the approval of the Family Court granted on such grounds as that court thinks fit, and
 - (b) either in relation to a specific proposal or generally, make, amend, or revoke a will.
- (4) Every will, amendment, or revocation made under subsection (3) is valid and effective as if the minor were of full age.
- (5) Before making an order under subsection (3), the Family Court must be satisfied that the minor understands the nature and effect of the making, amendment or revocation of the will.

Definitions: **will**, **minor**, s 4

Origin: *Wills Amendment Act 1969* s 2; *Wills Bill 1994 (Victoria)* cl 5

Section 6

Generally a will made by a minor is not valid

- C7 *Section 6* would mainly re-enact this general rule found now in s 2 of the Wills Amendment Act 1969. *Section 6* does not follow precisely the Victorian draft. The main changes *section 6* would introduce are:
- to empower approvals to be granted for will-making generally rather than as at present approvals being confined to a specific proposal;
 - to remove the right of the Public Trustee to grant approvals to make wills (there seems no justification for the Public Trustee to continue to have this advantage over other trustee corporations that are privately-owned); and
 - to remove the minimum age (ie, so that the Family Court could in appropriate cases grant to a person under the age of 18 years approval to make a will).
- Note that **minor** has a special meaning in this Act (see *section 4*).

Married minors

- C8 Minors who marry become eligible by virtue of marriage, to make, amend or revoke a will: *subsection (1)*. *Paragraph (b)* is intended purely to avoid the need for a will immediately after a marriage takes place. It does not relax the rule that a minor obtains capacity to make an effective will *only on marriage*. An unmarried minor's will in contemplation of a marriage has effect if (and therefore only *after*) the contemplated marriage occurs. An unmarried minor who wishes to make a will that would operate if he or she died before a marriage contemplated occurred would therefore need to obtain Family Court approval: see *subsections (3)–(4)*. Minors who later divorce retain the will-making capacity that their marriages gave them.

Section 6 commentary continues overleaf

Section 6 commentary continued

Family Court may authorise a will or will-making for an unmarried minor of any age

- C9 *Subsections (3)–(4)* also empower the Family Court to authorise an unmarried minor of any age to make, amend or revoke a will. It will be useful in situations (admittedly not numerous) where persons under the age of 18 have accumulated property of value, especially where, if a will is not executed, the property would pass inappropriately on an intestacy. Such a situation could arise, for example, where a minor will-maker who has a step-family after his or her parents separate and one or both remarries comes into substantial property. The existing New Zealand statute and the Victorian draft entitle courts to authorise a minor to make a will only in specific terms. By contrast *subsections (3)–(4)* would empower the Family Court to make an order granting the minor power either:
- to make a specific will; or
 - to make or revoke any will without on each occasion having to reapply to the court for approval.

7 Delegation of disposing power

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.

Definitions: **will**, s 4

Origin: *Wills Bill 1994 (Victoria)* cl 35

8 Formalities of execution

(1) A will is executed validly only if

- (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.

Definitions: **will**, s 4

Origin: *Wills Act 1837 (UK)* s 9; *Wills Amendment Act (1852) (UK)* s 1; *Wills Bill 1994 (Victoria)* cl 7

9 Will valid despite witness not knowing document witnessed was a will

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.

Definitions: **will**, s 4

Section 7

- C10 *Section 7* would be new to New Zealand. It has been the general rule that a testator cannot delegate his or her will-making powers to another person. The rule is a logical corollary of the importance attached to strict compliance with the formalities of execution: *Tatham v Huxtable* (1950) 81 CLR 639. There seems no reason, however, why during his or her lifetime a person should be able to create, for example, a power of appointment not confined to members of a certainly defined class as a term of a trust, but not be able to do precisely the same thing by will. *Section 7* would remove this anomalous disability.

Section 8

- C11 *Section 8* would restate the Wills Act 1837 (UK) s 9 and the Wills Amendment Act (1852) (UK) s 1. The only change that *section 8* would introduce is to relax the requirement under the present law that a testator's signature must be at the foot or end of the will. So long as a testator signs a will with the intention of executing it, then under *subsection (2)* the will is valid whatever part of the will the testator signs. In *Re Stewart (dec'd)* (unreported, 17 December 1991, HC, Auckland, A 389–485), [1992] NZ Recent Law Review 168, the court could grant probate to all three pages of a home-made will where the testatrix and a witness signed at the bottom of the second only by treating the third page as part of the preceding two.

Section 9

- C12 *Section 9* would replace the Wills Act 1837 (UK) s 13. There is no requirement that witnesses need to know the contents of a testamentary document being signed or that the document is a will.

10 Dispensing with execution formalities

- (1) A document that purportedly embodies the testamentary intentions of a deceased person but has not been executed in accordance with section 8 may nevertheless be accepted by the court as constituting:
- (a) the will of the deceased; or
 - (b) an amendment to the will of the deceased; or
 - (c) an exercise by the deceased of a power of appointment; or
 - (d) a revocation of the will of the deceased;
- if the court is satisfied that this was what the deceased intended.
- (2) In forming its view, the Court may consider the document and any evidence relating to the manner of execution of the document or testamentary intentions of the deceased person, including evidence (whether or not admissible before this section commenced) of statements made by the deceased person.
- (3) This section applies to a document whether it came into existence within or outside New Zealand.

Definitions: **document**, **will**, s 4; **New Zealand**, *Acts Interpretation Act 1924* s 4

Origin: *Wills Bill 1994 (Victoria)* cl 9

Section 10

- C13 *Section 10* would be new to New Zealand. It is based on but does not adopt exactly the wording of the Victorian draft. It empowers the Court to accept as valid a document that does not comply with the *section 8* formal requirements, but purports to make, amend, or revoke a will, or to exercise a power of appointment. The court will accept the document only if satisfied that it expresses a deceased person's genuine intentions. One main purpose of the formalities is to authenticate a document as an expression of a deceased's genuine intentions. The logic of the change is that there is no reason why the ways of proving a deceased's genuine intentions should be confined to complying with the formal requirements, if the intentions can also be proved in other ways. Similar provisions dispensing with strict compliance have been enacted already in
- South Australia (Wills Act 1936 s 12(2), enacted in 1975),
 - Queensland (Succession Act 1981 s 9),
 - Northern Territory (Wills Act 1968 s 12(2), enacted in 1984),
 - Western Australia (Wills Amendment Act 1987 s 9), and
 - New South Wales (Wills, Probate and Administration (Amendment) Act 1988 s 3, Schedule 1(12)).

