Reform of the Law of Wills

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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. This article examines important current proposals for the enactment of new and up-to-date uniform wills legislation throughout Australia.

Australia is moving steadily towards uniform wills legislation and eventually towards uniform legislation governing all major areas of the law of succession. At a meeting of the Standing Committee of Attorneys-General held in May 1992, it was agreed that the States and mainland Territories should co-operate with the aim of achieving uniform succession statutes throughout Australia. The intention is that textually identical legislation will be enacted in each jurisdiction to cover not only the law of wills and intestacy but also the law relating to probate, the administration of estates of deceased persons, and family provision. In short, Australia now officially has a Uniform Succession Laws project.

The history of these proposals dates from at least the year 1977 when the Standing Committee of Attorneys-General adopted a policy of uniform law reform as to the recognition of interstate grants of representation. In 1984, the Law Reform Commission of Western Australia published a report[1] which recommended a system for the automatic recognition of grants of representation throughout Australia. In 1991, the Standing Committee decided not to adopt this recommendation; but its decision the following year as to uniform succession laws generally was itself a recognition of the significance of the Western Australian Commission's earlier work.

Two other significant developments have occurred in this area. The first was the enactment of the Succession Act (Qld) in 1981. This statute, in a mere 72 sections, comprehensively covers the law of wills and intestacy,

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1. WALRC *Recognition of Interstate and Foreign Grants of Probate and Administration* (Perth, 1984).

probate and administration, and family provision, and is one model upon which the general structure of uniform succession legislation could well be based. Experience has shown this Act to work well and the Act has itself been amended only marginally.

The second development was the appearance in May 1994 of the final report of the Law Reform Committee of the Victorian Parliament ('the Report').[2] This document, running to some 300 pages, is probably the most comprehensive on its subject ever published in Australia. It contains a draft Wills Act ('the draft Act') as the Victorian Committee's main contribution to the national Uniform Succession Laws project.

The draft Act, in 38 sections, is for the most part a 'plain language' document. It embodies a complete statutory regime governing wills, and would enact numerous significant changes to existing law. It is the purpose of this article briefly to consider the most important of these innovative proposals. They are as follows (references to sections being to sections in the draft Act):

- provision for 'statutory wills' (section 6);
- execution formalities, including gifts to interested witnesses (sections 9 and 11);
- effect of divorce on wills (section 13);
- admissibility of extrinsic evidence in the construction of wills (section 23);
- effect of dispositions to unincorporated associations of individuals (section 34).[3]

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2. Parliamentary Law Reform Committee *Reforming the Law of Wills* (Melbourne: Govt Printer, 1994).
3. Other provisions of the draft Act that would reform the law of wills in one or more Australian jurisdictions include: the conferring of jurisdiction on the county (district) court in matters of wills and probate where the value of the estate is within the jurisdictional limit of the court (s 3); the conferring of testamentary dispositive power upon a testator in respect of property coming to a personal representative by virtue of that office after the testator's death (s 4(2), (3)); an express prohibition on a trustee's power to dispose of trust property by will (s 4(5)); provision for minors to make, alter and revoke wills in contemplation of marriage and during marriage (s 5(2)); the conferring of power on the court to make orders authorising an unmarried minor to make, alter or revoke a will (s 5(3)); abolition of the rule that a will must be signed by the testator at the foot or end (s 7(2)); provisions assimilating the formal validity of exercise of testamentary powers of appointment with wills (s 7(4), (5)); provision to preserve dispositions to, and appointments to office of, a testator's surviving spouse where the will was made before marriage but not in contemplation of it (s 12(2)); the liberalisation of rules regarding alterations to wills (s 15(3)); provision requiring a beneficiary to survive a testator for 30 days, unless a contrary intention appears (s 26); the liberalisation of statutory substitutional gift rules to extend to issue of issue (s 32); provision to salvage certain inaptly-drawn residuary gifts (s 33); provision clarifying the law as to delegation of testamentary power (s 35); provision for rectification of wills in cases of clerical and communicational mistakes (s 37); provision for maintenance distributions within 30

STATUTORY WILLS

Section 6 of the draft Act would give effect to the radical proposal that a 'statutory will' may be made (or a will altered or revoked) by order of the court authorising the same for and on behalf of any person — regardless of age — who for any reason lacks testamentary capacity. The contemplated jurisdiction may also be exercised in respect of a particular, specific, testamentary provision. There is currently no legislation of this type in force anywhere in Australia.[4]

