



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 76 – Part II

**Effect of Marriage or Divorce
on Wills**

DISCUSSION PAPER

JANUARY 1985

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

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Preface

The Commission has been asked to examine and report upon the effect of marriage or divorce on wills, including the wills of persons who subsequently lose the mental capacity to make a new will.

The Commission has not formed a final view on the issues raised in this discussion paper and welcomes the comments of those interested in the topic. It would help the Commission if views were supported by reasons.

The Commission requests that comments be sent to it by Friday 29 June 1990.

Unless advised to the contrary, the Commission will assume that comments received are not confidential and that commentators agree to the Commission quoting from or referring to their comments, in whole or part, and to the comments being attributed to them. The Commission emphasises, however, that any desire for confidentiality or anonymity will be respected.

The research material on which this paper is based can be studied at the Commission's office by anyone wishing to do so.

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Summary

Terms of reference

We have been asked to examine and report upon the effect of marriage or divorce on wills, including the wills of persons who have lost the mental capacity to make a new will.

Effect of marriage on an existing will

Present position

Under Western Australia's *Wills Act 1970*, when a person makes a will and later marries, the marriage automatically revokes the will. There are only two exceptions to this rule. Under the first of these a will is not revoked by a marriage where there is a declaration in the will that it is made in contemplation of the marriage. The second exception relates to wills made in exercise of a power of appointment.

The general rule

The general rule can on occasions work unfairly, for example, where an elderly person with family commitments and a will honouring those commitments marries again and dies shortly afterwards without having made a new will. If the estate is only modest, the second husband or wife will receive at least the bulk of it under the intestacy rules and the first family little or nothing.

We ask whether the general rule should be retained and, if so, whether there should be modifications or further exceptions to the general rule. One possibility discussed is that gifts to children of former marriages under a will existing at the time of a remarriage should be preserved, even if the rest of the will is revoked; another is that gifts in the will to the person whom the testator later marries should be preserved. These issues are considered in paragraphs 3.1 to 3.17 of the Discussion Paper.

Wills made in contemplation of marriage

If the general rule is to be retained some modification of the first exception namely where there is a declaration in the will that it is made in contemplation of the particular marriage, may be desirable. At present, the exception can defeat the deliberate intentions of the testator.

In this context, the paper discusses a number of questions, including -

- (a) The extent to which evidence from outside the will itself should be admissible to determine whether words used in the will are an expression of contemplation of the marriage. Should the evidence be confined to that of the circumstances existing at the time of the making of the will, which appears to be the present position, or should evidence of statements made by the testator as to his or her intention be admissible also?
- (b) Whether it should be sufficient if the will is found to have been made in contemplation of the marriage, even though that contemplation is not expressed in the will at all.
- (c) Whether the exception should be extended to wills made in contemplation of any, rather than a particular, marriage.

These issues are considered in paragraphs 3.18 to 3.29 of the paper.

Effect of divorce on an existing will

Increasing incidence of divorce

Although marriage generally revokes a prior will, divorce does not. In recent times the number of divorces has been rising. In 1988, 3964 divorces were granted in Western Australia. The increase alone raises the question whether there should be a provision about the effect of divorce on a testator's will similar to that dealing with marriage.

Operation of the existing law

The present law sometimes operates in an apparently unfair way. This can occur, for example, where there has been a comprehensive property settlement by the husband in favour of the wife at the time of the divorce proceedings and years later the former wife also inherits his estate under a will made during their marriage but left unrevoked.

Arguments for and against the existing law

There are arguments for leaving the existing law as it is. These include the view that the law should be reluctant to interfere with the express intention of testators independently of their intention, and that some divorced testators do not revoke earlier wills because they continue to feel some responsibility towards the former partner and wish the will to remain in existence.

On the other hand, most testators, if they thought about it, would not want to benefit their former spouses under their wills, or at least not as generously as had been intended before the divorce, and if they do, it is usually through mistaken belief that divorce revokes an earlier will, inadvertence, oversight or procrastination. The former spouse might have already benefited from a provision for his or her maintenance or a property settlement. If divorce were to effect a statutory revocation of a gift in the will to a former spouse and the testator died without making a new will, the revocation would usually result in the property passing to relatives with a stronger moral claim to it than the former spouse. The principal arguments in favour of the existing law and those against it are set out in detail in Chapter 4 of the Discussion Paper.

One way of mitigating the potential for injustice in the present law would be by administrative action, such as by the Family Court registry advising the parties of the effect of the present law when the divorce is granted. But this has some difficulties - for example, any notice from the Court might not reach a party, especially one who has not contested the proceedings. If administrative action is to be adopted, the main issue is how this sort of information should be communicated to the parties.

Statutory revocation?

In a number of other jurisdictions some type of statutory revocation has been introduced. For example, in Tasmania all existing wills are now revoked by the subsequent divorce of the testator. A disadvantage of this reform is that even a will containing no gift to the other spouse is revoked on divorce. The only exception provided for in the Tasmanian legislation is where the will is expressed to be made in contemplation of the divorce. We ask whether the present law should be retained and, if not, what the effect of divorce on an existing will should be. Our tentative view is that the best solution is found in legislation recently enacted in New South Wales. This provides that any gift to the former spouse is revoked and the property intended to be given is to pass as if the former spouse had predeceased the testator. Under the New South Wales legislation, appointments under the will of the former spouse as executor, trustee or guardian are also revoked. The New South Wales provisions and those operating in several other jurisdictions where there is some kind of statutory revocation are considered in paragraphs 5.1 to 5.11 of the paper.

Exceptions to a general rule

If the law is to be changed to provide for revocation on divorce of testamentary gifts and appointments in favour of the testator's spouse, some modifications or exceptions would be desirable.

One possibility would be to provide, as in Ontario, that where a contrary intention appears in the will, the gifts and appointments it makes in favour of the former spouse are not revoked by divorce. Another possibility would be to provide, as in New South Wales, that the gifts and appointments are not revoked if the Supreme Court is satisfied by any evidence, including evidence of statements made by the testator, that the testator did not, at the time of the divorce, intend to revoke the gifts or appointments.

Other matters discussed in connection with the ambit of the suggested rule include -

- (a) whether the *Inheritance Act* should be amended so that a former spouse of a testator would always be entitled to apply for provision out of the estate where a gift in his or her favour is revoked because they have been divorced; and

- (b) whether there should be an exception in regard to provisions in the will dealing with the payment of debts or liabilities of the testator to the former spouse.

These and other possible modifications and exceptions to a general rule of revocation are discussed in paragraphs 5.12 to 5.27 of the paper.

Relevant divorces

In the paper, we discuss the question of which divorces, and in particular which overseas divorces, should effect a revocation under the suggested general rule (paragraphs 5.28-5.30).

Retrospectivity

We also consider whether a reform of the present law should apply retrospectively, that is should apply to the wills of all testators, including those divorced before the amendments take effect, or only to the wills of those who are divorced after the amendments come into effect (paragraphs 5.35-5.38).

List of questions at issue

Part IV of the discussion paper contains a complete list of questions on which the Commission seeks comment. As well the Commission invites comment on any other matters within the terms of reference.

Part I - Introduction

Chapter 1

GENERAL

1. TERMS OF REFERENCE

1.1 We have been asked to examine and report upon the effect of marriage or divorce on wills, including the wills of persons who have lost the mental capacity to make a new will.¹

1.2 The reference arose from concerns about the unintended effects after divorce of wills drawn up before divorce which provided for former husbands and wives. The Public Trustee expressed concern to the Government at the number of incapable persons under his protection whose marriages were dissolved and who did not have testamentary capacity to revoke their wills or make new ones.² The Public Trustee also said that, in his experience, the community in general was not aware that a will was not revoked by divorce and this sometimes caused problems when a former spouse died. Perpetual Trustees W.A. Ltd has given examples³ to the Commission of instances where the present law has caused problems. Because in looking at the question of the effect of divorce on wills, the question of revocation of wills by marriage also naturally arises, we were asked to examine and report on this topic also.

1.3 In Western Australia, the law governing the effect of the marriage of a testator⁴ on the testator's will is contained in section 14 of the *Wills Act 1970*, which derives from nineteenth century English legislation.⁵ There is no legislation dealing with the effect of divorce⁶ on a will and a divorce does not revoke a will or any part of it. The situation was much the same

¹ In Part I of this project, we dealt with the question of whether the formal requirements for a valid will should be modified by the adoption of the doctrine of substantial compliance or otherwise. We submitted our report in November 1985. Legislation based on the recommendations made in that report was enacted in 1987: *Wills Amendment Act 1987*.

² See footnote 24 in ch 4 below.

³ These examples were given in depersonalised form.

⁴ The term "testator" is used in this paper to include both women and men who execute wills. The usual term for a woman will-maker is "testatrix."

⁵ S 18 of the *Wills Act 1837* (UK) and s 177 of the *Law of Property Act 1925* (UK) which modified the effect of s 18.

⁶ In this paper "divorce" means termination of marriage by a decree of dissolution of marriage or a decree of nullity. The term "former spouse" includes any husband or wife whose marriage or putative marriage has been terminated by either of these decrees. The two types of decree are described in para 5.28 below, and see also para 5.29 below.

in other Australian States, but in some States and some overseas jurisdictions there have either been reforms or proposals for reform.⁷

2. LAYOUT OF PAPER

1.4 The effect of marriage on wills is dealt with in Part II of this paper and the effect of divorce on wills in Part III. Part IV sets out issues in relation to both topics on which we seek comment. Comment on any issue within the terms of reference as well as those specified would be welcome.

⁷ Chs 3, para 4.13 and ch 5 below.

Part II - Effect of Marriage on Wills

Chapter 2

THE EXISTING LAW

1. HISTORICAL BACKGROUND

2.1 In 1839, Western Australia adopted the English *Wills Act 1837*.¹ Section 18 of that Act provided that "every will made by a man or woman shall be revoked by his or her marriage".² Before the Act came into operation it was realised that it would operate to revoke wills made in contemplation of marriage, and an unsuccessful attempt was made in Parliament to suspend the coming into operation of the Act.³ Almost a century later, that aspect of the Act was modified in England. Section 177 of the *Law of Property Act 1925* provided that a will expressed to be made in contemplation of a marriage should not be revoked by the solemnisation of the marriage contemplated. A similar provision was enacted in Western Australia in 1962.⁴

2.2 In 1970, a new *Wills Act* was enacted in Western Australia. Instead of the provisions set out above, section 14 of the *Wills Act* provides:

"(1) A will is revoked by the marriage of the testator except where -

- (a) there is a declaration in the will that it is made in contemplation of the marriage; or

¹ By Act 2 Vict No 1.

² The only exception to this rule was a will made in exercise of a power of appointment when the property appointed by the will would not in default of appointment pass to the testator's heir, personal representatives or the person entitled as the testator's next of kin under the *Statute of Distribution 1670* (UK). This Statute, which applied in Western Australia, set up a statutory scheme by which personal property devolved if the deceased failed to make a will. With respect to real estate of which the deceased died intestate, common law rules providing for inheritance by the heir-at-law applied in Western Australia, until the State enacted the *Real Estate Administration Act* in 1893. This Act provided that the administrator of the estate was to hold and apply real estate as if it were personalty. The relevant provisions in the Statute of Distribution have been superseded in this State. There is now a statutory code which governs the devolution of real and personal property, contained in the *Administration Act 1903* (WA): see footnote 28 below in this ch and para 3.1 below. For an explanation of a power of appointment see para 2.14 below.

³ By Sir Edward Sugden: (UK) *Parliamentary Debates* 4 December 1838 columns 521, 529 and 537.

⁴ S 20 of the *Law Reform (Property, Perpetuities, and Succession) Act 1962*. The provision was repealed and re-enacted in similar terms as s 116 of the *Property Law Act 1969*.

(b) the will is made in exercise of a power of appointment where the property thereby appointed would not in default of appointment pass to the testator's personal representatives as such.

(2) A will expressed to be made in contemplation of the marriage of the testator is void if the marriage is not solemnised, unless the will provides to the contrary."

2.3 Express provisions in the Australian Constitution empower the Commonwealth to make laws with respect to "marriage"⁵ and "divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants".⁶ This power might extend to prescribing the effect of marriage on wills⁷ and also of divorce on wills, but the Commonwealth has not legislated on the topic and the States therefore retain the power to do so.⁸

⁵ S 51(xxi).

⁶ S 51(xxii).

⁷ The possibility was raised by R Sackville and C Howard in an article *The Constitutional Power of the Commonwealth to regulate Family Relationships* (1970-71) 4 Fed L Rev 30, 64. For a review of recent High Court cases on the scope of the marriage power, see A Dickey *Family Law* (1985) 37-52. It must be doubtful whether the ambit of the marriage power is wide enough to permit the Commonwealth to prescribe the effect of marriage on wills.

⁸ *Australian Constitution* s 109 provides that: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

Inconsistency under s 109 can arise in two principal ways: by a law of the Commonwealth indicating that it is to "cover the field" in respect of a particular subject on which there is also State law or by a direct conflict between a law of the Commonwealth and a law of the State: see *Miller v Miller* (1978) 141 CLR 269, 275 per Barwick CJ.

There have been some enactments by the Commonwealth under the marriage power, such as the *Marriage Act 1961*. However, there is no Commonwealth legislation covering the field of succession to property owned by married persons and there appears to be no direct conflict between s 14 and any provision enacted by the Commonwealth under the marriage power.

Sackville and Howard's article also raises the question of whether the Commonwealth power referred to in para 2.3 extends to prescribing the effect of *divorce* on wills - the topic considered in chs 4 and 5 below.

The Commonwealth has not enacted legislation covering the field of succession to property owned by testators who are divorced. In *Smith v Smith* (1986) 161 CLR 217, the High Court held that the *Family Law Act 1975* which is the principal Commonwealth legislation in this area revealed no intention to express exhaustively what the law should be governing the provision of maintenance or other benefit for one spouse out of the estate of the other spouse.

We are not aware of any Commonwealth law which would be in direct conflict with legislation implementing any of the solutions discussed by the Commission in ch 5 below. In *Garside and Garside* (1978) FLC 90-488, a Family Court case where a property settlement was ordered, Wood SJ ordered that as a condition precedent to the payment over of \$30,000 by the husband to the wife she should make and deposit with the Registrar of the Court an irrevocable will under the terms of which she would leave all her estate of whatsoever nature to the surviving children of the marriage equally. In making this order, the judge invoked the provisions of s 80 (k) of the *Family Law Act 1975* (Cth) which empowered the Court in exercising its powers under Part VIII of the Act (entitled "Property, Spousal Maintenance and Maintenance Agreements") to make any order which it thinks it is necessary to make to do justice.

2. THE GENERAL RULE

2.4 The general rule is that the marriage of the testator revokes, by operation of law, a will made before the marriage. This applies to all wills, including a "privileged will", that is a will made by a mariner at sea and, in certain circumstances, by a person serving with the armed forces of the Commonwealth of Australia or its allies, which need not comply with the normal requirements of the Act for a valid will.⁹ It also extends to an "informal will", that is one which does not comply with the normal requirements of the Act for a valid will but which the Supreme Court is satisfied was intended by the deceased to be his or her will.¹⁰

2.5 Sometimes men and women promise that they will not revoke a will, particularly if they are making financial arrangements affecting others in their lifetimes. A covenant not to revoke a will is not broken when the will is revoked by marriage, because the revocation in that case results from the operation of law.¹¹

2.6 A void marriage will not revoke a will.¹² However, a marriage which is merely voidable¹³ revokes a will made before the marriage unless the marriage is avoided during the testator's lifetime.¹⁴

3. WILLS EXPRESSED TO BE IN CONTEMPLATION OF MARRIAGE

2.7 As an exception to the general rule, a will which declares that it is made in contemplation of a particular marriage, which marriage was later solemnised, will not be revoked by that marriage. However, the ambit of the exception is not clear. It would seem that the testator's contemplation of the particular marriage does not have to be stated in

However, in our opinion s 80(k) could not be held to be in direct conflict with legislation implementing any of the solutions discussed in ch 5 below. *Garside and Garside* is also referred in footnote 42 in ch 5 below.

⁹ *In the Estate of Wardrop* [1917] P 54. As to privileged wills, see *Wills Act 1970* (WA) ss 17-19.

¹⁰ To so find the Supreme Court must be "satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will": *Wills Act 1970* s 34.

As to informal wills, see *Wills Act 1970* ss 8, 32-34 and 38.

¹¹ *In re Marsland* [1939] Ch 820; *Clausen v Denson* [1958] NZLR 572.

¹² *Mette v Mette* (1859) 1 Sw & Tr 416; 164 ER 792. As to void marriages, see para 5.28 below.

¹³ As to voidable marriages, see footnote 64 below in ch 5 and para 5.29 below.

