



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 76 – Part II

**Effect of Marriage or Divorce
on Wills**

REPORT

DECEMBER 1991

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

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To: **HON J M BERINSON QC MLC**
ATTORNEY GENERAL

In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972*, I am pleased to present the Commission's report on the Effect of Marriage or Divorce on Wills.

M D PENDLETON, *Chairman*

20 December 1991

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Part I – Introduction

Chapter 1

GENERAL

1. TERMS OF REFERENCE

1.1 The Commission was 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 of divorce on wills drawn up during the marriage. In most cases those effects relate to provisions in the will for the husband or wife. 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. Examples were given to the Commission of instances where the present law has caused problems.³ Because in looking at the question of the effect of divorce on wills, the question of revocation of wills by marriage also naturally arises, the Commission was asked to examine and report on this topic also. The terms of reference do not extend to the effect of the formation or termination of a de facto relationship on wills.⁴

¹ This project is Part II of Project No 76. In Part I of the project, the Commission 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. It submitted its report in November 1985. Legislation based on the recommendations made in that report has been enacted: *Wills Amendment Act 1987* and *Wills Amendments Act 1989*.

² See paras 4.8 and 4.76 below.

³ These examples were given to the Commission by Perpetual Trustees WA Ltd without mentioning the names of the persons concerned.

⁴ In October 1990, the WA Legislative Council Select Committee on de facto relationships presented its report *De Facto Relationships*. It did not make any recommendations on the question of the effect of the formation or termination of a de facto relationship on wills. The *De Facto Relationships Act 1984* (NSW) does not contain provisions dealing with the question.

1.3 In Western Australia, the law governing the effect of the marriage of a testator⁵ on the testator's will is contained in section 14 of the *Wills Act 1970*, which derives from nineteenth century English legislation.⁶ The general rule (to which there are two exceptions) is that the marriage of the testator revokes an existing will.⁷ There is no legislation dealing with the effect of divorce⁸ on a will and a divorce does not revoke a will or any part of it. In some Australian States and some overseas jurisdictions there have either been reforms or proposals for reform.⁹

2. DISCUSSION PAPER

1.4 In March 1990, the Commission issued a discussion paper.¹⁰ The paper discussed the issues raised by the terms of reference and sought public comment. Nineteen submissions were received in response to the discussion paper. The Commission thanks those who made submissions to it. Their names appear in Appendix I to this report.

⁵ 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."

⁶ 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.

⁷ Para 2.2 below.

⁸ In this report "divorce" is intended to include not only termination of marriage by a decree of dissolution but also by a decree of nullity or declaration of invalidity: paras 4.60-4.62 below; and see also paras 4.63-4.65 below. The term "former spouse", in relation to a testator, is intended to mean the person who immediately before the divorce was the testator's spouse, or in the case of a purported marriage was the other party to the purported marriage.

⁹ See, for example, paras 4.21-4.22 below.

¹⁰ Cited in this report as the "discussion paper".

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 in England 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. WILLS ACT 1970

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 -

¹ By Act 2 Vic. 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 of the Statute of Distribution have now been superseded in this State. There is a statutory code which governs the devolution of real and personal property, contained in the *Administration Act 1903* (WA) see footnote 32 below in this ch and para 3.1 below. For an explanation of a power of appointment see para 2.16 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*.

- (a) there is a declaration in the will that it is made in contemplation of the marriage; or
 - (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 wills and also of divorce on wills,⁷ but the Commonwealth has not legislated on the topic and the States therefore retain the power to do so.⁸

3. THE GENERAL RULE

2.4 By virtue of section 14(1) of the *Wills Act 1970*, 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

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.

⁸ This is explained in footnotes 7 and 8 to ch 2 of the discussion paper.

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.

2.5 Sometimes men and women promise that they will not revoke a will, particularly if they are making financial arrangements affecting others. 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

4. WILLS EXPRESSED TO BE IN CONTEMPLATION OF MARRIAGE

2.7 As an exception to the general rule contained in section 14(1) of the *Wills Act 1970*, 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.¹⁵ 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 terms.¹⁶ However, that the will was made in contemplation of the marriage must be sufficiently expressed in the will itself.¹⁷ 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.¹⁸

2.8 As a result there is 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. The Commission is 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.¹⁹ The words "my fiancée" or "my wife" were regarded in these cases as simply descriptive of the object of

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 4.60 below.

¹³ As to voidable marriages, see para 4.63 below.

¹⁴ *Re Roberts* [1978] 3 All ER 225.

¹⁵ *Wills Act 1970* s 14(1)(a).

¹⁶ See *Laver v Burns Philp Trustee Co Ltd* (1986) 6 NSWLR 60, 68. See also, for example, *Re Chase* [1951] VLR 477.

¹⁷ *Re Chase* [1951] VLR 477.

¹⁸ *Re Hamilton* [1941] VLR 60.

¹⁹ 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.

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*,²⁰ 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 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."²¹

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.²²

2.10 Helsham J's approach was adopted in 1986 by the New South Wales Court of Appeal in *Layer v Burns Philp Trustee Co Ltd*.²³ In 1973, the Full Court of the Supreme Court of

²⁰ [1973] 1 NSWLR 180. In this case, the testator married on 10 March 1956 and on 2 March 1956 had executed a will leaving his property to "my wife (Mrs P Foss)".

²¹ 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.

²² [1973] 1 NSWLR 180, 184.

²³ (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 fiance and betrothed Andrea C Alambra" did not have an effect similar to the reference to the fiance 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 fiance should he die in the Philippines while on the brief visit in which he was then engaged. He added that it was -

Queensland reached the same conclusion as Helsham J in *Keong v Keong*.²⁴ However, it was still not possible to admit direct 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 contemplation of marriage required by law to be in the will itself.

2.11 Although *In the Will of Foss, Lyster v Burns Philp Trustee Co Ltd* and *Keong v Keong* would be very persuasive authorities if a case came before the Supreme Court of Western Australia, it is not completely certain that they would be followed.²⁵

2.12 The *Wills Act 1970* section 14(1) requires that the will must declare that the *will* is made in contemplation of the marriage. In England, it was held at first instance in *Re Coleman* (deceased)²⁶ 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, the Court of Appeal has 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.²⁷

2.13 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

"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."

²⁴ [1973] Qd R 516.

²⁵ It is to be noted that the exception in New South Wales (s 15(2) of the *Wills Probate and Administration Act 1898*) is differently worded to that in S 14 of the *Wills Act 1970* (WA) (para 2.2 above). The New South Wales provision 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." The words used in the Western Australian provision (*a declaration* in the will that it is made in contemplation of the marriage) seem to be narrower than the words used in the New South Wales provision. The same wording as in New South Wales is used in s 3 of the *Law Reform (Wills) Act 1962* (Qld) on which *Keong v Keong* was decided.

²⁶ [1975] 1 All ER 675.

²⁷ *Lyster v Burns Philp Trustee Co Ltd* (1986) 6 NSWLR.

contemplation of the testator's marriage to a named person will not have the automatic effect of rendering benefit to the named person conditional on the marriage of the testator.²⁸

2.14 Only a few applications are made to the Supreme Court each year for probate of wills made in contemplation of marriage. There would, no doubt, be other wills which were in fact made in contemplation of marriage but which were not the subject of probate applications.²⁹ In recent times a growing number of people are living in de facto relationships. Some of the partners in these relationships who intend to marry may make wills (whether complying with section 14(1)(a) or not) which are in contemplation of marriage. Because of the increased numbers of those living in de facto relationships, the numbers of wills made in contemplation of marriage might be increasing. However, statistics as to the numbers of wills made in contemplation of marriage are not kept.

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

2.15 The second exception to the general rule contained in section 14(1) of the *Wills Act 1970* relates to a will made in the exercise of a power of appointment.³⁰

2.16 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 instrument creating the power of appointment will often provide that the power may be exercised by the appointor through his or her will. The choice of appointees may be restricted by the terms of the power.³¹ 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. Where an appointor has exercised a power of appointment by will, the general rule of revocation contained in section 14 extends to include the revocation of the will on the marriage of the appointor.

2.17 However, 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

²⁸ See for example, *Wills Probate and Administration Act 1898* (NSW) s 15(2); *Succession Act 1981* (Qld) s 17(1) and *Wills Act 1936* (SA) s 20(2).

²⁹ These wills would be revoked by the marriage and do not have to be brought into the registry: *Non-Contentious Probate Rules 1967* r 13.

³⁰ *Wills Act 1970* s 14(1)(b): para 2.2 above.

³¹ See J E Martin *Hanbury and Maudsley Modern Equity* (12th ed 1985) 166-168.

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.³² An example would occur where the appointor was given power to appoint property among a class of nephews and nieces in such shares as the appointor should by will appoint and the instrument creating the power provides that in the event of a failure to exercise the power the property should pass to the members of the class in equal shares.

2.18 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.³³

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

2.19 Both the exceptions to the general rule contained in section 14 are designed to alleviate the possibly harsh consequences of the general rule.³⁴ If the principal object of the general rule is to protect the testator's new spouse and children,³⁵ 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.³⁶ 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

³² 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.)

³³ *In the Goods of Russell* (1890) 15 PD 111.

³⁴ The exceptions are set out in s 14 of the *Wills Act 1970* (para 2.2 above) and explained in paras 2.7 - 2.18 above.

³⁵ See discussion paper para 3.2 and also para 3.3 below.

³⁶ This anomaly in s 18 of the *Wills Act 1837* (UK) was recognised soon after the enactment of that Act: para 2.1 above.

marriage where there is a declaration in the will that it was made in contemplation of the marriage.

2.20 The general rule of revocation by marriage contained in section 14 extends to 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 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.³⁷ 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.

7. NOTICE TO PARTIES INTENDING TO MARRY

2.21 When a marriage celebrant receives the prescribed notice of intended marriage from the parties intending to marry, the celebrant is required to give each party a brochure entitled "Marriage and You".³⁸ One of the paragraphs in this brochure contains the following advice:

"If you have already made a will, your marriage operates to revoke that will unless it is clear that you made it in contemplation of the marriage. You should consult your solicitor about the need to make a will or change your existing will, or as to any provisions it should contain to provide for your spouse or children."

The brochure therefore gives notice to a party of the effect of marriage on an existing will. There is, of course, the possibility that the party will not read the brochure and even if the party does read the brochure he or she may soon forget what it said about the effect of marriage on an existing will.

2.22 In respect of wills made in contemplation of marriage, the brochure could have the effect of misleading a party. It might suggest that it is sufficient for the will to have been made in contemplation of the marriage, whether or not the contemplation is expressed in the

³⁷ 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.

³⁸ *Marriage Act 1961* (Cwth) s 42(5A).

will. That the will was made in contemplation of the marriage must be expressed in the will itself, as has already been noted.³⁹

³⁹ Para 2.7 above. There is an exception where a party is domiciled in New South Wales at the time of the marriage: where the will was made after the coming into operation of the *Wills Probate and Administration (Amendment) Act 1989*, and in contemplation of a marriage, it will not be revoked by the marriage, whether or not the contemplation is expressed in the will: para 3.11 below.

Chapter 3

DISCUSSION OF AND RECOMMENDATIONS AS TO THE PRESENT 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.

On 6 August 1990, the Government issued a press release in which it said it intended to introduce legislation seeking to have the basic sum allowed to the surviving spouse increased from \$50,000 to \$125,000 where the deceased was survived by children and from \$75,000 to \$175,000 where there were no children. The proposed bill has not yet been introduced into Parliament.

2. THE GENERAL RULE

3.2 In the United States of America, the *Uniform Probate Code* does not have a ground of revocation by marriage.² However, jurisdictions outside the United States which have been studied by the Commission have the general rule that the marriage of the testator revokes a will. Reforms in these jurisdictions have either increased the number of exceptions to the general rule 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.³

3.3 The Commission's discussion paper raised the question of whether the general rule should be retained and its discussion paper set out the principal arguments for and against the general rule.⁴ Nearly all the commentators who commented on the question were in favour of retention of the general rule. Some of the commentators gave reasons for their views. Perhaps the strongest reason for retaining the rule was offered by the Family Law Council which said:

² However, the surviving spouse is entitled to receive a share as if the testator had died intestate: s 301 of the model *Uniform Act on Intestacy, Wills and Donative Transfers 1990*, which was prepared with the Code when it was redrafted in 1990. Alternatively, the surviving spouse may elect to take a prescribed percentage of the estate (which is calculated in accordance with the length of duration of the marriage). Because it is so new the *Uniform Probate Code 1990* has not yet been adopted in any American States. However, the National Conference of Commissioners on Uniform State Laws has informed the Commission that the original Code (which also did not have a ground of revocation by marriage) was adopted in 15 of the States of the United States.

Another American Code, the *Californian Probate Code*, recognises community property on marriage. Under this Code, if the testator fails to provide for the surviving spouse in a will, the spouse is to receive a portion of the estate as if the testator had died intestate, unless the spouse has been intentionally omitted from the will: ss 6560-6562.

³ *Succession Law Reform Act 1977* (Ontario) s 16 (see discussion paper para 3.11); *Wills Act 1958* (Vic) s 16(2) and (3) (see discussion paper paras 3.12 and 3.26 and footnote 9 below in this ch); *Succession Act 1981* (Qld) s 17(1) (see discussion paper paras 3.19 and 3.22 and para 3.10 below); *Wills Probate and Administration Act 1898* (NSW) s 15(3) and (4) (see para 3.11 below) and *Wills Act 1837* (UK) s 18 as substituted by the *Administration of Justice Act 1982* (see discussion paper para 3.22 and para 3.10 below).

⁴ Discussion paper paras 3.2 - 3.3.

"[I]n marrying, a person assumes certain responsibilities consequent upon the change of status and these are more likely to be reflected in the intestacy provisions than in a prior Will not made in contemplation of marriage."

3.4 One of the strongest arguments in favour of abolition of the general rule is that the *Inheritance (Family and Dependents Provision) Act 1970*⁵ provides a more finely tuned remedy than the automatic revocation provided by the general rule. Under that Act where the disposition of the testator's estate does not make adequate provision for the proper maintenance, support, education or advancement of the testator's spouse, children, or certain other dependants, the Supreme Court may order provision for them out of the estate. However, in the view of the Commission, intestacy is preferable to forcing spouses and children to assert their claims under that Act. Legal proceedings under the Act are expensive,⁶ inconvenient, take time and usually delay the finalisation of the administration of the estate. Their outcome is uncertain and they can also be the cause of ill feeling developing among widows or widowers and children and named beneficiaries. The Commission noted that the general rule that a will is revoked by marriage applies in all other Australian jurisdictions and it is desirable to maintain uniformity on this topic⁷

3.5 The Commission has given the question of whether the general rule should be retained further consideration in the light of the arguments in favour of and against the rule and also in the light of the comments received by it on this issue, and has concluded that the general rule should be retained. It *recommends* accordingly.