The theoretical justification for this proposal is that some persons lacking testamentary capacity, especially by reason of mental incapacity, might 'need' to make provision for others by will, or alternatively, that others might 'need' this type of provision to be made for them by an incapacitated 'testator'. The Report gives as examples of cases in which this jurisdiction is said to be desirable the following:

- applications to make provision for a housekeeper or some other employee of an incapacitated person to whom that person is under an obligation;
- applications to ensure that an incapacitated person's moneys derived from that person's family are returned thereto;
- applications where an incapacitated person's 'family situation' or assets have changed since the person made a will;
- applications to make provision for a de facto spouse;
- applications where a distribution of the incapacitated person's estate upon intestacy would be 'morally unjust' to some members of the person's family.[5]

The section contains detailed provisions regarding the procedure to be followed by an applicant. It provides for a two-stage process: first, application for leave to apply for an order;[6] secondly, application for an order following the granting of leave.[7] An application for leave to apply may be allowed to proceed as an application for an order, and the order made, in the one proceeding.[8]

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days of a testator's death (s 39(2)); and provision for the production, inspection and copying of wills for and by interested persons (s 39(3)).

4. In February 1992, by its report entitled *Wills for Persons Lacking Will-Making Capacity*, the NSW Law Reform Commission made somewhat similar recommendations to those contained in the draft Act. The principal differences are that the NSW recommendations would, first, require proof of lack of testamentary capacity; and secondly, would permit joinder of the Protective Commissioner to the proceedings. In addition, the detail of the NSW proposals is different in many respects from that of the draft Act. The NSW report is very brief, and it does not address many of the concerns considered in this article. See also Mental Health Act 1983 (Eng) ss 96 and 97.
5. *Reforming the Law of Wills* supra n 2, 36, 39.
6. S 6 (4), (5), (6), (7).
7. S 6(8).
8. S 6(7)(f).

The section contains numerous provisions designed to prevent its possible abuse.[9] Thus, the proposed jurisdiction would be conditional upon the court being satisfied that the proposed will (or alteration or revocation) 'is or might be one which would have been made'[10] (sic) by the person had he or she had capacity. In addition, 'adequate steps' must have been taken to allow representation of all persons with a legitimate interest in the application.[11] Further, subject to the court's discretion, evidence as to some 11 additional matters must also be furnished to the court by the applicant. These include, among other matters, the reasons why the application is being made,[12] the actual wishes of the incapacitated person,[13] the likelihood of that person acquiring or regaining capacity,[14] and the claims of relations of that person upon intestacy.[15]

The section also contemplates the possibility that a registrar may exercise the jurisdiction of the court in all cases where an order is sought by consent of all the parties,[16] and in contentious cases, where the value of all the affected interests does not exceed a sum to be specified in the rules to be made under the Act.[17]

It is difficult to endorse these proposals in their present form, and several comments seem appropriate. The first is that nothing in the Report really seems to justify the existence of this novel jurisdiction at all, and it is suggested that none of the examples given above does so. It would create an interventionist, paternalistic jurisdiction exercisable even though an applicant had no claim under an existing will of the incapacitated person, no claim on intestacy, no claim under family provision legislation, and no claim as a creditor of the estate. Most persons who had acted as housekeeper for an incapacitated person would fall within one of these categories; and if such a person did not, the services rendered must surely have been performed in a spirit of charity.

Secondly, the section does not require that the fact of incapacity must be positively proved to the court (or registrar) by the applicant. Sub-section (5)(a) merely requires, negatively, that leave to apply must be refused if the court is not satisfied that 'there is reason to believe that the person for whom the statutory will is to be made ... is or may be incapable of making a will'. It follows that the jurisdiction exists merely if there is some reason to believe that a person 'may' lack capacity. It is suggested that this is an unsatisfactory

9. S 6(5), (6).
10. S 6(5)(b).
11. S 6(5)(e).
12. S 6(6)(a).
13. S 6(6)(d).
14. S 6(6)(e).
15. S 6(6)(g).
16. S 6(9)(a).
17 S 6(9)(b).

form of drafting and that the contemplated jurisdiction is open to abuse at this point.