¹⁴ *Re Roberts* [1978] 3 All ER 225.

terms.¹⁵ However, that the will was made in contemplation of the marriage must be sufficiently expressed in the will itself.¹⁶ Extrinsic evidence (that is evidence from outside the will itself) of the testator's intention is not admissible for the purpose of showing that the will was so made.¹⁷

2.8 There is, as a result, some doubt whether a will expressed simply in favour of "my fiancée X", or "my wife X" (to whom the testator was not married at the time), saves the will from being revoked upon the subsequent marriage of the testator to X. We are not aware of any Western Australian decisions on this. In other jurisdictions there are conflicting decisions. In some cases wills were held to have been revoked upon the subsequent marriage of the testator to the beneficiary named in the will.¹⁸ The words "my fiancée" or "my wife" were regarded in those cases as simply descriptive of the object of benefit under the will and not as an expressed intention that the will should remain in operation notwithstanding the particular marriage. In these cases the courts would not admit extrinsic evidence to clear up the question, on the ground that the will itself must express the relevant intention.

2.9 However, in 1973, in the New South Wales case of *In the Will of Foss*,¹⁹ Helsham J held that if there are some words in the will which may or may not amount to an expression that the will is made in contemplation of the marriage, extrinsic evidence of surrounding circumstances may be admitted, because:

"Whilst it is correct to say that the fact that a marriage was contemplated must appear by some expression in the will itself, it is also correct to say that whether the will contains such an expression must depend upon the construction of the will. If the will clearly contains such an expression, then there is no problem. If it does not, but there are some words which may or may not amount to such an expression, then the will must be construed so as to find its

¹⁵ *Layer v Burns Philp Trustee Co Ltd* (1986) 6 NSWLR 60. In New South Wales the comparable provision to the first exception in s 14 is worded differently. It provides that "a will which is expressed to be made in contemplation of a marriage, shall not be revoked by the solemnisation of the marriage contemplated". In this case Mahoney JA (with whose reasons for judgment Samuels JA and Priestley JA agreed) said at 68: "It is accepted that "expressed" does not require that the contemplation of the particular marriage be stated in terms". See also, for example, *Re Chase* [1951] VLR 477.

¹⁶ *Re Chase* [1951] VLR 477.

¹⁷ *Re Hamilton* [1941] VLR 60.

¹⁸ For example, *Burton v McGregor* [1953] NZLR 487; *Public Trustee v Crawley* [1973] 1 NZLR 695 and *Re Taylor* [1949] VLR 201.

Cases where wills were held not to have been revoked include *In the Estate of Langston deceased* [1953] P 100 and *Pilot v Gainfort* [1931] P 103.

¹⁹ [1973] 1 NSWLR 180.

true meaning. In order to ascertain the meaning of the words used by a testator it is permissible to construe the document in the light of the surrounding circumstances. This is the law in relation to ambiguities of language used in a testamentary document, and applies no less to the aspect of whether a testator has expressed the fact that his marriage was contemplated as to any other."²⁰

So, to find out what the testator meant by the words the testator used in the will, the document was construed in the light of the surrounding circumstances, such as whether the marriage was planned and imminent at the time of the making of the will.²¹

2.10 Helsham J's approach was recently adopted by the New South Wales Court of Appeal in *Layer v Burns Philp Trustee Co Ltd*.²² In 1973, the Full Court of the Supreme Court of Queensland reached the same conclusion as Helsham J in *Keong v Keong*.²³ But it is still not possible to admit extrinsic evidence of the testator's intention to show that a will was made in contemplation of a marriage, that is to say, in order to provide the expression of intention which is required by law to be in the will itself.

²⁰ Id 183. The rule applied by Helsham J that in construing a will the court is entitled in any case of doubt to have regard to the circumstances surrounding the testator when the will was made, was one which was long established: see, for example, *Allgood v Blake* (1873) LR 8 Ex 160, 162. The rule is a qualification to the basic principle of exclusion of extrinsic evidence in construing a will.

²¹ [1973] 1 NSWLR 180, 184.

²² (1986) 6 NSWLR 60. In this case, the testator Sidney Layer married Gail Coombs a few minutes after he had executed a will benefiting "my wife Gail Layer". At the time the testator was suffering from leukaemia which was assumed to be terminal. The wife would have benefited more on intestacy. The Court of Appeal held that the words "my wife Gail Layer" were an expression of contemplation of a marriage - in fact of a particular marriage which then took place. The conclusion was reached in the light of surrounding circumstances. But in a later (unreported) case in the Supreme Court of New South Wales, *Pellow v Brown*, 3 April 1986 No 1 of 1985, Waddell CJ in Equity found that a testator's reference in a codicil to his will executed while he was in hospital after a heart attack during a visit to the Philippines that "should I die in the Philippines, the sum of Four Thousand Australian Dollars . . . shall be delivered by the executor of my estate to my fiancée and betrothed Andrea C Alambra" did not have an effect similar to the reference to the fiancée in *Layer v Burns Philp Trustee Co Ltd*. His Honour said that taken as a whole the codicil was providing a benefit for the testator's fiancée should he die in the Philippines while on the brief visit in which he was then engaged. He added that it was - "true that the codicil makes it clear that the deceased had in mind an expectation of marriage to the plaintiff should he survive his illness from which he was suffering at the time of the codicil but that, I think, is different from what is required by subs 15(2). The words used in that subsection . . . mean, I think, that there must be found in the will some expression which indicates that the will was made with an intention that it govern the disposition of the estate of the testator after the contemplated marriage had been solemnised . . . In the case of the codicil it seems to me there is no expression of intention that the codicil should be part of the disposition of the estate of the deceased after solemnisation of his marriage to the plaintiff."

²³ [1973] Qd R 516.

2.11 The Act requires that the will must declare that the *will* is made in contemplation of the marriage. In England, it was held in *Re Coleman (deceased)*²⁴ that expressions in the will which merely show that parts of the will were made in contemplation of the marriage solemnised will not suffice unless those parts amount at least to substantially the whole of the beneficial dispositions made by the will. In New South Wales, however, it has been held that if the testator expresses at some point in the will the fact that he is contemplating marriage, the will as a whole is expressed to be made in contemplation of marriage.²⁵

2.12 Under section 14(2) of Western Australia's *Wills Act 1970* a will expressed to be made in contemplation of a marriage will be void if the marriage is not solemnised, unless the will provides to the contrary. In the other Australian jurisdictions a will expressed to be made in contemplation of the testator's marriage to a named person will not have the automatic effect of rendering benefit to that person conditional on the marriage of the testator.²⁶

4. WILLS MADE IN THE EXERCISE OF A POWER OF APPOINTMENT

2.13 The second exception to the general rule relates to a will made in the exercise of a power of appointment.

2.14 A power of appointment is a power given by a person (the "donor") to someone else ("the appointor") to effect the disposal of the donor's property by "appointing" it to other people. The choice of appointees may be restricted by the terms of the power.²⁷ For example, a person might decide that, instead of dividing property between particular children in specified shares, he or she would give a power of appointment to another person who could, at a later date, by will appoint the property among the children in such shares as the appointor should select. Powers of appointment are useful because the appointor can take into consideration circumstances existing at the time of the exercise of the power of appointment (often after the donor's death) which the donor could not have foreseen. The general rule of revocation contained in section 14 extends to making the marriage of the appointor revoke a will by which the appointor exercised a power of appointment.

²⁴ [1975] 1 All ER 675 (a decision of Megarry J).

²⁵ *Layr v Burns Philp Trustee Co Ltd* (1986) 6 NSWLR 60 (New South Wales Court of Appeal).

²⁶ See *In re Natusch* [1963] NZLR 273.

²⁷ See J E Martin *Hanbury and Maudsley Modern Equity* (12th ed 1985) 166-168.

2.15 Under the second exception to the general rule a will which is made to exercise a power of appointment is not revoked by the marriage of the testator (that is the appointor) where the property disposed of by the will would not, if the testator failed to make an appointment, pass to the testator's personal representatives, in other words, would not become part of the testator's estate.²⁸

2.16 Although it is not clear from the wording of the exception, a will which both disposes of property and also exercises a power of appointment is revoked as to the disposition but good as to the exercise of the power of appointment provided the latter is within the exception.²⁹

²⁸ The second exception is derived from the sole exception to revocation by marriage contained in s 18 of the English *Wills Act 1837*: footnote 2 above in this ch. The exception was redrafted for Western Australia's *Wills Act 1970* because of changes to the laws of succession since 1837. By 1970 heirship which was once relevant in succession to real estate had long been abolished and the *Statute of Distribution 1670* (UK) had been more or less superseded by provisions in the *Administration Act 1903* (WA). After amendments to the *Administration Act* in 1976, the provisions in the *Administration Act* totally superseded those in the *Statute of Distribution*. However, the reference in s 18 of the *Wills Act 1837* to those entitled under the *Statute of Distribution 1670* (footnote 2 above in this ch) was not carried into the redrafted provision, although this could have been replaced by a reference to those entitled under Western Australia's *Administration Act 1903*. The intention of the reference in the *Wills Act 1837* (UK) (s 18) was said to be that: "... a will exercising a power of appointment should only be wholly revoked by the subsequent marriage of the testator in those cases in which the instrument creating the power provides that in default of appointment the fund shall devolve as on an intestacy, in which event the widow of the testator will take her portion of the fund." (*Re Gilligan (deceased)* [1949] 2 All ER 401, 406 per Pilcher J.)

²⁹ *In the Goods of Russell* (1890) 15 PD 111.

Chapter 3

A CONSIDERATION OF THE EXISTING LAW

1. THE EFFECT OF REVOCATION OF THE WILL

3.1 If a will is revoked by marriage and the testator takes no action to execute a new one, he or she dies intestate and special rules set out how the estate will be divided among his or her relatives. Briefly, the relevant parts of these rules provide -

- * Firstly, that the widow or widower is always entitled to the deceased's household chattels.
- * Secondly, where the deceased has left a widow or widower and children and the estate (apart from household chattels) is worth no more than \$50,000, the widow or widower is entitled to the whole of that estate. If the estate is worth more than \$50,000, he or she receives the first \$50,000 and one third of the residue and the children are entitled to the other two thirds.
- * Thirdly, if the deceased had no children and the estate is worth no more than \$75,000, the widow or widower is entitled to the whole of the estate. If the estate exceeds \$75,000, the widow or widower is entitled to the first \$75,000 and one half of the residue. Normally, there will be other relatives of the deceased who will be entitled to the remaining half.
- * Finally, where the surviving widow or widower does not acquire the whole of the estate by virtue of the rules outlined above there are provisions under which he or she can acquire the matrimonial home.¹

¹ The rules referred to in para 3.1 are contained in s 14 of the *Administration Act 1903* (WA) and the Fourth Schedule to that Act. In two of the situations listed in para 3.1 the surviving spouse is entitled to interest from the date of death calculated as prescribed by s 14.

2. ARGUMENTS FOR AND AGAINST THE GENERAL RULE

3.2 Should the general rule that a will is revoked by the marriage of the testator be retained?² The principal arguments in favour of its retention are -

- (a) Marriage is traditionally thought to effect fundamental changes in a person's life. Husbands and wives acquire on marriage new personal, legal and financial responsibilities which are likely to make some or all of the provisions contained in earlier wills inappropriate. Starting with a clean slate can be desirable.
- (b) The rule is also a protective device. By revoking old wills which otherwise may have survived and thereby bringing into play the rules applicable to intestate succession, the rule shields members of the testator's immediate family from the testator's inadvertence or carelessness in not making a new will.³ The provisions of the law which determine how the property of a deceased person is distributed on intestacy as described in the previous paragraph are more likely to correspond with the testator's likely or actual intentions than the provisions of a will made before he or she married. It is in any event contrary to public policy that a testator should fail to make adequate provision for dependants, particularly if, as a result, they are likely to become impoverished or even charges on the State.
- (c) Intestacy is preferable to forcing husbands, wives and children to assert their claims through the courts under the *Inheritance (Family Dependents*

² Discussions of arguments for and against retention of the general rule may be found in Appendix C of the Victorian Statute Law Revision Committee's *Report upon the Proposals contained in the Wills (Interested Witnesses) Bill 1971* (1972); Law Reform Commission of British Columbia *Report on the Making and Revocation of Wills* (1981) 72-73; Lord Chancellor's Law Reform Committee Twenty-second Report *The Making and Revocation of Wills* Cmnd 7902 (1980) paras 3.1-3.7; Law Reform Commission of Tasmania Working Paper *Reform in the Law of Wills: The Making and Revocation of Wills* (1981) by G M Bates 33-35; New South Wales Law Reform Commission *Wills - Execution and Revocation* (1986) paras 9.10-9.11 and 9.19-9.20. Arguments against retention of the rule have been advanced by F C Hutley *The Revocation of Wills by Marriage* (1950) 23 ALJ 601; L McKay *The Contemporary Validity of Section 18 Wills Act 1837* (1975-77) 8 Vic University of Wellington L Rev 246; and C J Rowland *Succession and Administration* an article in *Annual Survey of Law* 1979 (1980 R Baxt ed) 407, 423.

³ In *Burton v McGregor* [1953] NZLR 487, Adams J said at 490 that "the purpose of the law as to revocation by marriage is to let in the claims of wives and children, and it is reasonable to suppose that their claims are properly protected and adjusted by the law as to intestacy."

*Provision) Act 1972.*⁴ Legal proceedings under that Act are expensive,⁵ inconvenient, take time and usually delay the finalisation of the administration of the estate. Their outcome is difficult to predict. Legal proceedings also create opportunities for family disputes among widows or widowers and children and named beneficiaries. Often the estates are relatively small in size and the expense and delay in seeking an entirely different provision from the estate might be disproportionate to the advantage denied by the inappropriate will.

- (d) The rule that marriage revokes a will has become relatively well known. If it were abolished, there is a danger that people aware of the rule but ignorant of its repeal would leave prior wills unrevoked.
- (e) The general rule applies in all other Australian jurisdictions and it is desirable to maintain uniformity in Australia on this topic.

3.3 On the other hand, the major arguments in favour of abolishing the rule that a will is revoked by the marriage of the testator are -

- (a) The rule came into existence when a woman's personal property automatically became her husband's on marriage. The rule was meant to protect a wife against the dispersion of her husband's property amongst strangers under the terms of a will made by her husband prior to the marriage. The reason is no longer valid, as a married woman now retains all her property on marriage.
- (b) Spouses and children receive considerable protection under the *Inheritance Act*.
- (c) The general rule operates without regard to the circumstances of the case. It might, for instance, have the effect of disinheriting children of the testator's

⁴ Referred to subsequently in this paper as "the Inheritance Act". Under this Act if the Supreme Court is of the opinion that the disposition of the testator's estate is not such as to make adequate provision from his or her estate for the proper maintenance, support, education or advancement of the testator's spouse, children, or certain other dependants, the Court may order that such provision as the Court thinks fit is made out of the estate of the testator for that purpose: ss 6 and 7.

⁵ Usually the judge will order that the costs of the application under the Act be paid out of the estate. This naturally reduces the amount available for distribution.

first marriage for the benefit of a well-to-do second spouse. Another example can arise where an elderly person with family commitments and a will honouring those commitments marries again and dies shortly afterwards without having made a new will.⁶

- (d) The rule operates to revoke whole wills. It thus disinherits beneficiaries, such as friends and charities, who have no rights on intestacy or under the *Inheritance Act*. Provisions in the will appointing executors, trustees and children's guardians are revoked, as are specific directions such as requests that the testator's body be available for human tissue donation purposes, or that it be cremated.
- (e) Because of the rule, a surviving spouse may become entitled to far more on intestacy than is required to meet his or her needs.

3. THE RATIONALE OF THE TWO EXCEPTIONS TO THE GENERAL RULE

3.4 Both the exceptions⁷ contained in section 14 are designed to alleviate the possibly harsh consequences of the general rule. If the principal object of the general rule is to protect the testator's new spouse and children, then it would be anomalous if a will made before the marriage but intended to cater for the new family circumstances after marriage were revoked.⁸ The first exception attempts to deal with this anomaly. The exception, however, goes no further than to prevent the revocation of a will by a subsequent marriage where there is a declaration in the will that it was made in contemplation of the marriage.

3.5 The general rule of revocation contained in section 14 extends to making the marriage revoke a will which exercised a power of appointment. This also finds its origin in the object of protecting the testator's widow and children. If the testator dies without having effectively exercised the power of appointment, it could be that the testator's new (post marriage) family

⁶ In fact, a person suffering from mental weakness may be able to enter a valid marriage but unable to make a new will even though the marriage revoked an existing will: *In the estate of Park; Park v Park* [1953] 2 All ER 1411. In that case, the testator was suffering from mental deterioration. His marriage was held to be valid but a will executed by him later on the same day as the marriage was held to be invalid.