3. THE ISSUE OF ADDITIONAL QUALIFICATIONS

3.6 In the discussion paper, the Commission considered a number of possible new modifications or exceptions to the general rule.⁸ After considering these possibilities in the light of comments received on the discussion paper, the Commission rejected all of them

⁵ Referred to subsequently in this report as "the Inheritance Act".

⁶ 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.

⁷ A suggestion which was raised in the discussion paper was that the will should not be revoked by marriage but that a statutory legacy in favour of the new spouse and children should be engrafted on it. The Commission does not favour the suggestion because of the rigidity of the rule and possible complications in the administration of some estates.

⁸ Discussion paper paras 3.9 - 3.22

except for two proposals which would allow more flexibility in respect of wills made in contemplation of marriage.⁹

4. WILLS MADE IN CONTEMPLATION OF MARRIAGE

(a) Introduction

3.7 The Commission proposes reform where a will is made in contemplation of a particular marriage and also reform where a will is made in contemplation of marriage generally. Each of these situations will now be considered separately.

⁹ The proposals rejected by the Commission were that:

- (a) the rule should be restricted in its operation to the testator's first marriage;
- (b) the rule should be abolished insofar as it affects any children of former marriages of the testator;
- (c) the will should not be revoked by the marriage of the testator where the spouse elects to take under the will by an instrument in writing filed with the Registrar of the Supreme Court within one year after the testator's death;
- (d) a gift in a will to a person whom the testator later marries should be saved;
- (e) all the beneficiaries of the revoked will should have the right to apply under the Inheritance Act for a share of the intestate's estate.

The first three of these proposals did not find favour with the Commission in its discussion paper. No commentator supported any of these proposals.

Under ss 16(2)(c) and (3) of Victoria's *Wills Act 1958*, a gift in a will to a person whom the testator later marries is saved and it was these provisions which formed the basis of the fourth proposal. 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. The Commission considered that this should be addressed by a hotchpot provision. However, such a provision would lead to complications analogous to those which are caused by legislation dealing with partial intestacies: see, for example, *Administration and Probate Act 1935* (Tas) s 44(4) & 47(a); *Administration and Probate Act 1919* (SA) s 72k; *Administration and Probate Act* (NT) s 70. The Commission came to the conclusion that the adoption of an exception based on the Victorian provisions involving as they do an inroad into the established general rule would not be justified in this State. Only one commentator on the discussion paper gave support to the Victorian provision.

In its discussion paper the Commission pointed to deficiencies in the fifth proposal. The proposal was not supported by any of the commentators.

A member of the public submitted to the Commission that property inherited by the surviving spouse should on the death of the surviving spouse pass to the children of the deceased spouse and the surviving spouse even though the surviving spouse has remarried in the meantime. The Commission did not adopt the suggestion because it imposed too great a restriction on the freedom of an individual to dispose of his or her property by will. There could be an obligation to make provision for others apart from the children and the testator should retain at least the ability to meet such an obligation.

(b) Wills made in contemplation of a particular marriage

(i) Where there is an indication in the will

3.8 In the discussion paper the Commission said that one possibility was to amend the existing exception to provide that certain extrinsic evidence (that is evidence from outside the will itself) should be admissible 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.¹⁰

3.9 The Commission pointed out that the Tasmanian Law Reform Commission has recommended a provision along the lines of the first of these suggestions.¹¹ 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 enacted¹² and would remove any uncertainty as to whether those decisions would be followed in Western Australia. The Commission said that the provision would apply a principle of construction which has long been used in construing wills where other ambiguities exist.¹³ 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.

¹⁰ Discussion paper para 3.21.

¹¹ 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 s 16(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.

¹² Paras 2.9-2.10 above.

¹³ This is explained in footnote 21 in ch 2 above.

3.10 Turning to the second of the approaches listed in paragraph 3.8 above, 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. This approach, which has been adopted in Queensland and England¹⁴ 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 would be the increased possibility of uncertainty, of fraudulent claims, and of 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.

(ii) *Where there is no indication in the will*

3.11 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. Section 15(3) of the *Wills Probate and Administration Act 1898* (as amended) provides:

"(3) A will made after the commencement of this subsection in contemplation of a marriage, whether or not that contemplation is expressed in the will, is not revoked by the solemnisation of the marriage contemplated."

Section 15(3) implements a recommendation of the New South Wales Law Reform Commission¹⁵ and goes further than reforms in any of the other jurisdictions studied by the Commission.¹⁶ It appears that 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. It seems that the extrinsic evidence which is admissible would include evidence of

¹⁴ *Succession Act 1981* (Qld) s 17(1); *Wills Act 1837* (UK) s 18(3) explained in footnote 40 to ch 3 of the discussion paper.

¹⁵ *Wills - Execution and Revocation* (1986) para 9.21.

¹⁶ In its report *The Making and Revocation of Wills* Cmnd 7902 (1980), The UK 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.

statements made by the testator¹⁷. However, the exception applies only where the testator had in contemplation a particular marriage, not marriage generally. The New South Wales Commission in support of its recommendation 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."¹⁸

In New South Wales, the onus would be on a person claiming that a will was made in contemplation of marriage to establish that on the balance of probabilities it was so made.

(iii) *The views of commentators on the issue*

3.12 In its discussion paper, the Commission sought comment on the questions of whether the existing exception relating to a will made in contemplation of a particular marriage should be modified and, if so, in what way or ways. A number of commentators including the Family Law Council of Australia, Perpetual Trustees WA Ltd, the Law Society of Western Australia and Registrar Watt were of the opinion that the existing exception should not be modified. The Family Law Council said that it should be necessary for it to be made explicit in the will itself that it is made in contemplation of marriage. Perpetual Trustees WA Ltd commented to the same effect. Registrar Watt said that it appeared from the applications for probate that there are so few wills made in contemplation of marriage that any real or perceived problem is of insufficient magnitude to warrant attention.

3.13 The Public Trustee favoured a redrafting of the existing exception to provide that the will should not be revoked if it contained an expression of contemplation of marriage to a particular person. He indicated that under the redrafted exception extrinsic evidence of the

¹⁷ This is not expressly stated in the legislation but is likely to be the case: see New South Wales Law Reform Commission *Wills - Execution and Revocation* (1986) para 9.21 and *Interpretation Act 1987* (NSW) s 34.

¹⁸ New South Wales Law Reform Commission *Wills - Execution and Revocation* (1986) para 9.21.

circumstances existing at the time of the making of the will, but not of evidence of statements by the testator of his or her dispositive intention, should be admissible to determine whether an expression contained in the will was an expression of contemplation of the marriage. The Hon I G Medcalf QC was of the same opinion. The Public Trustee said that the redrafted provision would remove any uncertainty as to whether the decisions in New South Wales and Queensland would be followed in Western Australia.¹⁹ He said that otherwise the existing rule, in the experience of his Office, operated without any problems. This was the only modification to the general rule which his Office would be in favour of.

3.14 The only commentator who expressly favoured the New South Wales reform was Mr Charles Rowland of the Australian National University. He said:

"The restrictions on the admissibility of evidence in the construction of wills are artificial, and I believe, misplaced. . . . Further, I believe that in principle the court exercising the probate function should not be unnecessarily restricted in the admission of evidence to decide whether the testator intended the document to be his or her will."

Ms Susan Hartley, the Convenor of the De Facto Law Reform Lobby Group, submitted that the Commission's recommendations should provide some degree of certainty for persons living in de facto relationships. She did not say which approach she would favour to deal with the question of wills in contemplation of marriage. However, she said that many de facto relationships are formed in contemplation of marriage and persons who make provisions for property in the contemplation of a marriage should have these wishes respected.

3.15 The Hon I G Medcalf QC opposed the New South Wales reform. He said that there could be no end to claims involving the alleged intentions of the testator or the alleged surrounding circumstances to suit the ambitions of rival claimants. There were too many opportunities for disputation and fraud. He maintained that there was great virtue in certainty so far as it can be obtained and it was undermined once you went beyond the certain words of the will. It might be true that requiring evidence of intention to be found in the will operates on occasions to defeat the intentions of testators, but so was the reverse proposition, namely that extrinsic evidence can on occasions result in the defeat of what was the testator's

¹⁹ The decisions are referred to in paras 2.9-2.11 above.

intention.²⁰ Registrar Watt who also opposed the New South Wales reform pointed to the potential for diametrically opposed evidence between rival claimants as to whether the deceased made the will in contemplation of marriage.

(iv) *Discussion of the New South Wales reform*

3.16 The strongest argument in favour of the New South Wales reform is that, provided it can be proved, the testator's intention that the will not be revoked is respected. This is important because many testators would not know that marriage generally revokes an existing will. Unless a testator instructs a solicitor to prepare the will, the testator normally will be unaware of the need to draft the will so that there is a declaration in it that it is made in contemplation of the marriage. A will made in contemplation of marriage without such a declaration is at present revoked thus defeating the intention of the testator.²¹

3.17 On the other hand the reform has disadvantages. Where a testator's last will is one made before the testator's marriage, the executor (or the executor's solicitor) will have to make enquiries about the circumstances in which the will was made, and sometimes about what the testator intended. In some instances, it will be difficult to determine what the testator meant to do, or what weight should be given to extrinsic evidence.²² The reform would result in a degree of uncertainty. Special procedural provisions would have to be inserted into the *Non-Contentious Probate Rules*.²³

²⁰ The Hon I G Medcalf QC said he did not subscribe to the view that adequate safeguards for those who could be prejudiced by the New South Wales reform would be provided by a special procedure to be included in the Non-Contentious Probate Rules. He said that if a procedure was utilised which really invites an interested party opposed to the claim to consent or be involved in litigation, this would not sit happily in a situation which has traditionally involved respect for the words used by the testator.

²¹ Under s 20A(3) of the *Wills Act 1968* (ACT) (inserted by the *Wills Amendments Act 1991*(ACT)) where a will contains a gift to a person being a gift expressed to be in contemplation of the marriage of the testator to that person -

(a) the gift is not revoked by the marriage; and

(b) the remaining provisions in the will are not revoked by the marriage unless a contrary intention appears from the will.

Under the New South Wales reform it is not necessary for any expression of contemplation of marriage to be contained in the will nor is it necessary to have a provision dealing with the situation where a gift is expressed to be in contemplation of marriage but the remaining provisions of the will are not. Under the New South Wales provision the question is whether the will was in fact made in contemplation of the marriage and extrinsic evidence is admissible to determine whether this was the case. The Commission prefers this approach.

²² The standard of proof would be the normal civil standard of proof on a balance of probabilities: para 3.11 above.

²³ See para 3.23 below.

3.18 Where the applicant relies in whole or in part on evidence of statements made by the testator, there will be the possibility of untruthful evidence. This could occur, for example, because a person who testifies to the court as to such statements has misunderstood what the testator had intended or has lied in giving evidence. A drawback with the proposal is that a witness in the proceedings will often be the surviving spouse and he or she will normally have an interest in the outcome, but in many instances there will be evidence from other witnesses as well.

(v) *Conclusion*

3.19 The Commission has come to the conclusion that an exception along the lines of the New South Wales reform should be adopted in this State. The principal reason for it reaching this conclusion is that it considers that a will made in contemplation of marriage to a particular person should not be revoked simply because it does not contain a declaration that it is made in contemplation of the marriage; if it can be proved that it was so made, that should be sufficient for it to retain its validity.²⁴

3.20 In most cases the answer to the question of whether the will was made in contemplation of marriage will be sufficiently clear to avoid the likelihood of litigation. In the Commission's view the reform is unlikely to "open the floodgates" to litigation.

3.21 One of the commentators on the discussion paper²⁵ made a comment in respect of the drafting of the suggested provision. The New South Wales provision does not expressly provide that extrinsic evidence is admissible to establish that the will was made in contemplation of marriage.²⁶ The commentator said that if the New South Wales provision is adopted in Western Australia it should expressly provide that extrinsic evidence is admissible.

²⁴ It is of interest to note that in the law of contract, the High Court in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 took a liberal approach to the admission of parol evidence. It held that evidence of discussions between the parties prior to entry into the contract had been properly admitted for the purpose of deciding whether a term was to be implied into the contract.

In para 2.14 above the Commission said that wills made in contemplation of marriage by persons living in de facto relationships could be increasing. Adoption of the New South Wales reform would mean that the validity of a will made in contemplation of marriage (where that was proved) by a person living in such a relationship would be preserved although the will did not comply with the requirements of s 14(1)(a) of *Wills Act 1970* (WA).

²⁵ Mr W A Lee. Mr Lee is a former Reader in Law at the University of Queensland and is the author of *Manual of Queensland Succession Law*.

²⁶ However, it is likely that extrinsic evidence (including evidence of statements by the testator) would be admissible in New South Wales: See New South Wales Law Reform Commission *Wills - Execution and Revocation* para 9.21 and *Interpretation Act 1987* (NSW) s 34.

This would make it clear that such evidence is admissible. The Commission agrees with the suggestion.

3.22 The adoption of a provision along the lines of the New South Wales reform in Western Australia's *Wills Act 1970* would constitute an additional exception to the general rule in section 14 that marriage revokes an existing will.²⁷ In regard to the existing exception, section 14(2) of the *Wills Act 1970* provides that 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. There should be an equivalent provision for the proposed additional exception, otherwise the effect would be different depending on whether or not the will was expressed to be made in contemplation of the marriage. The Commission considers that in relation to the additional exception it should be expressly provided that extrinsic evidence (including evidence of statements by the testator) should be admissible to establish that the intention of the testator was that the will should not be void if the marriage was not solemnised and that this may be established by such evidence alone.