Thirdly, it is difficult to be confident in the effectiveness of many of the supposed safeguards against abuse of the process. For example, sub-section (5)(b) provides that the court must be satisfied that 'the proposed will [or alteration or revocation] is or might be one which would have been made by the person if he or she had testamentary capacity'. This requirement seems both too narrow and too wide; and in any case requires the court to perform the logically impossible feat of deciding, in the case of mental incapacity, what a person without the capacity to do something would have done had the capacity existed. In addition, a testator 'might' have made all manner of unlikely dispositions — one could never know, or not at any rate know with the degree of certainty necessary to be 'satisfied'. Further, of the various matters on which evidence would be required to be furnished to the court, it is not difficult to imagine how, in the case of an unscrupulous applicant, these could be avoided or minimised.[18]

Fourthly, the section does not require positively that the incapacitated person be consulted as to his or her wishes on the subject of the proposed order for a statutory will.[19] Nor does it require that that person ever be informed that a statutory will has been made. It follows that a person who has regained capacity might be unaware that such a will has been made, and that it contains provisions different from those contained in a will validly made by the person prior to the incapacity. It is suggested that the proposed legislation is seriously defective in these respects.

Fifthly, it seems highly questionable whether this is an appropriate matter in which consent orders should be made at all. The section would confer jurisdiction upon a registrar in all cases in which all the interested parties consent.[20] This is surely a matter that should be clarified in the legislation itself, not merely in rules of court. The reason is partly that it is not clear whether a registrar has the power positively to determine as a matter of fact whether all of the possibly interested parties have consented; and partly that there exists an obvious potential for collusion between fraudulent applicants. One can readily imagine collusive schemes devised

18. S 6(6), although it presents the superficial appearance of a set of rigorous safeguards against abuse of this jurisdiction, is in reality very loosely drafted. In particular, para (d) relating to the actual wishes of the incapacitated person; para (e) relating to the regaining of capacity; and para (f) relating to existing wills of the incapacitated person, are drafted in terms that in the opinion of this commentator could easily be avoided or otherwise made ineffective. It is suggested that the general weakness of the entire section is that insufficient weight is given in its provisions to the actual wishes of the incapacitated person; very few persons who would technically fall within its provisions would, in fact, be utterly incapable of forming a rational intention as to testamentary wishes.

19. S 6(7)(c).

20. S 6(9)(a).

between persons having some colour of claim under the section whereby the interests, say, of persons who would be entitled on intestacy were fraudulently concealed from the court or registrar. It is suggested that the contemplated jurisdiction, by the very fact that it concerns the property of vulnerable persons, is peculiarly susceptible to this kind of abuse.

Finally, the very concept of a 'statutory will' (quite apart from this being a contradiction in terms) is foreign to the philosophy that has always informed wills legislation in Anglo-Australian law. Our courts have always emphatically disclaimed any jurisdiction to make a will, or any part of a will, for a testator. The reason, of course, is that testamentary dispositions are gifts, and that a gift of a person's property must be made by that person. Only by making effective gifts by will can a testator defeat the claims of next-of-kin to the testator's property after death.

The fact is that the phrase 'statutory will' is a euphemism for a radical mode of compulsory property distribution from the estates of persons who were vulnerable to legal process in their lifetimes. If there really does exist a class of persons who should be benefited in this way, then changes should be made to family provision law to accommodate them. Upon the evidence of the Report such a class does not seem to exist at all. But it is, it is suggested, a mistake to proceed in this direction by means of a statutory lie.

It is further suggested that the present proposal has the potential for serious abuse, without fully-effective safeguards, against the property of vulnerable persons. Many succession lawyers and concerned citizens might well consider the terms of section 6 of the draft Act as both unnecessary and potentially mischievous, and that they should be omitted in their entirety from any proposal for uniform Australian wills legislation.

EXECUTION FORMALITIES

1. Dispensation with formality requirements

The draft Act contains provisions for the execution of wills similar in substance to those found in all Australian jurisdictions. Section 9, however, embodies the latest version of the law relating to the potential validity of informally executed wills (including alterations, revocations and exercises of powers of appointment). It is substantially similar in this regard to existing legislation in New South Wales, South Australia and the Australian Capital Territory giving the court power to dispense with the formality requirements.