⁷ See para 2.2 above.

⁸ This anomaly in s 18 of the *Wills Act 1837* (UK) was recognised soon after the enactment of that Act: para 2.1 above.

will benefit under the gift over in default of appointment. The purpose of the second exception is to prevent the general rule applying where revocation could not confer any advantage to the testator's estate because under the gift over in default of an appointment the property would not pass to the testator's estate, but elsewhere.⁹ The general rule of revocation will still apply where the property will pass in default of appointment to the testator's estate, as the testator's new (post marriage) family will stand to benefit through the estate.

4. DISCUSSION

(a) Retention of the general rule

3.6 In the United States of America the Uniform Probate Code contains a ground of revocation by divorce, but not by marriage. The Code has been enacted without amendment in at least eight States.¹⁰ However, reforms in jurisdictions which adopted legislation similar to Western Australia's have not followed the Uniform Probate Code approach and instead have either increased the number of exceptions to the general rule that the marriage of the testator revokes a prior will, or allowed more flexibility in respect of the exemption relating to a will made in contemplation of marriage. Examples of this approach are found in Ontario, Victoria, Queensland, New South Wales and England.¹¹ The same attitude was taken by the Tasmanian Law Reform Commission and a majority of the members of the Law Reform Commission of British Columbia in their recommendations.¹²

3.7 Another way of varying the operation of the general rule would be to save the will from revocation by marriage but to engraft on it a statutory legacy in favour of the new spouse and children.¹³ If there was still money left in the estate after payment of the statutory legacy,

⁹ See I J Hardingham, M A Neave and H A J Ford *Wills and Intestacy in Australia and New Zealand* (2nd ed 1989) para 602.

¹⁰ *1982 Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings* 472.

¹¹ *Succession Law Reform Act 1977* (Ontario) s 16 (see para 3.11 below); (Vic) *Wills Act 1958* s 16(2) and (3) (see paras 3.12 and 3.26 below); *Succession Act 1981* (Qld) s 17(1) (see paras 3.19 and 3.22 below); *Wills Probate and Administration Act 1898* (NSW) s 15(3) and (4) (see paras 3.23 and 3.26 below) and *Wills Act 1837* (UK) s 18 as substituted by the *Administration of Justice Act 1982* (see footnote 40 below in this ch and para 3.22 below).

¹² Law Reform Commission of Tasmania *Report on Reform in the Law of Wills* (1983) 13-14; Law Reform Commission of British Columbia *Statutory Succession Rights* (1983) 136. The recommendations have not yet been implemented.

The Attorney General of Victoria's working party to review the *Wills Act 1958* has also recommended in its initial report issued in 1986 that the general rule be retained: initial report 30.

¹³ A similar suggestion was raised by the Lord Chancellor's Law Reform Committee in its twenty-second report *The Making and Revocation of Wills* Cmnd 7902 (1980). Very few of those who commented to the

the other beneficiaries should share what remained pro rata. In protecting the spouse and children the outcome of the statutory legacy would be similar to a distribution on intestacy. The disadvantage lies in the rigidity of the rule and possible complications in the administration of some estates. For these reasons, at this stage, we do not favour the approach.

3.8 The present law restricts the opportunities for inadvertence in making appropriate wills by persons who marry after they have made their wills but there are merits in reconsidering the law. It may be desirable to modify the general rule, and the exceptions, to some extent, but the argument for abolition is not overwhelming. In particular, the rule has come to be known by the community, and it would be most unfortunate if its abolition were, in its turn, to have unintended adverse consequences to lay persons who had acted on their understanding of the law.¹⁴

(b) Possible qualifications to the general rule

(i) Restriction to testator's first marriage

3.9 One modification to the rule could be to restrict its operation to the testator's first marriage. That way a will made to protect children of the first marriage or the first spouse would remain in effect in spite of a subsequent marriage. This implies that a second marriage is different in kind from or inferior to a first. We do not accept this reasoning.¹⁵

Committee saw merit in the suggestion and some were firmly opposed to it on the ground that it would lead to complications analogous to those which already beset partial intestacies: *id.* The Committee did not see any clear advantage in the suggestion: *id.*

The Law Reform Committee's suggestion was also rejected by the New South Wales Law Reform Commission in its report *Wills - Execution and Revocation* (1986) mainly on the basis of its rigidity: report para 9.15 and footnote 31 to ch 9.

¹⁴ The Law Reform Committee of the Law Society of the Australian Capital Territory in a report *The Wills Ordinance 1968* (1987) prepared for it by C J Rowland and adopted by it has recommended that if the general rule is to be retained, legislation should provide that the marriage celebrant inform the parties of that fact: report 18. The Committee said that if the law deprives a considered, solemn, formal act of its force without the consent of the actor, the law should ensure that the actor is informed of the fact: *id.*

¹⁵ The Lord Chancellor's Law Reform Committee in its report *The Making and Revocation of Wills* Cmnd 7902 (1980) considered and rejected this suggestion. The Committee said that second marriages were not necessarily different in nature from first marriages (para 3.5) and much might depend on the duration of the marriage, the circumstances of its termination and whether or not there were children. The New South Wales Law Reform Commission in its report *Wills - Execution and Revocation* (1986) also considered but rejected the possibility on similar grounds: report para 9.15 and footnote 32 to ch 9.

(ii) *General rule not to affect children of former marriages*

3.10 The Tasmanian Law Reform Commission considered abolishing the rule insofar as it affects any children of former marriages of the testator, but not former spouses, to preserve the entitlement of those children under a will of the testator existing at the time of remarriage, but not the entitlement of the former spouse.¹⁶ The Commission did not adopt this approach in its report. If the suggestion were implemented in Western Australia, the former spouse could be entitled to make application under the *Inheritance Act* for a share in the estate of the testator.¹⁷ In our view such a modification could work unfairly, especially where after a divorce the testator had made a will leaving the estate or the bulk of it to the children of the dissolved marriage. The new spouse and children of the later marriage could be forced into making an application under the *Inheritance Act*.

(iii) *Spouse electing to take under the will*

3.11 In Ontario the general rule has been modified by providing that the will is not revoked by the marriage of the testator where the spouse of the testator elects to take under the will by an instrument in writing filed within one year after the testator's death in the office of the Surrogate Clerk for Ontario.¹⁸ Presumably that right of election would be exercised only if the will's provisions would benefit the surviving spouse more than an intestacy would. A disadvantage is that the surviving spouse may be unaware of the right to do it and in any event has only a limited time in which to choose to exercise it. The provision could also result in some delay in the administration of the estate.

(iv) *Will containing a gift in favour of the person whom the testator marries*

3.12 We can see advantages in an exception enacted in Victoria which allows a will made with no expressed contemplation of any marriage to be saved provided the will contains a gift

¹⁶ Law Reform Commission of Tasmania Working Paper on *Reform in the Law of Wills: The Making and Revocation of Wills* (1981) 35-36.

¹⁷ A former spouse is entitled to apply under this Act if at the date of death of the deceased that former spouse "was receiving or entitled to receive maintenance from the deceased, whether pursuant to an order of any court, or to an agreement or otherwise": s 7(1)(b).

¹⁸ *Succession Law Reform Act 1977* (Ontario) s 16.

(of whatever size) in favour of the person whom the testator marries.¹⁹ Any property disposed of by the will to other persons is deemed to form part of the testator's residuary estate and to be property in respect of which the testator died intestate.²⁰ This ensures that the spouse will receive such portion of that residue as he or she would have been entitled to if the will had been actually revoked on marriage, in addition to what passes to the spouse by virtue of the exception. The exception was proposed by the Victorian Chief Justice's Law Reform Committee because:

"A testator may make a will in favour of a woman at a time when marriage between them is not in contemplation. She may, to take some illustrations, be his business partner, or his mistress, or they may be working together in charitable or other activities. If later they should marry each other . . . the provision so made . . . may need to be supplemented by the widow's share, as on an intestacy, in the remainder of the estate, or by an order under the Testator's Family Maintenance legislation. But for the widow to have the benefit of the particular form of disposition selected by the testator may be of great importance to her; and it seems an unwarranted interference with the testator's wishes to enact, as s 16 does, that the provision made for her shall, in such cases, fall with the rest of the will."²¹

Of course the argument applies with equal force to a male spouse. The requirement that gifts made to other persons should fall into residue and be disposed of as if the testator had died intestate is intended to protect the surviving spouse and children of the marriage. In many cases, the testator would intend that when the marriage has been entered into the spouse should be entitled to a greater share in his estate than that provided for in the will.

¹⁹ *Wills Act 1958* (Vic) s 16(2)(c) - inserted by *Wills (Interested Witnesses) Act 1977* (Vic) s 4. The same exception also applies if the will "confers a general power of appointment upon the person whom the testator marries".

This reference to a general power of appointment relates to property owned by the testator in respect of which he has given a person a power to appoint by his will. It is to be distinguished from property in respect of which by will he *exercises* a power of appointment of property not owned by him. It is this latter situation which is the subject of the second exception in *Wills Act 1970* (WA) s 14: para 2.2 above.

²⁰ *Wills Act 1958* (Vic) s 16(3) - inserted by *Wills (Interested Witnesses) Act 1977* (Vic) s 4. Similarly, any property the subject of a general or special power of appointment conferred upon any person other than the spouse of the testator is deemed to form part of the testator's residuary estate and to be property in respect of which the testator died intestate: *Wills Act 1958* (Vic) s 16(3).

Ss 16(2)(c) and (3) were based on the Victorian Chief Justice's Law Reform Committee report *Section 16 of Wills Act 1958* (1970).

²¹ Id 3-4.

3.13 If the Victorian provision were to be adopted in Western Australia a surviving spouse who took what the will provided plus the statutory entitlement on intestacy might get more than the deceased intended and thereby deprive others of a proper share in the estate. This could be addressed by a hotchpot provision. The provision would ensure that the spouse did not "double dip". Under the provision the amount of the gift would be notionally brought into account for the purpose of distribution of the residue. Thus if the amount of the gift to the spouse was less than the spouse would have received on a total intestacy he or she would on distribution of the residue only receive an amount from residue which with the gift would place that spouse in an equivalent position to that which would have prevailed had there been a total intestacy. If the amount of the gift was greater than the amount which the spouse would have received on a total intestacy, then under the provision the spouse would be able to elect to be excluded from the distribution of residue and retain the full amount of the gift.²² The New South Wales Law Reform Commission in its report *Wills - Execution and Revocation*²³ did not adopt the Victorian provision because it was thought unnecessary; in New South Wales the surviving spouse would be better provided for on intestacy than was the case in Victoria when the exception was proposed there in 1970.²⁴ In Western Australia the provisions governing distribution on intestacy are not as generous to the spouse²⁵ so this argument does not apply with the same force.

3.14 There might be other unintended effects. In recent years the number of de facto relationships has increased significantly. Some people living in such relationships have no doubt made wills, at a time when marriage was not contemplated, containing gifts to the other de facto spouse. The Victorian provisions, if adopted, would have the effect of not revoking such a gift if the testator later married the de facto spouse.

²² As to hotchpot generally, see E B Smyth and J R Peden *Executorship Accounts* (6th ed 1975) 196-201 and 251.

²³ (1986).

²⁴ It was proposed by the Victorian Chief Justice's Law Reform Committee in its report *Section 16 of Wills Act 1958*. In 1970 in Victoria the spouse of an intestate who was survived by issue was only entitled to \$10,000 plus one-third of the remainder of the estate. In New South Wales in 1986 at the time of the submission of the New South Wales Law Reform Commission's report, the surviving spouse was entitled to household chattels, \$100,000 and one half of the balance together with certain rights designed to secure the matrimonial home: *Wills, Probate and Administration Act 1898* (NSW) ss 61A, 61B and 61D.

²⁵ Para 3.1 above.

3.15 In considering whether the additional exception should be adopted in Western Australia, it should be remembered that the new spouse has rights under the *Inheritance Act* where provision on intestacy is inadequate.²⁶

(v) *Right of all beneficiaries to apply under Inheritance Act*

3.16 Another approach would be to give all the beneficiaries of the revoked will the right to apply under the *Inheritance Act* for a share of the intestate's estate as recommended by the Law Reform Commission of British Columbia in respect of the equivalent legislation in that province.²⁷ A testator's expressed intention to provide for a beneficiary might be evidence of a moral obligation which ought still to be honoured, even if the testator's marriage had significantly altered his or her obligations.²⁸ Courts could have a discretion to provide for such beneficiaries from the estate guided by the testator's intentions as expressed in the will, looking at all the circumstances, changed or not. There might be no practical problems in this approach if the testator's estate were large, but if it were small, such an application would be more likely to fail.²⁹

3.17 Section 7(1) of the *Inheritance Act* sets out the class of those already entitled to make application.³⁰ It does not go far beyond the deceased's spouse (including the divorced spouse in some cases), children and parents. Brothers and sisters of the deceased, for example, are not entitled to claim. The class of those entitled on an intestacy might be more extensive, depending on the circumstances. For example, where the net value of the deceased's estate (apart from household chattels) exceeds a specified sum and the deceased has no children then not only the surviving spouse and the deceased's parents but also the deceased's brothers and sisters will be entitled to some share in the estate.³¹ There are also some restrictions; for

²⁶ Footnote 4 above in this ch.

²⁷ Law Reform Commission of British Columbia *Statutory Succession Rights* (1983) 133. As yet, the recommendation has not been implemented.

²⁸ Ibid.

²⁹ Ibid. The Law Reform Commission of British Columbia said that response to its proposal when it was raised in its working paper prior to the preparation of its report had been mixed: report 133. It was observed, for example, that the basis of the court's jurisdiction would be uncertain and could cause problems. For example, what considerations should the court take into account if the beneficiary was a charity? The Commission commented:

"This is a problem which will not arise often. A complex response is undesirable. The court will consider the interests of the intestate successors, the size of the estate, and the claims of beneficiaries under the revoked will. We are satisfied that the courts should be able to resolve these problems satisfactorily."

³⁰ S 7(1) is set out in the Appendix to the Discussion Paper.

³¹ *Administration Act 1903* (WA) s 14.

instance not all dependants of the deceased can claim on intestacy, even if they are in a close familial relationship, such as step children. The aim of the *Inheritance Act*, in brief, is to enforce any moral obligation which the testator might have had to make provision after his death for the support of persons with whom he had a close *familial* relationship *and* who fell within a class prescribed in the legislation.³² Under the proposal discussed above, beneficiaries under a revoked will who did not have a close familial relationship with the deceased would nonetheless be entitled to make an application under the Act. Furthermore, others apart from those included as beneficiaries in the will might have had a moral claim on the deceased's bounty but not be able to have recourse to the estate. As well, if the deceased did not have a will at the time of the marriage, the proposal would have no application.³³

(c) Wills made in contemplation of marriage.

(i) Introduction

3.18 If the general rule is to be retained, some modification of the exception relating to wills made in contemplation of marriage may be desirable, as the present exception can defeat the deliberate intentions of the testator. Reforms and proposals in some of the jurisdictions examined by the Commission indicate a number of ways in which this could be done.

(ii) Lessening the rigour of the existing phraseology

3.19 Section 14 could be reworded so that difficulties in its interpretation³⁴ are avoided - the Queensland provision simply states that it is sufficient if the will contains "an expression of contemplation" of the marriage.³⁵

³² See *Re Allen (Deceased)*, *Allen v Manchester* [1922] NZLR 218, 220-221.

Under the British Columbia proposal, bodies and organisations which were beneficiaries in the will would be able to make a claim as well as individuals. Whether it is appropriate for say a charitable institution, which had provided assistance to the deceased and which was named as a beneficiary in the will, to be able to make a claim under the *Inheritance Act* is debatable.

³³ Perhaps the question of whether the class of claimants under the *Inheritance Act* is wide enough in the light of changes occurring in recent times in the Australian family is more pertinent than the British Columbia proposal. It is interesting to note that under the *Family Provision Act 1982* (NSW), the class of eligible claimants includes a person who was at any particular time wholly or partly dependent on the deceased and was at that particular time or at any other time a member of the household of which the deceased was a member: s 6(1). The Law Reform Committee of Western Australia had recommended that a provision which would have had similarities to the New South Wales provision be enacted in this State: *Report on The Protection to be given to the Family and Dependants of a Deceased Person* Project No 2 (1970) para 27. However, except as to de facto widows and widowers (*Inheritance Act* s 7(1)(b)) the recommendation has not been enacted.

³⁴ Para 2.7 - 2.11 above.

³⁵ *Succession Act 1981* (Qld) s 17(1).