3.23 If an exception along the lines of the New South Wales reform is adopted in this State, it would be necessary particularly in the light of the situation relating to extrinsic evidence for a special provision to be inserted in the *Non-Contentious Probate Rules 1967* to cater for applications under the new provision.²⁸ These would be necessary to give parties who might be prejudiced by a grant of probate (or letters of administration with the will annexed) made by virtue of the new reform, the opportunity to oppose the application.²⁹ This does not mean that all applications for grants of representation for wills made in contemplation of marriage would have to follow the more elaborate procedure which these rules would involve. The

²⁷ The existing exception that a will is not revoked by marriage where "there is a *declaration* in the will that it is made in contemplation of the marriage" would remain. In para 3.19 of its discussion paper, the Commission suggested that the rigour of the phraseology of that exception could be lessened. In this context, it referred to the Queensland provision which simply states that it is sufficient if the will contains "an expression of contemplation" of the marriage: *Succession Act 1981* (Qld) s 17(1). Because the Commission proposes that the New South Wales provision should be adopted, the Commission considers that amending the existing exception to lessen the rigour of its phraseology would not be justified. The New South Wales provision is broader in its ambit than the existing exception in s 14, although admittedly if it is to be adopted in this State, the Commission proposes that it will only have application to wills made after the implementing legislation comes into operation: paras 3.24-3.25 below.

²⁸ Cf *Non-Contentious Probate Rules 1967* (WA) r 20A and *Supreme Court Rules 1970* (NSW) Order 78 rr 34C, 35 and 36. The Commission understands that the New South Wales rules referred to (or some of them) are at present being reviewed. See also footnote 20 above in this ch.

²⁹ It is possible that a person who knows that the will was made in contemplation of marriage will conceal that fact because he or she will benefit more from the deceased's estate under an intestacy than under the will. The applicant for letters of administration is already required to swear that the deceased died intestate. This could be strengthened by requiring the applicant to swear that at the time of death there was no unrevoked will made in contemplation of marriage.

existing exception under which the will is not revoked if there is a declaration in the will that it is made in contemplation of a marriage should continue to apply. Where there is such a declaration in the will, the applicant can be expected to proceed under the existing exception using the existing provisions in the *Non-Contentious Probate Rules 1967*. The applicant would only proceed under the new provision where the requisite declaration is not in the will.

3.24 The New South Wales Law Reform Commission recommended that its proposal that a will made in contemplation of a marriage is not revoked by the marriage, whether or not the contemplation is expressed in the will, should apply in the case of all testators dying after the commencement of the amending Act. Thus, the Commission recommended that the reform should be retrospective in the sense that it would apply to wills made before the amending legislation. The New South Wales legislature did not follow this recommendation and the amending legislation only applies to wills made after its commencement. The Commission favours the approach of the New South Wales legislature. A testator may have received legal advice on his or her will before the amendment is enacted. Furthermore, as a general rule new laws are not made retrospective in their operation.

3.25 The Commission accordingly *recommends* that -

- (a) The existing exception to the general rule in the case of a will containing a declaration that it is made in contemplation of a particular marriage which is later solemnised should be retained.
- (b) An additional exception should be added to section 14 of the *Wills Act 1970*, namely that where there is no declaration in the will that it is made in contemplation of the particular marriage the will should not be revoked by the marriage of the testator if the will was made in contemplation of the marriage. It should be expressly provided that extrinsic evidence (including evidence of statements by the testator) should be admissible to establish that the will was made in contemplation of the marriage and that this may be established by such extrinsic evidence alone.
- (c) The amending legislation should provide that where the will was made in contemplation of the marriage, but there is no declaration in the will that it is

so made, the will should be void if the marriage is not solemnised, unless the testator at the time of making the will intended the contrary. It should be expressly provided that extrinsic evidence (including evidence of statements by the testator) should be admissible to establish that the intention of the testator was that the will should not be void if the marriage was not solemnised and that this may be established by such evidence alone.

(d) Where the applicant for a grant of probate of a will (or of letters of administration with the will annexed) relies on the new exception, there should be appropriate procedural provisions to enable those who would be adversely affected by the grant to have the opportunity to oppose the application for the grant of representation.

(e) The new exception should only apply to wills made after the Act establishing the exception comes into operation.

(c) Wills made in contemplation of marriage generally

(i) Provisions elsewhere

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. However, the testator might have thought about the new responsibilities which would arise in the event of marriage and made provision for them in the will. In Victoria and New South Wales the testator may draft a will so that it will not be revoked by any subsequent marriage.³⁰ The Victorian provision is contained in section 16(2)(b) of the *Wills Act 1958* which provides:

"(2) A will shall not be revoked by a marriage of the testator if . . .

(b) 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

³⁰ The Attorney General of Victoria's *Working Party to Review the Wills Act 1958* (1986) recommended that the provision be retained in Victoria. The British Columbia Law Reform Commission has recommended a similar provision: Law Reform Commission of British Columbia *Statutory Succession Rights* (1983) 136.

the will that the testator had in contemplation that he would or might marry and intended the disposition made by the will to take effect in that event."

The New South Wales provision which is contained in section 15(4) of the *Wills Probate and Administration Act 1898* provides:

"(4) A will made after the commencement of subsection (3) which is expressed to be made in contemplation of marriage generally is not revoked by the solemnisation of a marriage of the testator."

The Victorian reform implemented a recommendation of the Victorian Chief Justice's Law Reform Committee.³¹ In support of its recommendation, the Committee said:

"As the testator has, in such cases, applied his mind to, and provided for, the change of circumstances which would be constituted by a subsequent marriage, it seems unreasonable for the law to say, as s 16 now does, that the occurrence of that very change of circumstances shall render his dispositions void. And the operation of the section in such cases not only defeats testamentary intention, but must often inflict serious injustice upon parents, dependent relatives, benefactors and other persons who have just claims upon the bounty of the testator, but no rights under the intestacy which the section creates."

The New South Wales provision implements a recommendation of the Law Reform Commission in that State. The Commission had said that the effect of such a reform would be to give effect to the testator's intention on this matter where it had been expressed in the will. The New South Wales family provision legislation, and not a rule as to automatic revocation, should be the vehicle whereby such an intention is liable to be set aside.

3.27 The approach, however, was not utilised by the Tasmanian Law Reform Commission.³² It believed that it would not be advisable to allow the exception to operate where the testator had merely expressed a general contemplation of marriage, rather than a specific intent to marry a particular person. Only in the latter event would he be likely to have addressed his mind specifically to the importance of the step he is about to take and arranged his affairs with full knowledge of the consequences.

³¹ Section 16 of the *Wills Act 1958* (1970).

³² Law Reform Commission of Tasmania *Report on Reform in the Law of Wills* (1983) 13.

(ii) *Comments on the proposal*

3.28 There was little support for the proposal among the commentators on the discussion paper. Charles Rowland said he would be inclined to require that the testator make the will contemplating marriage to some particular person. But he added that he did not think there would be many cases - and there would be very few hard ones - so perhaps, in the interests of uniformity, New South Wales should be followed. The Citizen's Advice Bureau of WA Inc supported the proposal because it would enable effect to be given to what the testator intended.

3.29 The other commentators on the issue, who included Registrar Watt, the Law Society, Perpetual Trustees WA Ltd, the Public Trustee, the Hon I G Medcalf QC and the Family Law Council, were all opposed to the suggestion. Registrar Watt said that such a provision, if it was enacted, would not oblige the testator to give serious consideration to individual circumstances. A testator should review his will when his circumstances changed. The proposal would be out of line with this approach. Perpetual Trustees WA Ltd said that it took the view that anyone contemplating marriage should at that time consider his or her arrangements regarding a will. Wills in contemplation of marriage are a convenience used in general to avoid having to sign wills concurrently with signing of the marriage register. The Hon I G Medcalf QC referred to the New South Wales decision in *Layer v Burns Philp Trustee Co Ltd*³³ under which 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 a particular marriage, extrinsic evidence of surrounding circumstances may be admitted. Mr Medcalf said that if the *Wills Act 1970* was amended so that a will expressed to be made in contemplation of marriage generally was not revoked by the marriage of the testator and the principle of *Layer v Burns Philp Trustee Co Ltd* was extended to the new exception, uncertainty would be created and there would be a very substantial abrogation of the existing rule of revocation by marriage.

3.30 The Family Law Council opposed the proposal that it should be possible to make a will in contemplation of marriage generally which is not revoked on marriage. However, it suggested that:

³³ (1986) 6 NSWLR 60; paras 2.10-2.11 above.

"A testator should be able to make a Will that will not be revoked, automatically by operation of law, on marriage. This would enable a person to bind himself or herself to a covenant not to revoke a Will, which covenant would be significantly more valuable than is presently the case owing to the operation of the general rule. For example, families could adjust arrangements and responsibilities for weaker members confident of the binding effect of promises made between them not to revoke Wills."

As already mentioned in this report, the present law is that 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.³⁴

(iii) *The Commission's approach*

3.31 The Commission confirms the view which it expressed in the discussion paper that it should be possible for a testator to draft a will so that it would not be revoked by any subsequent marriage. When the testator has applied his or her mind to, and provided for, the change of circumstances which would be constituted by a subsequent marriage, the testator should not have his or her intention defeated by the general rule. The operation of the section in such cases may cause an injustice to relatives and others who have just claims on the bounty of the testator but no rights under the intestacy which the section creates. Provided they are clearly evidenced, the intentions of the testator should be effectuated. Admittedly, the reform would create the potential for uncertainty. However, the Commission does not consider that the proposal should be rejected on this ground because there must be, in the first place, words in the will which could amount to an expression that the will was made in contemplation of marriage. If the testator's widow, widower or children from a marriage entered into subsequent to the will have not been adequately provided for in the will they have their right to make an application under the *Inheritance Act*.

3.32 The Commission considers that the correct emphasis in this issue is illustrated in the concerns of the Family Law Council set out in paragraph 3.30 above. It can be important for a person who believes that it is extremely unlikely that he will marry or marry again to be able to make a will which will continue to be effective if he does in fact marry. An illustration is where property is given by a parent to child A on the understanding that it will be left by A to child B if A dies before B. There could also, for example, be arrangements relating to a family business which require that an interest in property belonging to the business pass on

³⁴ Para 2.5 above.

the death of one of the proprietors to a child of that proprietor, even if that proprietor has remarried before death. At the time of making the will the testator may not regard a subsequent marriage as a possibility but the point is that the will should be effective if that does occur. The Commission considers that in this issue it would be better to get away from the concept of the will made in contemplation of marriage generally and instead to provide that a will is not revoked by the marriage of the testator if it expresses an intention that it will remain effective notwithstanding any subsequent marriage of the testator.³⁵ Testators may not contemplate marriage at the time of making the will or may not then regard subsequent marriage as a possibility or as likely but may wish the will to continue to govern the disposition of their estate if they should in fact later marry. They could achieve this by expressing an intention in the will that it would remain effective notwithstanding any subsequent marriage of the testator. Section 14(2) of the *Wills Act 1970*, which provides that 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, should not be extended to the proposed provision. The object of the new provision would be that the will would be effective whether or not the testator married.

3.33 The Commission gave consideration to requiring that in order to prevent revocation there should be a *declaration* in the will that it remain effective notwithstanding any subsequent marriage of the testator. It also considered the possibility that to prevent revocation there would need to be a declaration in the will that it would not be revoked by the solemnisation of any subsequent marriage to which the testator was a party. It concluded that the requirement of a declaration was unnecessarily rigorous and that it should be sufficient to provide that a will should not be revoked by the marriage of the testator if it expresses an intention that it will remain effective notwithstanding any subsequent marriage of the testator.

(iv) *Extrinsic evidence*

3.34 The discussion paper discussed the question of the extent to which extrinsic evidence should be admissible to determine whether an expression contained in the will is an

³⁵ This seems to have been the approach of the Law Reform Commission of British Columbia in its report *Statutory Succession Rights* (1983). It recommended that the equivalent provision to section 14 of the *Wills Act 1970* (WA) be amended to provide that:
 "... a will is not 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 any marriage other than a specific marriage that did not take place."

expression of contemplation of marriage generally.³⁶ 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.³⁷ Also under the New South Wales provision only evidence of the circumstances would be admissible.³⁸

3.35 The only commentators to comment on this issue were Mr Charles Rowland and the Family Law Council. Mr Rowland said that as a matter of principle, he would not be inclined to restrict the range of admissible evidence. The Family Law Council said that extrinsic evidence should not be admissible.

3.36 In the discussion paper, the Commission indicated that it was opposed to a 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. The Commission has also concluded that it should not be possible for the general rule to be excluded on the ground that it was made with the intention that it remain effective notwithstanding a subsequent marriage of the testator, where there is only extrinsic evidence that this was the case. To allow the exception without the expression of intention in the will would create uncertainty. The Commission considers this would not be justified especially in the light of the social objects of the general rule of revocation.³⁹

3.37 Cases in New South Wales and Queensland on wills made in contemplation of marriage indicate that even without reference to extrinsic evidence in legislation implementing the proposal, the Supreme Court in this State would probably allow the admission of extrinsic evidence of circumstances existing at the time of the making of the will.⁴⁰ Under neither the Victorian reform nor the New South Wales reform are statements made by the deceased admissible to help establish that words used in the will are an

³⁶ Discussion paper para 3.28.

³⁷ Para 3.26 above.

³⁸ 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.

³⁹ Para 2.19 above.

⁴⁰ *In the Will of Foss* [1973] NSWLR 180; *Layer v Burns Philp Trustee Co Ltd* (1986) 6 NSWLR 60; *Keong v Keong* [1973] QdR 516: paras 2.9 - 2.10 above.

expression of contemplation of marriage generally. Probably wills made under the proposed reform would be more likely to be prepared by solicitors than other wills. There will be few instances where the meaning of the words used is not clear. Provision for evidence of statements by the deceased does not seem to the Commission to be justified.

3.38 The Commission favours the admission of extrinsic evidence of circumstances existing at the time of the making of the will to assist in ascertaining the meaning of words used in the will. However, it considers that if there were to be a provision that a will is not revoked if it expresses an intention that it will remain effective notwithstanding any subsequent marriage, there should be no reference in the provision to extrinsic evidence. The reason for this view is the probability that the Supreme Court of Western Australia would allow the admission of extrinsic evidence of *circumstances* existing at the time of the making of the will.⁴¹

(v) *Retrospectivity*

3.39 The New South Wales Law Reform Commission recommended that its proposal (that a will expressed to be made in contemplation of marriage generally should not be revoked) should apply in the case of all testators dying after the commencement of the amending Act. However, the amending legislation only applies to wills made after its commencement. For the same reasons which it gave in the case of its proposed reform in respect of a will made in contemplation of a particular marriage,⁴² the Commission favours the approach which was taken in the legislation itself in New South Wales on this point.

(vi) *Conclusion*

3.40 The Commission accordingly *recommends* that -

- (a) a further additional exception should be added to section 14, namely that a will should not be revoked by the marriage of the testator if it expresses an intention that it will remain effective notwithstanding any subsequent marriage of the testator;

⁴¹ Paras 2.9 - 2.11 above.

