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‘KEY ASPECTS OF THE *SUCCESSION ACT 2006 (NSW)*’

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The serious reform of the law of succession in Australia is an ongoing project. Recently, NSW took steps to reform the law of wills, taking into account law reform recommendations, which were made a decade ago. This paper discusses some of the key changes and innovations made by the Succession Act 2006 (NSW) (which is still to be implemented and has been further amended by the Statute Law (Miscellaneous Provisions) Act (No 2) 2007 (NSW)), explaining how such reforms will change the law in NSW and, in some cases, demonstrating how it will bring the law into line with the law in other states. The Succession Act is briefly compared and contrasted with contemporaneous law reform efforts in WA – the Wills Amendment Act 2007(WA) which is still to be proclaimed. The paper concludes that notwithstanding the harmonization of particular issues, a consideration of the recent endeavours to reform the law of wills in NSW and WA indicates that the virtual or complete harmonization of the law in those states is unlikely in the near future.

I INTRODUCTION

The source of Australian succession law was English law,¹ but each Australian state introduced its own version so there are significant variations.² To create greater consistency, the Standing Committee of the Attorneys-General initiated the uniform succession laws project. One outcome of this initiative was The National Committee for

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¹ Rosalind F Atherton and P Vines, *Succession: Families, Property and Death Text and Cases* (2nd ed, 2003) [1.39]-[1.40]; G L Certoma, *The Law of Succession in New South Wales* (1997) 15-17.

² The National Committee for Uniform Succession Laws, *The Report on the Law of Wills* (1997) [2]. The NSW Law Reform Commission released and endorsed the report as *Report No 85 on the Law of Wills* (1998).

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

Uniform Succession Laws' *Report on the Law of Wills* and, later, a NSW Law Reform Commission Report (which replicated the National Committee's report and a model bill based on the then draft *Wills Act 1994* (Vic)).³

In 2006 the NSW government decided to implement the recommendations and parts of the model bill to bring NSW legislation into line with the wills legislation of other states and territories.⁴ On 27 October 2006, the *Succession Act 2006* (NSW) received assent ('*Succession Act*'), but at the date of writing has yet to commence operation. It will replace Parts 1 and 1A of the *Wills, Probate and Administration Act 1898* (NSW) (other than ss 30 and 31 of that Act); and will change the name of the *Wills, Probate and Administration Act* to the *Probate and Administration Act*.⁵ In late 2007 some relatively minor amendments to the *Succession Act* were passed and received assent.⁶ Where appropriate, this paper will also highlight the recent amendments. At the date of writing the *Succession Act* (as amended) had yet to commence operation.⁷ It is anticipated that the Act will commence operation in 2008. The purpose of this paper is threefold. First, the paper will briefly review the current law and discuss some (but not all) of the key provisions in the *Succession Act* (taking into account the recommendations of the National Committee as contained in the NSW Report).⁸ Second, the paper will demonstrate that there are still marked differences between the laws of the Australian states (and territories). In a paper of this length, it is impossible to deal with all such differences. Western Australia presents an interesting comparison and contrast to NSW. Western Australia has also taken steps to amend its present legislation, the *Wills Act 1970* (WA) ('the *Wills Act*'). The amending legislation, the *Wills Amendment Act 2007* (WA)

³ See above n 2. For a helpful brief history of the progress of the wills model legislation see: Rosalind F Croucher, 'The Uniform Succession Laws Project in Australia – Challenges Past, Present and Future' (Paper presented at the Succession Law Conference – The Future of Succession Law and Uniform Legislation, Adelaide, 18-19 October 2007) 2-4.

⁴ Consider *NSW Parliamentary Debates*, Legislative Assembly, 19 September, 2006, 1858 (Bob Debus, Attorney General).

⁵ *Succession Act 2006* (NSW) sch 2 [1].

⁶ *Statute Law (Miscellaneous Provisions) Act 2007* (NSW). This Act was passed by Parliament on 29 November 2007 and was assented to on 7 December 2007.

⁷ The commencement provision has not been triggered: *Succession Act 2006* (NSW) s 2.

⁸ The paper will not focus on Part 2.4 of the *Succession Act*, which deals with wills under foreign law.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

(‘the *Amendment Act*’) was assented to on the 26 October 2007 and is to come into operation on a day fixed by proclamation.⁹ A comparison and contrast between the *Succession Act*, the *Wills Act* and the *Amendment Act* will be made. Third, concluding remarks will reflect on the progress and process of law reform in the law of wills in Australia.

II MINORS

A Wills Made by Minors

The current law in NSW is that a will made by a minor is not valid unless the minor was married at the time the will was made, the will was made pursuant to the leave of the Supreme Court or the will was made in contemplation of marriage and the marriage was later solemnized.¹⁰ Essentially the recommendations of the National Committee were that the age of capacity should not be lowered, but that a minor who is married may make, alter or revoke a will.¹¹

The *Succession Act* also provides that a will made by a minor is not valid.¹² A will made by a minor in contemplation of a marriage which is later solemnized will be valid, but it will not be valid if the marriage does not take place.¹³ However the legislation contains two important extensions. A minor who is married may make, alter or revoke a will.¹⁴ A minor who has been married may revoke the whole or part of a will made while the minor was married or made in contemplation of that marriage.¹⁵ These provisions make sense in the light of the special treatment of married minors and wills made by them.

⁹ *Wills Amendment Act 2007* (WA) s 2(1).

¹⁰ *Wills Probate and Administration Act 1898* (NSW) s 6. Ss 6A and 6B of that Act deals with wills made pursuant to the leave of the Court and wills made in contemplation of a marriage.

¹¹ National Committee for Uniform Succession Laws, above n 2, [2.11].

¹² *Succession Act 2006* (NSW) s 5(1).

¹³ *Succession Act 2006* (NSW) s 5 (2)(a).

¹⁴ *Succession Act 2006* (NSW) s 5(2)(b).

¹⁵ *Succession Act 2006* (NSW) s 5(2)(c).

B Leave of the Court

At present a minor may make a will with the leave of the court.¹⁶ The terms of the will must be disclosed to the court and the court may grant leave subject to such conditions as the court thinks fit. The National Committee took the view that courts ought to be able to authorize a minor to make, alter or revoke a will; the will ought to be retained by the registrar; and a minor's will made under an equivalent provision in another jurisdiction should be accepted for probate purposes.¹⁷

Accordingly, s 16 of the *Succession Act* is more extensive, and arguably more onerous, than the present law. The court may make an order not only authorizing a minor to make, but also to alter or revoke a will in whole or in part in the specified terms approved by the court or to revoke a will or part of a will.¹⁸ The minor or someone on behalf of the minor can make an application.¹⁹ Also, unlike the present law, s 16 stipulates that certain criteria must be satisfied: the minor understands the nature of the proposal; the proposal accurately reflects the intentions of the minor; and the proposal is reasonable in all the circumstances.²⁰ This suggests that both subjective and objective elements must be considered and satisfied before court authorization.²¹ Contrary to the present law, one of the witnesses to the will as made, altered or revoked in whole or in part must be the registrar.²² The will as made, altered or revoked must be deposited with the registrar,²³ although the mere failure to deposit does not affect the validity of the will.²⁴

¹⁶ *Wills Probate and Administration Act 1898* (NSW) s 6A.