(iii) *Wills made in contemplation of a particular marriage** **Where there is an indication in the will**

3.20 Another improvement to the exception would be to allow certain extrinsic evidence (that is evidence from outside the will itself) to be admitted to determine whether an expression contained in the will is an expression of contemplation of the marriage; either

- (a) extrinsic evidence of the circumstances existing at the time of the making of the will, but not of evidence of statements by the testator of his dispositive intention; or
- (b) all extrinsic evidence including direct evidence of the testator's dispositive intention,

could be admissible.

3.21 The Tasmanian Law Reform Commission has recommended a provision along the lines of the first of these suggestions.³⁶ The suggestion, if implemented, would give legislative effect to the position established by the case law in New South Wales and Queensland shortly before the reforms in those States were enacted³⁷ and would remove any uncertainty as to whether those decisions would be followed in Western Australia. There would seem to be little objection to this legislative reform. The provision would apply a principle of construction which has long been used in construing wills where other

The Law Reform Commission of British Columbia has suggested a similar provision. It has proposed that in British Columbia a will should not be revoked by the marriage of the testator where the will as a whole or any term of the will indicates an intention that the will be effective notwithstanding the marriage: Law Reform Commission of British Columbia *Statutory Succession Rights* (1983) 136.

In England, the *Administration of Justice Act 1982* substituted a new s 18 in the *Wills Act 1837*. It is now sufficient if it "appears from a will that at the time it was made the testator was expecting to be married to a particular person and that he intended that the will should not be revoked by the marriage".

³⁶ Law Reform Commission of Tasmania *Report on Reform in the Law of Wills* (1983) 13-14. The provision recommended by the Tasmanian Law Reform Commission follows s16(2)(b) of the *Wills Act 1958* (Vic) (which is the Victorian provision referred to in para 3.26 below), except that it would only operate where the testator had expressed a specific intent to marry a *particular* person.

³⁷ *In the Will of Foss* [1973] 1 NSWLR 180; *Keong v Keong* [1973] Qd R 516 (Queensland Full Court); *Layer v Burns Philp Trustee Co Ltd* (1986) 6 NSWLR 60 (New South Wales Court of Appeal): paras 2.9-2.10 above.

ambiguities exist.³⁸ Normally there would not be any uncertainty because there must be words in the will which might amount to an expression that the will was made in contemplation of the marriage, and only evidence of surrounding circumstances, as distinct from direct evidence of the testator's dispositive intention, would be admissible. If this solution is adopted the resolution in probate proceedings of the question of whether the exception applies should not normally involve long delay or substantial costs.

3.22 However, statements made by the testator may also help to establish that an expression contained in the will is an expression of contemplation of the marriage. The second approach above, which has been adopted in Queensland³⁹ and England,⁴⁰ would allow evidence to be given of these statements and diminish the chances of the testator's real intentions being frustrated. The suggestion would mean admitting evidence of a nature which would not be admitted in the interpretation of other instruments. There is the possibility of uncertainty, of fraudulent claims, and of increased litigation. But there still must be, in the first place, words in the will which could amount to an expression that the will was made in contemplation of the marriage. Furthermore, the evidence of the testator's statements would also be weighed with evidence of the surrounding circumstances. This solution ought not give rise to long

³⁸ Para 2.9 above.

³⁹ *Succession Act 1981* (Qld) s 17(1). This provision permits the admission of extrinsic evidence, including evidence of statements made by the testator, to prove that a certain expression in the will is indeed an expression of contemplation of marriage.

S 17(1) implements a recommendation made by the Queensland Law Reform Commission in its report *The Law relating to Succession* (1978) at 11.

⁴⁰ *Wills Act 1837* (UK) s 18 as substituted by the *Administration of Justice Act 1982* s 18. Under the new s 18(3) of the *Wills Act 1837* (UK), the expectation and intention must *appear* from the will. However, this must be read in the light of s 21 of the *Administration of Justice Act 1982* which has a twofold effect: first, evidence of surrounding circumstances may be admitted in all cases to assist in construing a provision in the will, and secondly, if the will is ambiguous, evidence of the testator's dispositive intention may be admitted to help construe the will. Thus the English position appears to be much the same as that of Queensland.

The new s 18 was based on recommendations made by the Lord Chancellor's Law Reform Committee in its twenty-second report *The Making and Revocation of Wills* Cmnd 7902 (1980).

The new s 18(4) provides:

"Where it appears from a will that at the time it was made the testator was expecting to be married to a particular person and that he intended that a disposition in the will should not be revoked by his marriage to that person, -

- (a) that disposition shall take effect notwithstanding the marriage; and
- (b) any other disposition in the will shall take effect also, unless it appears from the will that the testator intended the disposition to be revoked by the marriage."

S 18(4) was inserted to override the decision in *Re Coleman (deceased)* [1975] 1 All ER 675: Lord Chancellor's Law Reform Committee report para 3.18 and see para 2.11 above for the ruling in *Re Coleman (deceased)*. If a will or part of a will is shown by its language to be intended to survive a particular marriage, the presumption by virtue of s 18(4) is that the whole will survives.

A provision similar to s 18(4) was contained in the Australian Capital Territory's draft Wills (Amendment) Ordinance 1986. However, the draft has fallen into abeyance.

delay or substantial costs in probate proceedings to resolve whether or not the exception applies.

*** Where there is no indication in the will**

3.23 Under a provision enacted in New South Wales in 1989 a will made in contemplation of a marriage is not revoked by the marriage, whether or not the contemplation is expressed in the will.⁴¹ The provision, which implements a recommendation of the New South Wales Law Reform Commission,⁴² goes further than reforms in any other jurisdiction.⁴³ There need not be anything in the will which indicates or could indicate the relevant intention. The general rule can be excluded through extrinsic evidence alone. Doubtless, the extrinsic evidence which is admissible would include evidence of statements made by the testator.⁴⁴ The exception applies only where the testator had in contemplation a particular marriage, not marriage generally. The New South Wales Commission said:

"We consider that to allow extrinsic evidence only for the purpose of "construing" some provision in the will is unduly restrictive and encourages fine and unreal distinctions. This comparatively liberal approach to extrinsic evidence . . . indicates that we consider that a modern court is quite able to deal with disputed issues of fact of this nature in the comparatively few cases that will arise. To require evidence of the necessary intention invariably to be found in the will would, in our view, operate on occasions to defeat the actual and provable intentions of certain testators."⁴⁵

3.24 This reform means that the testator's intention that the will not be revoked is respected. Many testators make their own wills without legal assistance and some would not know that marriage generally revokes an existing will, or the technical aspects of the exception to that rule. Most testators who make a new will after a marriage are prompted to do so because there has been a change in their circumstances, but if they were living in a de facto

⁴¹ *Wills Probate and Administration (Amendment) Act 1989* (NSW) which inserted the provision as s 15(3) of the *Wills Probate and Administration Act 1898* (NSW).

⁴² *Wills - Execution and Revocation* (1986) para 9.21.

⁴³ In its report *The Making and Revocation of Wills* Cmnd 7902 (1980), the Lord Chancellor's Law Reform Committee was opposed in the present context to the admission of extrinsic evidence of the testator's intention even to assist in the interpretation of an expression in the will: report para 3.16.

⁴⁴ See New South Wales Law Reform Commission *Wills - Execution and Revocation* para 9.21 and *Interpretation Act 1987* (NSW) s 34.

⁴⁵ Report para 9.21.

relationship at the time of the making of the will, they might not consider their circumstances to have changed.

3.25 On the other hand this reform creates uncertainty. It might not be enough to look at the will itself to see whether the marriage might or might not have revoked it. Often inquiries will have to be made about other circumstances, including inquiries about what the testator intended. Sometimes it will be difficult to determine what the testator meant to do, or what weight should be given to extrinsic evidence, and there is always the risk of increased litigation and delay in the administration of the estate.

(iv) *Wills made in contemplation of marriage generally*

*** Where there is an indication in the will**

3.26 The present law in Western Australia does not preserve the validity of a will if it is made in contemplation of any, rather than a particular, marriage. But the testator might have thought about his or her new responsibilities and made provision for them in the will. In Victoria and New South Wales the testator may draft the will so that it will not be revoked by any subsequent marriage provided that there is some indication in the will that it is made in contemplation of marriage generally.⁴⁶ The Attorney General of Victoria's working party to review the *Wills Act 1958* has recommended that the provision be retained in Victoria⁴⁷ and the British Columbia Law Reform Commission has recommended a similar provision.⁴⁸ However, the Tasmanian Law Reform Commission thought that unless the testator had expressed a specific intent to marry a particular person he or she would be unlikely to have thought sufficiently specifically about the importance of the step and arranged his or her affairs with knowledge of the consequences.⁴⁹

⁴⁶ *Wills Act 1958* (Vic) s 16(2)(b) and *Wills Probate and Administration Act 1898* (NSW) s 15(4). (s 15(4)) was inserted by the *Wills Probate and Administration (Amendment) Act 1989*.

In each case the reform implemented the recommendation of a law reform agency: Victorian Chief Justice's Law Reform Committee *Section 16 of the Wills Act 1958* 4-5; New South Wales Law Reform Commission *Wills - Execution and Revocation* (1986) para 9.21.

In addition, the Victorian legislation retained the old exception under which a will was not to be revoked if it was expressed to be made in contemplation of a particular marriage: *Wills Act 1958* (Vic) s 16(2)(a). As to wills made in contemplation of a particular marriage in New South Wales, see para 3.23 above.

The enactment of a similar provision to s 15(4) of the New South Wales Act has been recommended by the British Columbia Law Reform Commission in its report *Statutory Succession Rights* (1983) 136.

⁴⁷ Initial report of the Attorney General of Victoria's *Working Party to review the Wills Act 1958* (1986) 31.

⁴⁸ Law Reform Commission of British Columbia *Statutory Succession Rights* (1983) 136.

⁴⁹ Law Reform Commission of Tasmania *Report on Reform in the Law of Wills* (1983) 13-14.

3.27 At this stage, we think that it should be possible for the testator to draft the will so that it will not be revoked by a subsequent marriage. If the testator had considered his or her new responsibilities after marriage and provided for them by will, there seems little reason for the law to intervene.

3.28 To what extent should extrinsic evidence be admissible to determine whether an expression contained in the will is an expression of contemplation of marriage generally? The Victorian provision permits the admission of extrinsic evidence of the circumstances existing at the time of the making of the will but it would appear that it does not enable the admission of evidence of statements by the testator as to his or her dispositive intention.⁵⁰ Also under the New South Wales provision only evidence of the circumstances would be admissible.⁵¹ The same two possibilities suggest themselves as in the case of wills made in contemplation of a particular marriage. These are the admission of extrinsic evidence of the circumstances only or the admission of all extrinsic evidence including evidence of the testator's dispositive intention.⁵² The desirable solution might be different depending on whether the will is made in contemplation of a particular marriage or marriage generally.

*** Where there is no indication in the will**

3.29 In none of the jurisdictions we have looked at is there provision for the general rule to be excluded on the ground that the will was made in contemplation of marriage generally where there is *only* extrinsic evidence that this was the case. Under such a rule it might be possible to negate the general rule in virtually all cases, particularly where younger single testators were involved, simply by showing that, in a vague sense, the testator contemplated that he or she might be married some day.⁵³ We think such a situation would be undesirable.

⁵⁰ *Wills Act 1958* s 16(2)(b) where the relevant passage reads "(if) it appears from the terms of the will or from those terms taken in conjunction with the circumstances existing at the time of the making of the will . . .".

⁵¹ By parity with *In the Will of Foss* [1973] 1 NSWLR 180 and *Layer v Burns Philp Trustee Co Ltd* (1986) 6 NSWLR 60: paras 2.9 - 2.10 above.

⁵² Para 3.20 above.

⁵³ The New South Wales Law Reform Commission in its report *Wills - Execution and Revocation* (1986) rejected this solution on this ground: report para 9.21.

(d) Wills made in exercise of a power of appointment

3.30 The second exception to the general rule states that a will made to exercise a power of appointment is not revoked by the testator's marriage if the property which is the subject of the power would not have passed to the testator's estate in default of appointment.⁵⁴ The purpose of the exception is to prevent the general rule applying where revocation of the will to the extent that it exercised the power of appointment could not confer any advantage to the testator's estate because under the gift in default of appointment the property would not pass to the testator's estate.⁵⁵ The general rule of revocation still applies where the property will pass under the gift over in default of appointment to the testator's estate as the testator's new (post marriage) family will stand to benefit through the estate if the testator dies without having effectively exercised the power.⁵⁶ The exercise of the power by the will signed before marriage might have been in favour of other people. The second exception is consistent with the principle underlying the basic rule in section 14. At this stage, we think that the exception should be retained.

3.31 The exception could be widened. In Victoria, the exception would in addition fail to operate if the document which creates the power of appointment provides that the property which is the subject of the power would pass to the person who would be entitled on the intestacy of the testator, for argument's sake the testator's widow, if the power of appointment was not exercised. In this case, the Victorian legislation revokes the exercise of the appointment made by the testator in a will executed before marriage.⁵⁷

⁵⁴ *Wills Act 1970* (WA) s 14(1)(b); paras 2.2 and 2.13-2.16 above. The exception is a modernised version of the exception contained in the *Wills Act 1837* (UK) as originally enacted: footnote 28 in ch 2 above. In New South Wales, the Australian Capital Territory, Queensland and England, the exception has been redrafted along the same lines as in Western Australia: *Wills Probate and Administration Act 1898* (NSW) s 15(1); *Wills Ordinance 1968* (ACT) s 20(2); *Succession Act 1981* (Qld) s 17(2); *Wills Act 1837* (UK) s 18 (as substituted by the *Administration of Justice Act 1982*).

The Australian Capital Territory, New South Wales and English provisions make it clear that a will which both disposes of property and also exercises a power of appointment is revoked as to the disposition but good as to the exercise of the power of appointment provided the latter is within the exception: see para 2.16 above.

⁵⁵ Para 3.5 above.

⁵⁶ They could benefit under the laws governing distribution on intestacy or under a will made by the testator after the marriage.

⁵⁷ In Ontario, the exception applies if the property would not in default of appointment pass to the "heir, executor or administrator of the testator or to the persons entitled to the estate of the testator if he died intestate": *Succession Law Reform Act 1977* (Ontario) s 16(c).

3.32 The Lord Chancellor's Law Reform Committee in its report on the making and revocation of wills⁵⁸ said:

"We have considered how the exception ought to operate in cases where in default of appointment the property would not have passed exactly as on an intestacy, but very nearly so. For example, the default gift might be to all or some of those who would have taken on an intestacy or even to the testator's widow and children or other relatives in proportions different to those set out in the statutory intestacy trusts. Although we appreciate that our conclusion could cause some illogicalities, we think that the best course would be to provide that the exception to section 18 should operate in all cases except where, in default of appointment, the subject property of the power would pass exactly as on an intestacy or to the deceased's personal representatives as part of his estate."⁵⁹

In the event, this recommendation of the Lord Chancellor's Committee was not implemented in full. The new section 18 of the *English Wills Act* provides, as the Western Australian equivalent does, that the exception operates in all cases except where in default of appointment the property the subject of the power would pass to the testator's personal representatives.

⁵⁸ Lord Chancellor's Law Reform Committee twenty-second report *The Making and Revocation of Wills* (1980 Cmnd 7902).

⁵⁹ *Id* para 3.11.

Part III: Effect of Divorce on Wills

Chapter 4

DISCUSSION OF EXISTING LAW

1. PRESENT POSITION

4.1 Though marriage generally revokes a prior will, divorce does not. A gift in a will, the exercise of a power of appointment by will, and an appointment in a will as executor, trustee or guardian or as donee of a power of appointment, all remain in full effect unless the will specifically directs otherwise. Unless a contrary intention appears in the will, a reference to a "husband" or "wife" in a will means the husband or wife at the time the will was made and a donee so described is entitled to take.¹ If a divorced testator marries again his or her will is automatically revoked.²

2. THE INCIDENCE OF DIVORCE

4.2 When the *English Wills Act 1837*, which was adopted in Western Australia,³ was enacted in England it was unnecessary for Parliament to consider the question of the effect which divorce should have on an existing will. Until 1857 the only way to obtain a divorce in English law was by Act of Parliament and this was extremely rare.⁴ However, in recent times, the number of divorces granted in Western Australia has been rising. In the five year period 1961-1965, the average annual number of divorces was 549.⁵ In 1988, 3,964 divorces were

¹ *In re Coley, Hollinshead v Coley* [1903] 2 Ch 102; *In re Devling, deceased* [1955] VLR 238. However, words such as "during widowhood" or "so as she remains my widow" form a condition as to the beginning and ending of the wife's interest, so that the effect of a subsequent divorce before the gift takes effect is that the former wife is disentitled to the gift: *Public Trustee v Morrison* [1887] 6 NZLR 190; *In re Boddington; Boddington v Clairat* (1884) 25 Ch D 685.

