Where There Is A Will, There Is A Way – A new Wills Act for New Zealand

By Nicola Peart*

I. Introduction

On 1 November 2007 New Zealand acquired for the first time its own, home grown, Wills Act to replace the Wills Act 1837 (Imp).[1] Although the New Zealand Parliament made several amendments, the Imperial statute remained the foundation statute for wills in New Zealand.[2] It has stood the test of time and, as a result of the transitional provisions, will have to continue doing so for some years to come. Although s 4 states that the Wills Act 2007 applies to wills of persons dying on or after 1 November 2007, most of the substantive reforms will not affect wills executed before that date.[3]

The Wills Act 2007 implements many of the recommendations made by the New Zealand Law Commission in its 1997 Report entitled *Succession Law:* A *Succession (Wills) Act*.[4] The Law Commission was of the view that there was nothing wrong with the essence of the old law, but its language was archaic, it contained anomalies and anachronisms, and it would benefit from a few substantive changes to ensure testators' wishes were not unnecessarily frustrated. Accordingly, it recommended that the 1837 Act and its amendments be replaced by a single local Act in language that was contemporary and plain so that it could be more readily understood and applied.[5]

Much of the Wills Act 2007 is indeed a restatement of the old law. It is also expressed in plain English and set out logically under clear headings. The overly long provisions of the past have been replaced with short sentences and subsections, and the terminology has been simplified. The term 'testator' has been replaced with will-maker,[6] and the expression 'testamentary document', was used in the Bill as an inclusive term to refer to the various forms of testamentary documents,

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1 The WA No 36 received its Royal assent on 28 August 2007 and its commencement date is 1 November 2007: WA [WA] s 2.

2 The Act remained in force in New Zealand by virtue of s 3(1) and the First Schedule to the Imperial Laws Application Act 1988.

3 Section 40. For example, the validation power in s 14 and the ability to save gifts to witnesses in s 13 cannot be used in relation to wills executed before 1 November 2007.

4 New Zealand Law Commission, Report 41, Succession Law A Succession (Wills) Act (1997) available at <http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_41_113_R41.pdf>

5 Ibid, para 4.

6 WA s 6 defines 'will-maker' as the equivalent of 'testator' and 'testatrix'.

is now simply called a will.[7] The aim was to make the Act as uncomplicated as possible to ensure its accessibility and usefulness to anyone wanting to make a will.[8]

The substantive amendments made by the Act take account of changes in family relationships, remove age restrictions on the ability of minors to execute wills, and reform the law in various ways to enable better effect to be given to a testator's wishes. One of the most significant changes is the power to validate wills that do not comply with the prescribed formalities for making, changing, revoking or reviving wills.[9] That change follows the Australian lead and avoids wills being invalidated in circumstances where the document is shown to express the deceased's testamentary intentions.[10] Another important change is the widening of the rules of evidence that may be admitted to assist in ascertaining a testator's intentions. In various parts of the Act, the Court is empowered to consider external evidence of the deceased's intentions in determining both the validity and construction of wills.[11] This change further contributes to the Act's goal of giving better effect to testamentary intentions. The Act also restates certain common law rules in statutory form.

The Wills Act 2007 does not create a code of rules.[12] Nor does it purport to cover all aspects relating to wills.[13] The common law will therefore continue to influence the law governing wills. In fact, the role of the Courts is enhanced by this Act, because they have discretionary powers not previously enjoyed.

There are two fundamental principles that underpin the law governing wills. The first is to uphold the ascertainable intentions of will-makers, though this principle is subject to the substantial inroads made by the Family Protection Act 1955, the Law Reform (Testamentary Promises) Act 1949 and, more recently, the Property (Relationships) Act 1976. The second principle is that great care must be taken in determining whether what is claimed to be an expression of a will maker's wishes is genuinely so, because a will operates only after its maker has died. Over the past few decades, there has been a growing concern that there was an imbalance in favour of the second principle. The plain intentions of testators were easily defeated by technicalities and minor mistakes which the courts were unable or unwilling to overcome.[14] The changes made by the Wills Act 2007 are intended to provide the means to redress the imbalance so that better effect can be given to the ascertainable intentions of testators without losing sight of the caution expressed in the second principle.

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7 WA s 8.

8 Wills Bill as reported from the Justice and Electoral Committee (78–2) at p 2 available at <http://www.parliament.nz/NR/rdonlyres/E9767055-8F2B-4390-ADFE-F626C01C4D12/54373/DBSCH_SCR_3736_4892.pdf>

9 WA s14.

10 South Australia first introduced the dispensing power, as it is referred to in Australia, by inserting s 12(2) into its Wills Act 1936 in 1975: Wills Act Amendment Act (No 2) 1975 (SA). A dispensing power has since been adopted in all the other Australian states and territories. Commentators in New Zealand have been recommending this reform for over 25 years: Julie Maxton 'Execution of wills: The formalities reconsidered' (1980–1982) 1 *Canterbury Law Review* 408; Rosemary Tobin 'The Wills Act formalities: A need for reform' [1991] NZLJ 195.

11 For example, s 14(3) and s 32.

12 In contrast to the Succession (Homicide) Act 2007 which establishes a code of rules to replace the common law forfeiture rule.

13 For example, testamentary capacity is not addressed by the Act.

14 See for example the comments made by Fisher J in *Re Jensen* [1992] 2 NZLR 506 in relation to rectification of wills.

This paper will consider whether the Act is likely to achieve these aims. The focus of this paper is on the changes made by the Act, first in regard to the making of valid wills, and then the changing and revoking of wills and gifts in wills. The paper will conclude with a discussion of the provisions in the Act that purport to restate the common law pertaining to mutual wills and correction of wills.

II. Making a valid will

A will is valid if it was made by a person entitled[15] and competent to make a will[16], complies with the formalities prescribed by s 11 or is validated by the Court under s 14, and has not been revoked by the will-maker or by operation of law.[17]

A. Meaning of will

Section 8 defines a will as a document that is made by a natural person and disposes of property to which the will-maker is entitled when he or she dies, or to which the will-maker's personal representative becomes entitled as personal representative after the person's death, or appoints a testamentary guardian. Curiously, no mention is made of the appointment of an executor, which wills typically do. Whenever the term 'will' is used, it includes a codicil or other testamentary document that changes, revokes or revives a will.[18] The use of one word aids simplicity, which is one of the aims of the Act.

Section 8(6) contains a strange provision, which may lead to confusion. It provides that s 108 of Te Ture Whenua Maori Act 1993 overrides s 8. This suggests that wills of Maori land have a different meaning and do something different. That misconceives s 108. It merely restricts the range of beneficiaries to whom Maori freehold land may be devised on death. Owners of Maori land who wish to make a will must comply with the ordinary rules for making, changing and revoking wills.[19] The Law Commission proposed a similar provision to s 8(6) in its Draft Wills Act, but that clause related to the property that a deceased might dispose of and stated that nothing in the section was to restrict the operation of s 108 Te Ture Whenua Maori Act.[20] In the context of a clause dealing with the kinds of property that may be the subject matter of a will, the reference to s 108 was appropriate, but it is misplaced in s 8 which is concerned with the meaning of a will.

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15 WA s 9 determines minors' capacity.

16 *Banks v Goodfellow* (1870) LR 5 QB 549 establishes the requirements for testamentary capacity. See also *Bishop v O'Dea* [1999] 18 FRNZ 492 and *Nijsse & Ors v Squires & Anor* [2004] Court of Appeal CA CA53/04 (Unreported, McGrath, Hammond & Chambers JJ, Dec 15, 2004).

17 WA ss 16, 18 and 19 deal with revocation. Section 7 defines a valid will as one that complies with s 11 or is declared valid under s 14.