It is enough for this purpose that 'the Court is satisfied that the deceased intended the document to constitute his or her will ...' (or alteration, revocation, or exercise of a power of appointment).[21]

21. S 9(1).

This standard is probably lower than that presently applying in Western Australia and the Northern Territory, where the court must be satisfied that 'there can be no reasonable doubt' as to the deceased's intention; and it is quite different from the requirement of 'substantial compliance' applying in Queensland. There appears, however, to be no Western Australian case decided on the standard of 'no reasonable doubt' that would clearly not have been decided in the same way had the standard simply been that 'the Court is satisfied' as to the testator's intention.[22]

From a policy perspective, the formality requirements of wills legislation, and the power to dispense with those requirements, is a matter upon which arguments are numerous and finely balanced. Fundamentally, the question is: how far should the law facilitate home-made wills, given that the making of such a will is by its very nature an occasion as to which a suspicion of fraud or of undue influence may attach? In adopting the ordinary civil standard of proof of intention the Report has endorsed the experience of most Australian jurisdictions that there seems in practice to be little cause for concern with the courts' exercise of this power.[23]

2. Interested witnesses

These considerations also apply to section 11 of the draft Act, which would effect a significant departure from existing succession law in most Australian jurisdictions in abolishing the long-established rule that disqualifies an essential witness, and the witness' spouse, from taking a benefit under a will. This is a matter on which succession lawyers tend to have strong feelings — some seeing the rule as anachronistic and its abolition as long-overdue reform, others seeing its abolition as subversive of one of the fundamental cornerstones of the law of wills.

It is suggested that there is currently only one justification for the existence of the rule. As Lord Evershed said, it is 'to protect a testator who [is] in extremis, or otherwise weak and not capable of exercising judgment, from being imposed upon by someone who [comes] and presents him with a will for execution under which the person in question [is] himself substantially interested'.[24]

There are several arguments favouring abolition of the rule. These include the view that a person perpetrating a fraud against a testator will

22. Eg *In the Estate of Crossley (Dec'd)* [1989] WAR 227; *James v Burdekin* [1990] 3 WAR 298; *In the Estate of Possingham (Dec'd)* (1983) 32 SASR 227; *In the Estate of Sutton* (1989) 51 SASR 150.

23. See especially Langbin *Excusing Harmless Areas in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law* (1987) 87 Columbia L Rev 1, 34-37, in which the author, following an exhaustive consideration of the issues, supports the application of the civil standard of proof.

24. *Re Royce's Will Trusts* [1959] Ch 626, 633.

usually be well aware of the law and will therefore ensure that the will is properly executed and attested, so that only honest witnesses are likely to be prejudiced by the rule; and that any gift to an attesting witness will in any event naturally create a suspicion of undue influence which may be raised and argued by other interested parties.

The latter point has more force, it is suggested, in theory than in practice. More than 99 per cent of wills are proved in Australia by the administrative procedures of a supreme court probate registry. If the interested-witness disqualification were removed in the terms of section 11 of the draft Act a registrar would probably have no jurisdiction to make requisitions as to the circumstances surrounding execution of the will merely because it appeared that there was an interested witness. The matter would probably have to be raised in a challenge to the validity of the disposition in the court's contentious jurisdiction in a probate action by either a residuary beneficiary or next-of-kin. That person, as plaintiff, would bear the ultimate burden of proving the fact of undue influence — a burden which might well prove impossible to discharge, and so potentially costly to the plaintiff as to discourage litigation in the first place.

What is certain is that the rule only applies in practice to home-made wills, and that these are the only wills to which Lord Evershed's reasoning applies. There is no doubt that the rule does afford at least some protection to weak, defenceless and otherwise vulnerable testators and that its abolition would remove that protection.

EFFECT OF DIVORCE ON WILLS

Section 13 of the draft Act would revoke any disposition in favour of a spouse upon divorce or annulment of the testator's marriage, subject to a contrary intention expressed in the will.[25] It would also revoke any appointment by the will of the spouse as executor, trustee, advisory trustee or guardian.[26] A disposition or appointment revoked under this provision would operate as though the spouse had predeceased the testator.[27]

Although this provision would effect a major reform in the law of wills in the majority of Australian jurisdictions, it is hardly controversial; and it accords with recommendations for reform by the Law Reform Commission of Western Australia in 1991, and by the South Australian Law Reform

25. Other than a power of appointment exercisable by the spouse exclusively in favour of the spouse's children.
26. Other than an appointment of the spouse as guardian of the spouse's children, or as trustee of property left by the will to trustees upon trust for beneficiaries including the spouse's children.
27. S 13(2).

Committee in 1977, neither of which has so far been implemented.