⁴² Para 3.24 above.

- (b) a will complying with the new exception should be effective whether or not the testator marries;⁴³ and
- (c) the new exception should only apply to wills made after the Act establishing the exception comes into operation.

Under this proposal, it will not be possible to exclude the general rule of revocation by extrinsic evidence alone as would be the situation in the case of Commission's proposal in respect of a will made in contemplation of a particular marriage.⁴⁴

5. WILLS MADE IN EXERCISE OF A POWER OF APPOINTMENT

3.41 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 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.⁴⁵ 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. 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.⁴⁶ The exercise of the power by the will signed before marriage might have been in favour of other people.

⁴³ Thus s 14(2) of the *Wills Act 1970* (WA) would not be extended to apply to it. Under that subsection a will expressed to be made in contemplation of a particular marriage is void if the marriage is not solemnised, unless the will provides to the contrary.

⁴⁴ Paras 3.11, 3.21, 3.24, 3.25 and 3.36 above.

⁴⁵ *Wills Act 1970* (WA) s 14(1)(b); paras 2.2 and 2.15-2.18 above. For an explanation of a power of appointment, see para 2.16 above. The exception is a modernised version of the exception contained in the *Wills Act 1837* (UK) as originally enacted: footnote 32 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 Act 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 2.18 above.

⁴⁶ Para 2.20 above.

3.42 In the discussion paper, the Commission said that the exception was consistent with the principle underlying the basic rule in section 14. It said that at that stage it thought the exception should be retained. Nearly all of those who commented on the exception said it should be retained. Mr W A Lee said that section 14(1)(b) could be retained but should be redrafted so that it is clearer in its presentation.

3.43 In the discussion paper, the Commission said that the exception could be widened. In Victoria, the exception fails to operate if the document which creates the power of appointment provides that the property which is the subject of the power is to 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. A difficulty with this arises where the default gift is only to some of those who would have taken on intestacy or is to those who would have taken on intestacy but in proportions different to those set out in the statutory provision governing distribution on intestacy. This issue was considered by the Lord Chancellor's Law Reform Committee in its report *The Making and Revocation of Wills*.⁴⁷ The Committee said:

"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."⁴⁸

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.

3.44 Only a few commentators commented on the question of the precise circumstances in which the exception should not apply. None was in favour of altering the exception along the lines of the Victorian legislation or of the proposal of the Lord Chancellor's Committee or of altering the existing circumstances in any other way.

⁴⁷ Lord Chancellor's Law Reform Committee Twenty-second report *The Making and Revocation of Wills* Cmnd 7902 (1980).

⁴⁸ Id para 3.11.

3.45 If the Victorian approach were to be adopted, it would be desirable to have a provision along the lines suggested by the Lord Chancellor's Committee. However, only where the property the subject of the power of appointment is to pass to the widow or widower of the testator in default of appointment and the widow or widower would be wholly entitled under the laws of distribution on intestacy, is it likely that the property would pass exactly as on an intestacy.⁴⁹ Altering the effect of the exception does not seem to the Commission to be justified.

3.46 The Commission considers that the exception contained in section 14(1)(b) of the *Wills Act 1970* should be retained but that it should be redrafted so that it is clearer in its presentation.⁵⁰ It *recommends* accordingly.

⁴⁹ When the estate exceeds a specified value other relatives are also entitled (*Administration Act 1903* s 14; para 3.1 above). Because of the way in which the shares of the beneficiaries are calculated under s 14 it is unlikely that in this situation the shares will coincide with the shares specified in default of appointment.

⁵⁰ An example of a clearer presentation of the exception is found in s 18 of the *Wills Act 1837* (UK) as substituted by the *Administration of Justice Act 1982* (UK). The exception in the *Wills Act 1837* (UK) now reads:

"18(1) Subject to subsections (2) to (4) below, a will shall be revoked by the testator's marriage.

(2) A disposition in a will in exercise of a power of appointment shall take effect notwithstanding the testator's subsequent marriage unless the property so appointed would in default of appointment pass to his personal representatives."

Part III - Effect of Divorce on Wills

Chapter 4

DISCUSSION OF AND RECOMMENDATIONS AS TO THE PRESENT LAW

1. PRESENT POSITION

4.1 Though marriage generally revokes a prior will, divorce does not. A gift in a will, an exercise of a power of appointment by will, a conferral in a will of a power of appointment, or an appointment in a will as executor, trustee or guardian, 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 beneficiary so described is entitled to take.¹ If divorced testators marry again their wills are automatically revoked.²

2. THE INCIDENCE OF DIVORCE

4.2 When the English *Wills Act 1837* (which was adopted in Western Australia³) 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 1990, 3,845 divorces were 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.

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 long 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 The Commission has not been able to obtain any accurate information on the percentage of persons who are divorced and who later remarry. However, in 1990, 116,959 marriages were solemnised in Australia: Australian Bureau of Statistics *1990 Marriages Australia* 4. In 25,221 of these, the male partner had earlier been divorced and in 23,622 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.

⁶ Australian Bureau of Statistics *1990 Divorces Australia* 3. The publication 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 9.4 per cent in 1981 but had risen to 16.2 per cent in 1990: id 6.

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.
- (b) A number of law reform agencies have reported on the effect of divorce on wills.⁸ However, none has demonstrated that succession by a divorced spouse by inadvertence happens more often than inheritance by a divorced spouse where the gift to the divorced spouse has been 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 in existence. 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.
- (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

In the case of females the percentage increased from 9.3 in 1981 to 15.3 in 1990: *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; 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.

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 the Commission, the Law Society of Western Australia's Family Law Committee intimated that most litigants in the Family Court of Western Australia who have a solicitor are advised by the solicitor to change their wills⁹ 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 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.¹¹ It also said that Committee members 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, at least in the situation where the marriage has not broken down, 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.
- (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

⁹ *Australian De Facto Relationships* (1985) by CCH Australia Limited at 6322 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 the Commission that in roughly seventy 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.

¹¹ A Sub-Committee of the Family Law Council which commented on the Commission's discussion paper submitted to the Commission that this argument was a strong one against change in the law.

this might be either before or after the divorce. The Family Court 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".¹²

- (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.¹³
- (d) Some testators mistakenly believe that divorce automatically revokes earlier wills or gifts made in them to their former spouses.¹⁴ Even when they know it does not, testators might inadvertently leave their wills 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.
- (f) If an injustice is caused to the former spouse by the statutory revocation, it might be able to be mitigated by an application under the *Inheritance Act*. 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 otherwise¹⁵

4.5 Similar arguments apply in respect of powers of appointment¹⁶ granted in favour of the former spouse in the testator's will and the testamentary appointment of a 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

¹² *Family Law Act 1975* (Cwth) s 81.

¹³ See paras 4.6-4.7 below.

¹⁴ 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

¹⁵ S 7. Children of the deceased are among those who are entitled to make a claim under the Act.

¹⁶ As to what constitutes a power of appointment, see para 2.16 above.

children - perhaps children of subsequent relationships or children over whom custody disputes had been bitterly fought.

4.6 If only the gift to the former spouse is to be revoked by the divorce and the will contains an alternative gift,¹⁷ the testator's children would usually be beneficiaries under the alternative gift. Also where because of the revocation the testator died intestate, the testator's children would become entitled to the estate.¹⁸ 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.

4.7 Where the testator had no children, the testator's parents would be the principal beneficiaries (although probably not the sole beneficiaries) on intestacy.¹⁹ 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.²⁰

4.8 The Commission's terms of reference include the effect of divorce on the wills of persons who have lost the mental capacity²¹ to make a new will due, for example, to mental illness. In most cases, the will made before the testator lost testamentary capacity would have named the testator's spouse as the sole or principal beneficiary. Because of the loss of testamentary capacity, the testator is unable to revoke the will or make a new one, even though it is reasonable to assume that the testator would have wished to do this in light of the divorce. The issue is important because the testator may have other relatives such as children who have a stronger moral claim to the testator's estate. However, the Commission does not regard the argument that the divorced spouse may lose or may have already lost the mental

¹⁷ That is, one which is to operate if the former spouse predeceases the testator or does not survive the testator for a stipulated time.

¹⁸ *Administration Act 1903* (WA) s14.

¹⁹ 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) s14. 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*.

²⁰ 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.)

²¹ Para 1.1 above. This requisite mental capacity is normally referred to as "testamentary capacity". As to what is testamentary capacity, see I J Hardingham, M A Neave and H A J Ford *Wills and Intestacy in Australia and New Zealand* (2nd ed 1989) para 306.

capacity to make a new will²² as an argument which justifies some form of revocation in respect of an existing will on divorce. The problem would be best dealt with by legislation specially designed to deal with it. This has occurred in England, where legislation empowers the Court of Protection to order the execution of a will for a person incapable of making a valid will.²³ The New South Wales Law Reform Commission is about to submit a report on the subject of wills for persons lacking will-making capacity²⁴ and an examination of the topic in Western Australia in the light of the New South Wales report may well be justified.²⁵

4. OPTIONS FOR REFORM

4.9 In the discussion paper, the Commission outlined a number of possible solutions to the question of what the effect of the divorce of the testator on an existing will should be. After considering the possible solutions in the light of the comments received on the discussion paper, the Commission has rejected some of them.²⁶ They had not been favoured by the Commission in its discussion paper and were not supported by any of the commentators. The Commission found that there were three possible solutions which had considerable merit and which required careful consideration. These were that -

- (a) the existing law should not be altered;

²² Para 4.4(e) above.

²³ *Mental Health Act 1983* (UK) Part VII 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.

²⁴ In 1989 the New South Wales Law Reform Commission issued a discussion paper *Wills for Persons Lacking Will-Making Capacity* (DP20). Legislation to deal with the problem was recommended in Victoria by the Chief Justice's Law Reform Committee in its report *Wills for Mentally Disordered Persons* (1985).

²⁵ In 1990, the *Guardianship and Administration Act* (WA) was enacted with the object of providing for guardianship of adults who need assistance in their personal affairs and for the administration of the estates of persons who need assistance in their financial affairs. A Board to be established under that Act is empowered to make guardianship and administration orders provided for in that Act: s 13. However, the Act does not enable a will to be made on behalf of a person who does not have testamentary capacity. Later in this report, the Commission recommends that there should be a general rule that on the divorce of the testator any gift or testamentary appointment in favour of the former spouse should be revoked: para 4.31. This would include the case where the testator has lost testamentary capacity by the time of the divorce. However, the recommendation only applies to the wills of testators who are divorced after the reform comes into operation: para 4.78. Furthermore, the problem of revocation of the remainder of the will and the making of a new will would still remain.

²⁶ The possible solutions rejected were to -

- (i) permit wills to be revoked by implication because of a general change of circumstances;
- (ii) give the Supreme Court power to modify the will or declare it revoked by the divorce; and
- (iii) modify the will by striking down all gifts to a former spouse and revoking testamentary appointments in favour of the former spouse.

The solution referred to in (iii) is the same as that referred to in (c) of para 4.9 except that under the latter the gift is to pass as if the testator's former spouse had predeceased the testator. The absence of this latter provision is a deficiency in (iii): see footnote 41 below in this ch.

- (b) an existing will should be revoked by the subsequent divorce of the testator;
and
- (c) a gift to the former spouse should be revoked and should pass as if the former spouse had predeceased the testator and that testamentary appointments in favour of the former spouse should also be revoked.

Each option is discussed below.

5. RETENTION OF THE EXISTING LAW

4.10 The principal arguments for the retention of the existing law have been set out above.²⁷

4.11 If the present law is retained, the potential for injustice in that law could be alleviated if each party to the divorce was informed that divorce did not revoke an existing will. At present, a pamphlet entitled "Marriage Breakdown and Separation" is handed to the applicant for an order of dissolution of marriage at the time the application is lodged in the Family Court²⁸ and a copy of it is served on the respondent with the application.²⁹ One of the items in the pamphlet advises that the law as to the effect of divorce on an existing will is different in each State and that a party to the proceedings should ask a solicitor, a legal aid officer or a community legal centre as to the effect in that party's case.

4.12 The pamphlet "Marriage Breakdown and Separation" is a two page document in small print and a party may not have read the relevant item or may have forgotten the advice contained in it by the time the divorce becomes absolute. Further notice at about the time of the divorce as to the effect of the divorce on an existing will would be desirable. The Commission considers that the best way of endeavouring to do this would be for the State to require the Registrar of the Family Court of Western Australia to send a notice with the copy

²⁷ Para 4.3.

²⁸ The pamphlet must be furnished by the solicitor for the applicant to the applicant before the application for dissolution of marriage is filed: Rules to the *Family Law Act* Order 25 r3(3). If the applicant files an application, otherwise than by a solicitor, court staff must hand a copy of the pamphlet to the applicant: id Order 25 r3(4).

²⁹ Id Order 25 r3(5).

of the decree nisi which the Registrar is required to send to each party after the decree has become absolute. The notice could state that under Western Australia's *Wills Act 1970*, an existing will of one of the parties continues to operate despite the divorce and is not revoked by the divorce. The Registrar of the Family Court of Western Australia has indicated to the Commission that she would be agreeable to sending out such a notice to the parties with the copy of the decree nisi.

4.13 The procedure of sending the notice with the decree nisi would not be a complete solution. The notice 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. 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. If the divorce took place outside Western Australia the Court concerned would not forward the notice. The procedure 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. However, the procedure would result in an increase in awareness of the present law among those divorced in the Family Court of Western Australia and in the number of wills of divorced persons which comply with their intentions.

4.14 Three commentators on the Commission's working paper said that the present law should be retained. Two of these supported the suggestion of sending out a notice with the copy of the decree nisi. Broadly speaking, the three commentators supported their view that the present law be retained by arguments included among those set out in paragraph 4.3 above. One of the three commentators, the Sub-Committee of the Family Law Council, also argued that the arguments which the Commission had advanced for altering the existing law and providing some form of revocation of testamentary gifts appeared to apply equally to parties who are permanently separated but not divorced.

4.15 Perpetual Trustees WA Ltd and the Public Trustee were among the commentators who maintained that the existing law should not be retained. Perpetual Trustees WA Ltd said that the present law results in instances of unnecessary litigation under the *Inheritance Act* and leads to injustice where relief under the Act is not available, for example, where the persons

prejudiced are a deceased person's brothers and sisters. One of the reasons given by the Public Trustee for his view was the problems his Office was experiencing caused by the number of incapable persons under his protection who were divorced and who did not have testamentary capacity to revoke their wills or make new ones. He 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.