11 Interested witnesses

- (1) If any disposition is made by will to a person ("the interested witness") who attests the execution of the will or to the interested witness's spouse, the disposition is void so far only as it concerns the interested witness or the interested witness's spouse or any person claiming under either of them.
- (2) A disposition made by will is not made void by this section if:
- (a) at least 2 persons who attest the execution of the will are not persons to whom any such disposition is so made or the spouse of any such persons; or
 - (b) all the persons who would benefit directly from the avoidance of the disposition consent in writing to the distribution of the disposition according to the will (all those persons having capacity at law to do so); or
 - (c) the court is satisfied that:
 - (i) the testator knew and approved of the disposition; and
 - (ii) the disposition was made by the testator freely and voluntarily.

Definitions: **disposition, will**, s 4

Origin: *Wills Act 1837 (UK)* s 15; *Wills Amendment Act 1977* s 3; *Wills, Probate and Administration (Amendment) Act 1988 (NSW)* s 13

Section 11

- C14 Because interested witnesses were until 1843 debarred from giving evidence a will witnessed by a beneficiary or an interested party could be held to be void. Sections 14 to 17 of the Wills Act 1837 (UK) were enacted to deal with this problem. Their effect was to preserve the validity of the will in question, but s 15 also provided that if a will was witnessed by a beneficiary or his or her spouse the will was saved but the gift to the beneficiary or spouse was void. It is unnecessary to re-enact ss 14, 16 and 17 because there is no longer a rule disqualifying interested witnesses from giving evidence.
- C15 In New Zealand the Wills Amendment Act 1977 s 3 modified s 15 of the 1837 UK Act by providing that a gift to a beneficiary or a spouse did not fail if there were at least two qualified witnesses. *Paragraph (a) of subsection (2)* would repeat this provision.
- C16 *Paragraphs (b)–(c) of subsection (2)* are two new provisions saving gifts to witnesses or their spouses if
- all interested parties agree, or
 - if the court is satisfied that the will-maker knew and approved of the disposition and made the disposition freely and voluntarily.
- They are based not on the Victorian draft but on the New South Wales Wills, Probate and Administration (Amendment) Act 1988 s 13.
- C17 Because will-makers should be able to know and satisfy quickly and inexpensively the requirements for executing a will, we consider it unnecessary to equate here a de facto partner of a beneficiary with a spouse of a beneficiary.

PART 3
PROPERTY DISPOSED OF

12 Property that may be disposed of by will

- (1) A person may dispose by will of property to which he or she is entitled at the time of his or her death.
- (2) A person may dispose by will of property to which the personal representative of that person becomes entitled by virtue of the office of personal representative after the death of that person.
- (3) It does not matter if the entitlement of the person or of the personal representative did not exist at the date of the making of the will or at the date of death.
- (4) In this section **property** includes:
 - (a) any contingent, executory, or future interest in property; and
 - (b) any right of entry or recovery of property or right to call for the transfer of title of property.
- (5) A person may not dispose by will of property of which the person was trustee at the time of death.
- (6) Nothing in this section is to restrict the operation of section 108 of *Te Ture Whenua Māori /The Māori Land Act 1993*.

Definitions: **disposition, will**, s 4

Origin: *Wills Act 1837 (UK)* ss 30–31

13 Where interest disposed of in part

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.

Definitions: **disposition, will**, s 4

Origin: *Wills Act 1837 (UK)* s 23; *Wills Bill 1994 (Victoria)* cl 9

Section 12

- C18 *Section 12*, by repeating provisions like those of s 3 of the Wills Act 1837 (UK), clarifies:
- the property that may be disposed of by will;
 - will-makers' ability to dispose of property which accrues to their estates after their deaths; and
 - will-makers' inability to dispose of property of which when they died they were not beneficial owners but trustees.

Section 13

- C19 *Section 13* would repeat in plainer language the Wills Act 1837 (UK) s 23. The section applies for example if a testator makes a will that devises land to X, then during his or her lifetime but without altering the will disposes of part of the land to Y. When the testator dies the devise is still effective to transfer to X the part of the land that remains in the testator's estate.

14 Effect of general disposition of land

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

Definitions: **disposition, will**, s 4

Origin: *Wills Act 1837 (UK)* s 26; *Wills Bill 1994 (Victoria)* cl 27

15 Effect of general disposition of property

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

Definitions: **disposition, will**, s 4

Origin: *Wills Act 1837 (UK)* s 27; *Wills Bill 1994 (Victoria)* cl 28

16 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) Subsection (1) does not apply if a contrary intention appears in the will.

Definitions: **disposition, will**, s 4

Origin: *Wills Act 1837 (UK)* s 28; *Wills Bill 1994 (Victoria)* cl 29

Section 14

C20 *Section 14* would repeat more directly the provisions of s 26 of the Wills Act 1837 (UK).

Section 15

C21 *Section 15* would repeat s 27 of the Wills Act 1837 (UK). Its effect is to ensure that unless the will says already a general gift includes property in respect of which a will-maker has a general power of appointment that the will-maker has not already exercised.

Section 16

C22 *Section 16* would replace the Wills Act 1837 (UK) s 28. It is relevant only to

- land still not brought under the Land Transfer Act 1952, and
- unregistered interests in land that has been registered under that Act (for example an unregistered leasehold interest in registered land).

PART 4
REVOCATION, REVIVAL, AND AMENDMENT

17 Revocation

The whole or any part of a will may be revoked only:

- (a) by a marriage as provided by section 18; or
- (b) by an order for separation or dissolution as provided by section 19; or
- (c) by a later will; or
- (d) 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
- (e) by the testator (or some person in his or her presence and by his or her direction) with the intention of revoking the will
 - (i) burning the will, or
 - (ii) tearing the will, or
 - (iii) otherwise destroying the will; or
- (f) by the testator performing any other act in relation to it which the court is satisfied demonstrates the intention of the testator to revoke the will.