¹⁷ National Committee for Uniform Succession Laws, above n 2, [5.11].

¹⁸ *Succession Act 2006* (NSW) s 16(1).

¹⁹ *Succession Act 2006* (NSW) s 16(2).

²⁰ *Succession Act 2006* (NSW) s 16(3).

²¹ If it is not possible to comply with these criteria, then it is still possible to seek a court authorized will based on the demonstrated fact that the minor lacks testamentary capacity: *Succession Act 2006* (NSW) s 18.

²² *Succession Act 2006* (NSW) s 16(5)(c). Section 16(5) of the *Succession Act* was amended to ensure that the court could authorize minors to alter or revoke a will in whole or part; and to state clearly the

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

C Western Australia: Comparison and Contrast

Section 7 of the *Wills Act* confirms that a will made by a minor is invalid. However, the way that the wills of minors may be accorded validity significantly differs from the approach of the National Committee or the *Succession Act* in two ways. First, Part VI of the *Wills Act*²⁵ permits privileged wills to be made by members of the defence services, mariners or seamen at sea irrespective of age. This exception exists in other states as well.²⁶ However, NSW abolished privileged wills in 1989.²⁷ Second, there are no provisions in the *Wills Act* permitting minors to make wills in contemplation of marriage or with the leave of the court.

When proclaimed, *The Amendment Act* abolishes privileged wills.²⁸ However, a will made by a person under the age of 18 years is not valid.²⁹ The provisions in the *Amendment Act* would not permit minors to make wills in contemplation of marriage or with the leave of the court. A court may only authorize a will for persons who lack testamentary capacity and have reached the age of 18 years.³⁰

III EXECUTION

A Procedure

requirements for executing such a will in accordance with a court order: *Statutory Law (Miscellaneous Provisions) Act (No 2) 2007* (NSW), sch 1, s 1.23, [4] & [5].

²³ *Succession Act 2006* (NSW) s 16(6).

²⁴ *Succession Act 2006* (NSW) s 16(7).

²⁵ *Wills Act 1970* (WA) ss 17-19.

²⁶ Atherton and Vines, above n 1, 247-248.

²⁷ *Wills, Probate and Administration (Amendment) Act 1989* (NSW). Other states have also done so – see Atherton and Vines, above n 1, 247.

²⁸ *Wills Amendment Act 2007* (WA) s 6.

²⁹ *Wills Act 1970* (WA) s 7 as amended by s 6 of the *Wills Amendment Act 2007* (WA).

³⁰ *Wills Amendment Act 2007* (WA) s 24 inserting Parts XI and XII (ss 38-50) into the *Wills Act 1970* (WA). Section 40(2) states that the court is not to make an order, unless at the time the order is made, the person concerned is living and has reached the age of 18 years.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

Under the present law, a will is not valid unless it is in writing, signed by the testator or on behalf of the testator, the testator intended the signature to give effect to the will and two or more witnesses witnessed the will.³¹ It is unnecessary for the will to be signed simultaneously by the two witnesses because the legislation requires witnesses to attest and sign the will in the presence of the testator, but not necessarily in the presence of the other witness.³² The National Committee retained this basic framework in its recommendations.³³

The *Succession Act* retains these requirements³⁴ subject to court-authorized wills³⁵ that will be discussed below.³⁶ This makes sense because court-authorized wills are created and validated under different criteria. The court will be called upon to authorize a will when it is clear that a person is unable to make a will in accordance with standard will-making requirements. The person lacks testamentary capacity and may not even have the capacity to sign a document. The court-authorized will is properly executed if it is in writing and signed by the Registrar and sealed with the seal of the court.³⁷

Section 8 of the *Wills Act* replicates the general approach of both the present law in NSW and s 6 of the *Succession Act*. Section 6 of the *Succession Act* requires that the testator make or acknowledge his signature in the presence of two or more witnesses present at the same time.³⁸ At least two or more of the witnesses must sign the will in the presence

³¹ *Wills Probate and Administration Act 1898* (NSW) ss 7 and 9.

³² *Wills Probate and Administration Act 1898* (NSW) s 7(2).

³³ National Committee for Uniform Succession Laws, above n 2, [3.2].

³⁴ *Succession Act 2006* (NSW) s 6.

³⁵ *Succession Act 2006* (NSW) s 18.

³⁶ Part V.

³⁷ *Succession Act 2006* (NSW) s 23(1).

³⁸ *Succession Act 2006* (NSW) s 6(1)(b). Note also the *Wills Act 1970* (WA) s 8(c).

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

of the testator (but not necessarily in the presence of each other).³⁹ The amendments in the *Amendment Act* do not change the *Wills Act* in this regard.⁴⁰

B Knowledge of Witnesses

The requirement that a witness had to be aware that the document he or she was witnessing was a will was abolished in England in 1837.⁴¹ The National Committee considered that it was unnecessary to re-introduce such a requirement because a testator should have the right to make a will without having to disclose either that he or she is making a will or its contents. The importance of the witness is to verify that the testator signed voluntarily and that the signature is the authentic signature of the testator.⁴² Accordingly, under the new legislation, it is made clear that a will executed in accordance with the *Succession Act* is validly executed even if one or more witnesses to the will did not know that the document he or she attested was a will.⁴³ Other states have implemented similar provisions,⁴⁴ but there is no equivalent in the *Wills Act* and the *Amendment Act* does not address this issue, so that it is arguable that the situation remains uncertain in WA.

IV WITNESSES

A Blind Persons

³⁹ *Succession Act 2006* (NSW) s 6(1)(c). Section 8(d) of the *Wills Act 1970* (WA) also requires that the witnesses attest and subscribe the will in the presence of the testator, but there is no superadded requirement that they must necessarily do so in the presence of each other. This also the case in SA: *Wills Act 1936* (SA) s 8(c); and appears to be the case in Tasmania: *Wills Act 1992* ss 10(b) & 10(c).

⁴⁰ *Wills Amendment Act 2007* (WA) s 7.

⁴¹ National Committee for Uniform Succession Laws, above n 2, [3.4].

⁴² National Committee for Uniform Succession Laws, above n 2, [3.5].

⁴³ *Succession Act 2006* (NSW) s 7.

⁴⁴ Consider *Wills Act 1997* (Vic) s 8; *Wills Act 2000* (NT) s9); *Succession Act 1981* (Qld) s 10(5).

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

At present any person competent to be a witness in civil proceedings in a court in NSW, other than a blind person, can be a witness to a will.⁴⁵ The National Committee expressed concerns that a reference to 'blind' raised the question of what was the definition of 'blind' and did not deal with the possibility that a person was only temporarily unable to see.⁴⁶ Accordingly, the *Succession Act* is re-focused on the requirements for witnesses. A witness must be able to verify that the testator signed the will voluntarily; and the signature is the testator's. A person who is unable to see and attest that a testator has signed a document may not act as witness to a will.⁴⁷

Some other states have implemented a similar provision.⁴⁸ The *Wills Act* does not presently deal with the capacity of blind witnesses to attest wills, although the *Amendment Act*, when proclaimed, would amend the present legislation, so that a person who is unable to see would not be able to act as a witness to a will.⁴⁹

The issue whether a blind person can witness a will is a controversial one. Section 12 of the *Wills, Probate and Administration Act 1898* (NSW) was criticized by an eminent academic for being an inaccurate statement of the case law and discriminatory against a particular group of disabled persons.⁵⁰ Nevertheless, both NSW and WA have amended their respective legislation to make it clear that persons who are unable to see whether temporarily or permanently are unable to witness wills. However, perhaps in unusual circumstances where a blind or visually impaired person was involved in the making of a will, it may be possible to rely on the court's powers to dispense with formal requirements for the execution, alternation or revocation of wills.⁵¹ The *Succession Act*,⁵²

⁴⁵ *Wills Probate and Administration Act 1898* (NSW) s 12.