18 WA s 8(2) and (3).

19 Native Land Laws Amendment Act 1895 s 33 invalidated the custom of ōhākī (oral will usually made close to death), but the custom is still in use. See for example *Re Moeahu* (1996) 14 FRNZ 609. During the first reading of the Bill on 10 October 2006, Dr Pita Sharples (MP, Maori Party) called upon Parliament to allow ōhākī as an alternative expression of a will-maker's intentions: available at <http://www.parliament.nz/en-NZ/PB/Debates/Debates/e/7/d/48HansD_20061010_00000846-Wills-Bill-First-Reading.htm>

20 NZLC above n 4, at 22.

B. Capacity of minors to make wills

Section 9 of the Wills Act 2007 changes the capacity of minors to make wills. There is no longer a minimum age requirement and Court approval can be given generally rather than for a specific will, or for a specific change or revocation of a will. Under the old law, minors could make a valid will if they were or had been married, if they were or had been in a civil union or a de facto relationship.[21] The minimum age for entering into any of these relationships is 16 and parental or Court approval is required if the minor is under the age of 18.[22] Minors who were not in one of those relationships could make a will only if they were at least 16 and had the approval of the District Court or the Public Trust to make, change or revoke a particular will.[23] Minors under the age of 16 were unable to make wills.

Section 9 retains the right of minors to make wills if they are or were married, in a civil union or in a de facto relationship, but it has removed the minimum age requirement for minors who are not in such relationships. Minors of any age can now make a will with the approval of the Family Court if the Court is satisfied that the minor understands the effect of making, changing or revoking wills. The approval is general, rather than for a specific will. The Court's assessment of the minor's understanding must therefore be focussed on their testamentary capacity generally, rather than their ability to understand a specific will. This change accords with the general law relating to minors' capacity,[24] and recognises that in the context of modern family structures the intestacy rules may not be appropriate.

The law has been further amended by s 10 to enable minors who have agreed to marry or enter into a civil union to make a will in contemplation of that marriage or civil union, but the will takes effect only if the marriage or civil union occurs.[25] There is no equivalent provision for persons under 18 who have agreed to enter into a de facto relationship. They must obtain Court approval under s 9 or wait until they have begun living together as a couple with the approval of their parents or guardians.

De facto partners under the age of 18 should be encouraged to make a will if they want their partner to inherit, because for purposes of the intestacy rules in the Administration Act 1969, and claims under the Family Protection Act 1955 and the Property (Relationships) Act 1976, both de facto partners must be at least 18 years old to be eligible.[26] De facto partners must be forgiven for any confusion they may feel in regard to the status of their relationship when they are 16 or 17 years old. Their relationship is legally recognised for some of their succession rights but not for others. This inconsistency defies common sense and ought to be removed.

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21 Wills Amendment Act 1969 s 2, as amended by the Wills Amendment Act 2005 s 6.

22 Marriage Act 1955 ss 17 and 18; Civil Union Act 2004 ss 7, 19 and 20; Interpretation Act 1999 s 29A.

23 Wills Amendment Act 1969 s 2.

24 Care of Children Act 2004 ss 6, 36 and 38; *Gillick v West Norfolk And Wisbech Area Health Authority and Department of Health and Social Security* [1986] 1 AC 112, [1985] 3 All ER 402, [1985] 3 WLR 830, [1986] 1 FLR 224; United Nations Convention on the Rights of the Child (1989) Article 12.

25 Section 10 is one of the exceptions to the rule in s 18 that a will is revoked on marriage or entry into a civil union: WA s 18(2).

26 The definition in Property (Relationships) Act 1976 s 2D determines a surviving de facto partner's eligibility to make a claim under that Act and to inherit under the intestacy rules (Administration Act 1969 s 2) or claim under the Family Protection Act 1955 s 2.

As before, a 'military or seagoing person' under the age of 18 may also make a will and does not require Court approval.[27]

C. Formalities for execution

Section 9 of the Wills Act 1837 set out the formal requirements for executing a will. It was introduced to simplify the making of wills in the United Kingdom by introducing uniform rules for all wills, other than wills of soldiers and seamen.[28] Prior to 1837 the formal requirements for wills depended on the type of property to be disposed of. There were ten forms of will, each for different circumstances and with different requirements. The importance of land to the feudal system meant that succession to real property was tightly regulated in comparison to succession to other types of property.[29] Section 5 of the Statute of Frauds 1677 laid down strict requirements for wills devising realty. They had to be in writing, signed by the testator in the presence of three or four credible witnesses who were required to attest and subscribe the will in the testator's presence.[30] If there was any defect in the execution the will was void. These wills were under the jurisdiction of the common law courts. Wills dealing with a deceased's personal estate were under the control of the Ecclesiastical Courts, and did not even require writing in some circumstances.[31] The complex rules pertaining to the making of wills led to the adoption of the Wills Act 1837.

Section 9 of that Act required all wills, other than wills of seamen at sea and soldiers in military action, to be in writing, signed at the foot or end of the document by the testator or another in the testator's presence and by his direction.[32] The signature had to be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and those witnesses were required to attest and subscribe the will in the presence of the testator. The requirement that the signature be at the foot or end of the document was clarified in s 1 Wills Act Amendment Act 1852 (Imp), but otherwise s 9 applied unamended in New Zealand until the Wills Act 2007 came into force. Strict compliance with s 9 was required. Minor mistakes or technical glitches invalidated the will.[33]

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27 Section 10(4).WA.

28 Commissioners on the Law of Real Property, Fourth Report, HC 226 (1833) at p 12.

29 Wills of certain types of land tenure became legally possible only after the Statute of Wills was adopted in 1540. For a brief overview of the legal history of wills see A Borkowski, *Textbook on Succession* (1997) pp39–41 and R F Atherton and P Vines, *Succession; Families, Property and Death* (2003) at 24–28. The history is more fully described in T Jarman and R Jennings, *Jarman on Wills Volume 1* (1951); Sir John Baker, *The Oxford History of the Laws of England: Volume VI: 1483–1558*, (2003) ch 35 for wills relating to land; for wills relating to personality, see R H Helmholz, *The Oxford History of the Laws of England: Volume I: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s*, (2004) ch 7.

30 A witness was not credible if he or she had an interest in the will.

31 See the references in note 29 above.

32 The Statute of Frauds 1677 (Imp) s 22 exempted soldiers and seamen from its requirements and that exemption was continued in the Wills Act 1837 s 11. Those provisions were replaced in New Zealand by the Wills Amendment Act 1955 Part 1.

33 It is interesting to note that in *Re Menzies; NZ Guardian Trust Ltd v Public Trust* [2006] High Court New Plymouth CIV 2006–443–00318 (Unreported, Judges, 20 October 2006) the Court did not adopt the same rigid approach to a will made under the Protection of Personal and Property Rights Act 1988 s 55. It admitted the will to probate even though it was not executed in the presence of both witnesses.

Langbein identified four main functions in the wills formalities: an evidentiary, channelling, cautionary, and protective function.[34] The evidentiary function is served by the need for writing, the will-maker's signature and the attestation of the witnesses. They provide the Court with reliable evidence of the will-maker's testamentary intent and of the terms of the will. The formalities also have a channelling function, because they channel will-makers into standard forms of behaviour, organization, language and content of most wills. The cautionary function of the formalities reminds the will-maker of the importance attached to the making of a will. The signing of a written will in the presence of witnesses and their attestation create a ceremony that impresses on the participants the solemnity and legal significance of what is being done. Finally, the formalities have a protective function. The presence of two independent witnesses is aimed at reducing the risk of fraud, forgery or undue influence.[35]

These functions are important to the principles underpinning wills. It is not surprising, therefore, that s 11 of the Wills Act 2007 makes only one change to the formalities for executing wills. It omits the requirement that the signature be placed at the foot or end of the will. It may now be placed anywhere on the document. The effect of this change is that parts of a will that come after the signature can now be admitted to probate without the need to resort to strained constructions to avoid those parts being omitted from probate.[36] Although this change follows similar changes made in the United Kingdom[37] and most of the Australian states[38], it is a curious change. The position of the signature has the practical advantage of indicating where the will ends and guards against unauthorised additions to the will.[39] In view of the validation power in s 14, the need for this change is questionable.

The retention of the other formalities, in particular the requirement that the witnesses be present at the same time to witness the same act, means that wills such as the one in *Re Colling* will still be invalid.[40] Mr Colling was in hospital when he executed his will. A patient in the next bed and the ward sister were his witnesses, but as he started to sign his will the ward sister was called away. Mr Colling continued to sign his will witnessed by the patient who attested and signed the will. When the ward sister returned, Mr Colling acknowledged his signature, whereupon she signed the will. The will was held to be invalidly executed, because the two witnesses had witnessed different acts. This type of departure from the formalities will continue to render

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34 JH Langbein, 'Substantial compliance with the Wills Act' (1975) 88 *Harvard Law Review* 489.