Definitions: **will**, s 4

Origin: *Wills Act 1837 (UK)* s 20; *Wills Bill 1994 (Victoria)* cl 14; *Wills, Probate and Administration Act 1988 (NSW)* s 17(3)(c)

18 Revocation by marriage

- (1) A will is revoked by the marriage of the testator.
- (2) Despite subsection (1), 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, is not revoked by the marriage of the testator.
- (3) A will is not revoked by the marriage of the testator if it appears from the terms of the will, or from those terms taken together with circumstances existing at the time the will was made, that the testator contemplated a particular marriage and intended the will to take effect in the event of that marriage.

Definitions: **disposition, will**, s 4

Origin: *Wills Act 1837 (UK)* s 18; *Wills Amendment Act 1955* s 13; *Wills Bill 1994 (Victoria)* cl 12

Section 17

- C23 Except for revocation by marriage (*section 18*), or by separation or dissolution order (*section 19*), revocation of a will depends on the intention of the testator expressed in various ways. *Section 17* would replace the Wills Act 1837 (UK) s 20, but under the proposed provision an act of destruction taking effect as a revocation is defined more widely than under the present law. It would include:
- any writing on the will by the testator,
 - any act of crumpling up the will by the testator, or
 - any other symbolic act of destruction, so long as the intention of the testator that the will be revoked by destruction can be clearly ascertained.

Section 17 adds to the Victorian draft a *paragraph (f)* which is to the same effect as s 17(3)(c) of the New South Wales Wills, Probate and Administration Act 1988 (a provision enacted in 1989).

Section 18

- C24 *Subsections (1)* and *(2)* are drawn from and would replace s 18 of the Wills Act 1837 (UK) (discussed in *Re Panapa* [1993] 1 NZLR 694, (1992) 9 FRNZ 459). *Subsection (3)* would replace s 13 of the Wills Amendment Act 1955.

19 Revocation by an order for separation or dissolution

- (1) Dissolution 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 the testator made of his or her spouse as executor, trustee, advisory trustee, or as trustee of property left by will to trustees upon trust for beneficiaries including the spouse's children;
- except so far as a contrary intention appears in the will.
- (2) If a disposition or appointment is revoked by subsection (1), that disposition or appointment takes effect as if the spouse had predeceased the testator.
- (3) In this section **dissolution of the marriage** means either:
- (a) a final order dissolving a marriage made under s 42 of the *Family Proceedings Act 1980*, any final or absolute order or decree or enactment for divorce, dissolution or nullity recognisable under the laws of New Zealand; or
 - (b) a separation order made in respect of the parties to a marriage under Part III of the *Family Proceedings Act 1980*.

Definitions: **disposition**, **will**, s 4

Origin: *Wills Amendment Act 1977* s 2; *Wills Bill 1994 (Victoria)* cl 13

20 Revival of a revoked will

- (1) A will or part of a will that has been revoked is revived by re-execution or by execution of a codicil showing an intention to revive the will or part.
- (2) A revival of a will which was partly revoked and later revoked as to the balance only revives that part of the will most recently revoked.
- (3) Subsection (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.
- (5) A will which has been revoked by destruction cannot be revived.

Definitions: **will**, s 4

Origin: *Wills Act 1837 (UK)* s 22; *Wills Bill 1994 (Victoria)* cl 16

Section 19

- C25 *Section 19* would replace s 2 of the Wills Amendment Act 1977 (mentioned, for example, in: *Re Jackson* [1991] 3 NZLR 125, [1991] NZ Recent Law Review 178; *Re Goodwin (dec'd)*; *Goodwin v Public Trustee* (unreported, HC, Wellington, 10 September 1993, CP862–89). *Section 19* provides that a dissolution order revokes some gifts to a spouse and some appointments of a spouse. The Family Proceedings Act 1980 s 26 provides that a separation order prevents a spouse from succeeding on an intestacy, but s 2 of the Wills Amendment Act 1977 makes no comparable provision in relation to wills. *Section 19* would remove this anomaly.

Section 20

- C26 *Section 20* would replace the Wills Act 1837 (UK) s 22. Its purpose is to permit a will that has been revoked, and has therefore lost its validity, to have that validity restored. For an example of a question about whether an earlier will was revived, see *Re Estate of Archibald; Archibald and Ors v Archibald and Ors* [1992] 2 NZLR 109, [1992] NZ Recent Law Review 166. A will that has been revoked by destruction cannot be revived. In such cases a new testamentary instrument must be executed to give effect to the testator's intentions. *Subsection (5)* does not derive from the Victorian draft.

21 Amendment

- (1) A purported amendment to a will that has been executed is effective only if the purported amendment:
- (a) is executed in accordance with section 8; or
 - (b) is made by a minor and approved by the Family Court under section 6; or
 - (c) is made in a document that the court under section 10 is satisfied embodies a deceased's testamentary intentions and so accepts as constituting an amendment to the will of the deceased; or
 - (d) obliterates words in the will so that their effect is no longer apparent.
- (2) Despite subsection (1)(a) a purported amendment is executed properly if the signature of the testator and of the witnesses to the amendment are made:
- (a) in the margin, or on some other part of the will beside, near or otherwise relating to the amendment; or
 - (b) as authentication of a memorandum referring to the amendment and written on the will.

Definitions: **will**, s 4

Origin: *Wills Act 1837 (UK)* s 21; *Wills Bill 1994 (Victoria)* cl 15

PART 5
CONSTRUCTION AND RECTIFICATION

22 Date from which a will takes effect

- (1) A will takes effect, with respect to the property disposed of by the will, as if it had been executed immediately before the death of the testator.
- (2) Subsection (1) does not apply if a contrary intention is shown in the will.

Definitions: **will**, s 4

Origin: *Wills Act 1837 (UK)* s 24; *Wills Bill 1994 (Victoria)* cl 21

23 Failed dispositions

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

Definitions: **will**, s 4

Origin: *Wills Act 1837 (UK)* s 25; *Wills Bill 1994 (Victoria)* cl 22

Section 21

- C27 *Section 21* would replace s 21 of the Wills Act 1837 (UK). To ensure authenticity amendments will be admitted to probate only if the requirements this section prescribes are met.
- C28 *Subsection (1)(d)* differs from the corresponding Victorian draft provision which seemed to the Commission less clear than it should be. Its purpose is to permit amendment by something like revocation by destruction where parts of a will are obliterated.