6. AUTOMATIC REVOCATION OF THE WILL

4.16 The main arguments for altering the present law and providing for some form of revocation of testamentary gifts on divorce are set out earlier in this report.³⁰

4.17 In Tasmania, the *Wills Amendment Act 1985* enacted that where a marriage is dissolved, a will made by a party to the marriage is revoked on the dissolution of that marriage. This is also the position in at least one of the States in the United States of America.³¹ The only exception provided for in the Tasmanian legislation is that a will expressed to be made in contemplation of dissolution of marriage is not revoked by the dissolution so contemplated of the marriage. The effect of the Tasmanian enactment is to substitute the rules governing distribution on intestacy for the testamentary provisions contained in the will.³²

4.18 The enactment mirrors the revocation by marriage provision and is simple and unambiguous. As the enactment revokes the whole will, any gift or testamentary appointment in favour of the former spouse would be revoked.

4.19 However, the reform is unsatisfactory in a number of respects -

- * The testator may have made a will after the breakdown of the marriage in which he or she took account of the fact that the marriage had broken down. The will would be struck down on divorce unless expressed to be made in contemplation of the divorce.

³⁰ Para 4.4 above.

³¹ Kentucky: Rev Stat § 394.095 (1972).

³² In Western Australia, where the deceased had children, they would become the beneficiaries under the laws governing distribution on intestacy: para 4.6 above.

- * The will may have been made after the testator had acquired a de facto spouse and children through a new relationship.
- * Even a gift containing no gift to the other spouse is revoked on divorce.
- * Any special arrangements made in the will for the testator's children are struck down.
- * The testator may have made a property settlement in favour of the former spouse and left most of the remainder of his or her property by will to a charity. The gift in favour of the charity would be revoked.

4.20 Of the commentators on the discussion paper who commented on the question of the general approach which should be taken, more favoured the solution of automatic revocation of the will than any other approach. The commentators who favoured automatic revocation included Perpetual Trustees WA Ltd and the Public Trustee.³³

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

4.21 Under section 15A of the New South Wales *Wills Probate and Administration Act 1898* -

- (a) any gift or testamentary appointment made by a testator in favour of the testator's spouse is revoked on the testator's divorce, and
- (b) any property which would, but for that provision, have passed to the former spouse of the testator is to pass as if the former spouse had predeceased the testator but no class of beneficiaries under the will is to close earlier than it would have closed if the gift had not been revoked.

4.22 The provisions which were inserted into the Act in 1989³⁴ implemented recommendations made by the New South Wales Law Reform Commission.³⁵ The approach

³³ See para 4.29 below.

³⁴ *Wills Probate and Administration (Amendment) Act 1989* (NSW).

has also been adopted in Queensland³⁶ (following a recommendation of the Queensland Law Reform Commission³⁷) and in some Canadian provinces, such as Ontario,³⁸ as well as in the United States of America Uniform Probate Code.³⁹

4.23 The object of this approach is to retain those provisions in a will which have nothing to do with the former spouse. This is on the ground that it is not reasonable to assume that, if the testator had thought about his or her will following the divorce, he or she would have intended to revoke gifts or appointments in favour of persons other than the former spouse.⁴⁰ In most cases, the testator would have preferred those gifts and appointments to take effect rather than the provisions which would apply in respect of them in the case of total intestacy. The reason for the provision that the property which would have passed to the former spouse is to pass as if the former spouse had predeceased the testator was explained by the Queensland Law Reform Commission:

"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 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 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."⁴¹

³⁵ *Wills - Execution and Revocation* (1986) paras 10.6, 10.17, 10.29 and 10.30.

³⁶ *Succession Act 1981* (Qld) s 18.

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

A similar approach has been adopted in New Zealand. Under s2 of the *Wills Amendment Act 1977* (NZ) where a testator who has been divorced dies, any gift or testamentary appointment in the testator's will in favour of the former spouse "shall be null and void" and the will takes effect, so far as concerns the property affected by the gift, as if the former spouse had died immediately before the testator.

³⁷ Queensland Law Reform Commission *The Law relating to Succession* (1978) para 18.

³⁸ *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.

³⁹ This is a reference to the original *American Uniform Probate Code*. The original code was redrafted in 1990. On the topic of the effect of divorce on existing wills, the *Uniform Probate Code 1990* continued the same approach as the original code but in a more sophisticated form. Because it is so new the *Uniform Probate Code 1990* has not yet been adopted in any American States. The National Conference of Commissioners on Uniform State Laws has informed the Commission that the original code has been adopted in 15 of the States of the United States of America.

⁴⁰ Ontario Law Reform Commission *The Impact of Divorce on Existing Wills* (1977) 6; Queensland Law Reform Commission *The Law relating to Succession* (1978) para 18. The Queensland reform implemented a recommendation made in the latter report.

⁴¹ Queensland Law Reform Commission *The Law relating to Succession* (1978) para 18.

The provision avoids the problem which was shown by *Re Sinclair* [1985] 1 All ER 1066 to exist in the equivalent legislation in England. S 18A of the *Wills Act 1837* (which was inserted into that Act by the

The provisions in New South Wales and Queensland 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.⁴² The provision in the New South Wales legislation that no class of beneficiaries under the will should close earlier than it would have closed if the gift had not been revoked implemented a recommendation on the New South Wales Law Reform Commission⁴³ which had agreed with an earlier recommendation of the South Australian Law Reform Committee on the desirability of such a provision.⁴⁴

4.24 Where the approach under consideration has been utilised, the legislation has provided that the appointment under the will of the former spouse as executor or trustee is revoked.⁴⁵ Sometimes it has provided that the appointment of the former spouse as guardian is revoked⁴⁶ or that any power of appointment conferred by the will on the former spouse is revoked.⁴⁷

Administration of Justice Act 1982) simply provides that where after a testator has made a will, he or she is divorced "any devise or bequest to the former spouse shall lapse". In *Re Sinclair*, the testator's will left all his property to his wife and included an alternative disposition providing that if the wife died before the testator, the property should go to another beneficiary. It was held 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. In the opinion of this Commission, 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.

⁴² 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. (An estate *pur autre vie* is a life estate but it is limited to endure in favour of the life not of the tenant but of some other person.)

⁴³ *Wills - Execution and Revocation* (1986) para 10.20.

⁴⁴ *Report relating to the Effect of Divorce on Wills* (1977) 8. Cf *Wyndham v Darby* (1896) 17 LR (NSW) Eq 272.

⁴⁵ For example, *Wills Probate and Administration Act 1898* (NSW) s 15A(1)(b) and *Succession Act 1981* (Qld) s 18 (1)(b). S15(1)(b) of the New South Wales Act does not use the word "revoke" in this context. It says that appointments as "executor trustee or guardian shall be taken to be *omitted* from the will".

⁴⁶ For example, *Wills Probate and Administration Act 1898* (NSW) s 15A(1)(b) and *Succession Act 1981* (Qld) s 18(1)(b). In Western Australia, 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 46 Cont. 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.

⁴⁷ For example s 15A of the *Wills Probate and Administration Act 1898* (NSW) and s 18(2) of the *Succession Law Reform Act 1977* (Ontario) s 17(2) so provide.

As to what is a power of appointment, see para 2.16 above.

In New South Wales and Ontario, 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 appointor may exercise in favour of such person or persons as the appointor pleases, including the appointor or his or her

4.25 If the approach under consideration is adopted, only gifts and testamentary appointments in favour of the testator's spouse will be revoked on the testator's divorce. Thus, for example, if a testator has left his estate to his wife and provided that if she dies before him the estate is left to his children equally, then on the divorce the gift to the wife is revoked and his children will be the beneficiaries under the will. If the testator's will had left the whole of his estate to his wife but contained no substitutional provisions in the event of his wife dying before him, then there would be an intestacy and the testator's children would become entitled to the estate.⁴⁸ In the approach under consideration, bequests to charities and any special arrangements in relation to the testator's children would be preserved. The testator may, of course, have made a will after the breakdown of the marriage but before the divorce in which he took into account the fact that the marriage had broken down. If he has left his property to his children, the gift would be unaffected by the subsequent divorce. If the testator had entered a de facto relationship, provision made in the will for the de facto spouse and any children born to the relationship would be preserved despite the subsequent dissolution of the marriage between the testator and his former spouse. However, if before or after the marriage breakdown he has left property in his will to his wife and his intention is that the gift should take effect notwithstanding the divorce, his intention would be frustrated by the divorce. Another disadvantage is that the will may have provided that in the event of the testator's wife dying before him part of his estate should go to her relatives. This would probably not be the testator's intention in the event of a subsequent divorce.

4.26 Some of the commentators (including the Hon I G Medcalf QC and Mr Charles Rowland) favoured the proposal that the gift to the former spouse should be revoked upon divorce and should pass as if the former spouse had predeceased the testator.

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 appointor'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.

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 United States of *America Uniform Probate Code*.

⁴⁸

Para 4.6 above. As to the position where the testator has no children, see para 4.7 above.

8. CONCLUSIONS

(a) Existing law should be altered

4.27 The Commission has come to the conclusion that the existing law should be altered and that there should be some form of revocation of testamentary gifts and appointments upon the testator's divorce for the following reasons -

- (a) When a married testator makes a will the spouse is usually the beneficiary of the estate if he or she survives the testator. If they thought about it, most testators who have been divorced would not want to benefit their former spouses under their wills, or at least not as generously as had been intended before the divorce. In recent times, the number of divorces has increased substantially. Some testators who are divorced are not aware of the fact that divorce does not revoke an existing will. Administrative action aimed at informing the parties of this fact would increase awareness of the present law. In practice, however, it would not be possible to inform everyone who is a party to a divorce.⁴⁹ Furthermore, even where the testator is aware that divorce does not revoke an existing will, inadvertence, procrastination or incapacity could leave wills in existence which result in testators' property being disposed of in ways not intended by the testators.
- (b) Also the property rights of the parties are now often resolved once and for all in a property settlement as part of the divorce process. 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. Where the financial relationships have been finally determined, revocation on the divorce of the deceased's will or of gifts made by the deceased to the former spouse will usually result in the property concerned passing to relatives with a stronger moral claim to the estate than the former spouse.
- (c) Revocation of the will or of gifts made in it to the former spouse is a means of protecting the children of the marriage of the testator and of preventing the

⁴⁹ Para 4.13 above.

assets of the testator later passing from the former spouse to the children of his or her subsequent marriage or relationship.

- (d) Also, if the statutory revocation of the testator's will means that the testator's former spouse or another beneficiary under the will is not adequately provided for, those beneficiaries might be able to make a claim against the estate under the *Inheritance Act*.⁵⁰
- (e) In many cases, the appointment of the testator's former spouse as the person to exercise the power of appointment or to occupy the office of executor, trustee or guardian would no longer be desirable after the divorce.⁵¹

(b) Revocation of gifts and testamentary appointments in favour of former spouse

4.28 The Commission does not favour the approach of revoking the whole will on the divorce of the testator. It considers that only gifts and testamentary appointments in favour of the former spouse should be revoked and that property which would have passed to the former spouse should pass as if the former spouse had predeceased the testator. It is very common for married testators to make wills leaving their estate to their spouses if they survive them or survive them by a specified number of days and provide that if they do not so survive them the estate is given to the testators' children. Under the solution preferred by the Commission, the gift to the spouse would be revoked on the testator's divorce and the testator's children would become the beneficiaries under the testator's will. This would probably be in accordance with the testator's wishes. If the testator had made special arrangements in the will for the children these would be preserved. Furthermore, where in addition to making a gift to the spouse the will contains gifts or appointments in favour of others then in most cases in the opinion of the Commission the testator would prefer those gifts and appointments to take effect rather than the provisions which would apply in respect of them in the case of a total intestacy. To an extent the solution proposed by the Commission overcomes the argument that many litigants have changed their wills after marriage breakdown but before the application for dissolution comes before the Court.⁵² Usually the testator's spouse would not be a beneficiary under such a will, or if the will makes provision for the former spouse, it

⁵⁰ S 7, set out in Appendix II to this report.

⁵¹ Para 4.30 below.

⁵² Paras 4.3 and 4.25 above.

is with the intention that it should not apply once the financial relationships between the parties have been determined in the divorce proceedings. In the first instance, under the Commission's proposal the disposition of the estate by the will would not be affected by the divorce. In the other instance the revocation would tie in with the testator's intention. As to the argument based on the fact that the party who did not bring the application may be unaware of the granting of the decree of dissolution,⁵³ the Commission considers it is likely that if that party knew of the divorce, he or she would not wish to benefit the former spouse under his or her will, or at least not as generously as had been intended before the divorce.⁵⁴

4.29 In its comments on the Commission's discussion paper, Perpetual Trustees WA Ltd opposed the possible solution of revoking only gifts and testamentary appointments in favour of the former spouse and instead supported the suggestion of complete revocation of the will. It said it had been the practice of the company for several years to draw wills for newly married couples who have no children along the lines that they leave their entire estate to each other but if one spouse dies after the other spouse has died then to their children, and in the event that there are no children then as to one-half share to the wife's side of the family and as to the other half share to the husband's side of the family. The company said that the approach avoids problems in the event of death occurring in a common catastrophe and one spouse surviving the other by minutes or days and then dying. The Public Trustee in his comments said that a significantly high percentage of wills prepared by the Public Trust Office - certainly for newly married couples without children - were along similar lines. The Public Trustee also supported the concept of complete revocation. If the Commission's proposal is implemented then for an injustice to occur where a will has been drawn along the lines indicated by Perpetual Trustees WA Ltd and the Public Trustee, the testator has to divorce or be divorced by his or her spouse, fail to have children, and die with that will unrevoked. The Commission is of the opinion that this will rarely occur. Under the present position where the testator has left his or her estate to the former spouse, the whole estate will go to the former spouse. Further, the Commission considers that the fact that these wills exist is not sufficient justification for not proceeding with its proposal.

⁵³ Para 4.3 above.

⁵⁴ It is of interest to note that under section 2-804 of the United States *Uniform Probate Code 1990*, the divorce not only revokes a gift to the testator's spouse but also any gift to a "relative of the divorced individual's former spouse". "Relative of the divorced individual's former spouse" is defined to mean an individual who is related to the divorced individual's former spouse by blood, adoption, or affinity and who after the divorce is not related to the divorced individual by blood, adoption or affinity. The question of revoking gifts to relatives on the former spouse's side of the family was raised by Charles Rowland in an article *Succession and Administration of Estates* published in *Annual Survey of Australian Law* 1987 (1988) 305 at 309.