⁴⁶ National Committee for Uniform Succession Laws, above n 2, [3.16].

⁴⁷ *Succession Act 2006* (NSW) s 9.

⁴⁸ Eg *Wills Act 1997* (Vic) s 10; *Succession Act 1981* (Qld) s 10 (10).

⁴⁹ *Wills Amendment Act 2007* (WA) s 10 inserting s 11 into the *Wills Act 1970* (WA).

⁵⁰ Rosalind Atherton, 'Wills Formalities in NSW: New Rules' (1989) 27(8) *Law Society Journal* 32, 34-35. Atherton argued that the exclusion of blind witnesses was never the law in probate. While on the particular facts of *In the Estate of Gibson* [1949] P 434, a blind person was not held capable of witnessing the will, the case was not authority for the exclusion of blind people generally.

⁵¹ *Ibid*, 35.

⁵² *Succession Act 2006* (NSW) s 8.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

the *Wills Act*⁵³ and the *Amendment Act*⁵⁴ contain provisions permitting the court to dispense with formalities in legislatively prescribed circumstances when it can be shown that the document embodied the testator's intentions.

B The Interested Witness Rule

The approach of various Australian jurisdictions to the nature and extent of the interested witness or beneficiary rule has been a good indicator of the lack of uniformity in the law of wills.

The witness beneficiary rule has had a long history.⁵⁵ In NSW, any beneficial gift given or made by will to a person who attested the execution of the will or to the interested witness' spouse is void, so far as it concerned the interested witness, the interested witness' spouse or any person claiming under either of them.⁵⁶ There are several legislative exceptions in NSW;⁵⁷ and in any event, courts have construed the rule and legislation strictly so, for example, the time of establishing the rule was the time of attestation,⁵⁸ or the gift to a witness or spouse of the witness as trustee was still valid.⁵⁹

The National Committee expressed concern that the problem with the rule was that it did not distinguish between innocent and guilty witnesses. Sometimes a family member who witnessed a home-drawn will was penalized because the witness or the spouse was a beneficiary.⁶⁰ The Committee considered that the rule should not disqualify a witness' spouse from taking a benefit under a will. If the disqualification were to continue, then the Committee considered that it should extend to de facto partners in the light of the

⁵³ *Wills Act 1970* (WA) ss 34-37.

⁵⁴ *Wills Amendment Act 2007* (WA) s 23 inserting s 32 into the *Wills Act 1970* (WA).

⁵⁵ See the discussion in *Estate of Miller* [2000] NSWSC 767. Note also s 15 *Wills Act 1837* (UK).

⁵⁶ *Wills Probate and Administration Act 1898* (NSW) s 13(1).

⁵⁷ *Wills Probate and Administration Act 1898* (NSW) s 13 (2). For a discussion of the legislative exceptions see *Estate of Miller* [2000] NSWSC 767.

⁵⁸ *Thorpe v Bestwick* (1881) 6 QBD 311.

⁵⁹ *Re Ray* [1936] Ch 520.

⁶⁰ National Committee for Uniform Succession Laws, above n 2, [3.18].

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

growing incidence of de facto relationships.⁶¹ However, on balance the Committee favoured removing the disqualification of the witness' spouse altogether.⁶²

Section 10 of the *Succession Act* retains the rule (and previous legislative exceptions), but no longer specifies that a gift to the spouse of a witness or a person claiming under that person is void.

WA has taken an approach different from the present law in NSW and under the *Succession Act*. Section 12 of the *Wills Act* already makes it clear that beneficiaries, their spouses and de facto partners are not incompetent to prove the execution of the will or its validity or invalidity. Moreover, under section 11 of the *Wills Act* executors and creditors of the testator are also not incompetent witnesses. Therefore, any form of the interested beneficiary rule has already been abolished and is no longer relevant in WA. In this regard, WA followed the trend in some jurisdictions that have abolished the rule.⁶³ The *Amendment Act* repeals Part IV (containing sections 11 and 12 of the *Wills Act*) as these provisions are no longer required because of the abolition of the interested beneficiary rule.⁶⁴

V COURT AUTHORIZED WILLS

A Section 18 of the Succession Act

The traditional approach to the making of wills is that the testator must have testamentary capacity⁶⁵ and a testamentary intention;⁶⁶ and know and approve the will.⁶⁷

⁶¹ National Committee for Uniform Succession Laws, above n 2, [3.39].

⁶² National Committee for Uniform Succession Laws, above n 2, [3.41].

⁶³ Eg *Wills Act 1936* (SA) s 17(1); *Wills Act 1968* (ACT) s 15; *Wills Act 1997* (Vic) s 11. Note also National Committee for Uniform Succession Laws, above n 2, [3.40] and [3.41].

⁶⁴ See *Wills Amendment Bill 2006* (WA): *Explanatory Memorandum*, 3.

⁶⁵ *Banks v Goodfellow* (1870) LR 5 P&D 549; *Bull v Fulton* (1942) 66 CLR 295.

⁶⁶ *Estate of Knibbs* (1862) 2 All ER 829.

⁶⁷ *Astridge v Pepper* [1970] 1 NSW 542.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

Section 18 of the *Succession Act* reverses traditional norms about will-making because it confers new powers on the court to authorize the making, alteration and revocation of wills for persons lacking testamentary capacity. However, it will not be easy to obtain leave to apply for such an authorization.

The National Committee supported, in principle, legislation that enabled courts to make wills for persons lacking testamentary capacity (a 'statutory will').⁶⁸ However, the Committee stated that such legislation should not permit the making of a statutory will unless the person was alive at the time the order was made.⁶⁹ The Committee considered that it would be preferable to expand the range of persons who would be eligible to apply under the family provision legislation, rather than permitting the court to authorize the making of a will after the death of the person whose assets were the subject of the dispute. The Committee considered that a successful application under the family provision legislation would supplant the effect of an out-of-date will or inappropriate disposition.⁷⁰ Certainly, to legislate otherwise would place under question fundamental characteristics of wills, for example, the ambulatory nature of wills.⁷¹ The Committee also recommended that the provision would apply to a minor (when the court could not rely on the general powers applicable to minors) in cases where the minor lacked the requisite degree of understanding.⁷² Section 18 of the *Succession Act* follows these recommendations.

The application process for the making, alteration and revocation of wills for persons lacking testamentary capacity is two tiered. However, despite the bifurcated process, the court would already be taking into account significant substantive matters when hearing the preliminary application for leave. In order to make an application, a person must first

⁶⁸ National Committee for Uniform Succession Laws, above n 2, [5.21].

⁶⁹ National Committee for Uniform Succession Laws, above n 2, [5.30].

⁷⁰ National Committee for Uniform Succession Laws, above n 2, [5.22]-[5.31].

⁷¹ As to the ambulatory nature of wills note: *Wills Probate and Administration Act 1898* (NSW) s 21; *Succession Act 2006* (NSW) s 30.

