

SECOND REPORT

to

THE ATTORNEY-GENERAL

RELATING TO THE ATTESTATION OF WILLS BY INTERESTED WITNESSES

and

DUE EXECUTION OF WILLS

DARWIN

NOVEMBER 1979

Members of the Northern Territory Law Review Committee:

The Honourable Mr Justice Toohey (Chairman), the
Honourable Mr Justice Muirhead, I. Barker Q.C.,
Mr T.I. Pauling S.M., Mrs N.P. Withnall,
Messrs G.R. Clark, J. Dorling, P.G. Howard,
D. Mildren, A.R. Miller, M. Maurice, T. Riley.

REPORT OF THE NORTHERN TERRITORY LAW REVIEW COMMITTEE -
RELATING TO THE ATTESTATION OF WILLS BY INTERESTED WITNESSES AND
TO DUE EXECUTION OF WILLS

To: The Honourable P.A.E. Everingham,
Attorney-General for the Northern Territory of Australia.

Sir,

Several aspects of the law relating to wills have been under consideration by this Committee for some time; two such matters are those mentioned in the title to this report. The Committee considers that these may conveniently be the subject of a report to you while consideration of the effect of marriage upon wills and the effect of divorce on wills receive separate and further consideration.

PART I. GIFTS TO ATTESTING WITNESSES

1. Present Legislation

Section 17 of the Wills Act 1938 provides:

"(1.) Where any person to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift or appointment of or affecting any real or personal estate (other than a charge or direction for the payment of any debts) is given or made by a will, attests the execution of the will, the devise, legacy, estate, interest, gift or appointment shall, so far only as concerns the person so attesting the execution of the will or the wife or husband of that person or any person claiming under that person or wife or husband, be void.

(2.) Notwithstanding any such devise, legacy, estate, interest, gift, or appointment, the person so attesting shall be admitted as a witness to prove the execution of the will or the validity or invalidity thereof."

2. The Legislation in South Australia and Victoria

2.1 South Australia

Requires the executor or administrator to file with the application for probate an affidavit reciting the fact that the will has been attested by a beneficiary. The Registrar can either proceed with the application, require further affidavits or refer the matter to the Court for probate to be granted in solemn form. A beneficiary under the will, or a prior will, or any person who would take on intestacy can also require proof in solemn form. The will is valid in its entirety.

2.2 Victoria

The amendment provides that the gift to the interested witness or spouse is valid if -

- (a) there are two witnesses who are not interested;
- (b) the interested witness would be entitled to a share in the distribution of the estate if the testator had died intestate, and the intestacy share would be greater than the gift in the will. If the share is less than the gift the beneficiary is entitled only to the intestacy share as if it had been left.

2.3 An interested witness whose share has been limited by paragraph (b) referred to in 2.2 may apply to a Court to have this limit abolished. The Court may do so on being satisfied that the testator knew and approved of the entitlement of the interested witness and the entitlement did not result from any undue influence.

3. The Possibilities

- 3.1 The South Australian amendment is simpler. It abolishes the rule that militates against interested witnesses and leaves the matter to the discretion of the Registrar or the Court, who can allow the gift. It provides no special rules for interested witnesses. Presumably the gift would be allowed if it is proved that it is made freely with the knowledge of the testator.
- 3.2 The Victorian amendment abolishes the rule but creates a new set of rules and a special procedure to cover gifts to attesting witnesses. The linking of such gifts to shares on intestacy could be justified on the grounds that it ensures that any gain from undue influence is no greater than a share on intestacy, and therefore discourages undue influence. But this situation would not often occur. The effect of the Victorian rules is that any interested witness who would not take on intestacy, or who is given a greater gift than his or her intestate share, is forced to take a Court action to uphold the gift. Under the South Australian rule such a gift, or any gifts, would only need to be justified if the Registrar or an interested party requires proof in solemn form.

4. Recommendation

The Committee respectfully recommends -

- (i) Abolition of the existing rule by the repeal of section 17 of the Wills Act;
- (ii) Enactment of a new section 17 following section 17 of the Wills Act (S.A.) as inserted by section 4 of the Wills Act Amendment Act, 1972 (S.A.) which appears in Appendix 1 hereto.

APPENDIX 1

Extract from Wills Act Amendment Act, 1972 (S.A.).

"4. Section 17 of the Principal Act is repealed and the following section is enacted and inserted in its place:-

17.(1) No will or testamentary provision therein shall be void by reason only of the fact that the execution of the will is attested by a person, or the spouse of a person, who has or may acquire, in terms of the will or provision, any interest in property subject thereto.