35 Ibid at pp 492–495.

36 Wills Act Amendment Act 1852 (Imp) s 1 provided that nothing underneath a signature was effective. The Courts construed this section very liberally. See for example *Stewart (deceased), Re* [1991] High Court Auckland A389/85 (Unreported, Tompkins J, 17/12/91) where the Court admitted all three pages of a will to probate, even though the signatures of the testator and the witnesses appeared at the bottom of the second page and the residuary gift was on the third page. In *Millar (deceased), Re* [1986] High Court Auckland CP1362/86 (Unreported, Sinclair J, 26/7/88) on the other hand, the portion below the signature was excluded, but that contained only her funeral and burial instructions.

37 Administration of Justice Act 1982 (UK) s 17 amended Wills Act 1837 s 9 to remove that requirement.

38 For example, Wills, Probate and Administration Act 1898 (NSW), 7(1)(c); Wills Act 1936 (SA) s8(b); Wills Act 1970 (WA) s 8(b).

39 In *Fairhurst, Re (dec'd)* [1976] 1 NZLR 51, for example, the Court found that the writing after the signature did not exist when it was signed. Only the part before the signature was admitted to probate.

40 *Re Colling* [1972] 3 All ER 729: [1972] 1 WLR 1440. See also *Re Harvey* [1986] High Court, Whangarei PS04/85 (Unreported, Thorp J, 14/1/86), *Parata v Parata* [1989] High Court, Auckland M205/87 (Unreported, Gault J, 8 November 1989), *Young v Young* [2002] High Court, Auckland P2689/01 (Unreported, Morris J, 22 May 2002).

wills invalid under s 11 of the Wills Act 2007, though the Court now has the power to validate non-compliant wills under s 14.

D. Validation of non-compliant wills

A major change in the Wills Act 2007 is the power given to the Courts by s 14 to validate wills that do not comply with the formalities prescribed by s 11. This change follows similar amendments made in Australia, though the power differs between the States. Queensland requires substantial compliance with the formalities and has taken a stringent approach to wills that do not meet the formalities.[41] The other states followed South Australia's lead of providing a general dispensing power.[42]

Given the importance of the power to validate non-compliant wills, it is worth quoting s 14 in full:

> (1) This section applies to a document that –
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> (a) appears to be a will; and
> (b) does not comply with section11; and
> (c) came into existence in or out of New Zealand.
>
> (2) The High Court may make an order declaring the document valid, if it is satisfied that the document expresses the deceased person's testamentary intentions.
>
> (3) The Court may consider –
>
> (a) the document; and
> (b) evidence on the singing and witnessing of the document; and
> (c) and evidence on the deceased person's testamentary intentions; and
> (d) evidence of statements made by the deceased person.

Section 14 imposes three requirements for a will to be declared valid. First, there must be a document. Second, the document must appear to be a will, and third, the Court must be satisfied that the document expresses the deceased's testamentary intentions.

1. *Document*

The Court's validation power can only be invoked if there is a 'document'. This term is defined in s 6 as 'any material on which there is writing'. Section 29 of the Interpretation Act 1999 defines 'writing' as representing or reproducing words, figures, or symbols in a visible and tangible form or medium (for example print).[43] The term 'material' is not defined in either of these Acts, but the remedial nature of s 14 and the purpose of the Act as a whole suggest that it should be given a wide meaning. It would naturally include paper, fabric, stone, wood, metal, glass, or photographs on which writing appears.[44] A will written on a wall, as in the South Australian case of *Estate of Slavinskyj*, would qualify as a document under s 14.[45] It would also include electronically stored

41 Succession Act 1981 (Qd) s 9; R F Atherton and P Vines, *Succession; Families, Property and Death* (2003) at 253.

42 Wills Act 1936 (SA) s 12(2) inserted by Wills Act Amendment Act (No 2) 1975 (SA).

43 There is no restriction as to the agent that can be used in writing a will, but if part of it is written in pencil and the other part in ink, there is a risk that the part in pencil may be seen as a draft only and not intended to be part of the will: *In the Goods of Adams* (1872) LR2 P&D 367. The Court could come to the same conclusion when exercising the validation power under s 14.

44 In *Re Estate of Torr* (2005) 91 SASR 117 a photograph was admitted as a document.

45 *Estate of Slavinskyj* (1988) 53 SASR 221. The relevant part of the wall could have been cut out, because it was made of plasterboard, but the Court accepted a photograph.

documents, even if they could not be printed, as long as they could be seen on a screen.[46] A text message could qualify as a document, and so could a film, video or CD on which a will had been written. Even writing on the shell of an egg would come within the meaning of 'document', though the will would have to be brief![47]

A visual or audio recording of a person making an oral will may strain the meaning of 'document', because there would be no writing, only spoken words. In *Treacey v Edwards* the Supreme Court of New South Wales admitted an audio tape of a will to probate, but that was after the meaning of document had been amended in that State to include 'anything from which sound, images or writings can be reproduced'.[48] Those additional words do not appear in the definition of 'document' in s 6 of the Wills Act 2007. On a literal interpretation of that definition audio or visual recordings of oral wills would not appear to qualify as a document. But a purposive interpretation could support admitting such recordings as documents. The medium would qualify as material, and the words are arguably reproduced in a visible or tangible form, especially if blind and deaf persons are considered. Blind persons often use speaking computers and deaf persons may read lips. The evidentiary function of requiring a document is not eroded by an audio or visual recording. The recording is direct evidence of the will-maker's expressed intentions and the spoken words can be easily and reliably converted into a conventional written document. Nonetheless, until the definition is amended or its meaning is construed expansively, as suggested, doubt must remain whether an audio or visual recording of an oral will can constitute a document for purposes of the Wills Act.

An oral will that was not recorded in some manner is even less likely to qualify as a 'document', not even if it was made formally in the presence witnesses. Even though the evidentiary, cautionary and protective functions of such a will may not be undermined, there would be neither 'material' nor 'writing', only the evidence of the witnesses as to what the will-maker said. Section 14 does not appear to envisage such indirect evidence of the will-maker's intentions, at least not as a starting point. It would seem, therefore, that the Maori custom of ōhākī would not meet the threshold requirement for the Court's validation power. Ironically, if someone had minuted the ōhākī in writing, there would be a document within the meaning of the Act. Whether it would be admitted to probate would depend on the Court being satisfied that the other requirements of s 14 were satisfied. But at least it would meet the threshold requirement and allow the Court to consider its validity.

It is unfortunate that there is only one gateway into s 14 and that is by means of a document. It is the ticket without which admission to the Court's validation powers cannot be granted. It is the only requirement prescribed by s 11 which is not dispensable and its definition is capable of a narrow construction. All the other requirements can be excused. The ability of the Courts to give better effect to a deceased's testamentary intentions is thus constrained, even where those intentions can be readily and reliably ascertained by means other than a document, as in the case of an

46 In *Re Trethewey* (2002) 4 VR 406 a computer file on a hard drive was admitted as a will. <<*In the Will of Mark Edwin Trethewey* [2002] VSC 83.

47 *Hodson v Barnes* (1926) 43 TLR 71 where a ship's pilot with a liking for eggs wrote his will on the empty shell of a hen's egg. The will was not admitted because of lack of animus testandi, not because it was written on an egg shell.

48 In *Treacey v Edwards* (2000) 49 NSWLR 739 the Court noted the concern about audio tapes and videos of oral wills, but commented that for some testators recording their testamentary intentions on a tape might be easier than writing them down. In case that was wrong, the Court held that the tape could also be admitted under the doctrine of incorporation, because there was a written will that referred to the audio tape.

audio or visual recording of an oral will or an ōhākī.[49] In this respect the Act achieves its goal only partially.

2. *Document appears to be a will*

The second pre-requisite for the validation power in s 14 is that the document must 'appear to be a will.' The document must therefore purport to do all or any of the things described in the definition of a will in s 8: dispose of property to which the person is entitled when he or she dies, appoint a testamentary guardian, or exercise a power of appointment. Alternatively, the document must refer to an existing will which the document is purporting to change, revoke or revive.[50] The validation power applies not only to the making of a will, but to all forms of testamentary actions including the making of a codicil.