⁷² National Committee for Uniform Succession Laws, above n 2, [5.32]-[5.35].

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

obtain the leave of the court.⁷³ The applicant must give the court extensive information.⁷⁴ Upon obtaining leave, a person may apply, on behalf of a person who lacks testamentary capacity, for an order authorizing the making or alteration of a will over all or part of the property of that person. The person on whose behalf the application is made must be alive at the time the order is made.⁷⁵ On hearing an application for leave, the court may give leave and then allow the application to proceed immediately as an application for an order.⁷⁶ In considering an application for an order the court is not bound by the rules of evidence⁷⁷ and may have regard to any information given to it and may inform itself of any other matter in any manner it sees fit.⁷⁸ From the perspective of evidence law, this is an extraordinary provision because it allows the standard rules of evidence to be set aside when the Court considers applications to make, alter and revoke wills. However, the exclusion of the rules of evidence is permitted for statutory wills in other jurisdictions⁷⁹ and so far, it does not appear to have raised severe criticisms. The provision is justifiable on the basis that the court wishes to ascertain as much about what the person's intentions as possible without the intrusion of rules set to limit and define what evidence is available in adversarial situations.

The legislation is then weighted against a court granting the application. The court must refuse leave to make an application unless the court is satisfied that certain strict criteria are satisfied including that 'the will, alteration or revocation is, or is reasonably likely to be, one that would have been made by the person if he or she had testamentary capacity.'⁸⁰

⁷³ *Succession Act 2006* (NSW) s 19.

⁷⁴ *Succession Act 2006* (NSW) s 19(2).

⁷⁵ *Succession Act 2006* (NSW) s 18(3).

⁷⁶ *Succession Act 2006* (NSW) s 20.

⁷⁷ *Succession Act 2006* (NSW) s 21(c).

⁷⁸ *Succession Act 2006* (NSW) ss 21(a) & (b).

⁷⁹ Eg *Wills Act 1997* (Vic) s 22 (c).

⁸⁰ See generally *Succession Act 2006* (NSW) s 22.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

A will that is authorized or altered by such an order must be deposited with the registrar⁸¹ although failure to comply with this requirement will not affect the validity of the will.⁸² A statutory will validly created in NSW or any other jurisdiction will be regarded as a valid will of the deceased.⁸³

B Western Australia and Victoria: Comparison and Contrast

Presently, there is no provision equivalent to s 18 of the *Succession Act* in the *Wills Act*. However, like other states in Australia, WA has taken steps to implement a scheme for statutory wills. The *Amendment Act* provides for court authorized wills, alterations and revocations.⁸⁴ Unlike NSW, the proposed legislation would not give the court the power to authorize the will when the person lacking testamentary capacity is under 18 years of age.⁸⁵ Moreover, the application process does not appear to be bifurcated. Instead, a person makes an application, furnishing certain information and materials to the court⁸⁶ and the court must refuse an application if it is not satisfied that the application does not meet certain criteria.⁸⁷ However, like NSW the court would not be bound by the rules of evidence.⁸⁸

An important issue is the fundamental standard that is applied to determine whether the will reflects the incapacitated person's intentions. It has been pointed out that there are significant points of difference between the states.⁸⁹ The National Committee recommended that a court ought to be able to authorize a statutory will, alteration or revocation if 'the proposed will, alteration or revocation is or might be one that would

⁸¹ *Succession Act 2006* (NSW) s 18(6).

⁸² *Succession Act 2006* (NSW) s 18(7).

⁸³ *Succession Act 2006* (NSW) s 26.

⁸⁴ *Wills Amendment Act 2007* (WA) s 24.

⁸⁵ *Wills Amendment Act 2007* (WA) s 24 inserting s 40(2) into the *Wills Act 1970* (WA).

⁸⁶ *Wills Amendment Act 2007* (WA) s 24 inserting s 41 into the *Wills Act 1970* (WA).

⁸⁷ *Wills Amendment Act 2007* (WA) s 24 inserting s 42 into the *Wills Act 1970* (WA).

⁸⁸ *Wills Amendment Act 2007* (WA) s 24 inserting s 43(2) into the *Wills Act 1970* (WA).

⁸⁹ See generally, J Hockley, 'Statutory Wills in Australia: Wills for Persons Lacking Capacity' (2006) 80 *Australian Law Journal* 68; Croucher, above n 3, 8-13.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

have been made by the proposed testator is he or she had testamentary capacity.’⁹⁰ In NSW, the test is whether the proposal ‘is, or is reasonably likely to be, one that would have been made by the person if he or she had testamentary capacity.’⁹¹ Under the *Amendment Act*, the issue is whether the suggested will, alteration or revocation ‘is one which could be made by the person concerned if the person were not lacking testamentary capacity.’⁹² Arguably the test under the *Amendment Act* is closer to the approach suggested by the National Committee⁹³ and less onerous than the test in NSW because the court must be satisfied that the person could have made the will, alteration or revocation. In NSW it is necessary to show reasonable likelihood. Indeed, one commentator has suggested that the NSW approach echoes the former Victorian legislation.⁹⁴ However, it is submitted that while the test in NSW is stricter than the one in the *Amendment Act*, it is not as rigorous as that which formerly prevailed in Victoria.

Until recently, the Victorian legislation required that ‘the proposed will or revocation accurately reflects the likely intentions of the person, if he or she had testamentary capacity.’⁹⁵ The tighter test for court authorized wills meant that courts in Victoria did not automatically accede to applications, even when it was evident that the person lacked testamentary capacity. For example, in *Boulton v Sanders*⁹⁶ the Supreme Court of Victoria held that the proposed will did not accurately reflect the likely intentions of the person, particularly in the light of gifts made under earlier wills and the fact that the proponent of the new will would benefit significantly.⁹⁷ Decisions such as those in *Boulton*⁹⁸ led to a reconsideration of the Victorian legislation and the amendment of the crucial test for determining whether the proposed will represented the incapacitated

⁹⁰ National Committee for Uniform Succession Laws, above n 2, [5.45]. model provision 21(b).

⁹¹ *Succession Act 2006* (NSW) s 22(b).

⁹² *Wills Amendment Act 2007* (WA) s 24 inserting s 42(1)(b) into the *Wills Act 1970* (WA).

⁹³ See Croucher, above n 3, 9.

⁹⁴ *Ibid*, 10.

⁹⁵ Formerly *Wills Act 1997* (Vic) s 26. Note also the tests in *Wills Act 1938* (SA) s 7(3)(b); *Succession Act 1981* (Qld) s 24(d) and *Wills Act 1992* (Tas) s 27E.

⁹⁶ [2004] VSCA 112.

⁹⁷ Cf *De Gois v Korp* [2005] VSC 326.

⁹⁸ Eg *Re Fletcher; ex parte Papaleo* [2001] VSC 109.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

person's intentions. A statutory will may be authorized by the court when it 'reflects what the intentions of the person would be likely to be, or what the intentions of the person might reasonably be expected to be if he or she had testamentary capacity.'⁹⁹ If the amendments to the Victorian legislation are any indication of future legislative attitudes, it would appear that less onerous approaches (such as that reflected in the *Amendment Act*) may become the norm in Australia,

VI REVOCATION

There are a number of ways under the current law in NSW by which wills are revoked.¹⁰⁰ Section 11 of the *Succession Act* sets out an exhaustive list that includes revocation of wills made by minors and statutory wills.¹⁰¹ The effect of marriage and divorce on wills is important.