(2) Where the execution of a will has been so attested the following provisions shall apply:-

- (a) any application for probate of the will, or letters of administration of the estate, of the deceased must be accompanied by an affidavit reciting the fact that the execution of the will has been so attested;
- (b) the Registrar may require one or more of the attesting witnesses to furnish an affidavit or affidavits setting forth in detail the circumstances surrounding the execution and attestation of the will;
- (c) the Registrar, if not completely satisfied of the due execution of the will may refer the matter to a Judge of the Court;
- (d) the Court may -
 - (i) upon the reference of proceedings under paragraph (c) of this sub-section;

or

- (ii) upon application by any beneficiary under the will or a previous will of the deceased, or a person who would be interested in the estate of the deceased upon intestacy,

grant probate of the will of the deceased in solemn form, or make any other order that it is competent for the Court to make upon an application for proof of the will in solemn form.

(3) ...".

APPENDIX 2

Extract from Wills (Interested Witnesses) Act, 1977 (Vic)

"(3) Where a will is attested by an interested witness -

- (a) the interested witness is a competent witness to prove the execution of the will or its validity or invalidity;
- (b) subject to paragraph (c) the will has the same force and effect as it would have had if neither the interested witness nor the spouse of the interested witness had been given anything under the will;
- (c) in relation to the property or power given to the interested witness or the spouse of the interested witness (as the case may be) under the will -
 - (i) where, disregarding the attestation by the interested witness and any attestation by any other interested witness, the will is duly executed the will has the same force and effect as if the interested witness had not attested the will;

- (ii) where sub-paragraph (i) does not apply and the interested witness or spouse of the interested witness (as the case may be) would be entitled to a share in the estate of the testator if the testator had died wholly intestate and that share is of an amount or value equal to or greater than the amount or value of his entitlement under the will and any partial intestacy the will has the same force and effect as if the interested witness had not been an interested witness;
- (iii) where sub-paragraph (i) does not apply and the interested witness or the spouse of the interested witness (as the case may be) would not be entitled to share in the estate of the testator if the testator had died wholly intestate, neither he nor any person claiming through him is entitled to any property or to exercise any power under the will or any partial intestacy; and
- (iv) where sub-paragraph (i) does not apply and the interested witness or the spouse of the interested witness (as the case may be) would be entitled to a share in the estate of the testator if the testator had died wholly intestate, and that share is of an amount or value less than the amount or value of his entitlement under the will the following provisions apply:-

He is not entitled to any property or to exercise any power under the will and the gift of the property or power to him is deemed to have been revoked by a codicil to the will;

He shall be deemed to have been given by codicil to the will a gift of the share that he would have been entitled to if the testator had died wholly intestate;

He is not entitled to take any further part of the estate of the testator and any part of the estate which is not disposed of by the operation of the will as it is deemed to be modified by codicils in accordance with this sub-paragraph shall devolve as if he had predeceased the testator without issue;

- (d) for the purposes of paragraph (c) the entitlement of a person shall be deemed to consist of the property given him by the will together with the subject-matter of any power conferred on him thereby; and
- (e) the amount or value of a share or entitlement referred to in paragraph (c) shall be assessed as at the date of the death of the testator and in conformity with any amounts and values which may be assessed for duty under the Probate Duty Act 1962."
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PART II. DUE EXECUTION OF WILLS

1. Present Legislation

1. Section 8 of the Wills Act 1938 provides "A will shall not be valid unless it is in writing and executed in the following manner:-

- (a) It shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction;
- (b) The signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
- (c) The witnesses shall attest and subscribe the will in the presence of the testator, but a form of attestation shall not be necessary."

Mrs N.P. Withnall, in her Discussion Paper presented to the Committee states: "...There are, of course, good and hallowed reasons for such formalities, and probably the number of cases in which it might be reasonable to depart from those formalities are rare, but I recommend that a provision in terms of section 12(2) of the South Australian Act be adopted. That section requires probate in solemn form, and casts a high standard of proof on the applicant - (he must satisfy the Court that '...there can be no reasonable doubt that the deceased intended the document to constitute his will...'). Further, section 12(2) of the South Australian Act provides:

"A document purporting to embody the testamentary intentions of the deceased person shall, notwithstanding that it has not been executed with the formalities required by this Act, be deemed to be a will of the deceased person if the Supreme Court, upon application for admission of the document to probate as the last will of the deceased, is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will."

Recommendation

We therefore respectfully recommend that a proviso be added to section 8 of the Wills Act 1938 based on the wording of section 12(2) of the Wills Amendment Act (No. 2) 1975 of South Australia.

J L Toohay

Chairman

A R Miller

Executive Member

D Milden

Member