Section 22

- C29 *Section 22* would replace the Wills Act 1837 (UK) s 24. A will speaks as from the date of death unless a contrary intention is shown, so that, for example, a gift of “my principal residence” means “my principal residence as at my date of death” not “my principal residence as at the date my will is made”.

Section 23

- C30 *Section 23* would replace s 25 of the Wills Act 1837 (UK). If a disposition other than the testator's exercise of a power of appointment proves ineffective then so long as the will expresses no contrary intention the subject matter of the failed disposition falls into residue. For examples see *Re Howey (dec'd)*; *New Zealand Guardian Trust Company Ltd v Chesterman* (unreported, HC, Auckland, 7 September 1989, M 1321–1387); *Re estate of Leitch*; *Perkins v Presbyterian Church of New Zealand* [1997] 1 NZLR 38.

24 Use of extrinsic evidence in construction

- (1) In proceedings to construe a will, evidence, including evidence of a testator's dispositive intention, is admissible to the extent that the words used in the will make the will, or any part of the will:
- (a) meaningless; or
 - (b) ambiguous or uncertain on the face of the will; or
 - (c) ambiguous or uncertain in the light of the surrounding circumstances.
- (2) In subsection (1)(c) **surrounding circumstances** excludes evidence of a testator's dispositive intention.

Definitions: **will**, s 4

Origin: *Administration of Justice Act 1982 (UK)* s 21; *Wills Act 1968 (ACT)* s 12B

Section 24

- C31 Traditionally only the words of a will have been construed, courts taking them at face value and according them in context their strict and primary meaning (the “dictionary principle”). The rule that only the words of the will may be construed is notionally similar to the “four corners” rule in the law of contract. It means that evidence of a will-maker’s intention – apart from the contents of the will itself – is inadmissible. To construe a will by reference to extrinsic evidence would tend to undermine the requirements of form prescribed for a valid will (especially the requirement that a will be in writing) and to create uncertainty, delay and expense. This primary rule (that only the words of the will may be construed) has, however, been subject to three exceptions. Courts construing a will may admit extrinsic evidence:
- *To examine the will from the will-maker’s perspective:* Courts may ascertain facts known to a will-maker when he or she made the will, a will-maker’s verbal habit and the circumstances in which the will was made, that show any special meaning the will-maker is likely to have meant the words of the will to have (the “armchair principle”).
 - *To resolve ambiguity in the light of surrounding circumstances:* If the words of an executed will when applied to the relevant surrounding circumstances are ambiguous, then courts may admit extrinsic evidence (including evidence of the will-maker’s intention) to help resolve that ambiguity.
 - *To rebut some presumptions of intention courts make as a matter of equity:* If, in the circumstances the court, as a matter of equity, presumes the will-maker to have had an intention, then extrinsic evidence of the will-maker’s intention may be admitted to rebut (and if so also to support) that presumption. An example is the presumption that a disposition to a creditor was meant by the will-maker to be in satisfaction of a debt owed.

If, with the aid of the primary rule or an applicable exception, the court is unable to give any meaning to a will provision, then that provision must be held void for uncertainty.

Section 24 commentary continues overleaf

Section 24 commentary continued

- C32 *Subsection (1)* provides that extrinsic evidence (including evidence of the will-maker's intention) is admissible to help construe a will in the circumstances like the "armchair" and ambiguity exceptions above (*paragraphs (b)–(c)*), and also in cases where the words of a will are meaningless (*paragraph (a)*). *Subsection (2)* provides that for the purposes of *subsection (1)(c)*, **surrounding circumstances** excludes evidence of the testator's intention. *Section 24* is based not on the Victorian draft, but on s 12B of the Australian Capital Territory's *Wills Act 1968* (s 12B was inserted in 1991). It is comparable to provisions in the *Tasmanian Wills Act 1992* and the amendment introduced to the *Wills Act 1837 (UK)* as it applies in the United Kingdom by s 21 of the *Administration of Justice Act 1982 (UK)*.

25 Dispositions to “issue”

- (1) A disposition to a person's issue without limitation as to remoteness is to be held in the same manner as provided by the *Administration Act 1969* s 78 for the statutory trusts for the issue of an intestate.
- (2) Subsection (1) does not apply if a contrary intention appears in the will.

Definitions: **will**, s 4

Origin: *Wills Bill 1994 (Victoria)* cl 30

Section 25

- C33 The word **issue** should be avoided by will drafters but nevertheless is still sometimes used (for an example see *Re Te Huango* [1993] 3 NZLR 77). *Section 25* is a new provision that is meant to clarify what occurs if a testator leaves property to issue without limiting the disposition to only immediate issue (that is, children, rather than the broader meanings, for example, of children *and* grandchildren, or of *all* lineal descendants). In these cases *section 25* provides that the approach to be taken is the same as that in the provisions of the Administration Act 1969 s 78 (apart from the reference to s 78, *section 25* is like the corresponding provision in the Victorian draft).
- C34 The Administration Act 1969 s 78 provides that the estate of an intestate is to be held on statutory trusts for the issue of the intestate. That property is then held on trust for the child or children of the deceased who attain the age of 20 years or earlier marry. Where a child predeceases the will-maker, the children of that child who attain the age of 20 years or earlier marry may take (if more than one in equal shares) the share that their parent would otherwise have taken.
- C35 The provisions about how to construe requirements to survive with issue in s 29 of the Wills Act 1837 (UK) are not reproduced in this Act. This is because they are for two reasons considered unnecessary.
- C36 The first reason concerns a now obsolete historical rationale for s 29: to prevent the creation of an “estate tail” (an interest inheritable only by specified descendants of the original grantee) by implication where a will devised land with words like “to A and his issue”. Estates tail were rare even before 1953 when s 16 of the Property Law Act 1952 came into force and practically abolished this form of tenure. Broadly, s 16 has the effect that estates (or fees) tail can no longer be created in New Zealand, even expressly: see Adams (ed), *Garrow’s Law of Real Property* (5th ed, Butterworths, Wellington, 1961), 37–39; (NZLC PP16, 1991), paras 11, 134; (NZLC PP20, 1992), 63; (NZLC R29, 1994), 55–56).