A Marriage

Currently, marriage revokes a will.¹⁰² This will remain the case.¹⁰³ More significantly, the current law in NSW is that wills in contemplation of marriage, ie wills made in contemplation of a particular marriage or wills expressed to be made in contemplation of marriage generally, are not revoked by the subsequent marriage.¹⁰⁴ The National Committee endorsed this broader approach¹⁰⁵ in preference to a limited exception where

⁹⁹ *Wills Amendment Act 2007* (Vic) s 3 substituting s 26(b) in the *Wills Act 1997* (Vic). *The Wills Amendment Act 2007* (Vic) contains a transitional provision (s 4 inserting a new section 52A in the *Wills Act 1997* (Vic)) the effect of which is that section 26, as amended will apply to an application for leave made before the commencement of the amending legislation. *The Wills Amendment Act 2007* (Vic) commenced operation on 15 August 2007.

¹⁰⁰ *Wills Probate and Administration Act 1898* (NSW) s 17.

¹⁰¹ *Succession Act 2006* (NSW) s 11(1)(a).

¹⁰² *Wills Probate and Administration Act 1898* (NSW) s 15(1).

¹⁰³ *Succession Act 2006* (NSW) s 12(1).

¹⁰⁴ *Wills Probate and Administration Act 1898* (NSW) ss 15(3) & (4).

¹⁰⁵ National Committee for Uniform Succession Laws, above n 2, [4.13].

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

a particular marriage was specifically anticipated in the terms of the will.¹⁰⁶ The broader position is restated in the *Succession Act*.¹⁰⁷

In WA, marriage also revokes a will.¹⁰⁸ However, unlike NSW, the will is revoked upon marriage unless there is a declaration that it is made in contemplation of that marriage.¹⁰⁹ A will expressed to be made in contemplation of the marriage of the testator is void if the marriage is not solemnized, unless the will provides to the contrary.¹¹⁰ The *Amendment Act* removes the requirement that there is a declaration in the will that it was made in contemplation of marriage.¹¹¹ It is sufficient if the will is expressed to be made in contemplation of the marriage¹¹² or there is other evidence establishing that contemplation.¹¹³ However, the *Amendment Act* does not appear to prevent the revocation of wills expressly made in contemplation of marriage generally.

B Divorce

Currently in NSW the issue of a decree that dissolves a marriage, a decree of nullity (in respect of a marriage which is void) or a decree that annuls a marriage, revokes a gift or power of appointment in favour of the spouse under the will.¹¹⁴ The disposition or appointment will take effect as if the testator's former spouse had died before the testator.¹¹⁵ The position under the *Succession Act* is similar¹¹⁶ (although reference is made to divorce and annulment).¹¹⁷ However, there are two important differences.

¹⁰⁶ National Committee for Uniform Succession Laws, above n 2, [4.11].

¹⁰⁷ *Succession Act 2006* (NSW) s 12(2) & (3).

¹⁰⁸ *Wills Act 1970* (WA) s 14.

¹⁰⁹ *Wills Act 1970* (WA) s 14(1)(a).

¹¹⁰ *Wills Act 1970* (WA) s 14 (2).

¹¹¹ *Wills Amendment Act 2007* (WA) s 12(1) amending s 14(1)(a) of the *Wills Act 1970* (WA).

¹¹² *Wills Amendment Act 2007* (WA) s 12(3) amending s 14(2) of the *Wills Act 1970* (WA).

¹¹³ *Wills Amendment Act 2007* (WA) s 12(3) amending s 14(2) of the *Wills Act 1970* (WA).

¹¹⁴ *Wills Probate and Administration Act 1898* (NSW) s 15A(1).

¹¹⁵ *Wills Probate and Administration Act 1898* (NSW) s 15A(1)(c).

¹¹⁶ *Succession Act 2006* (NSW) s 13(1) & (4).

¹¹⁷ *Succession Act 2006* (NSW) s 13(1).

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

Under the *Succession Act*, divorce or annulment of marriage does not revoke an appointment of the testator's former spouse as trustee of property left by the will on trust for beneficiaries that include the former spouse's children¹¹⁸ or the grant of a power of appointment exercisable by the testator's former spouse exclusively in favour of the children of whom both the testator and the former spouse are parents.¹¹⁹ These amendments were instituted as a result of the recommendations of the National Committee.¹²⁰

Currently, the court may determine that the testator did not intend the beneficial gift or power of appointment to be revoked by the termination of the marriage if there is 'any 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, power of appointment or appointment;'¹²¹ or 'there is a republication of a will after the termination of the marriage and there is no evidence of an intention to revoke the gift, power of appointment or appointment.'¹²² However, under the *Succession Act* a divorce or annulment of a marriage will not revoke a beneficial disposition or an appointment 'if a contrary intention appears in the will.'¹²³ This appears to narrow significantly the circumstances a court may take into account because an intention contrary to revocation must appear in the will. It is not sufficient to rely on oral or written statements outside the will or the lack of evidence of an intention to revoke the will.

There is no provision in the *Wills Act* dealing with the revocation of wills by termination of marriage. In this regard, WA appears to be the only state which has no legislative provision which deals with the effect of the termination of marriage on gifts or powers given under former spouses' wills.¹²⁴ The implementation of the *Amendment Act* will

¹¹⁸ *Succession Act 2006* (NSW) s 13(3)(a).

¹¹⁹ *Succession Act 2006* (NSW) s 13(3)(b).

¹²⁰ National Committee for Uniform Succession Laws, above n 2, [4.15]-[4.16].

¹²¹ *Wills Probate and Administration Act 1898* (NSW) s 15A(2)(a).

¹²² *Wills Probate and Administration Act 1898* (NSW) s 15A(2)(b).

¹²³ *Succession Act 2006* (NSW) s 13(2).

¹²⁴ Atherton and Vines, above n 1, 287.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

remedy this omission in respect to divorce and annulment.¹²⁵ However, the amendments do not preserve appointments of spouses as trustees of assets for their children. Nevertheless, a will is not revoked if there is a contrary intention in the will or if there is other evidence establishing that intention.¹²⁶ Therefore, in this regard the *Amending Act* appears to give the court wider powers than the *Succession Act*.

VII RECTIFICATION

Under the current legislation,¹²⁷ the court has had the power to rectify a will when the court is convinced that the will did not carry out the testator's intention.¹²⁸ The possible reason why the will does not carry out the testator's intentions is left open-ended. Generally an application must be made 18 months after the death of the testator.¹²⁹ However, the court may extend the period 'if the Court is satisfied that sufficient cause is shown for the failure to make the application within the period.'

Under the *Succession Act*, the court still retains the power to rectify wills,¹³⁰ and the new provision will apply immediately upon the commencement of the legislation. However there are two important differences.

The power of the court to rectify under the *Succession Act* is significantly narrower than under the current legislation which allows the court to rectify the will when it does not carry out the testator's intentions per se. Under the *Succession Act*, the court may only rectify the will when it is satisfied that the will does not carry out the testator's intentions because of a clerical error or the will did not give effect to the testator's instructions.¹³¹ The limitation ensures that the court will not be asked to carry out what would be a

¹²⁵ *Wills Amendment Act 2007* (WA) s 13 inserting section 14A in the *Wills Act 1970* (WA).

