NSW Law Reform Commission

REPORT 68 (1992) - WILLS FOR PERSONS LACKING WIL-MAKING CAPACITY

Table of Contents

Terms of Reference and Participants

To the Honourable P E J Collins, QC, MP,
Attorney General for New South Wales

WILLS FOR PERSONS LACKING WILL-MAKING CAPACITY

Dear Attorney General,

We make this Report pursuant to the reference made by the then Honourable R M Mulock, LLB, MP, Attorney General for New South Wales, to this Commission dated 23 December 1987.

The Hon R M Hope, AC CMG QC

(Chairman)

Professor David Weisbrot

(Commissioner)

Mr Ronald Sackville QC

(Commissioner)

Mr Hal Sperling QC

(Commissioner)

February 1992

Participants

The Law Reform Commission is constituted by the Law Reform Commission Act 1967. Pursuant to section 12A of the Act, the Chairman has constituted a Division for the purposes of this reference. The members of the Division are:

The Hon RM Hope QC

Professor David Weisbrot

Mr Ronald Sackville QC

Mr Hal Sperling QC

Executive Director

Mr Peter Hennessy

Research & Writing

Ms Marianne Christmann

Ms Fiona Manning

Librarian

Ms Beverley Caska

Desktop Publishing

Mrs Nozveen Khan

Mr Richard Turner

Word Processing

Mrs Nozveen Khan

Ms Nancy Klein

Mrs Shirley Lucke

Administrative Assistance

Ms Zoya Howes

1. Introduction

Background to the Reference

1.1 On 23 December 1987 the then Attorney General, the Hon R J Mulock LLB MP, gave the Commission a reference to inquire into and report upon:

(a) whether power should be given to any person or body-

(i) to give effect to a will or disposition of a testamentary nature made by or on behalf of a person lacking testamentary capacity by reason of mental disability;

(ii) to make such a will or disposition on behalf of such a person;

(b) any related matter.

1.2 The Reference arose under the Commission's Community Law Reform Program. The Program allows the Commission to give preliminary consideration to proposals for law reform made by members of the legal profession and the community at large and, where it is thought appropriate, to seek a suitable reference from the Attorney General on matters raised by the proposals.[1]

The scope of the investigation

1.3 The Commission has interpreted the terms of reference to include any person lacking testamentary capacity. The Commission, in considering the introduction of a statutory will-making scheme, was of the view that it was not appropriate to limit the scheme to those persons lacking testamentary capacity by reason of intellectual disability alone. Any scheme introduced should apply to individuals in any one or more of at least four categories:

persons suffering from a developmental disorder or disability;

persons diagnosed as suffering from a mental illness or disorder, including both organic and non-organic psychological conditions;

persons lacking capacity by reason of disease or accident, including the diseases and incapacities associated with old age and brain damage affecting capacity such as results from a stroke or accident; or

persons who may have testamentary capacity but through severe physical disability or injury are completely unable to communicate.

1.4 All persons who would otherwise be prevented from executing a valid will by reason of a failure to satisfy the requirement of testamentary capacity should be able to take advantage of a statutory will-making scheme.

The need for wills for persons lacking testamentary capacity

1.5 A statutory will-making scheme would benefit persons lacking testamentary capacity where:

a person makes a valid will and subsequently loses testamentary capacity;

a person has testamentary capacity, never makes a valid will and subsequently loses testamentary capacity; or

a person never has testamentary capacity and never makes a valid will.

1.6 In the first situation, if the person's circumstances change as a result, for example, of a child being born who is not included in the will or the person inherits property, then, subject to the provisions of the *Family Provision Act* 1982, there is currently no way of altering the will. In the second and third situations, if the person dies his or her property is distributed according to the rules of intestacy. An application may be made under the *Family Provision Act* 1982 for an order redistributing property but only a spouse, former spouse, de facto spouse, child, grandchild, dependant or a member of a household of which the deceased person was a member may apply under these provisions. An order will be made only if the Court is satisfied that the statutory criteria have been met.

1.7 In these situations, therefore, a person's property may be distributed in a way that is contrary to his or her intentions or, more accurately, what they would have been had he or she had testamentary capacity and been able to devise property. A statutory will-making scheme would allow the alteration of an existing will or the creation of a will on behalf of any person lacking testamentary capacity.

Consultation

1.8 In August 1989 the Commission distributed a Discussion Paper entitled *Wills for Persons Lacking Will-Making Capacity*[2] in which the Commission invited comment on the desirability of creating a scheme to allow court-sanctioned wills to be made on behalf of persons lacking testamentary capacity. Submissions received in response to the Paper were generally in favour of this proposal.

1.9 The Commission wishes to express its indebtedness to Mr Brian Porter, the current Protective Commissioner, for his invaluable assistance and useful practical advice on how the scheme should operate.

THE EXISTING LAW

Testamentary capacity

1.10 Testamentary capacity is essential for the making of a valid will and admission to probate. A testator must be of sound mind, memory and understanding when he or she is making a will to satisfy this requirement. A classic exposition on the degree of capability required for making a will was made by Cockburn CJ in *Banks v Goodfellow*:

> It is essential to the exercise of [testamentary] power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affection, pervert his sense of right, or prevent the exercise of his natural faculties - that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.[3]

1.11 A loss of sound mind, memory and understanding can arise from numerous conditions. Traditionally however, the law has distinguished between those persons who are generally insane and those who suffer from specific insane delusions but are otherwise sane. A condition of the mind will only be material where it affects the disposition of property in a will.[4]

1.12 Mental illness will not preclude a person from possessing testamentary capacity if it can be shown that the will was made during a lucid interval and the person satisfied the requirements of testamentary capacity at that time.[5] Insane delusions, even where only a portion of dispositions are affected, will preclude a person possessing testamentary capacity and render the whole will invalid.[6]

1.13 A will executed by a person who does not possess sound mind, memory and understanding when making the will may be declared invalid. Where a person dies without leaving a will or leaving an invalid will, his or her property will be distributed according to the rules of intestacy.