² We have not been able to obtain any accurate information on the percentage of persons who are divorced and who later remarry. However, in 1988, 116,816 marriages were solemnised in Australia: Australian Bureau of Statistics *1988 Marriages Australia* 3. In 25,281 of these, the male partner had earlier been divorced and in 23,496 of the marriages, the female partner had been divorced: id 4.

³ Para 2.1 above.

⁴ Between 1715 and 1852, there were only 184 Parliamentary divorces: Lord Chancellor's Law Reform Committee Twenty-second report *The Making and Revocation of Wills* Cmnd 7902 (1980) 19.

⁵ Australian Bureau of Statistics *1988 Divorces Australia* 3.

granted.⁶ The increase alone raises the question of whether an equivalent provision to that dealing with the effect of marriage on a testator's will is desirable in the case of divorce.

3. ARGUMENTS FOR AND AGAINST THE EXISTING LAW

4.3 The principal arguments in support of the existing law⁷ are -

- (a) A will is a solemn document and the law should be reluctant to interfere with the express intention of testators independently of their intention.
- (b) A number of law reform agencies have reported on the effect of divorce on wills,⁸ but none has demonstrated that succession by inadvertence happens more often than that a gift to a divorced spouse is left standing intentionally.
- (c) Some divorced testators fail to revoke earlier wills because they continue to feel some responsibility towards the former partner and intend the will to remain on foot. Automatic revocation of their wills on divorce would tend to defeat the intentions of these testators. In any event they may be ignorant of the change in the law.
- (d) In cases of hardship, testators' dependants can assert their claims under the *Inheritance Act*.
- (e) Because of the divorce, the minds of both spouses are turned to financial provision and it is unlikely that they will overlook their wills.

⁶ Ibid. Australian Bureau of Statistics *1988 Divorces Australia* indicates that in Australia in recent years the percentage of persons divorcing who have previously been divorced has been increasing. In the case of males, the percentage was 11.4 per cent in 1983 but had risen to 15.3 per cent in 1988: id 5. In the case of females the percentage increased from 10.9 in 1983 to 14.4 in 1988: ibid. The publication does not show the percentages separately for each State but presumably the general trend applies in Western Australia.

⁷ See, for example, Ontario Law Reform Commission *The Impact of Divorce on Existing Wills* (1977) 3-4; Lord Chancellor's Law Reform Committee Twenty-second Report *The Making and Revocation of Wills* Cmnd 7902 (1980) paras 3.35-3.38; C J Rowland *Revocation of Wills by Divorce: Is there a Need for Reforms?* (1981), an unpublished paper, paras 2.2-2.2.6 (Mr Rowland is a senior lecturer in law at The Australian National University); Law Reform Commission of Tasmania *Working Paper on Reform in the Law of Wills - The Making and Revocation of Wills* (1981) by G M Bates 45; New South Wales Law Reform Commission *Wills - Execution and Revocation* (1986) para 10.14.

⁸ For example, the Law Reform Commissions referred to in the previous footnote.

- (f) Simply because marriage revokes a will, there is no reason to conclude that divorce ought to have the same effect. Whereas marriage involves a positive duty to provide for one's spouse, divorce involves no corresponding duty not to provide for one's former spouse.

In a preliminary submission to us, the Law Society of Western Australia's Family Law Committee told us that most litigants in the Family Court of Western Australia who have a solicitor acting for them are advised by the solicitor to change their wills,⁹ and of these most have already done so by the time the application for dissolution comes before the Court.¹⁰ The Committee said that there would be a potential for injustice in the automatic revocation of wills on divorce in the situation where the party who did not bring the application was unaware of the granting of a decree because, for example, an order for substituted service of the application had been made. It also said that members of the Committee had had clients who wished to leave something to their former spouses in their wills if only so that children of the marriage would benefit through the former spouse.

4.4 The main arguments for altering the present law and providing for some form of revocation of testamentary gifts on divorce are:

- (a) When a married testator makes a will the spouse is usually the beneficiary of the estate if he or she survives the testator. It is reasonable to assume that a divorced testator would not intend to benefit a former spouse under a will, or at least not as generously as would have been the case if the marriage were still in existence. The law would more adequately represent the wishes of the majority of testators by providing for some form of revocation of testamentary gifts on divorce.

⁹ *Australian De Facto Relationships* (1985) by CCH Australia Limited at 6301 sets out a checklist for solicitors for the first interview with a client involved in a financial dispute with his or her de facto spouse. It is interesting to note that it contains the following item: "advise on possible need for re-drafting of will."

¹⁰ However, the Registrar of the Family Court of Western Australia has informed us that in roughly sixty per cent of divorce applications the applicant is not legally represented and it is rare for the party who is not the applicant to have legal representation. Of course, many of those who are not represented at the divorce would have consulted a solicitor in the earlier stages of the dispute. Under the Commission's tentative suggestion in para 5.11 below testamentary gifts and appointments in favour of the testator's spouse would be revoked on divorce. If this were implemented, the litigant's new will would only be affected by the subsequent divorce where the will contained such a gift or appointment. As to exclusion of the operation of statutory revocation by contrary intention, see paras 5.12-5.16 below.

- (b) The respective property rights of the parties are often resolved once and for all in a property settlement at the same time as the marriage breaks down, though this might be either before or after the divorce. The Family Court, in fact, is required, as far as practicable, to "make such orders as will finally determine the financial relationships between the parties to the marriage and avoid further proceedings between them".¹¹
- (c) If the testator dies after the statutory revocation but before making a new will, the revocation would usually result in the testator's property passing to relatives with a stronger moral claim to the estate than the former spouse.¹²
- (d) Some testators mistakenly believe that divorce automatically revokes earlier wills or gifts made in them to their former spouses. Even when they know it does not, testators might inadvertently leave the will in existence. In either case, property may pass to the former spouse contrary to the testator's wishes.
- (e) The former spouse may lose or may have already lost the mental capacity to revoke an existing will. In England this problem is alleviated by legislation which empowers the Court of Protection to order the execution of a will for a person incapable of making a valid will¹³ but there is no such provision in Western Australia.¹⁴
- (f) If an injustice is caused to the former spouse by the statutory revocation, the Inheritance Act might be available to mitigate it. The former spouse is entitled to make a claim under that Act if at the testator's death he or she was receiving or entitled to receive maintenance from the testator, whether pursuant to an order of a court, or to an agreement or otherwise.¹⁵

¹¹ *Family Law Act 1975* (Cwth) s 81.

¹² This argument is explained in greater detail in paras 4.9-4.10 below.

¹³ *Mental Health Act 1983 Part VII* (UK) and the *Court of Protection Rules 1982* (UK). The provisions are summarised by the Victorian Chief Justice's Law Reform Committee in its report *Wills for Mentally Disordered Persons* (1985) at paras 3-12.

¹⁴ It has been recommended in Victoria by the Chief Justice's Law Reform Committee in its report *Wills for Mentally Disordered Persons* (1985). The New South Wales Law Reform Commission has recently issued a discussion paper *Wills for Persons Lacking Will-Making Capacity* (DP 20 1989). As to the argument in (e) above, see footnote 24 below in this ch.

¹⁵ S 7.

4.5 Similar arguments apply in respect of powers of appointment conferred on a former spouse and the testamentary appointment of a former spouse as executor, trustee or guardian.

4. ADMINISTRATIVE ACTION AS A POSSIBLE SOLUTION

4.6 Does the potential for injustice in the present law justify changing the law? There might be other ways of mitigating it than by revoking the will statutorily. After a decree nisi granted by the Family Court has become absolute a copy of the decree nisi with a certificate that the decree has become absolute endorsed on it is sent by the Registrar of the Court to each of the parties. One possibility would be for the State to require the Registrar of the Family Court of Western Australia to send a notice with the copy explaining that the divorce does not revoke a will made by either of the parties and that each party should give consideration to whether he or she is satisfied with the terms of any existing will and, if not, should make a new will. The notice could be in the form of a brochure.

4.7 There are some difficulties with this suggestion. The brochure might not reach the party at all, especially a party who has not contested the proceedings, because the party's address in the court record may not be current or correct, or perhaps because he or she was never personally served with the divorce application in the first place.¹⁶ If the divorce took place outside Western Australia the Court concerned would not forward the brochure. If administrative action along the lines suggested is to be the solution, it would be preferable for it to operate on a uniform basis throughout Australia under Commonwealth legislation.

4.8 However, even if the suggestion was only put into effect by the Registrar of the Family Court of Western Australia, this would result in an increase in awareness of the present law among those divorced in that Court and in the number of wills of divorced persons which comply with their intentions.¹⁷ Although it might be argued that this solution

¹⁶ Where a party had legal representation, the notice would be sent to the solicitor with the copy of the order and might by arrangement be retained in the solicitor's office without being read by the party. The notice would need to be carefully worded because reforms in other jurisdictions, such as in New South Wales (para 5.8 below), as to the effect of divorce on wills could determine succession to the property or some of the property of a particular party. Even though the notice was appropriately worded, the variation of laws among different jurisdictions could lead to a party becoming confused as a result of the notice.

¹⁷ It could not, of course, overcome the fact that some of those who receive the notice will not make a new will because of inadvertence, procrastination or incapacity.

would be a matter within the domain of the Commonwealth,¹⁸ it may be possible for the State to reach an arrangement with the Commonwealth authorising the Registrar to include the brochure with the documents which the Registrar is required to send to the parties.

5. REVOCATION AS A POSSIBLE SOLUTION

4.9 We have not yet formed a view as to whether there should be some form of revocation of testamentary gifts on divorce but suggest that there might be merit in such a new rule. It may be that when the testator dies, the former spouse will have already benefited from provision for his or her maintenance or a property settlement. A statutory revocation would usually result in the testator's property passing to relatives with a stronger moral claim to the estate. If only the gift to the former spouse is to be revoked by the divorce and the will contains an alternative gift,¹⁹ the testator's children would usually be beneficiaries under the alternative gift. Also where the testator died intestate, the testator's children would become entitled to the estate.²⁰ This result would have the advantage of protecting the children of the marriage of the testator and preventing the assets of the testator later passing from the former spouse to children of his or her subsequent marriage or relationship.

4.10 Where the testator had no children, the testator's parents would be the principal beneficiaries (although probably not the sole beneficiaries) on intestacy.²¹ This would often be a reasonable result. The broad aim of the rules about distribution on intestacy is to achieve a just distribution of the estate of an intestate in the light of prevailing social attitudes.²²

4.11 Most testators, if they thought about it, would not want to benefit their former spouses under their wills, or at least not as generously as had been intended before the divorce.

¹⁸ As the Commonwealth *Family Law Act 1975* covers the field of matrimonial relief in the form of the granting of a divorce it may be that a requirement by the State that the Registrar forward the notice with the copy of the decree nisi would not be within the power of the State. It is s 51(xxii) of the *Australian Constitution* which empowers the Commonwealth to make laws with respect to divorce: para 2.3 above.

¹⁹ That is, one which is to operate if the former spouse predeceases the testator or does not survive the testator for a stipulated time.

²⁰ *Administration Act 1903* (WA) s 14.

²¹ Where a person dies intestate leaving parents and brothers or sisters but no spouse, and the net value of the estate does not exceed \$6,000, the parents are entitled to the whole of the estate: *Administration Act 1903* (WA) s 14. Where the net value of the estate exceeds \$6,000, the parents are entitled to \$6,000 and one half the residue and the brothers and sisters are entitled to the other half: *ibid*. Where there are no brothers and sisters, the parents are entitled to the whole of the estate: *ibid*.

²² Law Reform Commission of Western Australia *Report on Distribution on Intestacy* (Project 34 Part 1 1973) para 12. (The current provisions in the *Administration Act 1903* governing distribution on intestacy are based on recommendations made by the Commission in this report.)

Mistaken belief that divorce revokes an earlier will,²³ inadvertence, oversight or procrastination might result in wills which have unintended effects.²⁴

4.12 Similar arguments apply to a rule which would result in the revocation of powers of appointment granted in favour of the former spouse in the testator's will²⁵ and the appointment of the former spouse as executor, trustee or guardian. After the divorce the former spouse might be a less appropriate person to exercise a power of appointment in favour of those who had a moral claim to the property concerned. Most divorced testators would have strong views about their former spouses administering their estates or acting as testamentary guardians of their children - perhaps children of subsequent relationships or over whom custody disputes had been bitterly fought.

4.13 The thrust of reform of the consequences of divorce on wills in other jurisdictions has been to introduce some type of statutory revocation. Since 1977, the topic has been the subject of reform in New Zealand,²⁶ some Canadian provinces,²⁷ England,²⁸ Tasmania,²⁹ Queensland³⁰ and New South Wales.³¹ In each case the result was legislation which provided that on divorce there be revocation of the appointment of the former spouse as executor or trustee, some form of revocation of testamentary gifts, and in some cases revocation of powers of appointment granted in favour of the former spouse or of the appointment of the former spouse as testamentary guardian.³² In the United States of America's Uniform Probate Code 1969 similar provision is made.³³ The South Australian Law Reform Committee³⁴ also made similar recommendations which have not been implemented.³⁵

23 The number of such testators is probably increasing because the number of divorces has grown, and perhaps also because more divorces are being obtained without the assistance of solicitors: see para 4.2 above and footnote 10 above in this ch.

24 We do not regard the argument that the divorced spouse may lose or may have already lost the mental capacity to make a new will (para 4.4(e) above) as an argument which justifies some form of revocation of all wills on divorce. This is a problem which would be best dealt with by legislation specially designed to deal with it, as in England: para 4.4(e) above.

25 As to what constitutes a power of appointment, see para 2.14 above.

26 *Wills Amendment Act 1977* (NZ).

27 For example, Ontario (*Succession Law Reform Act 1977* s 17), British Columbia (*Attorney General Statutes Amendment Act 1979* s 63) and Saskatchewan (*Wills Amendment Act 1981* s 3).

28 *Wills Act 1837* (UK) s 18A, inserted by *Administration of Justice Act 1982* (UK) s 18.

29 *Wills Act 1918* (Tas) s 11: added by *Wills Amendment Act 1985* (Tas) s 5.

30 *Succession Act 1981* (Qld) s 18.

31 *Wills Probate and Administration Act 1898* (NSW) s 15A, inserted by *Wills Probate and Administration (Amendment) Act 1989* (NSW) schedule 1.

32 See the legislation noted in footnotes 26-31 above.

33 S 2-508.

34 South Australian Law Reform Committee *The Effect of Divorce on Existing Wills* (1977).

35 As to the power of the Australian States to legislate on the effect of the divorce of the testator on an existing will: see footnote 8 in ch 2 above.

Chapter 5

APPROACHES TO REFORM

1. INTRODUCTION

5.1 We have taken as our starting point the Ontario Law Reform Commission's five general approaches which could be taken to reform the principle that the testator's divorce does not affect an existing will.¹ These are to -

- (a) permit wills to be revoked by implication because of a general change of circumstances;
- (b) allow the Supreme Court to decide whether it would be just in a particular case to let the will stand;
- (c) provide that all existing wills are revoked by the subsequent divorce of the testator;
- (d) modify the will by striking down all gifts to a former spouse;
- (e) provide that the gift is revoked and is to pass as if the former spouse had predeceased the testator.²

2. ALLOWING WILLS TO BE REVOKED BY A GENERAL CHANGE OF CIRCUMSTANCES

5.2 In the United States of America, a number of States permit a subsequent change in the condition or circumstances of a testator to revoke a will by implication.³ This alternative has

¹ Report *The Impact of Divorce on Existing Wills* 4-9. These were considered by the New South Wales Law Reform Commission in its report, *Wills - Execution and Revocation* (1986) paras 10.18, 10.19 and 10.27 - 10.30.

² The fifth alternative was formulated in this manner by the New South Wales Law Reform Commission in its report *Wills - Execution and Revocation* (1986) paras 10.29-10.30 and 10.38. We prefer this formulation to that used by the Ontario Law Reform Commission which was: "to deem the ex-spouse to have died before the testator for the purpose of interpreting the provisions of the will".

the disadvantage of introducing uncertainty and raises the possibility of an increase in the amount of litigation concerning estates at least until a body of decisions has accumulated settling the basic question of what measure of changed circumstances would be required.

3. REVOCATION AT JUDICIAL DISCRETION

5.3 The second alternative, to give the Supreme Court power to modify the will or declare it revoked by the divorce, is flexible enough to deal with the peculiar details of individual cases but would often cause uncertainty as to the ultimate beneficiaries in the estate, delays in the administration of estates and the incurring of legal costs. This alternative does not offer any guidelines for the exercise of the Court's discretion. A judge might make the will which the judge thought it was the testator's moral duty to make, irrespective of whatever good reasons the testator might have had for weighing the competing claims on his or her bounty carefully and with greater background knowledge than that available to the judge.