The content of the document may be sufficient to establish that the document appears to be a will. If not, the circumstances of its 'execution', and any statements made by the deceased about the document may shed some light on its apparent purpose. The fact that it must appear to be 'a will' suggests some finality about the document and may be used to exclude drafts or notes of instructions.

3. *Expresses the deceased's testamentary intentions*

If there is a document and it appears to be a will, the validation power can be exercised. The Court must be satisfied that the document expresses the deceased's testamentary intentions. This is not the 'substantial compliance' model that Queensland adopted. It is similar to the dispensing power of the other Australian states, though it is expressed slightly differently. The Australian statutes permit the Courts to validate a document that purports to be a will if they are satisfied that 'the deceased person intended the document to constitute the person's will.'[51] A New Zealand Court will have to be satisfied that the document 'expresses the deceased person's testamentary intentions'. The difference in wording could be material.

The Australian wording has been construed by some courts to mean not only that the document must express the deceased's final intentions as to the disposition of the property referred to in the document, but also that it is that particular document that the deceased intended to be his or her will. Wills instructions and drafts of wills have been excluded by this approach.[52] Other Courts have opted for a more liberal approach, focussing on the substance of the document rather than its form.[53] The New Zealand provision could also be construed liberally, because it does not require the Court to be satisfied that the document is the deceased's will, merely that it expresses the deceased's testamentary intentions. The emphasisis is not on the subject document, but on its content. However, the requirement that the document must appear to be a will may be used to follow the more constrained interpretation.

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49 See the comments made by Dr Pita Sharples (MP, Maori Party) during the first reading of the Wills Bill on 10 October 2006, accessed on 21/2/07 available at <http://www.parliament.nz/en-NZ/PB/Debates/Debates/e/7/d/48HansD_20061010_00000846-Wills-Bill-First-Reading.htm>

50 WA s 8(3).

51 Wills, Probate and Administration Act 1898 (NSW) s 18A. See also Wills Act 1936 (SA), s 12(2); Wills Act 1970 (WA) s 34; Wills Act 1997 (Vic) s 9.

52 See for example *Re Application of Brown; Estate of Springfield* (1991) 23 NSWLR 535 and *Baumanis v Praulin* (1980) 25 SASR 423. See further R Atherton, 'Dispensing with Wills Formality in Australia: the problem of the draft will in the tranquil revolution' (1994) 2 *APLJ* 68.

53 *In the Matter of the Will of Lobato; Shields v Caratozzolo* (1991) 6 WAR 1; *Estate of Blakely* (1983) 32 SASR 473.

In the Australian states, other than Queensland, documents that were unsigned or not properly witnessed have been admitted to probate as the deceased's will.[54] The dispensing power has also been exercised to admit lost wills,[55] a suicide note,[56]and where two will-makers executed each other's will.[57] The greater the departure from the prescribed formalities, the more difficult it will be to satisfy the Court that the document was intended to be the deceased's will.[58]

The test in s 14 is not an objective one. It is specific to the particular deceased person. No two cases are necessarily the same. The wills may suffer from the same defects, but in the one case the Court may conclude that the document does express the deceased's testamentary intentions, whereas in the other it does not.[59] The Court must be satisfied to the ordinary civil standard of proof that the evidence as a whole, including any evidence of the will-maker's statements and testamentary intentions, shows that the document expresses the deceased's testamentary intentions.[60]

Australian precedent will no doubt assist the New Zealand Courts in developing this jurisdiction but, as indicated above, there are different approaches. New Zealand will have to develop its own approach with due regard to its social and cultural circumstances and Parliament's intent. The remedial purpose of s 14 and the aims of the Wills Act invite an expansive approach to the Court's validation power, whilst not losing sight of the evidentiary, protective and cautionary functions that the formalities would have served if they had been satisfied.

Two recent New Zealand cases that predate the adoption of the Wills Act provide interesting fact scenarios against which to test how the validation power might be exercised. The first case is *Costelloe v Costelloe* in which both witnesses denied being present when the will was signed.[61] One of the witnesses also denied that the signature beside his name was his signature. He was a business partner of the deceased and told the Court that the deceased had previously forged his signature on documents relating to their business. The other witness said that the signature was

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54 In *Estate of Williams* (1984) 26 SASR 423 the document was unsigned. In *Re Tretheway* (2002) 4 VR 406 the will-maker typed his name at the bottom of the computer file which was held to be the equivalent of a signature. In *Estate of Graham* (1978) 20 SASR 198 the document was signed by the will-maker and then given to her nephew to get it witnessed by the neighbours; in *In the Estate of Kelly* (1983) 32 SASR 413 the will was not signed in presence of witnesses.

55 *Estate of Williams v South Australia* unreported, SC(SA), Bollen J, 27/6/1989, 1584/89 referred to in *Will of Lobato; Shields v Caratozzolo* (1991) 6 WAR 1, where the Court admitted a reconstruction of a will from a witness's memory. The absence of a validation power in New Zealand has not prevented lost wills from being admitted to probate if their former existence, execution and terms can be established with sufficient certainty: *Davies (deceased), Re* [1999] High Court, Tauranga M47/98 (Unreported, Williams J, 4/8/99), *Re Hauraki* [2005] High Court, Auckland CIV 2005–404–3591 (Unreported, Heath J, 27/7/05). In *Re Campbell* [1948] NZLR 510 the Court admitted a will in reliance on the parol evidence of the widow and the consent of her son. As they were the only two persons who would benefit under the intestacy rules, the Court said that less evidence was required to establish the loss of the will and its contents than might otherwise be the case.

56 *Ryan v Kazacos* (2001) 159 FLR 452.

57 *Estate of Blakely* (1983) 32 SASR 473. Note that in *McConagle v Starkey* [1997] 3 NZLR 635 a switched will was able to be admitted to probate by using the Court's rectification powers.

58 *Re Brown; the Estate of Springfield* (1991) 23 NSWLR 535, 539–540.

59 Compare, for example, the decisions of Gray J in *Estate of TLB* (2005) 94 SASR 450 and *Estate of Schwartzkopff* [2006] 94 SASR 465 where similar defects nonetheless produced different outcomes.

60 Some Australian states, such as South Australia, required the Court to be satisfied beyond reasonable doubt, but that was subsequently changed: Wills Act 1936 (SA) s 12(2).

61 *Costelloe (dec'd), Re; Costelloe v Costelloe & Ors* [2007] High Court, Auckland CIV 2007–404–000922 (Unreported, Harrison J, Aug 10, 2007).

hers, but she did not know she had signed a will.[62] The deceased often asked her to sign documents that were covered up to prevent her knowing what she was signing. She did not see the deceased sign the document, nor did he acknowledge his signature to her. The Court concluded that the presumption of due execution had been rebutted and declared the will invalid.[63]

If the power to validate a will had been available, the Court may well have found that the will expressed the deceased's intentions. The defects in the attestation would not have been fatal and the steps he took to ensure that the will appeared to be properly witnessed suggests that the document did express his testamentary intentions.

The second case is *Da Costa v Adamson,* in which two computer wills were relied on to support a successful testamentary promises claim.[64] The applicant, Ms Da Costa, and the deceased, Mr Adamson, had both been married and had children from those marriages. They were Jehovah's Witnesses and had been de-fellowshipped when they made it known in 2004 that they were having a relationship and intended to move in together. Mr Adamson acquired a house in which the couple planned to live. To give his children time to adjust to their parents' separation and their father's new relationship, Ms Da Costa delayed moving in, but the couple did take steps to prepare for their joint household and their future together. During this period Mr Adamson wrote two virtually identical wills on his computer, one in July 2004 and the other in September 2004. Ms Da Costa was a major beneficiary in these wills. Neither will was printed off or signed or witnessed, but Mr Adamson did email Ms Da Costa a copy of the first one. He was killed in a plane crash in May 2005 shortly before Ms Da Costa was to move in with him.