4.30 Most divorced testators, if they thought about it, would not wish their former spouse to exercise a power of appointment conferred by the testator's will on the former spouse, nor would they wish the former spouse to administer their estate or to become guardian of their children by virtue of appointments made in their wills. Furthermore, the appointment of the former spouse to carry out the responsibilities involved may have become undesirable. For example, because of the marriage breakdown a poor relationship may have arisen between the former spouse and the potential appointees under the power, the beneficiaries under the will or the child the subject of the guardianship appointment.⁵⁵ In Western Australia, it is possible to appoint an advisory trustee⁵⁶ in addition to the responsible trustee and if the approach recommended by the Commission is adopted, the legislation should extend to revoke the appointment of the former spouse as an advisory trustee.

4.31 The Commission accordingly *recommends* that the *Wills Act 1970* should be amended to provide -

- (a) for a general rule that on the divorce of the testator any gift⁵⁷ in the testator's will in favour of the former spouse and any power of appointment conferred by the will on the former spouse should be revoked and the appointment under the will of the former spouse as executor, trustee, advisory trustee or guardian should be revoked; and
- (b) that any property which would, but for the provision proposed in (a), have passed to the former spouse of the testator pursuant to a gift referred to in (a), should pass as if the former spouse had predeceased the testator, but no class of

⁵⁵ The same arguments can be raised against testamentary appointments made in favour of relatives on the former spouse's side of the family, for example, a parent, brother or sister of the former spouse. It is of interest to note that under section 2804 of the United States *Uniform Probate Code*, testamentary appointments in favour of a "relative of the divorced individual's former spouse" are also revoked (see footnote 50 above in this ch for the definition of that expression). However, the concern of the Commission is to deal with the most obvious potential for injustice, namely testamentary appointments in favour of the former spouse.

⁵⁶ *Trustees Act 1962* (WA) s 14.

⁵⁷ A precedent for the manner of defining a "beneficial gift" exists in s 15A(1)(a) of the *Wills Probate and Administration Act 1898* (NSW). A precedent also exists in the *Succession Act 1981* (Qld) where s 18 refers to a "beneficial disposition of property" and the word "disposition" is defined in s 5 of the Act. The *Wills Act 1970* (WA) has a similar definition of "disposition" in s 4.

The limitation to *beneficial* gifts or *beneficial* dispositions is of course necessary.

The definitions under both Acts extend to an appointment of property by the will in favour of the former spouse. It is the intention of the Commission that the general rule of revocation of gifts made in favour of the former spouse should include an appointment by the will of property in favour of the former spouse.

beneficiaries under the will should close earlier than it would have closed if the gift had not been revoked.

However, some exceptions and qualifications to the general rule would be desirable. These will now be considered.

9. EXCEPTIONS AND QUALIFICATIONS TO THE PROPOSED GENERAL RULE

(a) Contrary intention

4.32 If the law is to be changed to provide for revocation on divorce of testamentary gifts and appointments in favour of the former spouse, some exceptions and qualifications would be desirable. First, there should be some provision to enable testators to exclude the operation of the statutory revocation of 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 subsequent divorce.

4.33 There are a number of ways of excluding the operation of the statutory revocation. One method which has been used in a number of jurisdictions is to provide in the legislation that where a contrary intention appears in the will, the testamentary gifts and appointments in favour of the former spouse are not revoked by the divorce.⁵⁸ A variation of this would be to provide that although the contrary intention must appear in the will 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.⁵⁹

⁵⁸ This is the position, for example, in Ontario (*Succession Law Reform Act 1977* s 17(2)), Saskatchewan (*Wills Amendment Act 1981* s 3) and British Columbia (*Attorney General Statutes Amendment Act 1979* s 63). However, the Queensland legislation does not allow for a contrary provision at all: *Succession Act 1981* (Qld) s 18.

⁵⁹ The Commission has already noted that in Queensland in the case of wills expressed to be made *in contemplation of marriage*, extrinsic evidence including evidence of statements made by the testator, is admissible to establish that an expression contained in the will is an expression of contemplation of that marriage: para 3.10 above.

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.

4.34 A second means has been adopted in section 15A of the New South Wales *Wills Probate and Administration Act 1898*.⁶⁰ Under section 15A the testamentary gift or appointment in favour of the former spouse is 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 termination of the marriage intend to revoke the gift or appointment. The provision is different from the approaches referred to in the previous paragraph in a number of respects. There need not be any indication in the will of a contrary intention. The intention not to revoke the will may be established by any evidence, including evidence of statements made by the testator. Also the relevant time of the testator's intention is not the time of the making of the will but the time of the divorce. The gift or appointment is not revoked if the Supreme Court is satisfied that at the time of the divorce the testator did not intend to revoke them.⁶¹

4.35 A third approach to the question was suggested to the Commission by Mr W A Lee. He proposed that a testamentary gift or appointment in favour of the testator's spouse should be revoked by divorce unless the will is expressed to be made in contemplation of the divorce. It seemed to him that it would be most unlikely that a testator in a stable married relationship would ever make a will which he or she intended to have the same effect, with respect to provision made for the spouse, whether or not a divorce eventuated. On the other hand, Mr Lee could see that when divorce looms a testator might make a will in contemplation of the divorce. He proposed that extrinsic evidence, including evidence of statements made by the testator, should be admissible to determine whether an expression contained in the will is an expression of contemplation of the divorce.⁶² 3

4.36 Only five of the commentators on the Commission's discussion paper commented on the exclusion of the operation of the statutory revocation. Their views on the question were divided. One commentator said that there should not be an exception to enable testators to exclude the operation of the statutory revocation. Two of the commentators supported the concept of providing in the legislation that where a contrary intention appears in the will, the

60 S 15A was inserted into that Act by the *Wills Probate and Administration (Amendment) Act 1989* (NSW).

61 The New South Wales reform is discussed in paras 5.14-5.15 of the Commission's discussion paper. The reform implemented a recommendation of the New South Wales Law Reform Commission in its report *Wills - Execution and Revocation* (1986): report para 10.32.

62 The exception suggested by Mr Lee would parallel the exception in Queensland in regard to wills made in contemplation of marriage: para 3.10 above. It is similar to the exception in Tasmania's *Wills Act 1918* to the general rule that divorce revokes the testator's will. S 12 of that Act provides that "a will expressed to be made in contemplation of dissolution of marriage is not revoked by the dissolution so contemplated of the marriage."

testamentary gifts and appointments in favour of the former spouse are not revoked by the divorce. The remaining two commentators supported the possibility that a will made in contemplation of divorce should not be revoked on the divorce. None of the five commentators advocated the adoption of the New South Wales reform.

4.37 The Commission has given further consideration to this issue in the light of the comments. It does not favour the New South Wales reform which was the second of the three approaches outlined above by the Commission. It would mean that the question whether gifts and testamentary appointments in favour of the former spouse are effective would have to be determined by evidence outside the will. The Commission considers that the reform would create uncertainty, foster litigation and also involve the danger of fraud.

4.38 The Commission has come to the conclusion that the first of the three approaches outlined by the Commission should be adopted, that is to say that the legislation should provide that where a contrary intention appears in the will, the testamentary gifts and appointments in favour of a former spouse should not be revoked by the divorce. The Commission favours this approach rather than providing for the third approach, namely an exception for wills expressed to be made in contemplation of the divorce.⁶³ Under the first approach, there would be no doubt that gifts and appointments in favour of the spouse could be saved from revocation even though the testator did not regard divorce as a possibility at the time of making the will.

4.39 Provision for admission of evidence of statements by the deceased to help establish that words used in the will are an expression of contrary intention does not appear to be justified. There will not be many instances where the meaning of the words used is not clear. The Commission, however, favours the admission of extrinsic evidence of circumstances existing at the time of the making of the will to ascertain the meaning of the words which might indicate a contrary intention. It is likely that the Supreme Court of Western Australia would allow the admission of such evidence, even though there is no reference to its admission in the legislative provision.⁶⁴ The Commission therefore does not propose that there should be a reference to extrinsic evidence in the proposed provision.

⁶³ A will expressed to be made in contemplation of the divorce would presumably be one in which a contrary intention as to the application of the general rule of revocation is apparent.

⁶⁴ See paras 2.11 and 3.37 above.

4.40 Admittedly, the approach of requiring a contrary intention to appear in the will does not cater satisfactorily for testators who do not know the law. Also to an extent this recommendation conflicts with the Commission's recommendation in respect of wills made in contemplation of marriage. In that case the Commission recommended that where a will is made in contemplation of a marriage but that contemplation is not expressed in the will, the will should not be revoked by the solemnisation of the marriage contemplated.⁶⁵ However, in the opinion of the Commission reliance, for example, on evidence of statements of the testator would create too much uncertainty in the case where there has been a divorce. Furthermore, in the case of marriage, the surrounding circumstances, such as marriage preparations, often provide reliable evidence. In the case of divorce the surrounding circumstances are likely to be of less assistance to the Court.

4.41 Assuming a general rule of revocation relating to the former spouse the Commission *recommends* that the enacting legislation should provide that insofar as a contrary intention appears in the will the rule should not apply.

(b) Debts and liabilities

4.42 Nothing in the reforms proposed by the Commission is intended to affect provisions in the will for the discharge of debts or liabilities of the testator to the former spouse or to the executor or administrator of the former spouse.

4.43 Thus, for example, if the testator owed his or her spouse a sum of money at the time of the divorce and there was a provision in the will for payment of the testator's debt to the spouse, the provision should be unaffected by the divorce.

4.44 The Commission considers that it is desirable to provide in the legislation that provisions for the discharge of the debts and liabilities of the testator to the former spouse or to the personal representatives of the former spouse are not affected by the general rule of revocation.⁶⁶ Assuming a general rule of revocation relating to the former spouse, the

⁶⁵ Para 3.25 above.

⁶⁶ Under the law governing the administration of estates the debts or liabilities would normally be payable out of the testator's estate. However, the will may have indicated the specific property in the estate from which the debt is to be paid or on which payment is to be secured and this should not be disturbed. As to the general topic of the order of the application of a deceased's assets in payment of the debts of the estate, see the Commission's report *The Administration of Assets of the Solvent Estates of Deceased Persons in the Payment of Debts and Legacies* (Project No 34 Part VII 1988).

Commission *recommends* that the enacting legislation should provide that the reform should not affect a direction, charge, trust or provision in the will of a testator for the payment or discharge 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.⁶⁷

(c) Contracts to dispose of property by will

4.45 Where at the time of the divorce there is a contract in existence under which the testator promised to benefit the testator's spouse by will and the testator's will confers the benefit in question on the former spouse, the general rule of revocation on divorce should not extend to that benefit. Such a promise may take one of at least two forms: the testator may promise to make particular provision for the promisee in the will; or the testator, having provided for the promisee in the will, may promise not to revoke or vary the provision in the promisee's favour.⁶⁸

4.46 Similarly, where the spouses have benefited each other under mutual wills, a gift to the testator's former spouse should be saved from revocation. Mutual wills are wills made pursuant to an agreement between two or more persons to make their testamentary directions interdependent and to maintain that interdependence.⁶⁹

4.47 In the situations described in the previous two paragraphs a general rule of revocation would revoke a gift in the testator's will to the other spouse pursuant to the contract. This would leave the former spouse to his or her remedies under the contract. The Commission

⁶⁷ 15A(3)(b) of the *Wills Probate and Administration Act 1898* (NSW), as inserted in that Act by the *Wills Probate and Administration (Amendment) Act 1989*, provides 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."

15A(3)(b) was followed in s 20A(3)(b) of the *Wills Act 1968* (ACT) which was inserted in that Act by the *Wills (Amendment) Act 1991* (ACT). 15A(3)(b) originated in s 2(3)(a) of the *Wills Amendment Act 1977* (NZ). The use in the provision of the words "in respect of" was criticised by R J Sutton in an article *The Wills Amendment Act 1977* (1979) 8 NZU L Rev 413 at 415-416. He said that in view of the network of liabilities existing between the partners to a dissolved marriage it would be easy for the surviving partner to point to some liability or another which might have been in the testator's mind when he made the will. Sutton also pointed to the fact that the provision was limited to directions for the "payment of any amount" and argued that most specific legacies would not be saved.

These are matters which have influenced the Commission not to follow s 15A(3)(b) in making its recommendation in para 4.44 above.

⁶⁸ I J Hardingham, M A Neave and H A J Ford *Wills and Intestacy in Australia and New Zealand* (2nd ed 1989) para 1202. Such a promise is enforceable according to ordinary contractual principle: *id* paras 1202 - 1203.

⁶⁹ *Id* para 1213.

considers that resort to these should be unnecessary and that there should be an express saving of the gifts concerned. Furthermore, it has been held that a contract not to revoke a will is not broken by the subsequent marriage of the promisor because revocation by marriage is regarded as resulting from operation of law and not from the act of the party.⁷⁰ Such reasoning might well apply by analogy in the case of revocation of gifts by divorce, but an express saving in the legislation would avoid this possibility.

4.48 The saving in respect of contracts to benefit the testator's spouse by will would need to be limited to gifts which comply exactly with the terms of the contract. Thus, for example, if a husband owned a suburban house and a block of flats and enters into a contract with his wife to leave the suburban house to her by will, and then later executes a will in which there is a specific devise of the house to her, that gift should be saved from revocation. If, however, he executes a will in which he leaves her all his real estate, the whole of this gift (which in this example, does not comply exactly with the terms of the contract) should be revoked. To save the whole of the gift from revocation would conflict with the presumed intention of the testator which underlies the proposed rule of revocation of gifts made in favour of the former spouse. The saving of the whole gift in such circumstances could result in the bulk of the estate passing to the former spouse because of a contract by the testator to leave one asset which is only a small part of the estate to the former spouse. It must be remembered that in the latter example given in this paragraph, the former spouse will probably have contractual remedies which she can enforce against the estate of the testator when he dies.⁷¹

4.49 Assuming a general rule of revocation relating to the former spouse, the Commission *recommends* that the enacting legislation should provide that the reform should not affect a gift in favour of a testator's former spouse which is in exact compliance with a contract between the testator and the former spouse -

⁷⁰ *In re Marsland* [1939] Ch 820 (see also para 2.5 above).

In the American State of Missouri, there is a general rule of revocation of gifts in favour of former spouses. In *Rookstool v Neaf* (1964) 377 SW 2d 402, the Supreme Court of Missouri held that an enforceable contract not to revoke a will gives the former spouse remedies after the divorce. The decision runs counter to *In re Marsland*.

⁷¹ Paras 4.45 and 4.47 above.