¹²⁶ *Wills Amendment Act 2007* (WA) s 13 inserting s 14A(2) in the *Wills Act 1970* (WA).

¹²⁷ *Wills Probate and Administration Act 1898* (NSW) s 29A.

¹²⁸ *Wills Probate and Administration Act 1898* (NSW) s 29A(1).

¹²⁹ *Wills Probate and Administration Act 1898* (NSW) s 29A(2).

¹³⁰ *Succession Act 2006* (NSW) s 27.

¹³¹ *Succession Act 2006* (NSW) s 27(1).

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

'guesstimate' of the testator's original intention.¹³² However, on the other hand, it may leave a court powerless to rectify a will when it has been drafted without clerical errors and without instructions. In particular, it remains unclear whether it would limit the power of the court in cases where there are homemade wills which on the evidence do not reflect the intentions of the testator, but have not been professionally drafted.¹³³ If the word 'instructions' is limited to instructions made to a legal professional practitioner, then the court's powers will be significantly curtailed. However, if 'instructions' included directions to a family member or friend assisting in the drafting of the will, the court's powers may not be quite so limited. Nevertheless, it appears unlikely that if a person completely drafted his or her own will which on objective evidence did not reflect his or her intentions at the time, it would not be possible for the court to rectify it under the new provision.

Although the legislation has retained an 18-month period after the death of the testator for the making of an application for rectification, the court may extend the period if the Court considers that it is necessary; and the final distribution of the estate has not been made.¹³⁴ In contrast the present position is that an application for rectification could still be made, even though there had been a distribution or partial distribution. A person who becomes a beneficiary by virtue of the court exercising its rectification powers could recover the assets, although there was a distribution.¹³⁵ However, the executor who had distributed the assets in accordance with statutory formalities¹³⁶ would not be liable for them.¹³⁷

There is no equivalent provision in the *Wills Act* and WA appears to be the only state which does not have a provision dealing with rectification so that the courts are presently

¹³² This was what occurred in the *Estate of Spinks* (Unreported, Supreme Court of New South Wales, Court of Appeal, 12 December 1991). Note also National Committee for Uniform Succession Laws, above n 2, [5.48]-[5.49].

¹³³ Croucher, above n 3, 14.

¹³⁴ *Succession Act 2006* (NSW) s 27(2).

¹³⁵ *Wills Probate and Administration Act 1898* (NSW) s 29A(4).

¹³⁶ *Wills Probate and Administration Act 1898* (NSW) s 92. A protective provision of some comparability in Western Australia is s 47A of the *Administration Act 1903* (WA).

¹³⁷ *Wills Probate and Administration Act 1898* (NSW) s 29A(3).

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

limited to the common law powers (of the former English Court of Probate) to rectify wills.¹³⁸ If implemented, the *Amendment Act* would cure this omission in terms broadly similar to the *Succession Act*.¹³⁹ However, the application of the order must be made within 6 months of the death of the testator,¹⁴⁰ subject to the court's power to extend the period if a final distribution has not been made.¹⁴¹

VIII SEVERAL MISCELLANEOUS MATTERS

A Extrinsic Evidence

Unaided by statute, courts developed a number of rules to assist the construction of wills. Extrinsic evidence was admitted on two bases: the armchair rule (in which the court endeavoured to place itself in the testator's position at the time the will was executed);¹⁴² and equivocations (latent ambiguities where the language in the will can be applied to each of two persons or to each of two things).¹⁴³ However, the common law extrinsic evidence rules did not allow evidence of the testator's actual intention.¹⁴⁴

Frustrated by the narrowness of the common law, some jurisdictions decided to implement provisions that enabled courts to take into account extrinsic evidence of the testator's intentions.¹⁴⁵ The National Committee also recommended both the extension of the admissible evidence to include the testator's intention and legislation to make it clear

¹³⁸ Atherton and Vines, above n 1, 317-318. See e.g. *Wills Act 1968* (ACT) s 12A(1); *Wills Act 1936* (SA) s 25AA and *Wills Act 1997* (Vic) s 31. However, for example, s 25AA(1) of the *Wills Act 1936* (SA) gives the court broader powers to rectify wills because the court may exercise the power if it satisfied 'that a will does not accurately reflect the testamentary intentions of a deceased person.'

¹³⁹ *Wills Amendment Act 2007* s 24 inserting section 50(1) in the *Wills Act 1970* (WA).

¹⁴⁰ *Wills Amendment Act 2007* s 24 inserting section 50(2) in the *Wills Act 1970* (WA).

¹⁴¹ *Wills Amendment Act 2007* s 24 inserting section 50(3) in the *Wills Act 1970* (WA).

¹⁴² *Boyes v Cook* (1880) 14 ChD 53; *Re Fowler* [1963] VR 639. For a helpful discussion see Certoma, above n 1, 143.

¹⁴³ *Re Cullen* [1946] VLR 47; *Re Fleming* [1963] VR 17.

¹⁴⁴ For a helpful discussion see Certoma, above n 1, 144-145.

¹⁴⁵ *Wills Act 1992* (Tas) s 43; *Wills Act 1968* (ACT) s 12B. Note also the later implemented provisions in *Wills Act 1997* (Vic) s 36; *Succession Act 1981* (Qld) s 33C. As to the historical antecedents of the Australian legislation see: Atherton and Vines, above n 1 343-344.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

when extrinsic evidence would be admissible.¹⁴⁶ Section 32 of the *Succession Act* states that extrinsic evidence of the testator's intention is admissible to assist in the interpretation of the language of the will, when the will or any part of the will is meaningless or ambiguous on the face of it or ambiguous in the light of the surrounding circumstances.¹⁴⁷ Evidence of the testator's intention is not admissible to establish any of the surrounding circumstances.¹⁴⁸ However, evidence that would be admissible at law for the purposes of construing a will is still admissible.¹⁴⁹

There is no equivalent provision in the *Wills Act*, though it appears that WA is not alone in this regard.¹⁵⁰ However, the *Amendment Act* has provisions in line with those recommended by the National Committee and contained in the *Succession Act*.¹⁵¹

B Thirty-Day Beneficiary Rule

Section 35 of the *Succession Act* is essentially a new provision. It is substantially based on the recommendations of the National Committee.¹⁵² The Committee considered that the period of one month after the death of the testator was not too long to wait before a gift under the will was deemed effective, taking into account that if there is any possibility of a family provision claim, there cannot be a distribution until after the period within which such a claim must be brought. The Committee also recommended that a personal representative would still be able to maintain certain dependants of the testator within the period.¹⁵³

Section 35 provides that if a disposition of property is made to a person who dies within 30 days after the testator's death, or if that or another period for survival appears in the

¹⁴⁶ National Committee for Uniform Succession Laws, above n 2, [6.29]-[6.36].

¹⁴⁷ *Succession Act 2006* (NSW) s 32(1).

¹⁴⁸ *Succession Act 2006* (NSW) s 32(2).

¹⁴⁹ *Succession Act 2006* (NSW) s 32(3).

¹⁵⁰ It appears that there is no comparable provision in the *Wills Act 1936* (SA) either.

¹⁵¹ *Wills Amendment Act 2007* (WA) s 22 inserting section 28A in the *Wills Act 1970* (WA).