Ms Da Costa was not able to claim under either the Property (Relationships) Act 1976 or the Family Protection Act 1955, because the Court found that she was not Mr Adamson's de facto partner. They never lived together as a couple.[65] Nor could she benefit from the 'computer wills', because they were invalid under s 9 Wills Act 1837. But the Court was satisfied that the computer wills were not tampered with and there was no evidence that Mr Adamson ever reconsidered his position as set out in those wills. He received a draft will in different terms from his solicitors, but there was no evidence that he had given instructions covering that draft up until his death 8 months later. The computer wills were accepted as evidence of Mr Adamson's intention and promise to make provision for Ms Da Costa and her testamentary promises claim was successful. But she received substantially less than Mr Adamson had left her in his computer wills.

Although the Court had no power to validate a will in this case, the observations made in regard to the computer wills suggest that they would have met the requirements of s 14 and could have been admitted to probate. If the deceased's children had objected to its terms, they could have made a claim under the Family Protection Act 1955. It is worth noting, however, that if Mr Adamson had died after the Wills Act 2007 came into force, Ms Da Costa would be in no better position. The wills would still have been invalid under s 11 and the Court could not have exercised the validation power in s 14 because the wills were made before 1 November 2007.[66] The Act will therefore continue to defeat clearly expressed testamentary intentions for some years to come.

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62 The validity of a will is not affected if the witnesses did not know that the document they were signing was a will: WA s 12(2).

63 *Re Young (Deceased)* [1969] NZLR 454.

64 *Re Adamson; Da Costa v Adamson* [2007] Family Court, Lower Hutt FAM 2005–032–001015 (Unreported, Ullrich QC, 13/7/07).

65 Property (Relationships) Act 1976 s 2D.

66 WA s 40(2)(k).

E. Gifts to witnesses

To ensure that the formalities serve their evidentiary and protective functions, witnesses should be independent and impartial. Accordingly, s 15 of the Wills Act 1837 (Imp) precluded witnesses from taking a benefit under the will. The will was not invalidated, but the gift to the witness was void. Section 3 of the Wills Amendment Act 1977 ameliorated the section's application if the gift was to a superfluous witness and the will had been attested by two witnesses who did not take an interest under the will.[67]

Gifts to a spouse who was married to a witness at the time of execution were also void.[68] Until the latter part of the 19th century the law treated husband and wife as one person.[69] A gift in a will to the spouse of a witness therefore conferred a benefit on the witness.[70] While that aspect of the rationale has no application in the present day,[71] the need for independent and impartial witnesses remains important. The witness may later be called upon to give evidence of due execution of the will and may not be perceived as a reliable witness if there is a conflict of interest. Thus in *Re Madsen,* where the evidence of the witnesses was required to show that the deceased had executed two testamentary documents on the same day, both witnesses had to forego any benefit under the will.[72]

Section 13 of the Wills Act 2007 restates the rule, and extends it to invalidate gifts to partners who were in a civil union or de facto relationship with a witness when the will was executed.[73] The gift is also void if the property would go to a person claiming under the witness or his or her spouse or partner, such as a child of a witness taking by substitution.[74] Executors may witness a will[75], but will lose the benefit of a charging clause in the will.[76]

While the need for this rule is understandable, it has on occasion produced harsh results and defeated a will-maker's intentions in circumstances where the gift was not in any way suspect.[77] In *New Zealand Guardian Trust Company v Mahe,* for example, the deceased's brother in law

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67 This change was first made in the United Kingdom in s 1(1) Wills Act 1968 in the wake of the decision in *In the Estate of Bravda* [1968] 2 All ER 217.

68 *New Zealand Guardian Trust Company v Mahe* [1989] High Court, Rotorua M218/85 M33/88 (Unreported, Doogue J, 22 June 1989). In *Ross v Caunters* (1980) Ch 297; [1979] 3 All ER 580 the invalidity of a gift to the spouse of a witness resulted in the solicitors who prepared the will being held liable for negligent advice about the execution of the will off site. See also *Hill v Van Erp* (1997) 188 CLR 159; (1997) 142 ALR 687.

69 The Married Women's Property Act 1884 put an end to the wife's legal invisibility. Margaret Briggs, 'Historical analysis' in Peart, Briggs and Henaghan et al *Relationship Property on Death* (2004), chapter 1.

70 Under the Statute of Frauds (Imp) 1677 witnesses were not competent if they benefited from the will, rendering the will invalid. Under the Wills Act 1752 the witness was not incompetent, but any benefit to the witness was void.

71 In fact, under s 10 of the Property (Relationships) Act 1976 inherited property would normally be separate property of the recipient and not be subject to division between the spouses or partners.

72 *Re Madsen* (2003) 23 FRNZ 79.

73 A gift to a fiancé or fiancée of the witness is not caught by s 13. In the case of a gift to a de facto partner of a witness, the uncertainty as to commencement of most de facto relationships may make it difficult to determine whether the beneficiary was living together as a couple with the witness at the time of execution.

74 WA s 13(1)(c).

75 WA s 12(1).

76 *Re Pooley* (1888) 40 Ch D 1.

77 *Aplin v Stone* [1904] 1 Ch 543; *Re Doland's Will Trust* [1970] Ch 267.

witnessed his will in which his wife, the deceased's sister, was a major beneficiary.[78] The gift failed. To reduce the harsh consequences, the Court strained the requirements of the Law Reform (Testamentary Promises) Act to restore some of the gift to the deceased's sister.

While will-makers may intuitively realise the need for independent witnesses, they may not appreciate the rule's application to spouses, and now partners, of witnesses. Spouses appear to be the ones most often caught by this rule. Fortunately, s 13(2) of the Wills Act 2007 ameliorates the rule by enabling gifts to witnesses or their spouses or partners to be saved. The gift is not void if all the persons who would benefit directly from the avoidance of the disposition consent in writing or electronically to the distribution of the property and have the legal capacity to give consent. Alternatively, the High Court may validate the gift if it is satisfied that the will-maker knew and approved of the disposition and made it voluntarily.

The first method of saving the gift is a statutory variation on the rule in *Saunders v Vautier* and suffers from similar limitations.[79] It is of no use if even one of the relevant beneficiaries lacks capacity or does not consent. However, the only beneficiaries whose consent is required are those who would 'benefit directly from the avoidance of the disposition'. That may reduce the number of beneficiaries whose consent has to be sought. Sections 28 and 29 should assist in identifying which beneficiaries would take the failed gift.

The alternative means of saving a gift to a witness, or their spouse or partner, is by making an application to Court and proving that the will-maker knew and approved of the disposition and made it voluntarily. The Court can declare the gift valid against the opposition of those who would benefit from the gift if it failed. Their opposition is relevant only if it shows that the deceased did not make the gift voluntarily or did not know and approve of the gift. The opposition of interested beneficiaries is not otherwise relevant. Even where it is relevant, the Courts are likely to treat their evidence with caution, because it may well be driven by self-interest. Section 13(2) is not a discretionary measure in which the interests of others must be taken into account. Any dissatisfaction that opposing beneficiaries may feel if the gift to the witness or the witness's spouse or partner is saved must be channelled through other testamentary remedies, such as the Family Protection Act.

III. Changes to wills

Section 15 restates the law governing changes to wills. As under s 21 of the Wills Act 1837, the change may be made by obliterating words in a will in such a way as to prevent their effect being apparent,[80] or by writing on the will and executing the changes in the manner prescribed by s 11. Changes that were not attested are presumed to have been added after the will was executed and are not admitted unless the presumption is rebutted.[81] However, the validation power in s 14 can

78 *New Zealand Guardian Trust Company v Mahe* [1989] High Court, Rotorua M218/85 M33/88 (Unreported, Doogue J, 22 June 1989).

79 *Saunders v Vautier* (1841) 4 Beav 115 affd Cr & Ph 240; [1841] EWHC Ch J27; [1841] EWHC Ch J82; (1841) Cr. & Ph 240.

80 *Re Adams* [1990] 1 Ch 601; [1990] 2 WLR 924; [1990] 2 All ER 118.

81 *In re Clarkson* [1918] GLR 205; *Cinnamon v Public Trustee for Tasmania* (1934) 51 CLR 403.

now be used to validate those changes, as they were in the South Australian case of *Estate of Standley*.[82] Wills of privileged persons may be changed informally.[83]

IV. Revocation of wills

The law governing revocation of wills and gifts in wills has also been amended. The means by which a will may be revoked by the will-maker have been expanded and the anomalies in regard to the effect of marriages and civil unions on wills have been removed. Both are now treated alike. The Act also brings the effect of separation orders on wills into line with their effect on intestate succession of spouses and civil union partners.[84] These changes not only ensure consistent treatment, but also prevent a will-maker's intentions from being unnecessarily defeated by the rigid application of inflexible rules.