Section 25 commentary continues overleaf

Section 25 commentary continued

- C37 The second reason concerns another historical purpose of s 29: to prevent some will dispositions breaching the rule against perpetuities. It is said that s 29 applied to will dispositions stating that they had effect only on a person having issue but not specifying a time at which this requirement would be tested. Section 29 might save these dispositions from perpetuities problems by treating the person as required to have had issue by the time he or she died (see the discussion in *Re Thomas, Thomas v Thomas* [1921] 1 Ch 306 and *50 Halsbury's Statutes* (4th ed, Butterworths, London, 1989), 173). But the Commission considers that there is little evidence that s 29 has saved many dispositions from the effect of breaching the rule against perpetuities.
- C38 The Commission therefore recommends that New Zealand follow the Western Australian legislation and the suggestions of the Queensland and New South Wales Law Reform Commissions and omit this provision (see QLRC WP46, 1994, para 6.7 and NSWLRC WP46, 1996, para 6.7).

26 Preservation from lapse of gifts to descendants

- (1) Unless a contrary intention appears in 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), subsection (1) 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 in which 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 fulfillment of any other contingency and that contingency has not been fulfilled before the time of the testator's death.
- (3) Subsection (1) shall not apply to:
 - (a) Any specific bequest or specific appointment of any personal chattels; or
 - (b) Any devise or bequest or appointment to any person as one of two or more joint tenants.

Section 26 continues overleaf

Section 26

- C39 Apart from some provisions that are spent, and some minor stylistic variations, *section 26* reproduces s 16 of the Wills Amendment Act 1955. Where a descendant predeceases the deceased, in broad terms these provisions have the effect that that descendant's children inherit in place of their parents.

(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 **appointed** and **appointing** have corresponding meanings;

child in relation to

- (a) a testator, means any child of the testator;
- (b) any person to whom any property is devised or bequeathed or appointed, means a child of that person;

issue, in relation to a testator, means any issue of the testator;

personal chattels has the meaning given in section 2 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) 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.

Definitions: **will**, s 4

Origin: *Wills Amendment Act 1955* s 16

27 If estate or residue disposed of in fractional parts and such a part fails

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

Definitions: **disposition**, **will**, s 4

Origin: *Succession Act 1981 (Queensland)* s 29; *Wills Bill 1994 (Victoria)* cl 33(2)–(3)

28 Rectification

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.

Definitions: **will**, s 4

Origin: *Administration of Justice Act 1982 (UK)* s 20; *Wills Bill 1994 (Victoria)* cl 37

Section 27

- C40 A will that disposes of an estate or of the residue of an estate in fractional parts, if well-drawn, will cover the possibility of a part failing, usually through lapse where a beneficiary has predeceased the deceased. A common form of words is, for example, for a gift to be to “such of A, B, and C as may survive me, and if more than one in equal shares.” Where the sharing is not equal the drafting is more complex. *Section 27* is designed to repair such omissions in wills that are not well-drawn and so to avoid partial intestacies.

Section 28

- C41 Sometimes a mistake creeps into a will unobserved by a testator and is not discovered until after the testator dies. Courts may be able to remedy such a mistake in construing the will. To give effect to the testator’s intention deduced from the entire will not by conjecture but with reasonable certainty, a court construing a will might supply omitted words and modify the words actually used: *Re Jensen* [1992] 2 NZLR 506, 510. At common law a court of probate also has a duty to omit from probate material fraudulently, accidentally or inadvertently inserted in a will. A probate court may in some jurisdictions also insert material which has been “accidentally or inadvertently omitted from the will when it was made”.
- C42 In *Re Jensen* the court was satisfied from the surrounding evidence that some words were included in the will mistakenly. But the judge questioned *obiter* the assumption that a probate court’s jurisdiction to rectify wills was limited to cases of fraud, mistake or insertion of words without a testator’s knowledge. By contrast to a court of probate, a court of equity, the judge said, had a broader jurisdiction to rectify documents. Citing as examples Maxton, “Rectification of Wills: A case for reform” [1984] NZLJ 142; *Rectification and Interpretation of Wills* (19th Report of the English Law Reform Committee) and Queensland Law Reform Commission Report number 22, 1978, the judge said that it seemed undoubted

that there are strong policy reasons for recognising a jurisdiction to rectify. . . . The object of the exercise is to give effect to the testator’s intentions. . . . Rectification is available for all other documents of this nature including, for example, deeds of settlement executed *inter vivos* but called into question after the deceased’s death. . . . In the United Kingdom the legislature has filled the breach with s 20 of the

Section 28 commentary continues overleaf

Section 28 commentary continued

Administration of Justice Act 1982 . . . but in the field of Judge-made law it is not always necessary or realistic to wait for legislative intervention. Equity is not past the age of child-bearing (per Harman LJ (1951) 67 LQR 506) and did not cease growing at some climactic date in England per Cooke P in *Hayward v Giordani* [1983] NZLR 140, 148.

- C43 *Section 28* is meant to give the courts a power in such cases to rectify a will. Courts would need to be satisfied that rectification was appropriate, for example, because a solicitor gave evidence that certain words were used in the draft and approved by the will-maker, but those words were accidentally omitted or transposed when the document was formalised. Legislation that gives courts power to rectify wills has been enacted in Queensland (see s 31 of the Succession Act 1981), and in New South Wales (see s 29A of the Wills Probate and Administration Act 1898, inserted in 1988).
- C44 By contrast, Australian Capital Territory provisions permit rectification of a will that in unknown, unforeseen or unappreciated circumstances would, if not rectified, operate in a way that failed to accord with the trend of will-maker's probable intent shown by the will and other evidence (see Wills Act 1968 s 12A(2), inserted in 1991, discussed in *Wills Reform* (NZLC MP2, 1996), 94–97; Rowland (1993) 1 APLJ 87–113 and 193–210). A will-maker can never foresee all the circumstances that will exist at the time of his or her death; some of these circumstances will, to the will-maker, always be unknown or unexpected. Empowering courts to rewrite wills on these grounds would seem to invite applications on the basis of speculation about a will-maker's wishes. Further, for one of the most compelling instances that Rowland gives, that of a will-maker being killed unlawfully by a will beneficiary, we have already recommended separate legislation: *Homicidal Heirs* (NZLC R38, 1997), para C15.