- (a) under which the testator is bound to dispose of property by will to the former spouse or to the executor or administrator of the estate of the former spouse⁷², or
- (b) which concerns the making of a will or the non-revocation of a will or a provision in it.

(d) Inheritance Act

4.50 At present by virtue of section 7(1)(b) of the *Inheritance Act*, a 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". If there is to be a general rule that gifts to the testator's spouse are to be revoked by divorce, 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 restricted circumstances provided for in section 7(1)(b).

4.51 In its discussion paper, the Commission sought comment on whether the *Inheritance Act* should 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 the spouse is revoked because the testator and former spouse are divorced.⁷³ As in the case of all applications under the *Inheritance Act*, it would be necessary for the applicant to prove that the deceased had a moral obligation to provide for the applicant (in this case the former spouse) as well as the fact that the disposition of the estate was not such as to make adequate provision from the estate for the proper maintenance, support, education or advancement in life of the applicant. Only a few of the commentators gave consideration to the issue. The majority of these favoured the suggestion, one of them⁷⁴ saying that he regarded amendment to the Act along these lines as a necessary corollary of the proposition in favour of revocation on divorce.

72 In this recommendation, the Commission intends that the word "dispose" should be interpreted as in the *Wills Act 1970* where it, for example, includes the creation of a life estate: s4 (definitions of "disposition", "dispose" and "property").

73 Discussion paper para 5.22.

74 The Hon I G Medcalf QC.

4.52 The Commission has given consideration to the question in the light of the comments. The proposal, if implemented, would operate somewhat arbitrarily. If the deceased had died without a will but would have wished his or her divorced spouse to benefit from the estate, the amendment would not entitle that former spouse to claim. It may be that the class of claimants under the *Inheritance Act* should be extended to include any former spouse. This is the position in some other jurisdictions.⁷⁵ The Commission concluded that an extension to the class of claimants simply to enable a former spouse to apply where a gift in favour of that spouse is revoked, because the testator and the former spouse were divorced, was not justified.

4.53 However, if there is to be a general rule that gifts to the testator's spouse are to be revoked by divorce, the enacting legislation should provide that the existing restricted right of a divorced spouse to apply under the *Inheritance Act* should not be affected.⁷⁶ The Commission *recommends* accordingly.

(e) Secret trusts

4.54 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.⁷⁷ Because a secret trust operates outside the will the effect of certain formalities and statutory rules about wills can be avoided.⁷⁸ For example, such a trust will be enforced in certain cases even though it was made orally.⁷⁹

⁷⁵ For example, in New South Wales: *Family Provision Act 1982* (NSW) s 6. The Court must first determine whether having regard to all the circumstances of the case there are factors which warrant the making of the application: *id* s 9(1).

⁷⁶ This express provision would make it clear that the existing restricted right would not be affected. Such an express provision was inserted in the reforms effected in England in 1982: s 18A of the *Wills Act 1837* (UK) (referred to in footnote 41 above in this ch).

⁷⁷ 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 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.

⁷⁸ *In re Young deceased* [1951] Ch 344, 350.

⁷⁹ See eg R P Meagher and W M C Gummow *Jacobs' Law of Trusts in Australia* (5th ed 1986) para 715.

4.55 In its discussion paper, the Commission considered the question of whether the proposed reform should contain a provision dealing with secret trusts but received little comment on the issue. The principal solutions appear to the Commission to be that -

- (a) nothing in the proposed reform should affect any secret trust;⁸⁰
- (b) the appointment of the former spouse to act as trustee for a secret trust should be invalidated but where the former spouse is the beneficiary under the secret trust, the former spouse should still take;⁸¹
- (c) the appointment of the former spouse as trustee for a secret trust should be preserved but where the former spouse is the beneficiary under the secret trust the gift under the trust to that beneficiary should be revoked;⁸² and
- (d) no provision relating to secret trusts be made in the legislation implementing the proposed reforms.⁸³

4.56 The Commission has come to the conclusion that the first of these four possibilities should be adopted in Western Australia. Under this solution, the former spouse when he or she was trustee in the secret trust would remain the trustee. This would avoid any difficulty arising out of vacancy in the office. In the situation where the former spouse was the

⁸⁰ Footnote 84 below in this ch.

⁸¹ This appears to have been the intention of the Ontario Law Reform Commission in its report *The Impact of Divorce on Existing Wills* (1977) 8 and 11. It recommended 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. The Ontario 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 a beneficiary under a secret trust: report 11. This was by analogy to *In re Young deceased* [1951] Ch 334, 350.

⁸² This suggestion was raised but not adopted by the New South Wales Law Reform Commission in its report *Wills - Execution and Revocation* (1986) at para 10.37.

⁸³ This was the solution adopted by the New South Wales Law Reform Commission in its report: *ibid.* It said that as far as it was aware secret trusts were not encountered frequently in New South Wales and the instances of secret trusts involving spouses who subsequently divorce would be very few. This factor inclined it to the view, which it recommended, that no provision be made in the legislation relating to secret trusts because such provision would add undue complexity to an otherwise comparatively simple piece of legislation. The recommendation was adopted in the legislation implementing the Commission's report. Thus in New South Wales where the testator leaves a gift to X but a secret trust was created in favour of Y (the testator's spouse) and Y and the testator were later divorced, the beneficial gift to Y would not be revoked. The New South Wales Commission anticipated that under the New South Wales legislation where the gift was left to Y (the testator's spouse) with a fully secret trust in favour of X, the gift would be revoked on divorce.

beneficiary under the secret trust, the gift to the former spouse would not be revoked by the divorce. The non-revocation is at odds with the general recommendation that gifts under the will to the former spouse be revoked. However, where the testator has made a new will between the marriage breakdown and the divorce and has left his or her property to say a child, there is the possibility that the testator may have told the child to hold part of the property in trust for the former spouse. Also the gift to the beneficiary, the former spouse, passes outside the will.⁸⁴

4.57 Assuming a general rule of revocation relating to the former spouse the Commission *recommends* that the enacting legislation should provide that the rule should not apply in the case of a secret trust where the former spouse is the trustee or beneficiary under the trust.

(f) Revival

4.58 Under Western Australia's *Wills Act 1970* a will or a part of a will which has been revoked can only be revived⁸⁵ by -

- (a) the re-execution of the will;⁸⁶
- (b) a later will or codicil showing an intention to revive the will or part of the will;⁸⁷ or
- (c) any written document declaring an intention of the testator to revive the will or part of the will where the document does not comply with the formalities for

⁸⁴ The first of the four approaches seems to have been the one favoured by the South Australian Law Reform Committee in its *Report relating to the Effect of Divorce upon Wills* (1977). It recommended that gifts in favour of the former spouse should be revoked but that nothing in the reforms proposed by it should alter the existing law relating to secret trusts. It also appears to be the approach under the Australian Capital Territory's draft *Wills (Amendment) Ordinance*. Under that draft testamentary gifts and appointments in favour of the former spouse would be revoked on divorce and the gift would pass as if the former spouse had predeceased the testator. However, this reform was not to affect "a devise or bequest to, or appointment 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 *Wills Ordinance 1969* (ACT). There is no reference in the draft to the situation where the former spouse is the beneficiary under the secret trust but as the property would pass to the former spouse outside the will, the drafter may have considered it unnecessary to provide expressly for that situation. This draft of s 20A was never enacted. Instead the *Wills (Amendment) Act 1991* (ACT) adopted s 15A of the *Wills Probate and Administration Act 1898* (NSW) which does not contain any provision relating to secret trusts: see previous footnote.

⁸⁵ That is, restored.

⁸⁶ S 16(1).

⁸⁷ Ibid.

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.⁸⁸

Where under the proposed reform, on the divorce of the testator, a gift in the testator's will to the testator's spouse has been revoked, or a power of appointment conferred by the will on the former spouse or the appointment under the will of the former spouse as executor, trustee, advisory trustee or guardian has been revoked, then it should be possible for the testator to revive the gift, the conferral of the power of appointment or the testamentary appointment.

4.59 In the opinion of the Commission, the provisions referred to in the previous paragraph would enable the testator to effect such a revival.⁸⁹ They appear to provide adequate means for revival. The Commission considers that a separate provision is not necessary.

10. RELEVANT TERMINATIONS OF MARRIAGE

(a) Australian decrees or orders

4.60 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 Commonwealth *Family Law Act 1975* provides for decrees of dissolution of marriage, decrees of nullity of marriage and declarations of invalidity of marriage. Under the Act a decree of nullity can only be based on the ground that the marriage is void.⁹⁰ A declaration of invalidity is also a form of relief for a void marriage. A void marriage is no marriage at all, whether or not a decree declaring it void

⁸⁸ S 37.

⁸⁹ Where a codicil refers by date to an existing will and expressly confirms it, that sufficiently shows an intention to revive it: *McLeod v McNab* [1891] AC 471; C H Sherrin and R F D Barlow *Williams' Law relating to Wills* (4th ed 1974) 134. A codicil prepared by a solicitor would normally refer by date to the will and subject to any alteration effected by the codicil expressly confirm the existing will. Usually codicils are prepared only by solicitors. A testator acting for himself or herself could be expected to prepare a new will, rather than a codicil.

⁹⁰ 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).

has been pronounced.⁹¹ However, probably most persons who wish to put an end to their void "marriages" would seek a decree of nullity or a declaration of invalidity.⁹²

4.61 In its discussion paper, the Commission discussed the question of which divorces should effect the revocation of a testamentary gift or appointment and how they should be defined.⁹³ Broadly speaking, commentators on the issue supported the suggestion made by the Commission in the discussion paper that absolute decrees or orders for the dissolution, nullity or annulment of marriage which were made in Australia should effect the revocation. That suggestion extended to include not only decrees or orders made under the *Family Law Act 1975* and its predecessor, the Commonwealth *Matrimonial Causes Act 1959*, but also under earlier legislation of the Australian States. However, later in this report the Commission has recommended that its proposed reform should only apply to the wills of testators who are divorced after the amending legislation came into operation.⁹⁴ Assuming that that recommendation is implemented, the relevant divorces would not include any granted under the *Matrimonial Causes Act 1959* or earlier State legislation.

4.62 Having reconsidered the matter in the light of the foregoing, the Commission *recommends* that -

- (a) an absolute decree for dissolution of marriage made under the *Family Law Act 1975*,⁹⁵ or
- (b) a decree of nullity of marriage or a declaration of invalidity of marriage made under the *Family Law Act 1975*

should have the effect of revoking a testamentary gift or appointment.

⁹¹ *Ross Smith v Ross Smith* [1963] AC 280, 315.

⁹² 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 or declaration of invalidity of marriage.

⁹³ Discussion paper paras 5.28 - 5.30.

⁹⁴ Para 4.78 below.

⁹⁵ 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. A decree nisi does not dissolve a marriage; only a decree absolute does this.

(b) Overseas decrees

4.63 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.⁹⁶ 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.⁹⁷ The Commission considers that those non-Australian decrees which are recognised by courts exercising jurisdiction under the *Family Law Act 1975* as having the effect of a decree of dissolution or nullity of the testator's marriage should have the same effect as an Australian decree in revoking a testamentary gift or appointment in favour of the testator's former spouse.⁹⁸ It *recommends* accordingly.⁹⁹

(c) Polygamous marriages

4.64 An essential characteristic of a legal marriage in Australia is that it is monogamous. Monogamy is not an essential feature of marriage in all cultures: in parts of Africa, Asia and the Middle East, polygamous marriages are allowed.¹⁰⁰ The law of Islam sanctions polygamy in certain circumstances.¹⁰¹ In recent decades, there has been substantial migration to Western Australia from countries where polygamous marriage is allowed. Polygamous

⁹⁶ S 104.

⁹⁷ S 104(10).

⁹⁸ 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.

Broadly speaking, commentators on this issue supported the suggestion made by the Commission in the discussion paper that overseas absolute decrees or orders for the dissolution or "annulment" of marriage which would be recognised by courts exercising jurisdiction under the *Family Law Act 1975* should effect the revocation.

⁹⁹ A reference to the *Family Law Act 1975* in legislation implementing the Commission's recommendations would be construed as a reference to any legislation which in the future replaces that Act: *Interpretation Act 1984* (WA) ss 5 and 16(2).

¹⁰⁰ Australian Law Reform Commission discussion paper *Multiculturalism: Family Law* (DP 46 1991) para 3.39.

¹⁰¹ Ibid.

marriages are not permitted in Australia.¹⁰² However, there would be a large number of people living in Australia who entered into a polygamous marriage overseas. Reflecting these developments, the *Family Law Act 1975* provides that for the purpose of proceedings under that Act, a union in the nature of a marriage which is, or has at any time been, polygamous, being a union entered into in a place outside Australia, is deemed to be a marriage.¹⁰³ Thus circumstances could arise where it would be possible for the court to make an order dissolving the marriage between a man and woman even though the union is or had been polygamous. Where the marriage is dissolved by the court or the court makes a decree of nullity of marriage or a declaration of invalidity of the marriage, any testamentary gift or appointment in favour of the divorced spouse should be revoked.

4.65 The Commission therefore *recommends* that for the purpose of the reform a union in the nature of a marriage which is, or has at any time been, polygamous being a union entered into in a place outside Australia should be deemed to be a marriage.

11. PRIVATE INTERNATIONAL LAW PROBLEMS

4.66 A provision revoking a testamentary gift or appointment in favour of the former spouse may raise problems of private international law. 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 it¹⁰⁴), but the gift to the former spouse comprised movable property situated in Western 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.

4.67 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 authority¹⁰⁵ on how these rules would be

¹⁰² *Marriage Act 1961* (Cwth) s 23B(1)(a).

¹⁰³ S 6.

¹⁰⁴ For example, South Australia or Victoria.

¹⁰⁵ 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.

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.¹⁰⁶

4.68 An alternative, which in the view of the Commission 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.¹⁰⁷ 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 divorce.¹⁰⁸ It seems to the Commission 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.¹⁰⁹

¹⁰⁶ In the absence of any provision in the will covering the disposition of the property in the event of failure of the gift.

In its report *Recognition of Interstate and Foreign Grants of Probate and Administration* (Project No 34 Part IV 1984) the Commission 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. The report has been considered by the Standing Committee of Attorneys General which has decided that the automatic recognition scheme recommended by the Commission should not be adopted.

¹⁰⁷ *Re Martin* [1900] P 211. The same principle applies to immovable property: *In the Estate of Micallef* [1977] 2 NSWLR 929.

¹⁰⁸ P E Nygh *Conflict of Laws in Australia* (4th ed 1984) 510.