4. AUTOMATIC REVOCATION OF THE WILL

5.4 This is the approach adopted in the Tasmanian *Wills Amendment Act 1985*⁴ and in legislation governing wills in a number of American States.⁵ The only exception provided for in the Tasmanian legislation is that a will expressed to be made in contemplation of divorce is not revoked by the divorce so contemplated.

5.5 The Tasmanian provision substitutes the rules governing distribution on intestacy⁶ for the testamentary provisions contained in the will. It mirrors the revocation by marriage provision and is simple and unambiguous. But it is unsatisfactory in a number of respects. It strikes down a will made after the breakdown of the marriage but not in contemplation of divorce. This could include a will made after the testator had acquired a de facto spouse and children through a new relationship. Even a will containing no gift to the other spouse is revoked on divorce. Bequests to friends and charities as well as any special arrangements made in the will for the testator's children are also struck down. It cannot be assumed that a testator would intend to revoke his or her entire will because of divorce.

³ See eg Mich CLA 702.9.

⁴ S 5 adding the relevant provision as s 11 to the *Wills Act 1918* (Tas). The provision implemented a recommendation in the Tasmanian Law Reform Commission's *Report on Reform in the Law of Wills* (1983) at 14.

⁵ For example in Oregon: Ore Rev Stat 114.130.

⁶ As to those rules in Western Australia, see para 3.1 above.

5. PARTIAL REVOCATION - REVOCATION OF GIFTS TO THE FORMER SPOUSE

5.6 On the face of it, this option would overcome the shortcomings of total revocation by revoking only gifts or benefits contained in the will in favour of the former spouse.⁷ Legislation along these lines was enacted in England in 1982⁸ under which any devise or bequest to the former spouse is to "lapse" except insofar as a contrary intention appears by the will.⁹ The provision has proved to be defective where the testator has made an absolute gift of property to his or her spouse and included an alternative disposition providing that if the spouse dies before the testator, the property should go to another beneficiary. It was held in *Re Sinclair*¹⁰ that "lapse" simply meant "fail" and that there was nothing in the section which justified the Court in equating failure by reason of divorce with failure by reason of death during the testator's lifetime. Thus the event provided in the will as giving rise to the substitutionary gift had not occurred and the estate devolved as on an intestacy. We believe the same difficulty would arise if instead of providing that the gift to the former spouse should lapse the legislation provided that the gift would be revoked. The English provision also provides that the will takes effect as if any appointment of the former spouse as an executor or trustee of the will were omitted, except insofar as a contrary intention appears by the will.

5.7 The South Australian Law Reform Committee in its report *The Effect of Divorce upon Wills*¹¹ also recommended that gifts in favour of the former spouse should be revoked. Instead of a short provision of the kind now contained in the English *Wills Act 1837*, the Committee recommended the enactment of detailed provisions setting out what was to be the scope and effect of its primary recommendation that gifts in favour of the former spouse should be revoked. For example, it recommended that it should be expressly provided that where there are alternative gifts given by the will and one alternative, or the only alternative, as the case might be, is a gift in favour of the divorced spouse, the will should operate and be

⁷ This approach would parallel s 13 of the *Wills Act 1970* (WA) which invalidates gifts to attesting witnesses.

⁸ By the *Administration of Justice Act 1982* s 18.

⁹ The provision is without prejudice to the right of the former spouse to apply for financial provision under the English family provision legislation: s 18A(2).

The section contains a separate provision dealing with interests in remainder which are subject to life interests where the life interest lapses by virtue of s 18A. The interest in remainder is to be treated as if it had not been subject to the life interest and, if it was contingent on the termination of the life interest, as if it had not been so contingent.

¹⁰ [1985] 1 All ER 1066.

¹¹ 1977.

construed as if that alternative had not been expressed in the will.¹² It did not favour the revocation of testamentary appointments.¹³ The Committee's recommendations have not been implemented.

6. GIFT TO BE REVOKED AND TO PASS AS IF THE FORMER SPOUSE HAD PREDECEASED THE TESTATOR

(a) Consideration of this approach

5.8 This alternative was adopted in amendments enacted in 1989 to the New South Wales legislation.¹⁴ As a result of those amendments, section 15A of the *Wills Probate and Administration Act 1898* provides that a gift to the former spouse is revoked and any property which would, but for that section, have passed to the former spouse of the testator is to pass as if the former spouse had predeceased the testator. The provision implemented recommendations made by the New South Wales Law Reform Commission.¹⁵ The approach has also been adopted in Queensland¹⁶ and some Canadian provinces, such as Ontario,¹⁷ as well as in the American Uniform Probate Code.¹⁸ The rationale for adopting the approach in Queensland was explained by the Queensland Law Reform Commission as follows:

"In order to make the consequences of the revocation clear, so far as beneficial dispositions to the spouse are concerned, it is desirable to provide that the dispositions should have effect as if the spouse had predeceased the testator. This would ensure that if, for instance, a life interest were left to a wife, the effect of a divorce would be to accelerate the interests of the beneficiaries entitled upon the death of the spouse; and if the testator had included a substitutional provision in his will to take effect in

¹² Report 8.

¹³ Id 6-7.

¹⁴ *Wills Probate and Administration (Amendment) Act 1989* (NSW).

¹⁵ *Wills - Execution and Revocation* (1986) paras 10.16, 10.17, 10.29 and 10.30.

¹⁶ *Succession Act 1981* (Qld) s 18.

By a majority the Attorney General of Victoria's *Working Party to Review the Wills Act 1958* (1986) has recommended that a provision modelled on s 18 be inserted in Victoria's *Wills Act 1958*: report 38.

¹⁷ *Succession Law Reform Act 1977* (Ontario) s 17. Ontario was the first of the Canadian provinces to adopt this approach which had been recommended by the Ontario Law Reform Commission in its report *The Impact of Divorce on Existing Wills* (1977). The Ontario legislation has been followed in some of the other Canadian provinces, for example, British Columbia and Saskatchewan: *Attorney General Statutes Amendment Act 1979* (British Columbia) s 63; *Wills Amendment Act 1981* (Saskatchewan) s 3.

¹⁸ As at 1 September 1982, 14 of the States in the United States of America had enacted the Code in its original or in an amended form: (1982) *Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings* 472.

the event of the prior death of his wife, that substitutional provision would still take effect, as this would presumably best accord with the testator's intention."¹⁹

This approach avoids the problem which was exposed in the English section by *Re Sinclair*²⁰ and would have led to the alternative beneficiary succeeding to the estate. The provisions in New South Wales and Queensland and in the American Uniform Probate Code are so worded that the former spouse is deemed to have predeceased the testator only in respect of property which is the subject of a revoked gift to the former spouse. This ensures that the interests of other beneficiaries are not affected, for example, where there is a gift to someone other than the former spouse which is conditional upon the former spouse surviving the testator. If the will as a whole were given effect as if the former spouse had predeceased the testator, such a gift would fail.²¹

5.9 Where this approach has been utilised, the legislation has usually also provided that any power of appointment²² conferred by the will on the former spouse and the appointments under the will of the former spouse as executor, trustee or guardian²³ are revoked.²⁴ This

¹⁹ Queensland Law Reform Commission *The Law relating to Succession* (1978) 12. The Queensland reform implemented a recommendation made in this report.

²⁰ Para 5.6 above.

²¹ The approach also overcomes the problem of a gift given to a named beneficiary but given *pur autre vie* and the other life is the life of the former spouse.

²² As to what is a power of appointment: see para 2.14 above.

²³ Under s 44 of the *Family Court Act 1975* a person who is the guardian or a joint guardian of a child may by deed or *will* appoint any person to be the guardian of the child after his or her death. After the death of the appointor, the appointment has effect only if the appointor is at the time of his or her death the sole guardian of the child. In any event, its effect is subject to any order of the Family Court.

²⁴ For example s 15A of the *Wills Probate and Administration Act 1898* (NSW) so provides. The legislation in Ontario, Saskatchewan and British Columbia (footnote 17 above in this ch) does not extend to the appointment of a guardian. In Queensland, s 18 of the *Succession Act 1981* does not extend to a power of appointment conferred on the former spouse.

In New South Wales, Ontario, Saskatchewan and British Columbia, the revocation extends to both a general power of appointment and a special power of appointment. A general power of appointment is a power that the donee may exercise in favour of such person or persons as the donee pleases, including the donee or his or her executors or administrators: 36 Halsbury *Laws of England* (4th ed 1981) para 806. A special power may be exercised only in favour of certain specified persons or classes such as the donee's children or charitable organisations: *ibid*. In the case of a special power of appointment, the donee is precluded from appointing to himself or herself. The New South Wales Law Reform Commission in its report *Wills - Execution and Revocation* (1986), after noting that the donee of a special power cannot appoint in his or her own favour, gave consideration to the question of whether revocation should be confined to general powers of appointment. The Commission said that, in the comparatively rare cases where powers of appointment conferred by will were now encountered there was usually to be found a gift over in default of appointment: report para 10.26. Following the model contained in the American Uniform Probate Code, the Commission decided that it was appropriate that a special power of appointment should be revoked where the spouse was the donee of the power: *ibid*. This, it believed, was more likely to accord with the intention of the testator if he or she had turned his or her mind to the question of the effect of the termination of marriage upon the will.

seems to be desirable as it would normally accord with the intention of the testator. In Western Australia, it is possible to appoint an advisory trustee²⁵ in addition to the responsible trustee and if this approach were to be adopted in this State the legislation should extend to revoke the appointment of the former spouse as an advisory trustee.

5.10 This approach could work unfairly where the will makes gifts to the family of the divorced spouse.²⁶ An example is the situation where the testator makes a will leaving the estate to the spouse but providing that if he or she predeceases the testator a half share in the estate is left to the parents of each spouse. It is unlikely that following the divorce, the testator would still wish to do this. A provision of this sort is usually made on the assumption that the testator will have received the spouse's property under the will of that spouse, and intends to give it back to his or her family. This would not be the case where the former spouse is only deemed to have predeceased the testator.²⁷ Although an estate could devolve in this way, it would only rarely do so.

(b) The Commission's tentative view

5.11 No reform is likely to preserve or promote the intentions of a divorced testator in every case. Given that, the Commission's tentative view is that if there is to be a legislative change the approach discussed in the three preceding paragraphs represents the best solution to the problem of what the effect of a divorce on an existing will should be.

(c) Ambit of the suggested rule

(i) Contrary intention

5.12 If the law is to be changed to provide for revocation of testamentary gifts and appointments on divorce, some modifications or exceptions would be desirable. First, there should be provision to enable testators to exclude the operation of the statutory revocation of

S 15A of the *Wills Probate and Administration Act 1898* (NSW) expressly provides that any appointment of property made by the testator's will in favour of the former spouse is revoked. Thus the exercise of a power of appointment by the testator in favour of the former spouse is revoked. There is also an express provision revoking an appointment of property in the *American Uniform Probate Code*.

²⁵ *Trustees Act 1962* (WA) s14.

²⁶ C J Rowland *Succession and Administration*, an article in *Annual Survey of Australian Law* 1987 (1988 R Baxt and G Kewley eds) 305, 309.

²⁷ Moreover, the former spouse may have made a new will after the divorce leaving his or her estate to a beneficiary other than the testator.

the gifts and appointments. This would cater for the testator who wishes to leave property to his or her spouse or to appoint that spouse as executor or administrator notwithstanding the divorce. There are provisions in Ontario, in the *American Uniform Probate Code* and in New South Wales which have the same aim.²⁸

5.13 In Ontario²⁹ where a contrary intention appears in the will, the gift and appointments it makes are not revoked by divorce. The position is the same under the *American Uniform Probate Code*.³⁰ It might be argued that the requirement that the contrary intention must appear in the will is too strict and that extrinsic evidence including evidence of statements made by the testator should be admissible to establish that words used in the will are an expression of contrary intention.³¹ This would parallel the provision in Queensland's *Succession Act 1981* in respect of wills made in contemplation of marriage.³²

5.14 In New South Wales proof of a contrary intention is not restricted to expressions in the will, but may be established by any evidence, including evidence of statements made by the testator, that the testator did not at the time of the divorce intend the general rule to apply. The New South Wales Law Reform Commission in its report *Wills - Execution and Revocation*³³ said:³⁴

"The legislation which we propose overrides an earlier expression of intention to benefit a spouse, and replaces it with what may be described as a rule of thumb. If the purpose of this is to approximate more closely the testator's likely real intentions, it does not seem necessary to restrict proof of the testator's real intentions to formally expressed intentions - especially since the testator probably never knew of the rule. It should be possible to use statements of the testator as evidence of his or her intention. Such a stance would be consistent with the use of this type of evidence in ascertaining

28 *Succession Law Reform Act 1977* (Ontario) s 17(2); *Wills Probate and Administration Act 1898* (NSW) s 15A(2). There is no such provision in the Queensland legislation where s 18 of the *Succession Act 1981* is worded in absolute terms.

29 *Succession Law Reform Act 1977* (Ontario) s 17(2). The position is the same in Saskatchewan and British Columbia: *Wills Amendment Act 1981* (Saskatchewan) s 3; *Attorney General Statutes Amendment Act 1979* (British Columbia) s 63.

30 *American Uniform Probate Code* s 2-508.

31 To some extent extrinsic evidence would already be admissible, as in interpreting a will the court must in any case of doubt have regard to the state of the testator's family and property and other surrounding circumstances when the will was made. To this extent, the court regards itself as "sitting in the testator's armchair": see *Boyes v Cook* (1880) 14 Ch D 53, 56.

32 Para 3.22 above.

33 1986.

34 Report para 10.32.

the testator's true intentions in other areas (*Re Resch's Will Trusts* [1969] 1 AC 514 at 547-8). Whilst the admissibility of evidence of intention outside the will itself, including evidence of statements by the testator, will create uncertainty, this is the necessary price to pay to ensure that a testator's real intentions are not frustrated. Although there is a danger of fraud, the courts are well used to weighing evidence and are alert to the danger. We consider that these arguments are sufficiently cogent to justify a recommendation that the general rule should be rebuttable by any evidence, including evidence of statements made by the testator, which establishes to the satisfaction of the court that the testator did not at the time of the termination of marriage intend the proposed general rule to apply."

5.15 The New South Wales provision is much wider than the Ontario provision. Under the former, the Supreme Court may be satisfied by any evidence, including statements by the testator, that he or she did not intend to revoke the testamentary gift or appointment at the time the marriage ends in divorce, not at the time of making the will. Any provision like this can create uncertainty, and there is always a difficulty in assessing the significance of the testator's statements in retrospect.

5.16 At present, the testator's former spouse may apply for provision out of the testator's estate under the *Inheritance Act* only if at the time of the testator's death he or she "was receiving or entitled to receive maintenance from the deceased, whether pursuant to an order of any court, or to an agreement or otherwise".³⁵ If the legislation requires that the will is revoked on divorce unless a contrary intention appears in the will, whether or not extrinsic evidence is admissible, there will be cases where a testator intentionally provides by will for a spouse from whom a divorce is contemplated, but without expressing a "contrary intention" in the will. In such a case the provision for the former spouse would be revoked against the testator's wishes. The effect could be mitigated by amending the *Inheritance Act* to allow a former spouse to make a claim when a gift to that spouse has been revoked.³⁶ Whether the *Inheritance Act* should be amended in this way is considered below.³⁷

³⁵ S 7(1).

³⁶ C J Rowland in his unpublished paper *Revocation of Wills by Divorce: Is there a need for Reforms?* (1981) argues at 16 that if the contrary intention must appear in the will the family provision legislation should be amended so that every former spouse is eligible to make an application under that Act.

³⁷ Para 5.22.

(ii) *Gifts made in accordance with contracts*

5.17 The New South Wales Law Reform Commission recommended³⁸ that gifts made to the testator's former spouse in accordance with contracts binding on the testator should be an exception to a general rule under which gifts to a former spouse are revoked.³⁹ It has been held⁴⁰ that a contract not to revoke a will is not broken by the subsequent marriage of the promisor because the revocation is regarded as resulting from operation of law and not from the act of the party. Such reasoning might apply by analogy to revocation of gifts by divorce, despite some American authority to the contrary,⁴¹ so the New South Wales Law Reform Commission thought it desirable that the saving of gifts made in accordance with contracts binding on the testator be clearly expressed in any legislation. Tentatively, we agree with that view and consider that the exception should be extended to include an appointment of property in favour of the testator's former spouse and also the conferral of a power of appointment on that former spouse.⁴²

38 *Wills - Execution and Revocation* (1986) para 10.35.

39 Report paras 10.35 and 10.38.

40 *In re Marsland* [1939] Ch 820 and *Clausen v Denson* [1958] NZLR 572.