PART 6
INFORMAL MAKING AND REVOKING OF WILLS
BY THE ARMED FORCES, SEAFARERS,
AND PRISONERS OF WAR

29 Definitions for Part 6

In this Part

Armed Forces has the meaning given in section 2(1) of the *Defence Act 1990*;

formal revocation, in relation to any will, means a revocation of that will in accordance with paragraph (c) or (d) of section 17;

formal will means a will made in accordance with section 8;

informal will means a will expressed in any form of words whether written or spoken and not made in accordance with section 8;

operational service has the meaning given in section 15(3) of the *Burial and Cremation Act 1964*;

prisoner of war means a person on whom prisoner of war status is conferred by Section II of Part III of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), as incorporated in the Fifth Schedule of the *Geneva Conventions Act 1958*;

privileged person has the meaning given in section 30;

seafarer has the meaning given in s 2(1) of the *Maritime Transport Act 1994*.

Definitions: **will**, s 4

Origin: *Wills Amendment Act 1955* s 2

30 Definition of "privileged person"

In this Part **privileged person** means a person who at any material date was:

- (a) a member of the Armed Forces on operational service; or
- (b) a seafarer at sea; or
- (c) a prisoner of war who, immediately before he or she was captured or interned, was a privileged person under (a) or (b).

Definitions: **will**, s 4; **Armed Forces**, **operational service**, **prisoner of war**, **seafarer**, s 29

Origin: *Wills Amendment Act 1955* s 4

Section 29

- C45 *Section 29* would essentially re-enact s 3 of the Wills Amendment Act 1955, but spent definitions would be omitted and remaining definitions updated.

Section 30

- C46 *Section 30* would define **privileged person**. The Ministry of Defence advised the Law Commission that the Wills Amendment Act 1955 provisions about the raising of foreign forces in New Zealand should not be continued (indeed, ss 5 and 11 of the Defence Act 1990 do not contemplate this eventuality). However, the Ministry also advised that New Zealand has contributed and will continue to contribute personnel to forces raised by, or in combination with, other states. These personnel *remain* members of the Armed Forces of New Zealand. The privilege of making and revoking wills informally should not, however, also be conferred on members of foreign armed forces when those forces are acting in combination with the Armed Forces of New Zealand.

31 Privileged persons may make or revoke wills informally

- (1) A privileged person may in accordance with this Part make an informal will.
- (2) Without limiting the general power conferred by subsection (1), any privileged person may, by an informal will, do all or any one or more of the following:
 - (a) dispose of the whole or any part of his or her 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) appoint any person as guardian of his or her infant children;
 - (d) make any other provision whatsoever which may lawfully be made by a formal will;
 - (e) amend wholly or in part a formal or informal will;
 - (f) revoke wholly or in part a formal or informal will; and
 - (g) revive wholly or in part a revoked formal or informal will.
- (3) Despite sections 17, 20 and 21, a privileged person may revoke, revive or amend a will (whether formal or informal) by any words (whether written or spoken) declaring an intention to revoke, revive or amend that will.
- (4) Nothing in this Part is to restrict the operation of section 108 of *Te Ture Whenua Māori/The Māori Land Act 1993*.
- (5) Despite any provision to the contrary in any other enactment, an informal will may be proved by such evidence as the court may consider sufficient.

Definitions: court, will, s 4; formal will, informal will, s 29; privileged person, s 30

Origin: *Wills Amendment Act 1955* s 5

Section 31

C47 *Section 31* would replace s 5 of the Wills Amendment Act 1955.

32 Wills made and revoked by minors who are or will be privileged persons

- (1) Despite section 6 an informal will made by a privileged person who is a minor shall be as valid as it would have been if the testator had not been a minor.
- (2) Despite section 6 a formal will made by a testator who is a minor shall be as valid as it would have been if the testator had not been a minor if, at the date of the making of the will, the testator:
 - (a) is a privileged person; or
 - (b) has received orders to train for or join any part of the Armed Forces for operational service; or
 - (c) has received orders to join any ship as a seafarer.
- (3) Despite section 6 a formal revocation of a will by a minor which depends for its validity on this Part shall be as effective as a revocation of the will as it would have been if the testator had not been a minor.

Definitions: **minor, will**, s 4; **Armed Forces, formal revocation, formal will, informal will, operational service, seafarer**, s 29; **privileged person**, s 30

Origin: *Wills Amendment Act 1955* s 6

33 Evidence that testator is a member of Armed Forces or a seafarer

- (1) A certificate in connection with any fact which has to be proved to establish that at any material date a person was a privileged person, or was entitled under section 32 to make or revoke a will while a minor 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 a person who at the material date was a member of the Armed Forces, by an officer of any service of the Armed Forces;
 - (b) in the case of a person who at the material date was a seafarer on any ship or had received orders to join any ship as a seafarer, by an officer on that ship.
- (2) Notice shall be taken judicially without further proof of the appointment and signature of any officer mentioned in subsection (1).

Definitions: **minor, will**, s 4; **Armed Forces, seafarer**, s 29; **privileged person**, s 30

Origin: *Wills Amendment Act 1955* s 6A

Section 32

C48 *Section 32* would replace s 6 of the Wills Amendment Act 1955.

Section 33

C49 *Section 33* would replace s 6A of the Wills Amendment Act 1955.

34 Witnesses to, and revocation and amendment of, a privileged person's will

- (1) Nothing in section 11 shall make null or 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) Despite section 17, where any testator who is a privileged person, whether or not he or she is a minor, with the intention of revoking a will directs or authorises (either in writing or orally) any other person to burn or tear or otherwise destroy a will of the testator, any burning, tearing, or other destruction effected pursuant to the direction or authority shall (whether or not it takes place in the testator's presence) be as effective to revoke the will as it would have been if it had taken place in the testator's presence.
- (3) Nothing in section 21 shall require any obliteration, interlineation, or amendment made in any formal or informal will to be executed in accordance with section 8 if the obliteration, interlineation, or amendment was made:
 - (a) by the testator or by some person in the testator's presence and by the testator's direction; and
 - (b) while the testator was a privileged person, whether or not the testator was a minor.