A. Wills revoked by the will-maker

Section 16 of the Wills Act 2007 relaxes the manner in which will-makers may revoke their wills. As before, they may revoke their will by executing a new will that complies with the formalities in s 11,[85] or they may write a document that makes it clear that they intend to revoke all or part of an existing will and execute that in accordance with s 11. A will is also revoked if the will-maker intends to revoke the will by destroying it or directing someone else to do so in the will-maker's presence.

In addition to these longstanding methods of revocation,[86] a will can now be revoked by the will-maker doing 'anything else in relation to the will that satisfies the High Court that the will-maker intended to revoke the will.'[87] Any act that stops short of destroying the will could come within the scope of this provision provided it was done with the intention to revoke the will. A will is also revoked if the revocation is declared valid under s 14.[88] Privileged wills may be revoked informally.[89]

B. Effect of marriage or civil union on wills

The entering into a marriage or civil union may also revoke a will, and their ending by a legal process revokes gifts in wills to former spouses and civil union partners. The Wills Act 1837 and

82 *Estate of Standley* (1982) 29 SASR 490.

83 WA s 34(2).

84 Section 26 Family Proceedings Act 1980 governs the effect of separation orders on intestate succession rights of spouses and civil union partners.

85 The earlier will may be expressly revoked by a revocation clause in the later will, or impliedly where the later will is partially or wholly inconsistent with the earlier one: *In re Prosser* [1918] NZLR 590. In *Re Madsen; Alt cit Anderson v Anderson,* (2003) 23 FRNZ 79 both wills were admitted to probate because they were executed on the same day and, despite some inconsistencies, the Court found that the two instruments should be read together to form the deceased's whole will.

86 See Wills Act 1837 s 20.

87 WA s 16(g).

88 WA 16(h).

89 WA s 34(2).

its subsequent amendments dealt only with the effect on a will of a marriage and its dissolution.[90] The changes made to the Wills Act in 2005 did not treat civil unions and marriages alike for all purposes. Wills of civil union partners were not revoked on entering into a civil union and its dissolution did not affect testamentary gifts to a former civil union partner. Sections 18 and 19 of the Wills Act 2007 remove these anomalies and treat civil unions and marriages alike. Section 19 also removes the different effects of separation orders on wills and intestacies. However, these changes apply only to wills executed after 1 November 2007.[91] The old anomalies will therefore continue to plague this area of the law and are likely to create considerable confusion.

Further confusion may be caused by the fact that de facto relationships are not treated in the same way as marriages and civil unions. The beginning and ending of a de facto relationship have no effect on the validity of the will of either partner or on gifts in the will to a former partner.[92] The uncertainty that commonly surrounds the commencement of de facto relationships makes it impossible to determine at what point the will is revoked. The need for certainty also precludes a separation from revoking gifts in a will. That affects not only former de facto partners, but also separated spouses and civil union partners who have no separation order.

1. *Effect on wills of entering into a marriage or civil union*

Section 18 of the Wills Act 2007 starts by stating that a will is revoked if the will-maker marries or enters into a civil union. However, it is not revoked if the will expressly says that it is made in contemplation of a particular marriage or civil union, or if the circumstances at the time of making the will clearly show that it was made in contemplation of a particular marriage or civil union.[93] An expression of contemplation of marriage in the will itself is therefore no longer necessary, at least not in wills executed after 1 November 2007.[94] It may be inferred from surrounding circumstances.

Whether this relaxation of the former provision would have saved the will in *Public Trustee v Crawley* is far from certain.[95] In that case the Court held that the term fiancée in a will was not an expression that necessarily contemplated marriage. The deceased may have intended the will to apply only during the engagement, not after marriage.[96] That was not the view of the English courts. The contemplation of marriage was held to be inherent in the word fiancée.[97]

In the recent decision in *Lynch v Lynch* the deceased's will executed two months before her marriage left only a life interest to her much younger second husband and the remainder to her adult children.[98] In the absence of any expression in the will contemplating the marriage, the will was revoked and the husband became entitled to a much larger share of her estate under the intestacy rules which was then reduced by the children's successful claims under the Family Protection

90 Wills Act 1837 s18 and Wills Amendment Act 1955 s 13(1) governed the effect on a will of entering into a marriage. Wills Amendment Act 1977 s 2 regulated the effect of dissolving a marriage on a will benefiting a former spouse.

91 WA s 40(2)(o)–(q).

92 The beginning and ending of a de facto relationship do affect the intestate entitlement of a de facto partner: s 77 and the definition of 'surviving de facto partner' in Administration Act 1969 s 2.

93 Section 18 is also subject to s 10 in respect of wills made by minors who have agreed to marry or enter into a civil union.

94 WA s 40(2)(o) and (p).

95 *Public Trustee v Crawley* [1973] 1 NZLR 695.

96 It followed *Burton v McGregor* [1953] NZLR 487.

97 *Estate v Langston* [1953] P 100.

98 *Lynch v Lynch* [2007] NZFLR 543.

Act. The will's proximity in time to the marriage, her husband's age, the will-maker's legitimate concern to protect her capital for her children and the terms of the will would all suggest that she made the will in contemplation of her impending marriage. Under s 18 the absence of a clear and unequivocal expression in the will would not be fatal to the continued validity of the will after marriage.

2. *Effect on wills of ending a marriage or civil union*

Former spouses and partners might assume that when their marriage or civil union was over neither party would continue to benefit under the will of the other. However, that assumption is only correct if they have legally dissolved their marriage or civil union or if a separation order exists.[99] As separation orders are rare and a formal dissolution cannot be sought until the parties have been separated for at least two years,[100] some former couples may not realise that they have to revoke or change their wills if they wish to exclude their former spouse or partner. De facto separation has no effect on wills.

(a) *Effect of dissolution of marriage or civil union*

Prior to the Wills Act 2007 the dissolution or annulment of a marriage before the will-maker's death precluded a former spouse from benefiting under any will of the deceased former spouse if the will predated the dissolution of the marriage.[101] The statutory revocation affected not only gifts and appointments of property in favour of the former spouse, but also an appointment of the former spouse as executor. Only testamentary payments of debts or liabilities to the former spouse remained valid.[102] The will took effect as if the former spouse had predeceased the will-maker.[103] The revocation did not apply if a contrary intention was expressed in the will, or the will was expressed to be made in contemplation of the dissolution or annulment, or if the will was ratified after the dissolution. Wills made by civil union partners were not affected by this rule.

Section 19 of the Wills Act restates the previous rule in plain English but makes two changes. First, it treats wills of former civil union partners in exactly the same way as wills of former spouses, but only if the will was executed after 1 November 2007.[104] The second change is that the exceptions to the revocation may have been widened by the re-wording of the provision. Rather than requiring an expression in the will that the revocation was not to apply or that the will was expressed to be made in contemplation of the dissolution, s 19(5) provides that the revocation does not apply if the will makes it clear that the will-maker intended the provision to be effective even if there was an order dissolving the relationship. The exception may apply where there is no expression in the will, but it is otherwise clear from the will that the gifts should not be revoked.

(b) *Effect of separation order*

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99 WA s 19.

100 Family Proceedings Act 1980 s 39.

101 Wills Amendment Act 1977 s 2; *Re Jackson (Deceased)* [1991] 3 NZLR 125; *Re Dedden* [1998] NZFLR 868; (1998) 17 FRNZ 591.

102 Wills Amendment Act 1977 s 2(3)(a). The fulfilment of a testamentary promise within the meaning of the law Reform (Testamentary Promises) Act 1949 was also unaffected by the revocation.

103 Wills Amendment Act 1977 s 2(2)(c); *Re Jackson (Deceased)* ibid; *Re Baker (deceased); Alt cit Delugar v Baker* [2005] High Court, Auckland CIV 2004–404–5114 (Unreported, Cooper J, 4 March 2005).