The intestacy rules

1.14 The rules of intestacy are contained in Division 2A of the *Wills Probate and Administration Act* 1898. These rules attempt to distribute a deceased person's estate in an equitable manner between a surviving spouse or de facto spouse, children, parents and other specified classes of relatives.

1.15 Under these rules, where a deceased person leaves a spouse and no children, the estate will be held in trust for the spouse absolutely but, where the person has been living at the time of his or her death with a de facto spouse for two years, the de facto spouse will receive the entire estate. Where there are children and a surviving spouse or de facto spouse, the estate will be divided between them according to a set formula. Where there is no spouse or children, the property may then go to the person's parents or other relatives, depending on the relational proximity to the deceased person.

1.16 The rules of intestacy may lead to a fair and equitable distribution of property among a person's next of kin and may come close to what the person's intentions would have been. The rules can however operate to exclude persons whom the deceased person may have wished to benefit. Friends, relatives by marriage and other relatives who are not kin are excluded from receiving any part of the estate. Conversely people may take who may not otherwise receive anything if the deceased had testamentary capacity.

1.17 The fact that property is distributed according to a fixed formula has several consequences. The most serious is that the rules cannot incorporate any assessment of the special needs of a spouse or a particular child. Another consequence is that particular items such as a home, business or jewellery are divided according to the rules and cannot be given to a person or persons in accordance with the deceased's wishes. The intestacy rules may therefore distribute property in a way that is contrary to the manner in which it would have been distributed had the person had testamentary capacity and been able to devise property.

The Family Provision Act 1982

1.18 The *Family Provision Act* 1982 enables an "eligible person" who has not received proper provision for his or her maintenance, education or advancement in life under a will or as a result of the operation of the rules of intestacy, to apply for an order for provision out of the deceased person's estate.[7] An eligible person is a person who is a spouse, former spouse, de facto spouse, child, grandchild, dependant or a member of a household of which the deceased person was a member.[8] The Act does not accommodate friends and other persons whom the deceased person may have wished to benefit.

MANAGEMENT OF THE AFFAIRS OF PERSONS WITH DISABILITIES

Inherent jurisdiction of the Supreme Court

1.19 The Supreme Court of New South Wales, from its inception in 1823, has had an inherent jurisdiction over persons who are mentally incompetent. Clause XVIII of the Charter of Justice 1823[9] provided:

> And we do hereby authorise the said Supreme Court of New South Wales to appoint ... guardians and keepers of the persons and estates of natural fools, and of such as are or shall be deprived of their understanding or reason by act of God, so as to be unable to govern themselves and their estates.

This has been interpreted to vest in the Supreme Court jurisdiction to exercise that part of the Royal Prerogative which related to persons of unsound mind as in force in England in 1823.[10]

1.20 The terms "natural fools" and "persons deprived of their understanding or reason by act of God" have escaped precise definition. The degree of incapacity required to invoke this jurisdiction is therefore uncertain. This provision is mainly of historical interest in light of the provisions of the *Protected Estates Act* 1983 and the *Disability Services and Guardianship Act* 1987.

Jurisdiction under the Protected Estates Act 1983

1.21 The *Protected Estates Act* 1983 vests jurisdiction in the Supreme Court in relation to persons who are incapable of managing their affairs. Section 13 provides:

> Where the Court is satisfied that a person is incapable of managing his or her affairs, it may make a declaration to that effect and order that the estate of the person be subject to management under the Act.

The Court may appoint a suitable person as manager of the estate or commit the management of the estate to the Protective Commissioner.[11]

The Protective Commissioner

1.22 The Protective Commissioner may be invested with the management of a person's estate from any one of four sources:

> the Supreme Court;[12]
>
> a magistrate;[13]
>
> the Mental Health Review Tribunal;[14] or
>
> the Guardianship Board.[15]

1.23 The Protective Commissioner may exercise all functions necessary and incidental to the management and care of a person's estate and such functions as may be specified by the Court.[16] The Protective Commissioner's powers are very wide[17] and allow a degree of flexibility to incorporate a person's individual needs and circumstances in managing his or her estate.

The Guardianship Board

1.24 The Guardianship Board was established by the *Disability Services and Guardianship Act* 1987. Section 14 enables the Guardianship Board, after conducting a hearing into any application made to it, to make a guardianship order if the Board is satisfied that the person is in need of a guardian, being a person "who has a disability and who, by virtue of that fact, is totally or partially incapable of managing his or her person".[18]

1.25 The Guardianship Board also has the power, as a result of an amendment to the *Protected Estates Act* 1983,[19] to make an order that the person's estate be subject to management under that Act if the Board is satisfied that the person is incapable of managing his or her affairs.[20] The Board can also request the Protective Commissioner to conduct an inquiry in relation to a person the subject of proceedings before the Board and report back to it.[21]

1.26 The effect of these provisions is that the Guardianship Board may conduct an examination of a person's capability to manage his or her person or affairs in the same way as the Supreme Court, a magistrate and the Mental Health Review Tribunal. The Board does not manage the affairs of a person. That function is referred to the Protective Commissioner.

THE LAW IN OTHER JURISDICTIONS

The English legislation

1.27 In England, legislation has been enacted to allow wills to be made for persons who are incapable of managing and administering their property by reason of mental disorder. The relevant provisions are contained in the *Mental Health Act* 1983 (UK).

1.28 Section 95 of that Act sets out the general functions of the judge with respect to the property and affairs of persons who are unable to manage or administer the same on his or her own behalf.