¹⁵² National Committee for Uniform Succession Laws, above n 2, [6.47].

¹⁵³ National Committee for Uniform Succession Laws, above n 2, [6.47].

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

will, within the period in the will,¹⁵⁴ the will takes effect as if the person had died immediately before the testator,¹⁵⁵ unless there is a contrary intention in the will.¹⁵⁶ A general requirement in the will that the beneficiary survive the testator does not indicate a contrary intention.¹⁵⁷ The 30-day beneficiary rule will extend the operation of the doctrine of lapse,¹⁵⁸ because the doctrine will apply where the beneficiary survived the testator for a period less than 30 days or a period prescribed by will. The National Committee noted that testators often included these provisions in wills in order to minimize death duties¹⁵⁹ and such provisions may prevent multiple administrations. The Committee also argued that the provision would simplify the rules of proof when it is not clear whether the beneficiary survived the testator.¹⁶⁰ The normal operation of the survivorship rules under which the eldest is deemed to die first in an event (when the factual order of death is unclear)¹⁶¹ is rendered largely otiose.

Some states have implemented provisions similar to s 35.¹⁶² There is no equivalent provision in the *Wills Act*, nor any in the *Amendment Act*. However, WA is not alone, because it appears that other states have not implemented the 30-day beneficiary rule.¹⁶³

C Unincorporated Associations

¹⁵⁴ Amendments for a period other than 30 days were made under the *Statute Law (Miscellaneous Provisions) Act (No 2) 2007* (NSW), sch 1, s 1.23, [8]. However, as another time period will be permitted in NSW, the provision is wider than *Wills Act 1997* (Vic) s 39; *Succession Act 1981* (Qld) s 33B.

¹⁵⁵ *Succession Act 2006* (NSW) s 35(1).

¹⁵⁶ *Succession Act 2006* (NSW) s 35(2).

¹⁵⁷ *Succession Act 2006* (NSW) s 35(3).

¹⁵⁸ As to the doctrine, see Atherton and Vines, above n 1, 359-360.

¹⁵⁹ National Committee for Uniform Succession Laws, above n 2, [6.45].

¹⁶⁰ *Ibid.*

¹⁶¹ *Conveyancing Act 1919* (NSW) s 35. The position in Western Australia is different. The relevant Western Australian provision is s 120 of the *Property Law Act 1969* (WA) which provides that where the order of death is unclear the property of each person dying shall devolve as if he had survived the other person and died immediately after.

¹⁶² Eg *Wills Act 1997* (Vic) s 39; *Succession Act 1981* (Qld) s 33B.

¹⁶³ There does not appear to be a comparable provision in the *Wills Act 1936* (SA) and the *Wills Act 1992* (Tas).

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

Traditionally, gifts to or trusts for the purposes of unincorporated associations were regarded as invalid as trusts for non-charitable purposes and/or in breach of the rule against perpetuities.¹⁶⁴ Dissatisfied with the traditional rules concerning gifts in wills to unincorporated associations, some legislatures implemented provisions to save gifts and trusts for unincorporated associations.¹⁶⁵ The National Committee endorsed this approach.¹⁶⁶

Section 43 of the *Succession Act* is substantially in the terms recommended by the Committee.¹⁶⁷ It reverses the traditional principles in so far that it operates to save such gifts or trusts by stating that they have the effect of being dispositions in augmentation of the general funds of the unincorporated association.¹⁶⁸ Traditional factors, which pointed to the invalidity of such dispositions to unincorporated associations, have no effect for succession purposes.¹⁶⁹ However, s 43 does not apply to charities, as there is specific legislation, which deals with gifts to them.¹⁷⁰

Some states have already implemented similar provisions,¹⁷¹ but others have not taken action to do so.¹⁷² There is no provision equivalent to s 43 of the *Succession Act* in either the *Wills Act* or the *Amendment Act*.

D Powers of Appointment

¹⁶⁴ Eg *Leahy v Attorney-General (NSW)* [1959] AC 457; *Bacon v Pianta* (1966) 114 CLR 634 where the courts considered the wording of the gift, the size of the group to be benefited, the geographical location of the group, the subject matter of the gift and the capacity to bring the association to an end.

¹⁶⁵ Eg *Succession Act 1981 (Qld)* s 33Q.

¹⁶⁶ National Committee for Uniform Succession Laws, above n 2, [6.107]-[6.109].

¹⁶⁷ National Committee for Uniform Succession Laws, above n 2, [6.109].

¹⁶⁸ *Succession Act 2006 (NSW)* s 43(1).

¹⁶⁹ *Succession Act 2006 (NSW)* s 43(6). The traditional factors stated in the legislation are that a complete list of members cannot be compiled; or that the members of the association may not be permitted to divide the assets of the association between themselves.

¹⁷⁰ Eg *Charitable Trusts Act 1993 (NSW)*. A comparable piece of legislation concerning charities is the *Charitable Trusts Act 1962 (WA)*. Interestingly, the Western Australian legislation deems trusts for recreational purposes for the social welfare to be charitable: *Charitable Trusts Act 1962 (WA)* s 5.

¹⁷¹ Eg *Wills Act 1997 (Vic)* s 47; *Succession Act 1981 (Qld)* s 33Q.

¹⁷² It appears that there is no comparable provision in the *Wills Act 1936 (SA)* and the *Wills Act 1992 (Tas)*.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

The traditional rule (and present law in NSW) is that a hybrid power of appointment in a will (where the appointee can appoint anyone except some group or individual) constitutes an invalid delegation of the testamentary power to make a will.¹⁷³ Several states and territories have abolished the rule.¹⁷⁴ The National Committee also recommended abolition because the rule was unworkable and discredited.¹⁷⁵ Section 44 of the *Succession Act* enacted the model provision recommended by the Committee,¹⁷⁶ so that if a power or trust was created by will and it would otherwise have been valid if the testator had made it by instrument during his or her lifetime, then it will not be void as a delegation of the testator's power to make a will.

There is no equivalent provision presently under the *Wills Act*, nor contemplated by the *Amendment Act*. There appears to be no equivalent provision in the legislation of some other states.¹⁷⁷

IX CONCLUSION AND COMMENT

It is strongly arguable that the implementation of the *Succession Act* will improve the law in respect of will-making in NSW in several ways.

First, the legislation is a step towards the harmonization of the laws regarding wills and will-making throughout Australia. For example, like other jurisdictions NSW courts will have the power to authorize statutory wills for minors and persons lacking testamentary capacity. There also appears to be a growing statutory convergence in Victoria, Queensland and NSW in respect of a wide range of issues such as: rectification; extrinsic evidence; unincorporated associations and hybrid powers of appointment.

¹⁷³ *Tatham v Huxtable* [1950] 81 CLR 639; *Horan v James* [1982] 2 NSWLR 376.

¹⁷⁴ Eg *Succession Act 1981* (Qld) s 33R; *Wills Act 1997* (Vic) s 48; *Wills Act 1968* (ACT) s 14A. Note also *Re Blyth* [1997] QSC 30.

¹⁷⁵ National Committee for Uniform Succession Laws, above n 2, [6.112]-[6.113].

¹⁷⁶ National Committee for Uniform Succession Laws, above n 2, [6.113].

¹⁷⁷ Consider the *Wills Act 1936* (SA) and the *Wills Act 1992* (Tas).