Definitions: **minor**, **will**, s 4; **formal will**, **informal will**, s 29; **privileged person**, s 30

Origin: *Wills Amendment Act 1955* s 7

35 Unwritten informal will operates only if testator dies within 12 months

- (1) Any valid informal will that is
 - (a) not in writing signed by a testator, or
 - (b) not all written by the testator,
 has no effect unless the testator
 - (c) died within 12 months after making the will, or
 - (d) was a prisoner of war
 - (i) when he or she made the will, or
 - (ii) within 12 months after making the will, and died either
 - (iii) a prisoner of war, or
 - (iv) within 12 months after ceasing to be a prisoner of war.
- (2) In this section **will** includes any words declaring an intention to revoke a will.

Definitions: **will**, s 4; **informal will**, **prisoner of war**, s 29; **month**, *Acts Interpretation Act 1924* s 4

Origin: *Wills Amendment Act 1955* s 9

Section 34

C50 *Section 34* would replace s 7 of the Wills Amendment Act 1955.

Section 35

C51 *Section 35* would replace s 9 of the Wills Amendment Act 1955.

PART 7
MISCELLANEOUS

36 Mutual wills

Where

- (a) two persons exchange promises about how each will dispose of his or her property on death; and
- (b) those promises have not been varied or discharged by agreement between such testators before the death of the first to die of such testators (the first testator); and
- (c) the first testator has duly performed that testator's promise; and
- (d) the effect of the last will of the surviving testator (the second testator) or of the failure of the second testator to make a will or of any disposition made by the second testator during the lifetime of the second testator is that the second testator is in breach of the promise made to the first testator by the second testator;

then

- (e) any person who would have succeeded to any part of the estate of the second testator, had the second testator not been in breach of the promise made by the second testator to the first testator, shall, to the extent that such promise is unfulfilled, be entitled as against the estate of the second testator to such relief as would be available to a beneficiary had the terms on which the personal representative of the second testator holds the second testator's estate been the terms promised by the second testator to the first testator.

Definitions: **will**, s 4

Section 36

- C52 *Section 36* does not derive from the Victorian draft. Its purpose is to set out in statutory form the existing law of mutual wills. Such a crisp statement of the legal position may assist courts that are required to deal with circumstances like those in *Re Newey (deceased)* [1994] 2 NZLR 590; *Goodchild* [1996] 1 All ER 670; and *Fisher v Mansfield and Ors* (unreported, High Court, Wellington, 7 May 1996, M 101/96).
- C53 *Section 36* would make unnecessary the resolution of doctrinal disputes about the conceptual basis of the existing law. It is by design *not* expressed to be a code. It also does not purport to influence issues like the standard of the proof of the promises or whether a beneficiary disappointed by ademption during the second testator's lifetime has some remedy other than the one it provides.
- C54 Some formulations of the existing law state that one of the probanda for mutual wills is an agreement not to revoke a will containing the disposition the testators agreed will be made. But the essence of the promise is that property will be disposed of on a testator's death in a certain way, and there is no breach of this promise if the will in which the disposition was contained at the time the promise was made is replaced by a later will that repeats the disposition, or for another example if the same result is achieved by a distribution on intestacy. We consider that in this respect *section 36* restates correctly the substance of the existing law.

37 Dispositions to unincorporated associations of persons

- (1) A disposition
 - (a) to an unincorporated association of persons, which is not a charity; or
 - (b) to or upon trust for the aims, objects or purposes of an unincorporated association of persons, which is not a charity; or
 - (c) to or upon trust for the present and future members of an unincorporated association of persons, which is not a charity; has effect as a legacy or devise in augmentation of the general funds of the association.
- (2) Property which is or which is to be taken to be a disposition in augmentation of the general funds of an unincorporated association must be:
 - (a) paid into the general fund of the association; or
 - (b) transferred to the association; or
 - (c) sold or otherwise disposed of on behalf of the association and the proceeds paid into the general fund of the association.
- (3) If the personal representative pays money to an association under a disposition, the receipt of the Treasurer of the association (or, if the officer is not so named, a like officer of the association), is an absolute discharge for that payment.
- (4) If the personal representative transfers property to an association under a disposition, the transfer of that property to a person or persons designated in writing by any two persons holding the offices of President, Chairman, Treasurer, or Secretary (or, if those officers are not so named, by like officers), is an absolute discharge to the personal representative for the transfer of that property.
- (5) Subsections (3) and (4) do not apply if a contrary intention appears in the will.
- (6) It is not an objection to the validity of a disposition to an unincorporated association of persons that a list of persons who were members of the association at the time the testator died cannot be compiled, or that the members of the association have no power to divide assets of the association beneficially amongst themselves.
- (7) This section shall not apply to any trust to which s 61B of the *Charitable Trusts Act 1957* applies.

Definitions: **disposition, will**, s 4

Origin: *Wills Bill 1994 (Victoria)* cl 34

Section 37

- C55 *Section 37* is new. It provides that a gift to an unincorporated association where the purpose is not charitable will have effect as “a disposition in augmentation of the general funds of the association”. There is no problem in relation to gifts to incorporated associations because they are notional persons and have a right to inherit. In relation to unincorporated associations, a gift has in the past failed unless the association is either a charity or it has a charitable function, in which case the gift may be saved by Charitable Trusts Act 1957 s 61B. There are unincorporated associations with no or only doubtful charitable status. Examples may include an iwi or hapū of Māori, or an association formed for a purpose that is political (for a discussion of the line between “political” and “charitable”, see *Re Collier, Taylor v Collier* (unreported, High Court, Hamilton, 14 August 1997, M 277/95)). There seems to be no reason why in such cases a gift to an unincorporated society should not be treated as an augmentation of the general funds of the association so fulfilling the will-maker’s clear intentions.

38 Law which determines validity of will of movable property

- (1) Every will and other testamentary instrument made outside New Zealand by any person (whatever may be his or her domicile at the time of making the same or at the time of his or her 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 or her 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 or her domicile of origin.
- (2) Every will and other testamentary instrument made within New Zealand by any person (whatever may be his or her domicile at the time of making the same or at the time of his or her 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 or her 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 rent charge 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.