41 *Rookstool v Neaf* (1964) 377 SW2d 402.

42 This was the position under amendments proposed to the Australian Capital Territory's Wills Ordinance 1969 by the draft Wills (Amendment) Ordinance 1986. The draft proposed that a new section, s 20A, be added to the (ACT) Wills Ordinance 1969. Under s 20A(1), where a testator is divorced, a devise or bequest to, an appointment of property in favour of, or a conferral of a power of appointment on, a former spouse by the will is revoked. S 20A(2)(a) then provides:

"Nothing in subsection (1) shall affect -

(a) a devise or bequest to, or appointment of property in favour of, or a conferral of a power of appointment on, a testator's former spouse pursuant to a contract between the testator and the former spouse under which the testator is or was bound to dispose of property by will in a particular way".

We prefer this provision to that used in s 15A(3)(b) of the *Wills, Probate and Administration Act 1898* (NSW) which provides that:

"Nothing in this section affects -

(b) any direction, charge, trust or provision in the will of a testator for the payment of any amount in respect of a debt or liability of the testator to the former spouse of the testator or to the executor or administrator of the estate of the former spouse".

S 15A(3)(b) was intended to give effect to the New South Wales Law Reform Commission's recommendation referred to in para 5.17 above but the provision appears to be mainly aimed at directions in the will for the payment of a debt or liability of the testator to the former spouse. This latter topic is discussed in paras 5.23-5.24 below.

Tentatively, we are of the view that as under the (ACT) draft Wills (Amendment) Ordinance 1980, the exception should include an appointment of property and a conferral of a power of appointment.

In footnote 8 in ch 2 above, the Commission referred to the Family Court case of *Garside and Garside* (1978) FLC 90-488. There Wood SJ ordered that as a condition precedent to the payment over of a sum of money by the husband to the wife she should make a will under which she would leave all her estate to the surviving children of the marriage equally. Because difficulties can arise in the enforcement of such an order, for example, where a spouse who made a will pursuant to the court order survives the other spouse and alters the will, it will usually be appropriate that the spouse should execute a covenant under which the estate would be liable in damages if the spouse left a will in different terms to those ordered by the court. Such a covenant would, of course, fall within the exception proposed in para 5.17 above.

(iii) *Revival*

5.18 Under Western Australia's *Wills Act 1970* a will or a part of a will which has been revoked can only be revived⁴³ by -

- (a) the re-execution of the will;⁴⁴
- (b) a later will or codicil showing an intention to revive the will or part of the will;⁴⁵ or
- (c) any written document declaring an intention of the testator to revive the will or the part of the will where the document does not comply with the formalities for the execution of a valid will or codicil but the Supreme Court is satisfied that there can be no reasonable doubt that the testator intended by the document to revive the will or the part of the will.⁴⁶

Thus if testamentary gifts or appointments in favour of a testator's spouse are to be revoked by divorce, then under the present law revival of the gift or appointment could only be effected by one of these means.

5.19 In New Zealand, under section 2 of the *Wills Amendment Act 1977* the testator's divorce renders null and void a testamentary gift or appointment in favour of the testator's former spouse.⁴⁷ The Act provides that the section does not apply if after the divorce the testator has by a codicil expressly shown an intention that the testamentary gift or appointment is to have effect notwithstanding section 2 of the Act or notwithstanding the divorce.⁴⁸

5.20 A different approach was taken in the 1989 amendments to the New South Wales legislation.⁴⁹ Under section 15A of the *Wills Probate and Administration Act 1898* which

⁴³ That is, restored.

⁴⁴ S 16(1).

⁴⁵ Ibid.

⁴⁶ S 37.

⁴⁷ S 2(2).

⁴⁸ Id s 2(3)(c). The will or part of the will which is revived is deemed to have been made at the time when it was first made and not at the time when it was revived: s 2(4)(a).

⁴⁹ *Wills Probate and Administration (Amendment) Act 1989* (NSW).

was inserted by those amendments, the testamentary gift or appointment in favour of the testator's former spouse is not revoked if it is contained in a will which is republished after the divorce by a will or codicil which evinces no intention of the testator to revoke the testamentary gift or appointment.⁵⁰

5.21 It can be argued in favour of the New South Wales approach that if the testator confirms a prior will by a codicil made after the divorce, this is a pretty clear indication of the testator's intentions. The testator is unlikely to have forgotten the provision for the former spouse. On the other hand the New South Wales provision could catch out an unwary testator who, knowing that the divorce revoked the gift to the former spouse, assumed that the codicil would not revive the gift. As most codicils are prepared by solicitors⁵¹ perhaps this is not of great concern.

(iv) *Inheritance Act*

5.22 If there is to be a general rule that gifts to the testator's spouse are to be revoked by divorce the former spouse should retain the existing restricted right to apply for provision from the testator's estate under the *Inheritance Act*,⁵² as an order under that Act could alleviate an injustice caused to the former spouse by the revocation. At present, by virtue of section

⁵⁰ This provision implemented a recommendation by the New South Wales Law Reform Commission in its report *Wills - Execution and Revocation* (1986) at para 10.34. The South Australian Law Reform Committee made a similar recommendation in its report *The Effect of Divorce Upon Wills* (1977) at 7.

The distinction between revival and republication is that the former restores a revoked will or codicil, while the latter merely confirms an unrevoked testamentary instrument so as to make it operate as if executed on the date of republication: C H Sherrin and R F D Barlow *Williams on Wills* (4th ed 1974) 136. However, in New South Wales the testamentary gift or appointment in favour of the divorced spouse would in effect be revived by republication under s 15A because the section expressly provides that the testamentary gift or appointment is not revoked where the will is republished.

By s 4 of the *Wills Probate and Administration Act 1898* (N.S.W.) every will which is republished or revived by a codicil is deemed for the purposes of the Act to have been made at the time it is republished or revived.

Precise words are not necessary to effect a republication and it is not necessary to republish the will expressly. Thus if the instrument is described as a "codicil to my will" it operates as a republication of the will: C H Sherrin and R F D Barlow *Williams on Wills* (4th ed 1974) 136.

⁵¹ This would also be the case where a will is republished by a later will.

⁵² The New South Wales legislation provides that the general rule that a testator's divorce is to revoke any testamentary gift or appointment in favour of the former spouse is not to affect "any right of the former spouse of a testator to make any application under the *Family Provision Act 1982*": *Wills Probate and Administration Act 1989* (NSW) s 15A(3)(a). The New South Wales Law Reform Commission recommended this express saving in its report *Wills - Execution and Revocation* (1986) 133 at para 10.33. Under s 14 of the *Family Provision Act 1982* (NSW), an order takes effect as if the provision had been made in a codicil to the will of the testator. The Commission suggested the express saving because it could possibly be argued that the general rule would strike down the codicil. Under the equivalent section in the *Inheritance Act* (WA), the provision made by the order takes effect "as if it had been made by a codicil to the will of the deceased executed *immediately before his death*": s 10.

7(1)(b) of the Act, the former spouse may make application under the Act if at the date of the testator's death the former spouse "was receiving or entitled to receive maintenance from the deceased, whether pursuant to an order of any court, or to an agreement or otherwise." There would be some cases where the revocation did not reflect the wishes of the testator or an injustice is caused to the former spouse but where the former spouse is not eligible to claim under the restrictive circumstances provided for in section 7(1)(b). It may be desirable to amend the *Inheritance Act* so that a former spouse of a testator would always be entitled to apply where a gift in his or her favour has been revoked by divorce, as suggested (in a different context) in paragraph 5.16 above.

(v) *Provisions dealing with payment of debts or liabilities*

5.23 In the New South Wales legislation it is provided that the general rule that a testator's divorce is to revoke any testamentary gift or appointment in favour of the testator's spouse is not to affect:

"any direction, charge, trust or provision in the will of a testator for the payment of any amount in respect of a debt or liability of the testator to the former spouse of the testator or to the executor or administrator of the estate of the former spouse".⁵³

The provision follows section 2(3)(a) of New Zealand's *Wills Amendment Act 1977* but this provision has been criticised:

"If there are liabilities to the other partner, then the purpose of this provision must be to validate a gift to that other partner "in respect of" these liabilities, even though the gift may go beyond the legal liability in its extent. For example, if the testator owes his wife \$300 and leaves her a legacy of \$300 in satisfaction, she will get \$300 one way or another and there is no need for subsection 2(3)(a). Only if he leaves her \$500 in respect of the \$300 debt, or if he leaves her \$300 when the debt is unenforceable (being, for example, statute-barred) would the provisions of subsection 2(3)(a) be needed."⁵⁴

⁵³ *Wills Probate and Administration Act 1898* (NSW) s 15A(3)(b).

⁵⁴ R J Sutton *The Wills Amendment Act 1977* (1979) 8 NZUL Rev 413, 415-416.

5.24 In view of the network of liabilities existing between the partners to a dissolved marriage a surviving partner might easily find some liability or other which might have been in the testator's mind when he or she made the will and allege that the provision made in that partner's favour was made "in respect of" the liability.⁵⁵ The provision can be supported - for instance, if there are statute barred debts owing by the testator to his or her former spouse it is arguable that provision in the will for their payment ought not to be revoked. But generally it seems to us that there is little justification for the special rule because enforceable debts owing to the former spouse are payable out of the testator's estate under the law governing the administration of estates.⁵⁶

(d) Secret trusts

5.25 A fully secret trust arises where a gift is made in absolute terms on the face of the will but the testator, before or after the date of the will, communicates to the legatee or devisee an intention that he or she hold the gift in trust for some other person, and the legatee or devisee accepts the trust or acquiesces in it. A half secret trust differs from a fully secret trust in that the will shows an intention that the legatee or devisee is to take as a trustee, though the trusts themselves are not expressed in the will, but have been communicated to the legatee or devisee by the testator before or at the time the will was made. In each case the secret trust operates outside the will.⁵⁷ Because a secret trust operates outside the will the effect of

⁵⁵ Id 416. Sutton said that if such pleas are sympathetically considered by the courts, whether the general rule that gifts to the former spouse are null and void will be applied in any particular case may become a matter of chance, depending on what evidence there is of the testator's intention at the time he made his will. "For example, even if the will were made when the couple were still together, it might be shown that the testator in having regard to his moral obligations to his wife took into account matters which would also give rise to legal obligations under the *Matrimonial Property Act* and made a global provision designed to ensure that no application under that Act would be necessary; such a provision, it would be contended, is made "in respect" of the liability". (The object of New Zealand's *Matrimonial Property Act 1976* is to provide for a just division of the matrimonial property between the spouses when their marriage ends by separation or divorce).

⁵⁶ The South Australian Law Reform Committee in its report *The Effect of Divorce upon Wills* (1977) at 7 proposed that where the testator by his or her will shows clearly that the testator is making provision for an actual or anticipated order for maintenance that provision should be unaffected by a proposed general rule that gifts in favour of the former spouse should be revoked. At this stage, we are not favourably disposed to the South Australian recommendation. The respective property rights of the parties are often resolved once and for all in a property settlement that accompanies the divorce: para 4.4(b) above. Furthermore, provided the former spouse was receiving or entitled to receive maintenance from the testator, he or she is entitled to make a claim against the testator's estate under the *Inheritance Act*: para 5.22 above. In any event if the general rule is not to apply where there is a contrary intention as suggested in paras 5.12-5.16 above, the stipulation in the will making provision for an actual or anticipated order for maintenance will sometimes be exempt from the operation of the general rule.

⁵⁷ As to secret and half secret trusts, see generally R P Meagher and W M C Gummow *Jacobs' Law of Trusts in Australia* (5th ed 1986) paras 711-735 and I J Hardingham, M A Neave and H A J Ford *Wills*

certain formalities and statutory rules about wills can be avoided.⁵⁸ For example, such a trust will be enforced in certain cases even though it was made orally.⁵⁹

5.26 Some law reform agencies have considered whether the testator's divorce should disqualify the testator's former spouse from taking the beneficial interest in the property when it is held in trust for the former spouse under a secret trust and also whether the divorce should disqualify the former spouse from acting as trustee for the beneficiary under the secret trust. The South Australian Law Reform Committee recommended that nothing in the reforms proposed by it should alter the existing law relating to secret trusts.⁶⁰ The Ontario Law Reform Commission proposed that the appointment of the former spouse to act as trustee for a secret trust should be invalidated but that the secret trust should not otherwise be interfered with. This would leave the trust valid. The intention of the Commission appeared to be that in the situation where the former spouse was the beneficiary under the secret trust, the former spouse would still take.⁶¹ The New South Wales Commission proposed instead that no provision relating to secret trusts be made in the legislation implementing the reforms suggested by it because secret trusts involving spouses who subsequently divorce were infrequently encountered and to add provision for them would cause undue complexity to an otherwise comparatively simple piece of legislation.⁶² This recommendation was adopted in the legislation implementing the Commission's report.⁶³ Thus in New South Wales where the testator leaves a gift to X but a secret trust was created in favour of Y (his or her spouse) and Y and the testator were later divorced, the beneficial gift to Y would not be revoked. The Commission anticipated that under the New South Wales legislation where the gift was left to

and Intestacy in Australia and New Zealand (2nd ed 1989) paras 730-739; C H Sherrin and R F D Barlow *Williams on Wills* (4th ed 1974) 318-323.

⁵⁸ *In re Young deceased* [1951] Ch 344, 350.

⁵⁹ See eg R P Meagher and W M C Gummow *Jacobs' Law of Trusts in Australia* (5th ed 1986) para 715.

⁶⁰ South Australian Law Reform Committee *The Effect of Divorce upon Wills* (1977). Under the Australian Capital Territory's draft Wills (Amendment) Ordinance 1986 (footnote 42 above in this ch) the general rule that the dissolution of the testator's marriage revokes testamentary gifts and appointments in favour of the former spouse is not to affect "a devise or bequest to, or appointment of property in favour of, or a conferral of a power of appointment on, a testator's former spouse by a will to the extent that the devise, bequest or appointment is the subject of a secret trust": proposed s 20A of the (ACT) Wills Ordinance 1969.

⁶¹ Ontario Law Reform Commission *The Impact of Divorce on Existing Wills* (1977) 8 and 11. The Commission said that the case law suggested that legislation invalidating direct testamentary dispositions to a former spouse would not apply in the situation where a former spouse was the beneficiary under a secret trust: report, 11. This was by analogy to *In re Young deceased* [1951] Ch 344, 350.

⁶² New South Wales Law Reform Commission *Wills - Execution and Revocation* (1986) para 10.37.

⁶³ There is also no provision relating to secret trusts in the Queensland provision (*Succession Act 1981* s 18) dealing with the effect of the testator's divorce on an existing will nor is there such a provision in the *American Uniform Probate Code*.

Y (the testator's spouse) with a fully secret trust in favour of X, the gift would be revoked on divorce.

5.27 The New South Wales Commission indicated that if a contrary view to its recommendation were adopted the legislation should be drafted so that where there was a valid secret trust the gift to the trustee in the trust would be saved (even if the trustee were the testator's former spouse) but that a gift under the trust to the beneficiary would be revoked where that beneficiary was the testator's former spouse even though such beneficial gift was made outside the will itself.

7. RELEVANT TERMINATIONS OF MARRIAGE

5.28 If testamentary gifts or appointments in favour of a testator's former spouse are to be revoked by the testator's divorce it will be necessary to indicate clearly in the legislation which divorces will effect the revocation. The *Family Law Act 1975* provides for decrees of dissolution of marriage and decrees of nullity of marriage. Under the Act a decree of nullity can only be based on the ground that the marriage is void.⁶⁴ A void marriage is no marriage at all, whether or not a decree declaring it void has been pronounced.⁶⁵ However, probably most persons who wish to put an end to their void "marriages" would seek a decree of nullity.⁶⁶ We suggest that absolute decrees or orders made by an Australian court for dissolution of marriage or nullity of marriage should effect a revocation of the testamentary gift or appointment.⁶⁷

⁶⁴ S 51. The grounds on which a marriage is void, for example, that one of the parties is not of marriageable age, are set out in Part III of the *Marriage Act 1961* (Cwth). Under the *Matrimonial Causes Act 1959* (Cwth) which was the predecessor of the *Family Law Act 1975* (Cwth), a decree of nullity could be based on the ground that the marriage was void or that the marriage was voidable: s 47. The circumstances in which marriages were void or voidable were set out in Part IV of that Act.

⁶⁵ *Ross Smith v Ross Smith* [1963] AC 280, 315.

⁶⁶ Not only is the obtaining of such a decree often desirable, but a party to the void marriage may wish to utilise the Court's jurisdiction to make appropriate orders as to custody, maintenance and property settlement ancillary to the decree of nullity itself.