104 WA s 40(2)(q).

The fact of separation does not affect a will.[105] But a separation order as between spouses and civil union partners does if the order was made after the will was executed and was still in existence when the will-maker died. Separation orders used to affect only the intestate entitlement of a surviving spouse or civil union partner.[106] Section 19 of the Wills Act now provides that a separation order has the same effect on a will as an order dissolving a marriage or civil union and is subject to the same exception.

An important difference between separation orders and orders dissolving or annulling a marriage or civil union is, of course, that the parties to the separation order retain their status as spouses or civil union partners and hence their eligibility under the Family Protection Act.[107] Any harsh effects of the statutory revocation can be ameliorated by an order under that Act. That avenue is not available if the marriage or civil union has been dissolved. Where there has been a dissolution, former spouses have on occasion successfully claimed under the Law Reform (Testamentary Promises) Act.[108]

(c) *Effect of the Property (Relationships) Act on wills*

The Wills Act is not the only statute to affect wills of spouses or partners whose relationship has ended. Gifts to a surviving spouse or partner are also revoked by the Property (Relationships) Act 1976 if the spouse or partner elects to apply for a division of relationship property.[109] Section 76 provides that in that event any gifts in the will to the surviving spouse or partner of a beneficial interest in any real or personal property in the estate are deemed to be revoked unless a contrary intention is expressed in the will.[110] The will takes effect as if the surviving spouse or partner had died before the deceased spouse or partner. On application by the surviving spouse or partner, the Court may reinstate the testamentary gifts if it considers it necessary to do so to avoid injustice.[111] Alternatively, the spouse or partner may seek provision from the estate by making a claim under the Family Protection Act 1955.[112]

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105 *Goodwin v Public Trust* [1993] High Court, Wellington CP862/89 (Unreported, Neazor J, 10/9/93), *Rendle v Ford* (2003) 23 FRNZ 256; [2004] NZFLR 66.

106 Family Proceedings Act 1980 s 26.

107 Family Protection Act s 3 simply refers to 'the spouse or civil union partner of the deceased'. See for example *Re Hilton (dec'd)* [1997] 2 NZLR 734; (1997) 15 FRNZ 340; [1997] NZFLR 438. See also Family Proceedings Act (1980) s 26.

108 *Dedden (deceased), Re Rattenbury v Bersma* (1998) 17 FRNZ 591; [1998] NZFLR 868, *Re Goodwin* [1993] High Court, Wellington CP862/89 (Unreported, Neazor J, 10 September 1993).

109 Property (Relationships) Act 1976 s 61.

110 For example, *B v Adams* (2005) 25 FRNZ 778 (FC) and *de Muth v Lee*

Alt cit EM v SL [2005] NZFLR 281 (FC). Neither case contained a contrary intention clause because the wills predated the adoption of the Property (Relationships) Amendment Act 2001 which inserted Part 8 into the Property (Relationships) Act 1976 and applies to wills that predate the amendments: Property (Relationships) Act 1976 s 56. Anecdotal evidence suggests that few will-makers are advised of the possibility of inserting a clause permitting their surviving spouse or partner to inherit some or all of the provision made for them in the will if they choose to take their relationship property entitlement.

111 Property (Relationships) Act 1976 s 77. The Court did so in *B v Adams* (2005) 25 FRNZ 778 (FC), because there was not much relationship property to share owing to the fact that the couple married later in life and were married for only a few years. Also the deceased had been persuaded by his widow to leave her only a small part of his estate out of concern that she was seen as a gold digger. The bulk of the estate, a farm, was left to a young man whom the deceased had befriended many years earlier but to whom he owed no moral duty in a Family Protection sense.

112 Property (Relationships) Act 1976 s 57 preserves the eligibility of spouses or partners to make claims under the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949.

3. *Effect of the forfeiture rule on wills*

The Succession (Homicide) Act 2007 codifies the common law rule that prevents a killer from benefiting financially from his or her victim.[113] Section 7(1) invalidates testamentary gifts to a beneficiary who is guilty of the homicide of the deceased.[114] Subject to any express testamentary direction to the contrary, any interest that the killer is not entitled to by virtue of s 7 passes as if the killer had predeceased the victim.[115]

V. Restatement of common law rules

The Wills Act 2007 restates the common law rules pertaining to mutual wills and rectification. It calls the latter 'correction'.

A. Mutual Wills

Spouses and partners sometimes make mutual wills, usually to ensure that assets pass to their (respective) children with or without first passing through the hands of the surviving spouse or partner. The essence of a mutual will is the agreement between the two parties that they will not revoke their wills or deal with the subject matter of the mutual will in breach of their agreement.[116] If the first party to the agreement dies without revoking his or her will, the surviving party cannot renege on the agreement and the obligations are enforceable by means of a constructive trust.[117]

The origin of mutual wills can be traced back to *Dufour v Pereira* where Lord Camden described the doctrine as follows:

> It is a contract between the parties, which cannot be rescinded, but by the consent of both. The first that dies, carries his part of the contract into execution. Will the Court afterwards permit the other to break the contract? Certainly not.[118]

The mutual wills doctrine is thus part of the Court's traditional equitable jurisdiction to prevent the unconscionable revocation of a will.

The common law doctrine is now restated in statutory form in s 30. It provides, in summary, that when

- two persons make wills disposing of property in the manner agreed, and
- they have promised each other not to change their wills in a way that breaches their agreement, or to dispose of the property in their lifetime,
- and the first one to die has kept the promise, but the second one to die has not,
- then any person who would have benefited from the will of the second person to die if that person had kept the promise may claim from that person's estate any part of the benefit that the estate does not provide.

As Lord Camden said in *Dufour*, the core element of the mutual wills doctrine is the promise between the parties not to revoke or change their wills in breach of the agreement. Section 30(3)

113 *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 QB 147 at 156–157, where Fry LJ invoked the 'so-called rule of public policy' to prevent criminals from benefiting from their own wrongdoing.

114 Homicide is defined in s 4 as in the Crimes Act 1961 but excludes a killing caused by negligent act or omission, infanticide under s 178 Crimes Act 1961, killing pursuant to a suicide pact and assisted suicide.

115 Succession (Homicide) Act 2007 s 7(3).

116 *Lewis v Cotton* [2001] 2 NZLR 21; (2000) 20 FRNZ 86; *Re Newey. (deceased)* [1994] 2 NZLR 590.

117 *Lewis v Cotton* ibid; C David 'Mutual wills; formalities; constructive trusts' [2003] Conv 238–247.

118 *Dufour v Pereira* (1769) 1 Dick 419; 21 ER 332 at 333.

provides that the promise may be made orally, in writing, or electronically. That too is a restatement of the common law.[119] That the promise may be made orally should not be taken to mean that its existence will be inferred from slight material or from the fact that the will-makers had executed corresponding wills. Mutual wills can give rise to practical problems and undesirable consequences for the surviving party. The Courts therefore insist on clear and unequivocal evidence of a promise not to revoke a will.[120]

In *Lewis v Cotton* the Court of Appeal scrutinised the evidence closely and concluded that there was insufficient evidence of an agreement between the parents not to revoke their wills. In *Fisher v Mansfield*, on the other hand, there was no doubt that the spouses had made mutual wills, because the husband's will said so. In *Price v McLennan* the agreement not to revoke the will was inferred from the terms of the will, the family circumstances, and the widow's statement to her late husband's children that she would not revoke her will that divided the assets equally between her son and her husband's two children.[121] She later executed a new will leaving the estate entirely to her son. Such breaches will now be amenable to claims under s 30 of the Wills Act 2007.

The section is only a partial restatement of the common law doctrine. It does not deal with the interest of the beneficiary of the promise pending the death of the surviving party to the promise. In *Lewis v Cotton* the Court of Appeal stated that a constructive trust would be imposed on the assets. In *Re Goodchild* the Court held that a floating trust would come into existence on the death of the first testator that would crystallise on the death of the second testator.[122] In *Fisher v Mansfield* the beneficiaries of the mutual will were held to have a sufficient interest in the land that was the subject matter of the mutual will to lodge a caveat to protect their interest until the widow's death.[123] The common law will thus continue to be relevant to mutual wills, but the criteria establishing their existence are now clarified and expressed in accessible language in s 30.