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

Second, leaving aside the issue of harmonization, it is also clear that some of the provisions have merit; and may assist in avoiding unnecessary intestacy problems. For example, s 43 of the *Succession Act*, which saves testamentary gifts to unincorporated associations, has been well overdue.¹⁷⁸ Likewise, s 44 of the *Succession Act* will remove a particular application of the rule against the delegation of testamentary power that has caused uncertainty. The fact that divorce will not automatically revoke the grant of a power of appointment exercisable by the testator's former spouse exclusively in favour of the children of the former marriage¹⁷⁹ will assist in the immediate maintenance and care of children after the death of one of their parents.

Third, both the National Committee and the legislature have taken a proactive approach to the exercise of judicial power and discretion by setting down clear and specific criteria that must be followed before, for example, authorizing wills by persons lacking testamentary capacity; or rectifying wills.

However, there are still significant problems in the Australian law of wills. One is that the law reform process for wills has been very slow in states such as NSW and WA, in the sense of implementing some or all of the major recommendations of the National Committee. Another is that while the uniform succession laws project has inspired some uniform legislation or similar legislative treatment of some key areas of succession, there is no complete and all pervasive uniform code governing wills in Australia and it appears unlikely that this will be achieved in the near future. The comparison and contrast between aspects of the law of wills in WA and NSW highlights several differences in approach which in turn affects the degree of uniformity achieved.

¹⁷⁸ *Re Drummond* [1914] 2 Ch 90; *Re Price* [1943] 2 All ER 505; *Leahy v A-G for New South Wales* [1959] AC 457; *Bacon v Pianta* (1966) 114 CLR 634.

¹⁷⁹ *Succession Act 2006* (NSW) s 13(3)(b).

Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers

One divergence is the way legislative reform has been initiated. Upon commencement of operation of the *Succession Act* in NSW, the legislature will have repealed large portions of the current legislation concerning wills and replaced it with a single and new piece of legislation, largely influenced by the recommendations of the National Committee. In contrast, in WA law reform has been highly selective and eclectic, the legislature considering specific amendments to the *Wills Act* rather than adopting all or most of the recommendations of the National Committee. Therefore, proposed reforms are sometimes engrafted on pre-existing provisions rather than starting afresh. For example, reforms concerned with the execution of wills seek to apply gender specific language, but amendments in regard to revocation of wills by marriage do not appear to apply the recommendations of National Committee as to wills made in contemplation of marriage generally. Despite the best intentions and efforts of the various law reform agencies which are committed to achieving uniformity in the law of wills, divergence appears to be an inevitable and common feature of state-based legislative reform. Notwithstanding the merits of various recommendations of the National Committee, it is clear that each state will scrutinize the proposals before taking action to bring them about. Uniformity will not justify the implementation of proposals which are considered inappropriate.

Sometimes, there are convergences between NSW and WA, for example, the common approach to the reform of the law in respect of blind witnesses (notwithstanding protestations that the reforms are unsound),¹⁸⁰ extrinsic evidence and rectification. However, there are also major substantive differences. For example, while the *Succession Act* adopts the recommendations of the National Committee in respect of gifts to unincorporated associations and powers of appointment, the *Amendment Act* does not. The *Amendment Act* builds on earlier legislative provisions and makes it clear that any form of the interested beneficiary rule has no part to play in the succession law of WA. Even when the *Amendment Act* does broadly comply with the recommendations of the National Committee, there may be differences in the detail. For example, unlike courts in

¹⁸⁰ Atherton, n 53, 34-35.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

NSW, courts in WA would not be able authorize wills for minors who lack capacity. However, it ought not to be assumed that a reluctance to adopt the recommendations of the National Committee is unwarranted. So far, WA has avoided the potential problem of the 30-day beneficiary rule, which will broaden the operation of the doctrine of lapse and potentially introduce the intestacy regime when it would otherwise not have operated.

Finally, the scheme for implementing the reform provisions will differ between the two states. Central to the implementation of the *Succession Act* is its proclamation in its entirety. Within the Act, timeframes for the implementation and operation of individual provisions are set in a separate schedule.¹⁸¹ While most provisions apply to wills made on or after the commencement of the *Succession Act*,¹⁸² other provisions (such as those in respect to rectification, unincorporated associations and hybrid powers of appointment) will apply irrespective of whether the will is made before, on or after the commencement of the Act so long as the testator died on or after the commencement date.¹⁸³ Other repealed provisions¹⁸⁴ will continue to apply to wills made before the commencement of the Act. There are also specific conditions about the applicability of provisions concerning blind persons¹⁸⁵ and the effect of marriage¹⁸⁶ and divorce.¹⁸⁷ The commencement of specific provisions has evidently caused some concerns, as it has been a focus of amendments under the *Statute Law (Miscellaneous Provisions) Act (No 2) 2007* (NSW).¹⁸⁸

It appears that the reforms contemplated by the *Amendment Act* would take some time to implement. While the legislation would only come into operation on a date fixed by

¹⁸¹ *Succession Act 2006* (NSW) sch 1, s 3.

¹⁸² *Succession Act 2006* (NSW) sch 1, s 3(1).

¹⁸³ *Succession Act 2006* (NSW) sch 1, s 3(2).

¹⁸⁴ Basically *Wills Probate and Administration Act 1898* (NSW), Parts 1 and 1A.

¹⁸⁵ *Succession Act 2006* (NSW) sch 1, s 3(7).

¹⁸⁶ *Succession Act 2006* (NSW) sch 1, s 3(8).

¹⁸⁷ *Succession Act 2006* (NSW) sch 1, s 3(9).

¹⁸⁸ Sch 1, s 1.23, [16]. For example, some provisions (such as s 4, dealing with what property may be disposed of by will) which had been earmarked for immediate commencement upon proclamation notwithstanding the date upon which the will was made, will only apply to wills made on or after the date of commencement.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

proclamation,¹⁸⁹ the *Amendment Act* allows for the separate implementation of different provisions in several ways. One way is that different days could be fixed for the commencement of various provisions.¹⁹⁰ Therefore, it appears that the legislation would not necessarily come into operation in its entirety on the same day. Another method is to automatically earmark (in the legislation itself) the immediate operation of certain provisions upon the commencement of the legislation.¹⁹¹ There are also provisions which save otherwise repealed provisions for wills made before the legislation commenced.¹⁹²

Essentially the implementation of the *Succession Act* is spread out, and this will add to the complexity of will-making in NSW. The implementation of amendments in the *Amendment Act* will be equally multifaceted. Therefore, it is anticipated that some of the changes foreshadowed by the *Succession Act* and the *Amendment Act* will only gain a practical permanence and necessarily represent the entire law on some issues after several decades. However, even if the reforms are embedded in the law of each state, it remains unclear whether the kind of uniformity anticipated by the National Committee will have been achieved in all matters.

¹⁸⁹ *Wills Amendment Act 2007* (WA) s 2(1).

¹⁹⁰ *Wills Amendment Act 2007* (WA) s 2(2).

¹⁹¹ E.g. *Wills Amendment Act 2007* (WA) s 12 inserting s 14(4) of the *Wills Act 1970* (WA); s 13 inserting s 14A(4)(b) of the *Wills Act 1970* (WA).

¹⁹² *Wills Amendment Act 2007* (WA) s 16 inserting s 17 of the *Wills Act 1970* (WA).