A divorce is normally accompanied by a property settlement. This should be regarded as final. It is therefore undesirable that the executors and family of one of the parties should be obliged subsequently to become involved with that person's former spouse. The only point of possible contention, it is suggested, is whether the revocation effected by divorce should be total (as in Tasmania)[28] or partial (as in New South Wales,[29] Queensland[30] and the Australian Capital Territory[31]). The more persuasive view seems to be that where a testator has made a will providing for persons other than a spouse there is no strong reason why dispositions in favour of others should be automatically revoked by the testator's divorce. The Tasmanian position results in at least some period of intestacy, and is calculated to ensure that a prudent divorcee will rush to his or her solicitor to make a new will immediately upon a decree having become absolute. Perhaps the most surprising aspect of this proposal is that it is not already the law throughout Australia.

ADMISSIBILITY OF EXTRINSIC EVIDENCE IN THE CONSTRUCTION OF WILLS

Section 23 of the draft Act contains proposals that are both innovative and desirable in permitting certain evidence extrinsic to a will to be admitted in the court's constructional jurisdiction. This would become possible where (a) any part of a will appears to be meaningless; or (b) any language used in a will is ambiguous on the face of it; or (c) evidence of surrounding circumstances (but not direct evidence of the testator's intention) shows that any language used in the will is ambiguous. Where the ambiguity is of kind (b), then direct evidence of the testator's intention would be admissible.

For a long time the case law as to admissibility of extrinsic evidence in the interpretation of wills, first codified by Sir James Wigram in 1831, has been in a state of flux and uncertainty. Many of the cases are difficult or impossible to reconcile, especially on the question of whether extrinsic evidence is admissible to raise the question of ambiguity in the first place.[32]

The present proposal seems to encapsulate what is desirable in the law that has emerged from decided cases, but without going beyond that law.

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28. Wills Amendment Act 1985 (Tas) s 5.
29. Wills Probate and Administration Act 1898 (NSW) s 15A.
30. Succession Act 1981 (Qld) s 18.
31. Wills Act 1968 (ACT) s 20A.
32. Cf *Re Fish* [1894] 2 Ch 83; *Higgins v Dawson* [1902] AC 1; *In the Will of Cain* [1913] VLR 50; *National Society for the Prevention of Cruelty to Children v Scottish National Society for the Prevention of Cruelty to Children* [1915] AC 207; *Day v Collins* [1925] NZLR 280; *Re Grazebrook* [1928] VLR 75; *Re Alleyn* [1965] SASR 22.

DISPOSITIONS TO UNINCORPORATED ASSOCIATIONS

Section 34 of the draft Act provides a desirable regime facilitating gifts by will to unincorporated associations of individuals. The case law on this subject is confusing and uncertain.[33] It derives from the fact that, by definition, an unincorporated association has no legal personality of its own; and, in addition, that where advancement of the purposes of the association is expressed or implied as the purpose of the gift, the rule of equity which invalidates trusts for non-charitable purposes may become operative.

The present proposal is based on section 63 of the Succession Act 1981 (Qld), Queensland being the only Australian jurisdiction so far to have enacted legislation validating gifts of this type and providing a regime for their operation. The draft section operates so as to treat the gift as one in augmentation of the general funds of the unincorporated association. Additional provisions deal with the payment of funds by, and the protection of, personal representatives.[34]

There is no doubt that legislation of the kind proposed is desirable, and there seems little doubt that the regime here set out for dealing with this type of disposition responds satisfactorily to the problems identified in the case law on the subject.

CONCLUSION

The Law Reform Committee of the Victorian Parliament has produced an important and valuable report on the reform of the law of wills. The draft Act, which is the major recommendation of the report, is likely to become, if not the specific textual precedent, 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.

In relation to 'statutory wills', and possibly in relation to its proposal to validate gifts to interested witnesses, however, the draft Act should not be adopted. In the opinion of this commentator, the provisions as to the former are too loosely drafted and are open to abuse; and they are in any event undesirable in principle. As to the latter, it seems undesirable to remove a long-standing protection afforded to vulnerable persons where no very cogent reason exists for doing so.

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33. Cf *Leahy v A-G (NSW)* [1959] AC 457; *Re Goodson* [1971] VR 801; *Re Turkington* [1973] 4 All ER 501; *Bacon v Pianta* (1976) 114 CLR 634.
34. S 34(2), (3).