Definitions: **will**, s 4; **New Zealand**, *Acts Interpretation Act 1924* s 4

Origin: *Wills Amendment Act 1955* s 14

Section 38

- C56 With the omission of spent material, *section 38* would repeat the provisions of s 14 of the Wills Amendment Act 1955.

39 Repeals and amendments

- (1) The First Schedule to the Imperial Laws Application Act 1988 is amended by repealing so much of it as relates to enactments relating to wills and accordingly
(1837) 7 Will 4 and 1 Vict, c. 26—The Wills Act 1837, sections 1, 3, 6, 9, 10, 13 to 31, and 33,
(1852) 15 and 16 Vict, c. 24—The Wills Act Amendment Act 1852, sections 1, 3, and 4,
cease to have effect as part of the laws of New Zealand.
- (2) The enactments specified in Schedule 1 are amended in the manner indicated in that Schedule.

Section 39

- C57 *Section 39* provides for repeals, and for necessary consequential amendments provided for by *Schedule 1*.
- C58 Minor changes to the High Court Rules would also be needed. An example is High Court Rule 659 (Alterations to will), in which it would be necessary to:
- substitute for the reference to the Wills Act 1837 (UK) s 21 (Alterations) a reference to the equivalent draft Act provision, *Section 21 (Amendment)*, and
 - substitute for the references to **alteration** the draft Act terminology **amendment**.

Another example is High Court Rule 655 (Conditions of, and order of priority for, grant of administration with will annexed), in which it would be necessary to substitute for the reference to section 2 of the Wills Amendment Act 1977 (Effect of divorce, etc, on wills) a reference to the equivalent draft Act provision, *Section 19 (Revocation by an order for separation or dissolution)*. Similarly, see the references to section 2 of the Wills Amendment Act 1977 in forms 51 (Affidavit to lead grant of probate) and 52 (Affidavit to lead grant of administration with will annexed).

SCHEDULE 1
ENACTMENTS AMENDED
see section 39(2)

Estate and Gift Duties Act 1968 (1968/35)

section 31

Delete "section 33 of the Wills Act 1837 of the United Kingdom Parliament"

Substitute "section 26 of the *Succession (Wills) Act 199–*"

Evidence Amendment Act 1980 (No 2) (1980/27)

section 12(2)

Delete "the Wills Act 1837 of the United Kingdom Parliament"

Substitute "the *Succession (Wills) Act 199–*"

Life Insurance Act 1908 (1908/105)

section 66C(1)(a)(iii)

Delete "section 6 of the Wills Amendment Act 1955 or section 2 of the Wills Amendment Act 1969"

Substitute "sections 6 or 32 of the *Succession (Wills) Act 199–*"

Māori Trustee Act 1953 (1953/95)

section 12A(7)

Delete "the Wills Amendment Act 1955"

Substitute "the *Succession (Wills) Act 199–*"

Protection of Personal and Property Rights Act 1988 (1988/4)

section 55(5)

Delete "section 10 of the Wills Act 1837 (U.K.)"

Substitute "section 8 of the *Succession (Wills) Act 199–*"

Public Trust Office Act 1957 (1957/36)

section 72(7)

Delete "the Wills Amendment Act 1955"

Substitute "the *Succession (Wills) Act 199–*"

Simultaneous Deaths Act 1958 (1958/37)

section 3(1)(e)

Delete "section 33 of the Wills Act 1837 of the United Kingdom Parliament"

Substitute "section 26 of the *Succession (Wills) Act 199–*"

section 3(1)(g)

Delete "section 16 of the Wills Amendment Act 1955 (as enacted by section 3 of the Wills Amendment Act 1958)"

Substitute "section 26 of the *Succession (Wills) Act 199-*"

Delete "section 16 of the Wills Amendment Act 1955"

Substitute "section 26 of the *Succession (Wills) Act 199-*"

section 3(1)(h)

Delete "section 33 of the said Wills Act 1837"

Substitute "section 26 of the *Succession (Wills) Act 199-*"

Trustee Companies Act 1967 (1967/35)

section 36(8)

Delete "the Wills Amendment Act 1955"

Substitute "the *Succession (Wills) Act 199-*"

Table comparing the Wills Act 1837 (UK) and the Succession (Wills) Act

THIS TABLE COMPARES the Wills Act 1837 (UK) as amended with the draft Succession (Wills) Act. Sections not listed have been repealed as to New Zealand (for details, see the sections of the full Act, reproduced at pages 69–98).

1837 Act (UK)		Draft Wills Act
1	replaced by	4
3	replaced by	12
6	unnecessary (repealed in England: Statute Law (Revision) Act 1969)	–
9	replaced by	8
10	replaced by	8
13	replaced by	9
14	unnecessary (para C14)	–
15	replaced by	11
16	unnecessary (para C14)	–
17	unnecessary (para C14)	–
18	replaced by	18
19	unnecessary	–
20	replaced by	17
21	replaced by	21
22	replaced by	20
23	replaced by	13
24	replaced by	22

1837 Act (UK)		Draft Wills Act
25	replaced by	23
26	replaced by	14
27	replaced by	15
28	replaced by	16
29	unnecessary (paras C35–C38)	–
30–31	unnecessary (omitted from Western Australia Wills Act 1970 and Queensland Succession Act 1981)	–
33	replaced by	26
1852 Amendment (UK)		Draft Wills Act
1	replaced by	8
1955 Amendment (NZ)		Draft Wills Act
3–11	replaced by	29–35
13	replaced by	18(3)
14	replaced by	38
16	replaced by	26
1969 Amendment (NZ)		Draft Wills Act
2	replaced by	6
1977 Amendment (NZ)		Draft Wills Act
2	replaced by	19
3	replaced by	11(2)(a)
4	unnecessary	–

[The printed version of this report contains as an appendix the Wills Act 1837 (Imp.), the Wills Act Amendment Act 1852 (Imp.), the Wills Amendment Act 1955, the Wills Amendment Act 1958, the Wills Amendment Act 1960, the Wills Amendment Act 1962, the Wills Amendment Act 1969, and the Wills Amendment Act 1977, which may be found in RS Vol 30.]