B. Correction of wills

Section 31 empowers the Court to correct a will that contains a clerical error or that does not give effect to the will-maker's instructions. This power affirms the recent developments of the common law that started with *Re Jensen*.[124] Prior to that case the Courts were very reluctant to rectify wills out of concern that they might make a will based on vague evidence that did not reflect the testator's intentions.[125] They would at most exclude words that were mistakenly inserted by the testator or by someone else without the testator's knowledge or authorisation.[126] The Courts would not supply mistakenly omitted words or make other corrections until Fisher J took the first step in *Re Jensen* in 1991. In that case, the very similar numbers on two mortgages were accidentally switched in the course of changing the wills of the deceased parents. Fisher J stated that he would

119 *Lewis v Cotton* above n 116.

120 Ibid.

121 *Price v McLennan Case name* [2000] High Court, Nelson M33/99 (Unreported, Wild J, 21/8/00).

122 *Re Goodchild* [1996] 1 All ER 670.

123 *Fisher v Mansfield* [1997] 2 NZLR 230. The beneficiaries were able to trace the original subject matter of the mutual will through its proceeds into the property purchased by the surviving widow.

124 *Jensen (deceased), Re Alt cit Ranby v Ranby* [1992] 2 NZLR 506.

125 *Isaac v Mills* (1887) 5 NZLR (CA) 122.

126 *Tanner & Ors v Public Trustee & Ors* [1973] 1 NZLR 68; *Tartakover v Pipe* [1922] NZLR 853; *Re Morris* [1971] p 62.

have rectified the wills if he had not reached the same result as a matter of construction. It was a classic case for rectification.

Since *Jensen*, the Courts have on several occasions relied on Fisher J's obiter dictum to relax the traditional common law constraints on the Court's power to rectify wills. In several cases clerical errors similar to the one in *Jensen* have been corrected.[127] And in *Re Walker* the Court corrected a will to insert the name of one of the will-maker's children.[128] Although the will-maker had read the will prior to executing it, the evidence of the solicitor who drafted the will satisfied the Court that the omission did not give effect to the will-maker's instructions. The power to rectify has not been used when the error results from the testator being mistaken about the beneficiary he intended to benefit.[129] The Court's willingness to rectify wills has been limited to clerical errors and to inserting or omitting words to give effect to the testator's instructions.

Section 31 affirms these common law developments. It does not confer a general power on the Courts to rewrite wills that do not produce the result that the will-maker had intended. In *Re Laurie* for example, the deceased left his estate to his widow for life and on her death to his siblings who were then living.[130] The will-maker's siblings survived him, but predeceased his widow. In the absence of a gift over to the will-maker's nephews and nieces, an intestacy resulted and the estate was distributed among the wife's family. The Court appreciated that the construction it was bound to give to the will meant that it produced the opposite result to that intended by the will-maker. Section 31 is unlikely to assist in that sort of case. The omission would not qualify as a clerical error and there was nothing in the judgment in *Re Laurie* to suggest that the will-maker had given instructions to insert a substitutionary gift. In the absence of instructions, express or implied, the statutory power of correction is not available.

Section 31 is merely intended to restate the common law in clear language and to provide legislative confirmation of the powers that the Courts had developed. Section 31 does not displace the common law. There is scope for further development of the power to correct wills. However, the very existence of a statutory power of correction may dissuade the Courts from expanding the common law powers to enable rectification in a wider range of circumstances.

VI. Construction of Wills

An important change appears in s 32 pertaining to the rules of extrinsic evidence in the construction of wills. It allows the Court to use evidence of the will-maker's testamentary intentions when words used in a will make the will or part of it meaningless, ambiguous or uncertain. Under the common law such direct evidence would not have been admissible.[131] However, evidence of the testator's intentions can be admitted only after the Court has established that there are words in the will that make it meaningless or make the will on its face ambiguous or uncertain. The Court can not use the will-maker's intentions as surrounding circumstances from which to deduce that

127 For example, *Macrae v Trustees Executors and Agency Company of New Zealand Ltd* [2002] High Court, Wellington CP251/01 (Unreported, Young J, 23/10/02) where the testator had mistakenly inserted the wrong investment policy number in a gift to one of the grandchildren. *Gibbs & Billing v Bluck* [2006] High Court, Auckland, CIV 2006–404–2054 (Unreported, Judges, 1 August 2006) the Court corrected an obvious mistake in a reference in a codicil to the will.

128 *Walker (deceased), Re; Alt cit Walker v Walker* [2000] High Court Wanganui M37/99 (Unreported, Ellis J, 21/7/00).

129 *Re McMillan* Case name [2001] High Court, Invercargill CP7/00 (Unreported, Young J, 5/4/2001).

130 *Laurie (dec'd), Re:* [1971] NZLR 936.

131 This rule is similar to the provision in the Administration of Justice Act 1982 (UK) s 21.

the words make the will ambiguous or uncertain. The ambiguity or uncertainty must be apparent from the face of the will, for example because the words are capable of more than one meaning in the context of the will.

In *Re Jensen* the Court found that the wills and codicils that the parents had executed contained inconsistencies.[132] There was therefore uncertainty on the face of the wills which would have entitled the Court to use evidence of the will-makers' intentions to construe the wills. As it was, the Court had to rely principally on the terms of the various testamentary documents and circumstantial evidence to determine the testators' intentions.

The will in *Re Laurie*, discussed above, was not meaningless. Nor did any of the words in the contingent gift of residue to the will-maker's siblings make the will ambiguous or uncertain on its face. The wording was clear and the consequence of the contingency not being satisfied was certain: the intestacy rules would apply. The problem was not with the words used, but with the will's failure to provide for the possibility of the contingency not being satisfied. A case such as *Re Laurie* would not be assisted by s 32, despite the fact that the testator's overall testamentary intent was apparent. The rules of extrinsic evidence are therefore still quite narrowly drawn. They cannot be used to admit evidence of the testator's intentions in circumstances where the will is silent.

VII. Miscellaneous provisions

Aside from the major changes outlined above, there are a few other provisions that are worth noting. First, s 25 enables testamentary gifts to be made to unincorporated associations that are not charitable. The section stipulates the steps that the executor must take to give effect to the gift. Second, s 28 determines the destination of a fractional part of a gift that fails. It goes to the part that does not fail or if more than one part does not fail to all the parts proportionately. As with many of the reforms in this Act, neither of these provisions will apply to wills executed before 1 November 2007.[133]

VIII. Conclusion

The Wills Act 2007 makes some much needed changes to the law governing wills. Apart from bringing the law into a single act and expressing it in plain, modern language, the Act removes the inconsistent treatment of civil unions and marriages and makes a number of reforms to enable the Courts to give better effect to testamentary intentions. These changes are to be welcomed, and they are not before time. They are based on recommendations of the Law Commission in a Report published 10 years ago.

The principal aim of the Wills Act is to enable better effect to be given to the ascertainable intentions of will-makers. While that aim is laudable, it must be remembered that there are significant restrictions on testamentary freedom. The Family Protection Act 1955 and the Law Reform (Testamentary Promises) act 1949 have a long history of overriding testamentary wishes. To these Acts must now be added the Property (Relationships) Act 1976 which revokes gifts in a will to a spouse or partner who elects to apply for division of relationship property. These three Acts create something of a tension with the aim of the Wills Act.

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132 *Re Jensen* [1992] 2 NZLR 506.

133 Section 40(r).

Within the limits on testamentary freedom, however, the Wills Act is a significant advance on the old law. The power to validate wills that do not comply with the formalities is one of the most significant changes. It is unfortunate that access to that power is constrained by the need to have a written document. At a time when audio and visual technology is so advanced, the need for a conventional medium to convey testamentary intentions seems unnecessarily restrictive and outdated. The lost opportunity to revisit the Maori custom of ōhākī is also regrettable. The ability to save gifts to witnesses and give effect to wills made in contemplation of a marriage or civil union without the need for an explicit statement to that effect in the will, are also welcome changes. All of these powers contribute significantly to the Act's remedial purpose. However, the fact that they cannot be used in relation to wills that predate the Act's commencement date is a major drawback and is likely to confuse and frustrate both the lay and professional communities.

For wills executed after 1 November 2007, the Act has the potential to give better effect to testamentary intentions than its predecessor. The extent to which that potential will be realised will depend upon the Courts' willingness to adopt an expansive approach both to the terms and the powers provided by this Act. If they do, it would be true to say: 'Where there is a will, there is a way.'