1.29 Section 96 provides:

> (1) ... the judge shall have power to make such orders and give such directions and authorities as he thinks fit for the purposes of that section [s95] and in particular may for those purposes make orders or give directions or authorities for-
>
> > (e) the execution for the patient of a will making any provision (whether by way of disposing of property or exercising a power or otherwise) which could be made by a will executed by the patient if he were not mentally disordered.

1.30 Section 96 empowers the judge[22] to make a will for a "patient", that is, a person "incapable, by reason of a mental disorder, of managing and administering his property and affairs".[23] The judge must however have reason to believe that the patient is incapable of making a valid will for himself or herself, and the patient must not be a minor, before he or she can order the execution of a will for a patient.[24]

1.31 The legislation does not contain any criteria specifying how the discretion is to be exercised. It is however apparent that a judge must have regard to the circumstances of the particular patient when making a will. In outlining the general function of a judge in relation to the property and affairs of a patient, section 95 requires a judge "to do all such things as appear necessary or expedient for making provision for other persons or purposes for whom or which the patient might be expected to provide if he were not mentally disordered".[25]

1.32 In *In re D(J)*[26] the Vice-Chancellor, Sir Robert Megarry, affirmed that the focus of the enquiry was the actual patient. His Honour then specified the principles which should guide the Court in deciding when and how the will-making power should be exercised:

> The first of the principles ... is that it is to be assumed that the patient is having a brief lucid interval at the time when the will is made. The second is that during the lucid interval the patient has a full knowledge of the past, and a full realisation that as soon as the will is executed he or she will relapse into the actual mental state that previously existed, with the prognosis as it actually is. ... The third proposition is that it is the actual patient who has to be considered and not a hypothetical patient. One is not concerned with the patient on the Clapham omnibus ... Fourth, ... that during the hypothetical lucid interval the patient is to be envisaged as being advised by competent solicitors. ... Fifth, in all normal cases the patient is to be envisaged as taking a broad brush to the claims on his bounty, rather than an accountant's pen.[27]

1.33 Applications under the English legislation may be made by specified categories of persons including receivers, any beneficiary under an existing will, and any person for whom the patient might be expected to provide if he or she was not mentally disordered.[28]

South Australia

1.34 The *Aged and Infirm Persons' Property Act* 1940 (SA) gives the Supreme Court a limited power to alter an existing will of a protected person. The Court can, if it appears that the will was made when the protected person suffered from an incapacity,[29] inspect the will, conduct enquiries to ascertain whether the will expresses the present desire and intention of the protected person and, if satisfied to the contrary, authorise the execution by the protected person of a new will disposing of his or her estate according to his or her present desire and intention.[30] This provision has rarely been used.[31]

Proposals for reform in Victoria

1.35 A Sub-committee of the Chief Justice's Law Reform Committee was constituted in 1983 to investigate whether the Supreme Court of Victoria should have the same power to direct and authorise the execution of a will or codicil for an infirm person as was conferred on the Court of Protection, initially by the *Administration of Justice Act* 1969 (UK) and now by the *Mental Health Act* 1983 (UK).

1.36 The principal recommendation in the Sub-Committee's Report[32] was that the Supreme Court should be given a similar power which would enable a judge:

> ... to direct or authorise that a will be made for any person of full age, if the Judge has reason to believe that the person is by reason of injury, disease, senility, illness or physical or mental infirmity incapable of making a valid will for himself.[33]

1.37 The Sub-committee's recommendations mirrored closely the English scheme except in two material respects. First, the scheme was not limited to "patients" as defined in the English legislation and encompassed any person who the Court had reason to believe was incapable of making a valid will. Secondly, any person was entitled to make an application to the Court for a will to be made, provided that leave was obtained from a Master where the person applying was not the Public Trustee.[34]

1.38 The Sub-committee's recommendations have yet to be implemented.

Other jurisdictions

1.39 No other Australian jurisdiction has legislation allowing a statutory will to be made for a person lacking testamentary capacity.

FOOTNOTES

1. The nature and progress of the Community Law Reform Program is discussed in detail in the Commission's Annual Reports.

2. DP 20, 1989.

3. (1870) LR 5 QB 549 at 564.

4. *Tippet v Moore* (1911) 13 CLR 248.

5. See eg *Kenny v Wilson* (1911) 11 SR (NSW) 460; *Bailey v Bailey* (1924) 34 CLR 558.

6. *Woodhead v Perpetual Trustee Co Ltd* (1987) 11 NSWLR 267. Prior to Woodhead the tainted portions could have been severed as a result of the decision in *In the Estate of Bohrmann* [1938] 1 All ER 271.

7. *Family Provision Act* 1982, s7.

8. *id*, s6.

9. Promulgated pursuant to the provisions of the *New South Wales Act* (4 GEO.IV C.96).

10. *RH v CAH* (1984) 1 NSWLR 694.

11. *Protected Estates Act* 1983, s22.

12. *id*, s13.

13. *id*, s16.

14. *id*, s17, s18, s19.

15. *id*, s17A.

16. *id*, s24.

17. See s24(2) for an inclusive list of functions.

18. *Disability Services and Guardianship Act* 1987, s7.

19. *Protected Estates (Disability Services and Guardianship) Amendment Act* 1987.

20. *Protected Estates Act* 1983, s17A.

21. *id*, s6(2).

22. Section 94 of the *Mental Health Act* 1983 (UK) allows the functions conferred on the judge to be exercised by the Lord Chancellor, any nominated judge, the Master of the Court of Protection or any nominated officer. Almost all statutory wills are however made by the Master.

23. *Mental Health Act* 1983 (UK), s94(2).

24. *id*, s94(4).

25. *id*, s95(1)(c).

26. [1982] 1 Ch 237.

27. *id*, 243.