¹⁰⁹ The Australian Law Reform Commission has been given a reference on choice of law rules. The reference requires the Commission to examine existing rules governing choice of law and procedure in

4.69 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 in the view of the Commission 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.¹¹⁰ Other jurisdictions studied by the Commission 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. The predominant view among those who commented to the Commission on the issue in response to the Commission's discussion paper was that private international law problems associated with the statutory revocation should be left to be determined by the common law rules of private international law.

4.70 The Commission *recommends* that private international law problems associated with the proposed reforms be left to be determined by the common law rules of private international law.

12. RETROSPECTIVITY

4.71 The question arises as to whether the Commission's proposed reform should apply whether or not the will was made before the date on which the reform was implemented and, if it should apply to wills made before that date, whether it should apply only where the divorce occurs after that date. There are therefore three possibilities, namely that the reform should apply -

Federal and Territory courts and make recommendations for any changes which may be necessary to make these rules adequate and appropriate to modern conditions. The Commission issued a discussion paper in July 1990 (discussion paper No 44) but has not yet presented its report.

¹¹⁰ 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 covering 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.

- (a) even though the will was made and the divorce took place before the reform was implemented (that is, to the wills of all divorced testators dying after the reform is implemented);
- (b) irrespective of when the will was made provided the divorce took place after the reform was implemented;
- (c) only in the case of wills made after the date on which the reform was implemented (in which case it would follow that the divorce would also be made after that).

4.72 In its *Report on the Impact of Divorce on Existing Wills*,¹¹¹ the Ontario Law Reform Commission recommended reform similar to that proposed in this report. It also recommended that the first of the three options set out in the previous paragraph 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 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. . . . 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."¹¹²

4.73 This approach was also adopted by the Queensland Law Reform Commission.¹¹³ 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.¹¹⁴

¹¹¹ 1977.

¹¹² Report 10.

¹¹³ *The Law Relating to Succession* (1978) 4.

¹¹⁴ *Succession Act 1981* (Qld) s 4.

4.74 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.¹¹⁵ 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.¹¹⁶ 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.¹¹⁷

4.75 In its discussion paper the Commission sought comment on the application of its proposed reforms.¹¹⁸ Nine commentators commented on the issue. Three of these contended that the reform should apply to the wills of all divorced testators dying after the implementation of the reform. These commentators therefore supported the first of the three possibilities listed in paragraph 4.71 above. The remaining six commentators supported the second of those possibilities. They maintained that the reform should only apply where the divorce took place after the reform was implemented.

4.76 The Commission has given further consideration to the issue. In addition to the arguments expounded in the Ontario report, unless the reforms apply to the wills of testators who die after the new legislation becomes effective, rather than only to the wills of the testators who have been divorced after that date, they will not assist a significant group of people whose plight has already been referred to in this report. 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.¹¹⁹ The situation can and does arise of the mentally ill testator being unable to revoke his or her will despite the fact that the former spouse has remarried. However, for the following reasons the Commission has decided not to recommend applying the reforms to the wills of all persons dying after legislation implementing the reforms comes into force. First, where the divorce had taken place before the reform was implemented, the revocation would operate in a retrospective manner. This could be undesirable. For example, at the time of the divorce, the testator may have known or

¹¹⁵ *Wills - Execution and Revocation* (1986) para 13.1.

¹¹⁶ *Wills Probate and Administration Act 1898* (NSW) Fifth Schedule Part I clause 5. This is also the position in the case of the amendments to *Wills Act 1968* (ACT): *Wills (Amendment) Act 1991* (ACT) s 17.

¹¹⁷ *Wills Amendment Act 1985* (Tas) s 6.

¹¹⁸ Discussion paper paras 5.35 - 5.38.

¹¹⁹ Paras 1.2 and 4.4(e) above.

been advised that divorce did not revoke an existing will and deliberately not revoked the will on the basis of that knowledge or advice. Secondly, in the case of many divorces, the testator will have made a new will which has taken account of the divorce. Thirdly, although neither of these reasons would be applicable in the case of a divorced spouse who has already lost the capacity to revoke an existing will at the time of the divorce, the Commission considers it is not justifiable to make an amendment to the law which would have general application because of the position of those suffering from mental incapacity. As stated earlier in this report, the Commission considers that the problem of the person who lacks testamentary capacity would be best dealt with by legislation specially designed to deal with it.¹²⁰

4.77 The Commission has come to the conclusion that the second of the possibilities should be adopted. The proposed reform should apply to the wills of those who are divorced after the enactment effecting the reform comes into operation, irrespective of when the will was made. Because of the divorce, the minds of the parties are turned to financial provision and it is around the time of the divorce that they are likely to form a decision on what their will should provide in the new circumstances. It is also around this time that they are most likely to learn of the effect of divorce on any existing will. Provided testators are able to make their decision as to what their wills should provide on the basis of the law as it stands at the time of the divorce and to implement that decision effectively, the Commission considers it justifiable for the reform to apply to the will of a testator made before the date on which the reform comes into operation if the divorce takes place after that date. In particular will this be so, if as the Commission proposes, notice is sent to the parties informing them that the divorce may affect any existing wills.¹²¹ If the reform was only to apply in the case of wills made after the date on which the reform was implemented, it would be a long time before the reform started to affect a significant number of wills.

4.78 The Commission therefore *recommends* that the reform should only apply to the wills of testators who are divorced after the reform comes into operation, irrespective of when the will was made.

¹²⁰ Para 4.8 above.

¹²¹ Paras 4.79-4.81 below.

13. NOTICE TO THE PARTIES

4.79 Earlier in this report, in considering whether the present law should be retained, the Commission pointed out that the potential for injustice in that law could be alleviated if each party to the divorce was informed that divorce did not revoke an existing will.¹²² Although there was a reference to the effect of divorce on an existing will in a pamphlet entitled "Marriage Breakdown and Separation" which is given to the parties in the early stages of the proceedings, the Commission said that further notice at about the time of the granting of the decree absolute as to the effect of the divorce on an existing will would be desirable. A party may not have read the relevant item in the pamphlet or may have forgotten the advice contained in it by the time the decree becomes absolute. The Commission considered that the best way of endeavouring to do this would be for the State to require the Registrar of the Family Court of Western Australia to send a notice with the copy of the decree nisi which the Registrar is required to send to each party after the decree has become absolute. For reasons which the Commission explained, the procedure of sending the notice with the decree nisi would not be a complete solution but would result in an increase in awareness of the present law among those divorced in the Family Court of Western Australia and in the number of wills of divorced persons which comply with their intentions.

4.80 Mr Charles Rowland in his comments on the Commission's discussion paper pointed out that there was no reason why the idea of ensuring that the parties to a divorce are told of testamentary consequences should not be complementary to revocation by divorce.¹²³ Indeed, if revocation by divorce was introduced, the parties to the divorce should be told of its testamentary consequences. With only one exception, commentators on the discussion paper who addressed this issue favoured the concept of the State informing the parties to a divorce of the testamentary consequences of the divorce. The Commission is also in agreement with this view.

4.81 The Commission accordingly *recommends* that the Family Court of Western Australia should adopt a practice aimed at informing the parties to a divorce of the testamentary effect of a divorce and suggests that the appropriate means of endeavouring to so inform the parties would be by attaching a suitably worded notice to the copy of the decree nisi which is sent to

¹²² Paras 4.11-4.12 above.

¹²³ The same point was made by another commentator, Mr Claude Rochecauste.

each of the parties when the decree becomes absolute. The recommendation and suggestion¹²⁴ are intended to apply whether the existing law remains or the law is reformed as proposed by the Commission.

¹²⁴ The Registrar of the Family Court of Western Australia has indicated that she would be agreeable to sending out the notice to the parties with the copy of the decree nisi: para 4.12 above.

Part IV: Summary of Recommendations

Chapter 5

Effect of Marriage

1. The general rule contained in section 14(1) of the *Wills Act 1970* that the marriage of the testator revokes, by operation of law, a will made before the marriage should be retained.

(Paragraphs 2.4 - 2.6, 2.21 and 3.1 - 3.5)

2.
 - (a) The existing exception to the general rule in the case of a will containing a declaration that it is made in contemplation of a particular marriage which is later solemnised should be retained.
 - (b) An additional exception should be added to section 14, namely that where there is no declaration in the will that it is made in contemplation of the particular marriage the will should not be revoked by the marriage of the testator if the will was made in contemplation of the marriage. It should be expressly provided that extrinsic evidence (including evidence of statements by the testator) should be admissible to establish that the will was made in contemplation of the marriage and that this may be established by such extrinsic evidence alone.
 - (c) The amending legislation should provide that where the will was made in contemplation of the marriage, but there is no declaration in the will that it is so made, the will should be void if the marriage is not solemnised, unless the testator at the time of making the will intended the contrary. It should be expressly provided that extrinsic evidence (including evidence of statements by the testator) should be admissible to establish that the intention of the testator was that the will should not be void if the marriage was not solemnised and that this may be established by such evidence alone.
 - (d) Where the applicant for a grant of probate of a will (or of letters of administration with the will annexed) relies on the new exception, there should

be appropriate procedural provisions to enable those who would be adversely affected by the grant to have the opportunity to oppose the application for the grant of representation.

- (e) The new exception should only apply to wills made after the Act establishing the exception comes into operation.

(Paragraphs 2.2, 2.7 - 2.14, 2.19, and 3.6 - 3.25)

3.
 - (a) A further additional exception should be added to section 14, namely that a will should not be revoked by the marriage of the testator if it expresses an intention that it will remain effective notwithstanding any subsequent marriage of the testator.
 - (b) A will complying with the new exception should be effective whether or not the testator marries.
 - (c) The new exception should only apply to wills made after the Act establishing the exception comes into operation.

(Paragraphs 3.26 - 3.40)

4. The exception contained in section 14(1) of the *Wills Act 1970* with respect to wills made in exercise of a power of appointment should be retained but it should be redrafted so that it is clearer in its presentation.

(Paragraphs 2.2, 2.15 - 2.18, 2.20 and 3.41 - 3.46)

Effect of Divorce

5. The *Wills Act 1970* should be amended to provide -
 - (a) for a general rule that on the divorce of the testator any gift in the testator's will in favour of the former spouse and any power of appointment conferred by the

will on the former spouse should be revoked and the appointment under the will of the former spouse as executor, trustee, advisory trustee or guardian should be revoked; and

- (b) that any property which would, but for the provision proposed in (a), have passed to the former spouse of the testator pursuant to a gift referred to in (a), should pass as if the former spouse had predeceased the testator, but no class of beneficiaries under the will should close earlier than it would have closed if the gift had not been revoked.

(Paragraphs 4.3 - 4.31)

6. Assuming a general rule of revocation relating to the former spouse, the enacting legislation should provide for a number of exceptions and qualifications as follows:

- (a) Insofar as a contrary intention appears in the will, the general rule should not apply.

(Paragraphs 4.32 - 4.41)

- (b) A direction, charge, trust or provision in the will of a testator for the payment or discharge 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 should not be affected.

(Paragraphs 4.42 - 4.44)

- (c) A gift in favour of a testator's former spouse which is in exact compliance with a contract between the testator and the former spouse -

- (a) under which the testator is bound to dispose of property by will to the former spouse or to the executor or administrator of the estate of the former spouse,¹ or
- (b) which concerns the making of a will or the non-revocation of a will or a provision in it,

should not be affected.

(Paragraphs 4.45 - 4.49)

- (d) The existing restricted right of a divorced spouse to apply under the *Inheritance Act* should not be affected;

(Paragraphs 4.50 - 4.53)

- (e) The rule should not apply in the case of a secret trust where the former spouse is the trustee or beneficiary under the trust.

(Paragraphs 4.54 - 4.57)

7. The enacting legislation should provide that a "divorce" which should effect the revocation of a testamentary gift or appointment occurs or shall be taken to occur -

- (a) when an absolute decree for dissolution of the marriage is made under the *Family Law Act 1975*;
- (b) when a decree of nullity of marriage or a declaration of invalidity of marriage is made under the *Family Law Act 1975*; or

¹ In this recommendation, the Commission intends that the word "dispose" should be interpreted as in the *Wills Act 1970* where it, for example, includes the creation of a life estate: s 4 (definitions of "disposition", "dispose" and "property").

- (c) on an overseas dissolution or annulment of the marriage which would be recognised by courts exercising jurisdiction under the *Family Law Act 1975*.

For the purpose of the reform a union in the nature of a marriage which is, or has at any time been, polygamous being a union entered into in a place outside Australia should be deemed to be a marriage.

(Paragraphs 4.60 - 4.65)

8. Private international law problems associated with the proposed reforms should be left to be determined by the common law rules of private international law.

(Paragraphs 4.66 - 4.70)

9. The proposed reform should only apply to the wills of testators who are divorced after the reform comes into operation irrespective of when the will was made.

(Paragraphs 4.71 - 4.78).

10. The Family Court of Western Australia should adopt a practice aimed at informing the parties to a divorce of the testamentary effect of a divorce.

(Paragraphs 4.79 - 4.81).

M D PENDLETON
Chairman

R L LE MIERE

J A THOMSON

20 December 1991

Appendix 1

LIST OF THOSE RESPONDING TO DISCUSSION PAPER

Barnes, Mr I J

Castel, Professor J-G

Citizens Advice Bureau of WA (Inc)

Dickey, Associate Professor A F

Family Law Council

Hartley, Ms S (Convenor of the De Facto Law Reform Lobby Group)

Law Society of Western Australia

Lee, Mr W A

Medcalf, Hon I G, ED QC

Martin, Ms C (Registrar of the Family Court of Western Australia)

Perpetual Trustees WA Ltd

Pocock, Mrs C

Prince, Mr A K R

Public Trustee

Rochecauste, Mr C

Rowland, Mr C

Saunders, Mr N L

Women's Refuge Group of WA Inc

Watt, Mr C G (a Registrar of the Supreme Court of Western Australia)

Appendix II

WESTERN AUSTRALIA INHERITANCE (FAMILY AND DEPENDANTS PROVISION) ACT 1970 SECTION 7

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, has some special moral responsibility to make provision.

(2) No application under subsection (1) of this section shall be heard by the Court unless –

- a) the application is made within six months from the date on which the Administrator becomes entitled to administer the estate of the deceased in Western Australia; or
- b) the Court is satisfied that the justice of the case requires that the applicant be given leave to file out of time.

(3) A motion for leave to file out of time may be made at any time notwithstanding that the period specified in paragraph (a) of subsection (2) of this section has expired.