⁶⁷ The intention would be to include not only decrees or orders made under the *Family Law Act 1975* (Cwth) and its predecessor the *Matrimonial Causes Act 1959* (Cwth) but earlier legislation of the Australian States under which such decrees or orders were made. However, decrees or orders made under the *Matrimonial Causes Act 1959* (Cwth) and earlier legislation of the Australian States will not be relevant if the revocation is only to apply in respect of the wills of testators who are divorced *after* the amending legislation comes into effect: paras 5.35-5.38 below.

Under the *Family Law Act 1975* (Cwth) a decree of dissolution of marriage must be based on the ground that the marriage has broken down irretrievably: s 48(1).

A decree nisi for the dissolution of a marriage should not be sufficient to effect the revocation. Only an absolute decree should do so.

5.29 If divorce is to revoke testamentary gifts or appointments, the question arises as to which non-Australian decrees should be recognised as capable of having this effect. The *Family Law Act 1975* makes provision for the recognition of overseas decrees.⁶⁸ Basically divorces or "annulments" effected in accordance with the law of overseas countries can be recognised on the ground of domicile, ordinary residence or nationality. The Act also preserves the recognition in Australia of dissolutions or annulments which would be recognised as valid under the common law rules of private international law. An annulment is defined in such a way that it covers not only a marriage which was a total nullity from the beginning but also the process of annulment of a voidable marriage whereby a marriage which is initially valid is rendered void.⁶⁹ We suggest that those non-Australian decrees which are recognised in Australia as having the effect of a decree of dissolution or nullity of the testator's marriage should have the same effect as that suggested for an Australian decree in revoking a testamentary gift or appointment in favour of the testator's former spouse.

5.30 We would therefore describe the decrees or orders which should have the effect of revoking a testamentary gift or appointment as absolute decrees or orders for the dissolution, nullity or annulment of marriage which were either made in a State or Territory of the Commonwealth or which would be recognised by courts exercising jurisdiction under the *Family Law Act 1975*.⁷⁰

8. PRIVATE INTERNATIONAL LAW PROBLEMS

5.31 A provision revoking a testamentary gift or appointment in favour of the former spouse may raise problems of private international law.⁷¹ Such problems would occur where, for example, the testator was domiciled outside Western Australia (in a jurisdiction in which divorce did not have the effect of revoking a prior will or a gift to a former spouse contained in it⁷²), but the gift to the former spouse comprised movable property situated in Western

⁶⁸ S 104.

⁶⁹ S 104(10).

⁷⁰ This has been the approach in New Zealand. The reforms effected by the *Wills Amendment Act 1977* (NZ) operate "where at the death of any person there is in force any absolute decree or order or any legislative enactment for the divorce of the person, or for the dissolution or nullity of marriage of the person and that decree or order or legislative enactment would be recognised by the Courts in New Zealand": s 2.

⁷¹ On the questions dealt with in this section, we derived considerable benefit from a discussion with Professor J-G Castel of Osgoode Hall Law School, Canada, the author of the leading Canadian text on private international law, while he was visiting Western Australia as the 1989 Robinson Cox Fellow at the Law School of the University of Western Australia.

⁷² Eg South Australia, Victoria or the Australian Capital Territory.

Australia. The question would be whether the Western Australian revocation rule would affect the gift in such circumstances. The issue would be of practical importance because, quite apart from overseas testators who own assets in Western Australia, there are many testators domiciled in other Australian States and Territories who own assets such as shares situated in Western Australia.

5.32 In the absence of an indication to the contrary in the legislative provisions implementing the revocation rule, this would be left to the common law rules of private international law. However, there is no binding authority⁷³ on how these rules would be applied to a provision revoking a testamentary gift or appointment in favour of a former spouse. If it were regarded as a matter of succession, the courts would presumably apply the normal rules that succession to movable property is governed by the law of the testator's last domicile and succession to immovable property is governed by the law of the place where the property is situated. In the example given in the previous paragraph, the result would be that the law of the testator's last domicile would be applied and the gift would therefore not be affected. However, if the property situated in Western Australia were immovable property, the result would be very different. The law of Western Australia would apply, the gift in the will would be revoked, and disposition of the property would be determined according to the Western Australian intestacy rules.⁷⁴

5.33 An alternative, which in our view is more likely to be the approach which a court would adopt, is to regard the question of whether a will is revoked by divorce as a matter of matrimonial law rather than succession. This approach is in harmony with the attitude of the courts to revocation of a will by marriage: it has been held that whether a will is revoked by marriage is a matter to be determined by the law of the testator's domicile at the date of the marriage.⁷⁵ A leading Australian text suggests that whether a will is revoked by divorce will in like manner be determined by reference to the law of the testator's domicile at the date of

⁷³ The Commission has been unable to find any reported decision in Australia, England or Canada dealing with the private international law issue under equivalent legislation in those jurisdictions.

⁷⁴ In the absence of any provision in the will providing for the disposition of the property in the event of failure of the gift. In our report on *Recognition of Interstate and Foreign Grants of Probate and Administration* (Project No 34 Part IV 1984) we recommended that automatic recognition should be given within Australia to a grant of probate or administration obtained in the Australian State or Territory in which the testator died domiciled. Under such a rule, if a grant had been obtained in the testator's last domicile, and that jurisdiction did not recognise divorce as having the effect of revoking the will, the courts of Western Australia would have to accept that will as effective to dispose of immovable property in Western Australia. Our report is being considered by the Standing Committee of Attorneys General.

⁷⁵ *Re Martin* [1900] P 211. The same principle applies to immovable property: *In the Estate of Micallef* [1977] 2 NSWLR 929.

divorce.⁷⁶ It seems to us that this is the most satisfactory approach. Questions of personal status are appropriately referred to the testator's personal law at the relevant time. In the example given, the result of this approach would be that a gift of property situated in Western Australia, whether movable or immovable, would not be revoked by divorce if the testator was at the time of the divorce domiciled in a jurisdiction which did not have such a rule. An advantage of this approach is that the testator's property, movable or immovable, would be treated in the same way.

5.34 Instead of leaving the matter to be determined by the common law, the statute setting out the revocation rule could provide specifically that the revocation would apply to all gifts or dispositions of property situated in Western Australia. This would bypass the common law rules of private international law. Such an approach would overcome the uncertainty as to how the common law rules might operate, but our provisional view is that it is better for legislation not to interfere in questions of private international law unless the common law rules have been clearly demonstrated to be unsatisfactory, which is not the case here.⁷⁷ We are mindful of the fact that the other jurisdictions which have introduced a rule providing for the revocation of a testamentary gift or appointment on divorce have not sought to alter the rules of private international law in any way.

9. APPLICATION OF REFORMS

5.35 The next question is whether the revocation of the testamentary gift to or appointment in favour of the former spouse should apply to all wills coming into effect after the date on which the amending legislation comes into operation (that is in respect of the wills of all testators dying after then) or only in those cases where the divorce takes place after that date. The Ontario Law Reform Commission recommended that the first of the two options should be adopted because:

"We consider that the reforms we have proposed in this Report are so desirable that we would recommend that they apply to all wills of persons dying after any legislation

⁷⁶ P E Nygh *Conflict of Laws in Australia* (4th ed 1984) 510.

⁷⁷ Indeed, the effect of the suggested statutory rule on the example given would be complex. The Western Australian law would operate to revoke the gift of movables situated in Western Australia, but unless there were provisions in the will providing for the disposition of the movables on the failure of the gift the movables would be distributed according to the intestacy rules not of Western Australia but of the law of the testator's last domicile.

implementing the reforms comes into force. We take the position that the amending provisions should have retrospective effect for a number of reasons. Firstly, this is consistent with the fundamental principle that wills, by their very nature, are ambulatory, and that the law in effect at the date of death of the testator should govern. Secondly, if we have made out a case for reforming the law and if our basic premise, that testators should be deemed to prefer the invalidation rather than the retention of testamentary benefits conferred upon a former spouse, is sound, then there is no convincing policy reason for not making the statute retrospective in its operation. Since it may well be presumed, in the absence of clear evidence to the contrary, that legislation is intended for prospective operation only, the amending statute should contain an express provision clarifying the legislative intention on this point. To make the legislation prospective only would be, in effect, to postpone reform for a generation or more, and there are no justifiable grounds for so doing."⁷⁸

5.36 This approach was also adopted by the Queensland Law Reform Commission.⁷⁹ The reforms which implement the Commission's recommendations apply to the wills of all testators dying after the commencement of that Act, even though the divorce may have occurred before then.⁸⁰

5.37 The New South Wales Law Reform Commission also recommended that its proposals should apply where the testator died after the commencement of the amending legislation.⁸¹ It adopted the reasoning of the Ontario Law Reform Commission. But the legislature did not follow the recommendation. The amendments to the *Wills Probate and Administration Act 1898* only apply where the divorce occurs after the coming into force of those amendments.⁸² No reason was given in Parliament for this change. No doubt the retrospectivity of the recommendation did not find favour. The Tasmanian reforms also only apply in respect of divorces occurring after the commencement of the amending legislation.⁸³

⁷⁸ Ontario Law Reform Commission *Report on the Impact of Divorce on Existing Wills* (1977) 10.

⁷⁹ *The Law Relating to Succession* (1978) 4.

⁸⁰ *Succession Act 1981* (Qld) s 4.

⁸¹ *Wills-Execution and Revocation* (1986) para 13.1.

⁸² *Wills Probate and Administration Act 1898* (NSW) Fifth Schedule Part I clause 5.

⁸³ *Wills Amendment Act 1985* (Tas) s 6. This is also the position under the amendments proposed to the Australian Capital Territory's *Wills Ordinance 1969* by the draft Wills (Amendment) Ordinance 1986. The draft is referred to in footnote 42 above in this ch.

5.38 In addition to the arguments expounded in the passage from the Ontario report, unless the reforms apply to the wills of testators who die after the new legislation becomes effective, rather than only to those wills where the testators have been divorced after that date, they will not assist a significant group of people whose plight has already been documented. They are those testators who have been divorced but now because of mental illness lack the testamentary capacity to revoke a will existing at the time of the divorce.⁸⁴ Against this is the argument that no such amendment should have any retrospective operation. A testator may have been advised at the time of his or her divorce that an existing will was not affected and deliberately not revoked the will on the basis of that advice.

⁸⁴ Paras 1.2 and 4.4(e) above.

Part IV: Questions at Issue

Chapter 6

The Commission seeks comment on the issues raised in this Discussion Paper and on any other matters within the terms of reference. In particular the Commission invites comment on all or any of the following questions. It would be helpful if views were supported by reasons.

Effect of marriage

1. Should the general rule that the marriage of the testator revokes a prior will be retained?

(Paragraphs 2.2, 2.4-2.6, 3.1-3.3 and 3.6-3.8)

2. If so, should there be modifications or new exceptions to that general rule and, if so, what should they be?

(Paragraphs 3.6-3.17)

3. Should the existing exception relating to a will made in contemplation of a particular marriage be modified and, if so, in what way or ways? If it should be necessary that there be an indication in the will that it is made in contemplation of the marriage, to what extent should extrinsic evidence be admissible to determine whether an expression contained in the will is an expression of contemplation of the marriage? Alternatively, should it be sufficient, as in New South Wales, if the will is made in contemplation of the marriage, even though there is no indication in the will that this is so?

(Paragraphs 2.2, 2.7-2.12, 3.4, 3.18-3.25)

4. Should it also be possible for the validity of a will to be preserved if it is made in contemplation of any, rather than a particular, marriage? Should it be necessary that there be an indication in the will that it is made in contemplation of marriage generally and, if so, to what extent should extrinsic evidence be admissible to determine whether

an expression contained in the will is an expression of contemplation of marriage generally?

(Paragraphs 2.7, 3.4 and 3.26-3.29)

5. Should there continue to be an exception to the general rule that wills are revoked on marriage with respect to wills made in exercise of a power of appointment and, if so, in what circumstances should that exception not apply?

(Paragraphs 2.2, 2.13-2.16, 3.5 and 3.30-3.32)

Effect of divorce

6. (a) Should the present law that divorce does not effect a revocation of all or any part of a will made previously by one of the married partners be retained?

(Paragraphs 4.1-4.13)

- (b) If the present law is to be retained, should the potential for injustice in that law be alleviated by administrative methods? What means should be used to provide or attempt to provide information to parties?

(Paragraphs 4.6-4.8)

7. Should there be, upon divorce, some form of revocation of testamentary gifts and powers of appointment? Should the appointment of the former spouse as executor, trustee or guardian be revoked?

(Paragraphs 4.1-4.5 and 4.9-4.13)

8. If so, what general approach should be taken? Should the approach be to -

- (a) permit a subsequent change in the condition or circumstances of a testator to revoke the will by implication;
- (b) empower the Supreme Court to modify the will or declare it revoked by the divorce, where this would be just;

- (c) provide that all existing wills are revoked by the subsequent divorce of the testator;
- (d) provide that any gift to a former spouse is revoked and that any power of appointment conferred by the will on the former spouse and the appointment under the will of the former spouse as executor, trustee or guardian are revoked;
- (e) provide that the gift is revoked and is to pass as if the former spouse had predeceased the testator and that any power of appointment conferred by the will on the former spouse and the appointment under the will of the former spouse as executor, trustee or guardian are revoked;
- (f) some other approach and, if so, what are its details?

(Paragraphs 5.1-5.11)

9. If the approach suggested in question 8(d) or question 8(e) should be adopted, then -

- (a) Should there be provision to enable testators to exclude the operation of the statutory revocation of a testamentary gift or appointment in favour of the former spouse? If so, should it be necessary that the contrary intention appear in the will and to what extent, if any, should extrinsic evidence be admissible to establish that words used in the will are an expression of contrary intention? Alternatively, should it be sufficient, as in New South Wales, if the Supreme Court is satisfied by any evidence that the testator did not, at the time of the divorce, intend to revoke the gift or appointment?

(Paragraphs 5.12-5.16)

- (b) Should a gift to or a conferral of a power of appointment on a testator's spouse pursuant to a contract between the testator and the former spouse binding the testator to dispose of property by will in a particular way, constitute an express exception to the general rule of revocation?

(Paragraph 5.17)

- (c) Should there be an express exception in respect of revival and, if so, what should it provide?

(Paragraphs 5.18-5.21)

- (d) Should the *Inheritance Act* be amended so that a former spouse of a testator would always be able to apply under that Act where a gift in favour of that spouse is revoked because the testator and former spouse are divorced?

(Paragraphs 5.16 and 5.22)

- (e) Should there be an exception to the general rule of revocation in regard to provisions in the will dealing with the payment of debts or liabilities of the testator to the former spouse and, if so, what form should the exception take?

(Paragraphs 5.23-5.24)

- (f) Should there be a provision dealing with secret trusts and, if so, what should it provide?

(Paragraphs 5.25-5.27)

- (g) How should those "divorces" which should effect the revocation of a testamentary gift or appointment be defined?

(Paragraphs 5.28-5.30)

- (h) Should private international law problems associated with statutory revocation be left to be determined by the common law rules of private international law or should there be a provision in the legislation which would by-pass those rules? If there should be such a provision, what should it provide?

(Paragraphs 5.31-5.34)

- 10. Should the reform (if any) supported or proposed by the commentator apply to the wills of all testators, including those divorced before the legislative amendments would take effect, or only to the wills of those who are divorced after the amendments come into effect?

(Paragraphs 5.35-5.38)

Appendix

SECTION 7(1) OF WESTERN AUSTRALIA'S INHERITANCE (FAMILY AND DEPENDANTS PROVISION) ACT 1972 - THE CLASS OF THOSE ENTITLED TO MAKE AN APPLICATION UNDER THE ACT

7. (1) An application for provision out of the estate of any deceased person may be made under this Act by or on behalf of all or any of the following persons -

- (a) the widow or widower;
- (b) a person whose marriage to the deceased has been dissolved or annulled and who at the date of the death of the deceased was receiving or entitled to receive maintenance from the deceased, whether pursuant to an order of any court, or to an agreement or otherwise;
- (c) a child of the deceased living at the date of the death of the deceased, or then *en ventre sa mere*;
- (d) a grandchild of the deceased who at the time of death of the deceased was being wholly or partly maintained by the deceased or whose parent the child of the deceased had predeceased the deceased living at the date of the death of the deceased, or then *en ventre sa mere*;
- (e) a parent of the deceased, whether the relationship is determined through lawful wedlock or adoption, or otherwise, where the relationship was admitted by the deceased being of full age or established in the lifetime of the deceased;
- (f) a *de facto* widow or widower of the deceased who at the time of the death of the deceased was being wholly or partly maintained by the deceased, who was ordinarily a member of the household of the deceased, and for whom the deceased, in the opinion of the Court, had some special moral responsibility to make provision.