28. Court of Protection Rules 1984 (UK), r17.

29. Incapacity is defined in s7 of the *Aged and Infirm Persons' Property Act* 1940 (SA).

30. *Aged and Infirm Persons' Property Act* 1940 (SA), s29(2).

31. H E Zelling, Chairman of Law Reform Committee of South Australia in a letter to the Chairman, NSWLRC dated 3 October 1989.

32. Chief Justice's Law Reform Committee (Vic), *Wills For Mentally Disordered Persons*, 1985.

33. *id*, para 53(a).

34. *id*, para 53(b).

2. Recommendations

2.1 This chapter sets out the Commission's recommendations. A draft Bill, the *Wills, Probate and Administration (Statutory Wills) Bill* to implement the Commission's recommendations is annexed to this Report. The references to clauses appearing at the end of most of the recommendations are references to the draft Bill. Those recommendations which are procedural in nature should be implemented by amending the rules of the Court rather than as substantive provisions in the draft Bill.

A statutory will-making scheme should be introduced

> **The Commission recommends the introduction of a statutory will-making scheme which will enable wills to be made on behalf of persons lacking testamentary capacity.**

2.2 Where a person lacking testamentary capacity dies his or her property may be distributed in accordance with an outdated will or the rules of intestacy. The distribution of property may be modified by an order under the *Family Provision Act* 1982. A statutory will-making scheme is a means of providing a person lacking testamentary capacity with a will reflecting, as far as possible, current intentions or at least what his or her intentions would have been but for the disability.

2.3 A statutory will-making scheme should not include a power to review the reasonableness at an earlier time of dispositions made by a person then having testamentary capacity on the grounds that the person now lacks such capacity. Rather the power should be exercised only in situations where a will or a new will is necessary to avoid a person's property being distributed in a manner contrary to his or her intentions or what those intentions would have been if he or she had testamentary capacity at the present time.

2.4 A statutory will-making scheme would greatly enhance the rights and dignity of persons with disabilities by enabling their property to be devised appropriately by having regard to their current situation.

The statutory will-making power to be vested in the Supreme Court

> **The Commission recommends that the power to make statutory wills be vested in the Supreme Court. (clause 32FB(1))**

2.5 In Discussion Paper No 20, *Wills for Persons Lacking Will-making Capacity (1989)*, the Commission's preliminary analysis of a statutory will-making scheme was premised on the assumption that the power to make statutory wills should reside in the courts. The Commission has received a number of submissions[1] suggesting that this power should be the responsibility of the Guardianship Board, primarily on the ground that it would be less expensive. It was also argued that the Board's proceedings were preferable because of their informal nature.

2.6 The Commission is not persuaded by these arguments for three reasons:

> Testamentary capacity is a legal concept familiar to the courts and customarily applied by the courts.
>
> The informality and privacy which are claimed as virtues of the Guardianship Board can also be provided by the Protective Division of the Supreme Court as may be appropriate.
>
> The Protective Division already has an analogous power to examine whether a person is capable of managing his or her affairs and to order that the estate of the person be subject to management.

2.7 The Commission therefore considers that the Protective Division of the Supreme Court is the most suitable forum in which to vest a statutory will-making power.

Persons covered by the scheme

> **The Commission recommends that the scheme cover any person lacking testamentary capacity. (clause 32FC)**

2.8 The scheme should apply to any person lacking testamentary capacity who, as a result, is prevented from executing a valid will. There does not appear to be any justification for limiting the scheme to persons falling within the ambit of the *Mental Health Act* 1983 (UK) or the *Protected Estates Act* 1983.

Who may apply for a statutory will.

> **The Commission recommends that any person should be entitled to apply to the Court to make a statutory will. The application should be made in accordance with rules of the Court. (clause 32FE)**

2.9 The English legislation, as noted above, limits the right to make an application to specific categories of persons. The Commission takes the view that other persons may have good reason to bring an application. Solicitors, social workers and health care workers who may be closely involved with the person should be entitled to make applications. The Protective Commissioner who may already be managing the person's financial affairs should also be entitled to make an application.

Joining the person lacking testamentary capacity as a defendant

> **The Commission recommends that a person lacking testamentary capacity, who is the subject of an application for the making of a statutory will, be joined as the defendant in the application. (To be prescribed by the rules of Court)**

2.10 Making a statutory will on behalf of a person lacking testamentary capacity is a significant intrusion on the person's freedom and autonomy. The Commission therefore considers that such a process should not occur without giving the person lacking testamentary capacity the opportunity to challenge the application.

2.11 Even where a person lacking testamentary capacity is not in a position to challenge the application, the service of a summons on the person as defendant serves to inform the person about the process taking place. This approach is consistent with the current emphasis on informing persons with disabilities of any decisions which may affect them and should not be dispensed with unless the Court is satisfied that some detriment may result to the person lacking testamentary capacity.

Joinder of the Protective Commissioner

> **The Commission recommends that the Protective Commissioner be given the power to apply to be joined in any proceedings for the making of a statutory will. (To be prescribed by the rules of the Court)**

2.12 Given that the Protective Commissioner may already be managing the affairs of a person lacking testamentary capacity, he or she may be able to assist the Court in dealing with an application for the making of a statutory will. He or she may be able to furnish the Court with, for example, details of a person's financial affairs or of persons with an interest in the application. The Commission considers that it is appropriate to give the Protective Commissioner the power to apply to be joined in these circumstances.

2.13 The Commission recommends that even if the Protective Commissioner chooses not to apply to be joined to the proceedings, he or she should nevertheless be entitled to attend and be heard at the hearing. (clause 32FG)

Leave to make application

> **The Commission recommends that the leave of the Court must be obtained before an application for an order for the making of a statutory will may proceed. (clause 32FF)**

2.14 The requirement that the leave of the Court must first be obtained is intended to screen applications and allow only adequately founded applications to proceed. By making it possible for any person to apply for the making of a statutory will, there is a concern that frivolous or vexatious applications may be lodged, or relatives may make applications for the purpose of ascertaining what provision, if any, the person who is the subject of an application has made for them in a will.

2.15 In order to obtain leave an applicant should have to satisfy the Court that there are reasonable grounds to believe that the person for whom the statutory will is sought to be made *may* be incapable of making a will. (At the actual hearing of the application for the order, the applicant must *prove* that the person is incapable of making a valid will). In addition the applicant should have to satisfy the Court that there are reasonable grounds to believe it may be appropriate that a statutory will should be made.

Who should be notified

> **The Commission recommends that an applicant should be required by the Court to notify those persons specified by the Court as having a sufficient interest in the proceedings. (To be prescribed by the rules of the Court)**

2.16 The making of a statutory will may have serious consequences for beneficiaries under an existing will or persons who would take on intestacy or are entitled to make an application under the *Family Provision Act*. Notifying all relevant persons of an application for the making of a statutory will is therefore important. It is envisaged that the Court will specify those persons to be notified when granting leave for the application for an order.

2.17 In this respect the Commission's approach is substantially the same as the approach taken in the English legislation where an applicant is required to give a notice of hearing to "such other persons who appear to the court to be interested as the court may specify".[2]

2.18 The Commission, in recommending that the Court be given a discretion to dispense with the notification requirements, has sought to accommodate situations where the objectives of the legislation would be defeated by delay. A case illustrative of the kind of situation envisaged by the Commission is that of *In re Davey (dec'd)*[3] in which the testatrix was 92 years of age and in very bad health. The Court dispensed with the notification procedure and ordered a statutory will. Within one week of this emergency procedure the testatrix died. Notification however should be dispensed with only in exceptional circumstances.

Lack of testamentary capacity

> **The Commission recommends that an applicant under the scheme be required to prove that the person for whom a statutory will is to be made lacks testamentary capacity before a statutory will may be made on his or her behalf. (clause 32FI)**

2.19 The Commission is of the opinion that the Court should not be empowered to order a statutory will on a person's behalf unless it is proven that the person for whom the will is to be made is incapable of making a valid will. This contrasts with the position under the *Mental Health Act* 1983 (UK) which requires only that a judge has "reason to believe" that a patient is incapable of making a valid will before a statutory will may be ordered.[4]

Factors to be considered by the Court

> **The Commission recommends that the Court should seek to make the will which would have been made by the person lacking will-making capacity if the person had the capacity to make a will at the time of the hearing of the application. (clause 32FH)**
>
> **The Commission recommends that in so doing the Court should consider the following factors (clause 32FJ):**
>
> **a. any evidence relating to the wishes of the person for whom the will is to be made;**

b. the likelihood of the person acquiring or regaining capacity to make a will at any future time;

c. the terms of any valid will previously made by the person and the interests of the beneficiaries under that will;

d. the interests of any person who would be entitled to receive any part of the estate of the person if the person were to die intestate;

e. the likelihood of an application being made under the *Family Provision Act* 1982 for or on behalf of an eligible person (within the meaning of that Act) in respect of the property of the person for whom the will is to be made and the provision that the Court might order to be made for the eligible person under that Act;

f. the circumstances of any person for whom the person might reasonably be expected to make provision under a will;

g. any gift for a charitable or other purpose the person might reasonably be expected to give or make by a will;

h. the likely assets of the estate;

i. any other matter that the Court considers to be relevant.

2.20 *A Guiding Principle*. The approach adopted by the Commission is that in determining the provisions of a statutory will the Court shall, so far as is possible, make a statutory will in the terms in which a will would have been made by the person lacking will-making capacity if the person had the capacity to make a will at the time of the hearing of the application. The Commission, by recommending that the Court make a will which the person would have made had he or she had testamentary capacity, intends to direct the Court's attention to the actual person at the time the application is being considered and not some hypothetical person. Sir Robert Megarry, Vice Chancellor, expressed this view in *In re D(J)*:[5]

> ... the court must seek to make the will which the actual patient, acting reasonably, would have made if notionally restored to full mental capacity, memory and foresight.

The Commission agrees with this approach.

2.21 *The Factors*. The Commission has specified what it considers to be the most important factors to be considered by the Court in making a statutory will. This differs from the approach adopted in the United Kingdom, where the legislature has left it entirely to the Court to formulate the principles which should guide it in making a statutory will.

Factor (a) is intended to reinforce the importance which should be attached to giving effect to the person's wishes in so far as they are ascertainable. A person lacking testamentary capacity may nonetheless have clearly indicated his or her own wishes but, where this is not the case, friends, relatives and other persons should be permitted to give evidence of the person's wishes as expressed by word or conduct.

Factors (b) is intended to enable tthe court to refrain from making a statutory will where the person is likely to gain testamentary capacity and therefore become capable of executing a valid will for himself or herself.

Factors (c) and (d) are intended to encourage the Court to consider the impact of making a statutory will on any person who would receive part of the person's estate if he or she was to die without a statutory will having been made.

Factor (e) is intended to avoid duplication of proceedings caused by eligible persons applying under the *Family Provision Act* for provision out of the estate after a statutory will has been made.

Factor (f) has regard to the interests of any person who should be provided for out of the person's estate but is not included in factors (c) to (e) inclusive.

Factor (g) requires the Court to have regard to the interests of any charity, benevolent society or other organisation which, by reason of the person's affiliation or connection might expect to be pro-vided for out of the person's estate.

Factor (h) is intended to allow the Court to assess the various claims to the person's estate and make provision in light of the likely nature and size of the estate.

Factor (i) allows the Court to consider any other factor consistent with the scheme of the Act, for example, any statement of preference concerning particular individuals made by a person lacking testamentary capacity. This would be consistent with allowing the person's views, as far as they are formed free of disability, to be taken into account. A further factor would be evidence that a person had deliberately refrained from making a will, which may suggest that the person intended that only his or her family would inherit any property on his or her death.

The execution of a statutory will

The Commission recommends that a statutory will ordered by the Court, or an alteration to an existing statutory will, be executed by the Registrar or Deputy Registrar in a manner prescribed by the rules of the Court.

2.22 In England, execution of a will made for a person incapable of managing and administering his or her property by reason of a mental disorder is in accordance with clause 97(1) of the *Mental Health Act* which provides:

> (1) Where under clause 96(1) above the judge makes or gives an order, direction or authority requiring or authorising a person (in this clause referred to as the "the authorised person") to execute a will for a patient, any will executed in pursuance of that order, direction or authority shall be expressed to be signed by the patient acting by the authorised person, and shall be:
>
> (a) signed by the authorised person with the name of the patient, and with his own name, in the presence of two or more witnesses present at the same time, and
>
> (b) attested and subscribed by those witnesses in the presence of the authorised person, and
>
> (c) sealed with the official seal of the Court of Protection.

The effect of a statutory will

The Commission recommends that a statutory will should have the same effect as a will executed under the *Wills Probate and Administration Act* 1898. (clause 32FL)

2.23 The Commission considers it appropriate to place statutory wills on the same footing as ordinary wills in all respects. It should, for example, be possible for a statutory will to be revoked by a person who later acquires testamentary capacity. This is consistent with the approach taken in the English legislation.[6]

Alteration of a statutory will

The Commission recommends that a Court may alter a statutory will on the application by any person. (clause 32FB(2)(a))

The Commission further recommends that the procedures for making a statutory will also apply to an application for alteration of a statutory will.

2.24 A statutory will should have the same standing as a will made in the ordinary way. Therefore, it should be possible to alter a statutory will in the event of a change of circumstances which make it appropriate to vary the distribution of assets after death. Any person should be entitled to apply to the Court for alteration of a statutory will in the same way as any person may apply for the making of a statutory will.

2.25 The requirement that leave must be obtained before proceeding with an application for alteration will preclude the kinds of applications considered earlier.[7] Executing the altered will in the same way as the original statutory will should also lead to an approach consistent with that taken in the *Wills, Probate and Administration Act* 1898.[8]

Revocation of a statutory will

The Commission recommends that a statutory will may be revoked by the same procedure as is followed when it is made (clause 32FB(2)(b)), unless the testator acquires or regains testamentary capacity in which case the statutory will should be capable of being revoked in the same way as an ordinary will (clause 32FM). A statutory will or a specific bequest contained therein should also be automatically revoked in accordance with the general provisions of the *Wills, Probate and Administration Act* 1898.

2.26 Any person should be entitled to apply to the Court for revocation of a statutory will by following the same procedures applicable to the application for the making and alteration of a statutory will.

2.27 Where a person for whom a statutory will is made acquires or regains testamentary capacity that person will be in a position to execute a valid will. The person should therefore be entitled to request the return of the statutory will from the registry and to revoke the statutory will in the same manner as a will executed pursuant to section 7 of the *Wills, Probate and Administration Act* 1898 if he or she so desires.

2.28 Sections 15 and 15A of the *Wills, Probate and Administration Act* 1898 will apply to statutory wills so that , subject to a precise application of those provisions, a statutory will would be revoked by the marriage of the person for whom the statutory will is made, and any beneficial gift in favour of a former spouse would be revoked if the marriage is terminated.

The Family Provision Act 1982

The Commission recommends that the *Family Provision Act* 1982 apply to statutory wills in the same way as ordinary wills. (clause 32FN)

2.29 While it is to be assumed that an eligible person's interests will be properly weighed when a statutory will is made, it is conceivable that such a person may feel that he or she has been inadequately provided for under the statutory will or circumstances may change after the will is made, through for example a child being born to the person who is the subject of a statutory will. In these circumstances an eligible person should be entitled to make an application under the *Family Provision Act* and should not be prevented from doing so because a statutory will exists.

2.30 The Commission appreciates that this may involve the Equity Court reviewing a statutory will. On a practical level however, section 9(3) of the *Family Provision Act*, which sets out the factors the Court may take into consideration when deciding what provision ought to be made in favour of an eligible person, is sufficiently wide to allow the Equity Court to consider the original reasons for making the statutory will.

Application to minors

The Commission recommends that the statutory will-making scheme should include minors. (clause 6)

2.31 Section 6A of the *Wills, Probate and Administration Act* 1898[9] gives the Supreme Court power to grant leave to a minor to make a will. Consistent with this approach the Commission has chosen not to follow the English legislation which expressly provides that the power of the judge to make an order for the execution of a will shall not be exercisable when the patient is a minor[10], and recommends that a statutory will may be made for a minor who lacks testamentary capacity.

Proceedings for a statutory will to be public

> **The Commission recommends that proceedings for the making of a statutory will (including any order made by the Court) should be open to the public and that a statutory will should be a public document subject to the Court's discretion to order otherwise. (To be prescribed by the rules of Court)**

2.32 The Commission considers there is no justification for departing from the general rule requiring courts to conduct hearings in public. The Commission however acknowledges the practice of the Protective Division under the *Protected Estates Act* 1983 of conducting proceedings in camera. This practice is in accordance with section 80(f) of the *Supreme Court Act* 1970, which provides that proceedings in the Equity, Probate or Protective Division may be conducted in the absence of the public, where the Court thinks fit.

2.33 In the Commission's view, the Court's discretion to close the Court is a sufficient measure to ensure that proceedings are not conducted in the presence of the public where it would be inappropriate to do so. Furthermore, a statutory will, being in effect a court order, should be a public document subject to the Court's discretion to order otherwise.

Costs

> **The Commission recommends that the costs of or incidental to proceedings for the making of a statutory will should be determined in accordance with the Court's discretion. (clause 32FO)**

2.34 The Supreme Court has a discretion as to how costs are awarded.[11] The Commission does not believe that the exercise of this discretion should be qualified.

Conflict of laws

2.35 Where a statutory will is made in New South Wales and a person lacking testamentary capacity later resides in another state or a person's real and personal property is distributed in several states, an issue may arise as to whether the statutory will should be enforced in other states when the person dies. Rules governing the laws which should apply are necessary.

2.36 The choice of law rules in Australia are currently the subject of inquiry by the Australian Law Reform Commission.[12] Until a report on this project is published the Commission does not consider it appropriate to develop any special conflict of law rules in relation to statutory wills.

Deposit in Supreme Court Registry

> **The Commission recommends that statutory wills should be deposited in the Supreme Court Registry. (clause 32)**

2.37 The Commission considers it appropriate to require that all statutory wills executed by the Registrar or Deputy Registrar be deposited in the Court registry. Section 32 of the *Wills, Probate and Administration Act* 1898 already makes provision for the deposit of wills in the registry of the Court. Unless the Court otherwise orders, statutory wills would remain in the registry until the death of the person for whom the will was made, or unless requested to be delivered to a testator who has satisfied the Court that he or she has acquired or regained testamentary capacity.

Procedures for statutory wills

The Commission recommends that Part 76 of the Supreme Court Rules 1970, which deal with procedures under the *Protected Estates Act* 1983, should be amended to incorporate the procedures required for the operation of a statutory will-making scheme.

2.38 Part 76 of the Supreme Court Rules requires applications under the *Protected Estates Act* to be made by summons returnable at the first instance before the Protective Commissioner. The Commission envisages that applications for the making of a statutory will would be made in the same way. Part 76 also sets out at length the requirements for affidavits and this could be suitably modified to accommodate statutory wills.

FOOTNOTES

1. eg Jim Simpson *Submission* 15 November 1989.

2. Court of Protection Rules 1984, r18(4).

3. [1980] 3 All ER 342.

4. s96(4)(b).

5. [1982] 1 Ch 237, 244.

6. See eg. *Mental Health Act* 1983 (UK) s97(3).

7. para 2.14

8. Section 18 of the *Wills Probate and Administration Act* 1898 requires an alteration to a will to be executed as a will. The section also deems an alteration to be duly executed if "the signature of the testator and the subscription of the witnesses are made in the margin or on some other part of the will opposite or near to such alteration or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will".

9. Introduced by the *Wills, Probate and Administration (Amendment) Act* 1989.

10. *Mental Health Act* 1983 (UK) s96(4)(a).

11. *Supreme Court Act* 1970, s76.

12. Australian Law Reform Commission, Discussion Paper 44 *Choice of Laws*, 1990.

Appendix A

WILLS, PROBATE AND ADMINISTRATION (STATUTORY WILLS) AMENDMENT BILL 1992

NEW SOUTH WALES

[STATE ARMS]

No. , 1992

A BILL FOR

An Act to amend the Wills, Probate and Administration Act 1898 to enable wills to be made for persons lacking will- making capacity.

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Wills, Probate and Administration (Statutory Wills) Amendment Act 1992.

Commencement

2. This Act commences on a day to be appointed by proclamation.

Amendment of Wills, Probate and Administration Act 1898 No 13

3. The Wills, Probate and Administration Act 1898 is amended as set out in Schedule 1.

SCHEDULE 1 - AMENDMENTS

(Sec. 3)

(1) Section 3 (**Definitions**):

(a) Insert in section 3 after the definition of "Seal of the Court": **"Statutory will"** means a will made in accordance with Part 1B.

(b) Omit the definition of "Will", insert instead:

"Will" includes:

(a) a testament, a codicil and any appointment by will or by writing in the nature of a will in exercise of a power; and

(b) a statutory will, unless a provision of this Act provides to the contrary; and

(c) any other testamentary disposition.

(2) Section 6 (**Will of minor**):

At the end of section 6, insert:

(2) A statutory will made for a minor is valid.

(3) Section 7 (**Form and manner of execution of wills**):

After section 7 (4), insert:

(5) This section does not apply to a statutory will.

(4) Section 9 (**Appointments by will to be executed like other wills etc.**):

At the end of section 9, insert:

(2) This section does not apply to an appointment made by a statutory wiin exercise of any power.

(5) Section 17 (**Manner of revocation**):

(a) After “this section” in section 17 (1), insert “or as provided in Part 1B”.

(b) In section 17 (2), after “another will”, insert “or statutory will”.

(6) Section 18 (**Effect of alteration in a will**):

After section 18 (2), insert:

(3) This section does not apply to a statutory will.

(7) Section 18A (**Certain documents to constitute wills etc.**):

After section 18A (2), insert:

(3) This section does not apply to a statutory will.

(8) Section 19 (**Revival**):

After “section 7” in section 19 (1) (b), insert “or Part 1B”.

(9) Section 20 (**When a devise not to be rendered inoperative etc.**):

Omit “as aforesaid”, insert instead “in accordance with section 17 or Part 1B”.

(10) Section 29A (**Power of the Court to rectify wills**):

After section 29A (5), insert:

(5A) This section does not apply to a statutory will.

(11) Section 32 (**Deposit of will in registry of the Court in testator's lifetime**):

(a) After section 32(1), insert:

(1A) The Registrar or Deputy Registrar is to deposit in the registry of the Court each statutory will he or she executes.

(1B) The statutory will:

(a) is to remain in the registry until the death of the testator for whom it was made; or

(b) is to be given to the testator if the testator so requests and the Court is satisfied that the testator has acquired or regained will- making capacity since the will was made.

(1C) On the death of the testator, the Registrar must deliver the statutory will to either of the executors named in the will, or in case of doubt to such person as the Court may direct.

(b) From section 32 (2), omit "so deposited", insert instead "deposited under subsection (1) or (1A)".

(c) After "deposited wills" in section 32 (2), insert "or deposited statutory wills".

(12) Part 1B:

After Part 1A, insert:

PART 1B - STATUTORY WILLS

Object of this Part

32FA. The object of this Part is to establish a scheme to enable valid wills to be made for persons lacking will-making capacity and for the admission of those wills to probate.

Definitions

32FB. (1) In this Part:

"Court" means the Supreme Court;

"order" means order under section 32FD.

(2) In this Part, a reference to the making of a statutory will includes a reference to the following:

(a) the alteration of a statutory will;

(b) the revocation of a statutory will;

(c) the making of a codicil to a statutory will.

Statutory wills valid

32FC. (1) A will made for a person who, at the time the will is made, lacks will-making capacity is valid if made in accordance with this Part.

(2) A person lacks will-making capacity if for any reason the person does not have the capacity to make a valid will.

(3) Without limiting subsection (2), a person may lack will-making capacity if the person is mentally ill or mentally disordered or is unable to communicate because of physical or other disability.

(4) For the purposes of this Part, a person does not lack will-making capacity merely because the person is a minor.

Orders for making of statutory wills

32FD. The Court may order the Registrar or Deputy Registrar to execute a will made in terms directed by the Court for a person who lacks will-making capacity.

Application for making of order

32FE. (1) Any person may apply to the Court for an order to be made.

(2) The application must be made in accordance with the rules of the Court.

Leave to make application required

32FF. (1) The leave of the Court must be obtained before the application for an order is made.

(2) The Court must refuse to give leave:

(a) if it is not satisfied that there are reasonable grounds to believe that the person for whom the statutory will is to be made under the order may be incapable of making a valid will; or

(b) whether or not the Court is satisfied that there are such grounds, if it is not satisfied that there are reasonable grounds to believe that it may be appropriate for a statutory will to be made for the person.

(3) The Court is not bound by the rules of evidence and may inform itself as it thinks fit in relation to any of the matters referred to in subsection (2).

(4) Evidence relating to the matters referred to in subsection (2) may be given to the Court in such form and in accordance with such procedures as the Court thinks fit,except as provided by rules of the Court.

Attendance at hearing of application

32FG. (1) At the hearing of an application for an order:

(a) the person for whom it is sought to make a statutory will may, and if the Court so directs must, attend and is entitled to be heard; and

(b) the person may be represented by a barrister or solicitor or, with the leave of the Court, by another person; and

(c) the Protective Commissioner is entitled to attend and to be heard.

Basic principle for making of statutory will

32FH. In considering an application for an order, the Court is to apply the principle that a statutory will should, as nearly as practicable, be made in the terms in which a will would have been made by the person lacking will-making capacity if the person had the capacity to make a will at the time of the hearing of the application.

Requirements to be satisfied before order made

32FI. The Court may make an order if, after conducting a hearing of the application for the order, the Court is satisfied:

(a) that the person for whom the will is to be made is incapable of making a valid will; and

(b) that, in the circumstances, a will should be made for the person.

Particular matters to be considered by the Court

32FJ. In considering an application for an order the Court must take into account the following matters:

(a) any evidence relating to the wishes of the person for whom the will is to be made;

(b) the likelihood of the person acquiring or regaining capacity to make a will at any future time;

(c) the terms of any valid will previously made by the person and the interests of the beneficiaries under that will;

(d) the interests of any person who would be entitled to receive any part of the estate of the person if the person were to die intestate;

(e) the likelihood of an application being made under the *Family Provision Act* 1982 for or on behalf of an eligible person (within the meaning of that Act) in respect of the property of the person for whom the will is to be made and the provision that the Court might order to be made for the eligible person under that Act;

(f) the circumstances of any person for whom the person might reasonably be expected to make provision under a will;

(g) any gift for a charitable or other purpose the person might reasonably be expected to give or make by a will;

(h) the likely assets of the estate;

(i) any other matter that the Court considers to be relevant.

Appointments by statutory will

32FK. (1) A valid appointment in exercise of a power may be made by a statutory will.

(2) If a statutory will makes an appointment in exercise of any power, the appointment is a valid execution of a power of appointment by will even if it has been expressly required that a will made in exercise of the power should be executed with some additional or other form of execution or solemnity.

Effect and construction of statutory will

32FL. (1) A statutory will has the same effect for the purposes of grant of probate or administration, and for all other purposes, as a will executed in accordance with section 7 by a person with capacity to make the will.

(2) A reference in this Act to a testator is taken, in relation to a statutory will, to be a reference to the person for whom the will was made

(3) The construction of a statutory will is not altered merely because the testator acquires or regains capacity after the execution of the will.

Revocation of statutory will by testator with capacity

32FM. A person who acquires or regains capacity to make a will after a statutory will has been made for the person may revoke the statutory will in the same way as a will executed under section 7 may be revoked.

Application of Family Provision Act 1982 and other documents

32FN. A reference in any Act (including the Family Provision Act 1982), statutory instrument or other document to a will includes a reference to a statutory will.

Costs

32FO. The Court may make orders in respect of costs of or incidental to proceedings under this Part in accordance with section 76 of the Supreme Court Act 1970.

Application of common law and equity

32FP. The principles and rules of the common law and of equity are, to the extent that they are not inconsistent with this Part, to apply to a valid statutory will in the same way as they apply to a will executed in accordance with section 7.

(13) Section 42 (**Application for probate or administration**):

After “deposited wills” in section 42 (3), insert “(and deposited statutory wills)”.