

# **FIJI LAW REFORM COMMISSION**

**WILLS AND SUCCESSION LAWS REFERENCE**

# **Final Report on the Review of Fiji's Wills and Succession Laws**

The Commission is constituted pursuant to the Fiji Law Reform Commission Act, Cap 26.

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Professor Robert Hughes

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# WILLS AND SUCCESSION LAW REFORM

Professor Robert Hughes

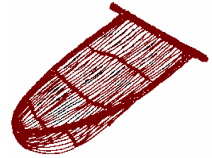
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FIJI LAW REFORM COMMISSION

September 2001



FIJI LAW REFORM COMMISSION



September 2001

The Hon. Mr. Qoroniasi Bale  
The Attorney-General  
Suvavou House  
Suva

Dear Attorney General

re : Report on Wills and Succession Law Reform

The Fiji Law Reform Commission has pleasure in submitting its Report on Wills and Succession Law Reforms in Fiji.

The Fiji Law Reform Commission wishes to thank the appointed commissioner Professor Robert Hughes for his dedication and perseverance in making this report possible.

The Commission would also like to record its appreciation and acknowledgment to the Republic of the Fiji Military Force, the Office of the Public Trustee and the Fiji National Provident Fund for their respective and useful submission.

The Report is hereby submitted for your consideration.

Yours Sincerely

Kiniviliame Keteca  
Acting Director of Fiji Law Reform Commission

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## Introduction

In September 1999 a Discussion Paper identifying a number of possible areas of reform of the current law of succession in Fiji was issued. This paper sought to invite comments from interested parties and the public at large on the issues identified or any others for that matter.

A number of submissions have been received and considered and the issues they have raised are contained in the commentary where relevant throughout the report. This report sets out a number of proposals for reform. Perhaps the central one for consideration is the introduction of a deformalisation proposal in relation to the making of wills. This reform follows developments in other jurisdictions such as Australia, New Zealand and England where the tendency has been to provide the courts to dispense with the formal requirements relating to wills which were derive originally from the English *Statute of Frauds*. There are a number of other issues of reform which hang upon the acceptance of this primary measure. For example, issues about the retention of a provision for privileged wills can be seen in a different light once the deformalisation measure is introduced.

However there are also substantial reforms proposed in areas such as the rules of intestate distribution and family provision. It is recommended, in the first case that rules of intestate distribution ought to provide greater benefits to a spouse of a deceased person and in particular that the legislation ought to provide the spouse of the deceased with the right to acquire the matrimonial home. It is proposed that the *Inheritance (Family Provision) Act* Cap. 61 be repeal and that a new *Family Provision Act* be enacted in its place. The purpose of this will be to update the current provisions so as to broaden the scope of persons who might apply for an order from the court as well as considerably widening the scope of powers of the court.

The prior discussion paper is annexed to this report. There is no need in this Report to traverse again many of the issues raised for discussion there. It is anticipated that the Discussion Paper will serve as introductory commentary on many of the areas now covered. However, where appropriate, the Report itself provides additional commentary and reflection on certain issues which have either been raised by submissions received or which have required further deliberation subsequent to the issue of the Discussion Paper. There are some new issues, which have been identified, and these are deserving of more extensive commentary.

It is to be noted that there are some additional areas in respect of which reforms are proposed which were not canvassed in the original discussion paper. These areas are not considered to be matters of likely contentiousness.

## **1. Widening the Definition of a Will**

In the Discussion Paper it was suggested that there was a need to widen the definition of a will in order to make it clear that the Court is entitled to grant probate where a document merely appoints a testamentary guardian or purported merely to revoke a pre-existing will. Whilst it might be the case that the Courts have in fact admitted such documents to probate in the past it is felt that there is a need to confirm the jurisdiction of the court to do so.

There was no objection to this proposal and it is felt that it is a sound one which will clarify the jurisdiction of the court in an area which is otherwise unclear in some respects. The amended definition will impact directly on the understanding of a will for the purposes of other recommended amendments contained in this report; for example, compliance with the formal requirements in respect of documents amending or revoking an existing will.

### **Recommendation 1**

It is recommended that section 2 of the *Wills Act* Cap 59 be amended by deleting the current definition of 'will' and substituting for it the following:

“will' includes every testamentary disposition of property including a codicil and any instrument appointing an executor, revoking a former will or revoking the appointment of an executor and an instrument merely appointing a testamentary guardian made in accordance with the provisions of this Act.”

## **2. Formal Requirements relating to Wills**

The current formal requirements for the making of a will are those set out in section 6 of the *Wills Act*. These formal requirements are those which have long been a part of succession law, not only in Fiji but in many other countries in the Commonwealth and elsewhere. The formal requirements are those which have their origins in the English *Statute of Frauds* of the sixteenth century but more recently following the provisions of the *Wills Act 1837* (U.K.). The standard exception from the formal requirements is in relation to nuncupative or privileged wills made by certain privileged persons. The current exception in this regard is contained in section 17 of the *Wills Act* which is discussed further below.

The imposition of formal requirements for the making of wills in Fiji currently include the following:

- a. that the will be written;
- b. that it be signed by the testator or by some person in his presence and by his direction in such place on the document as to be apparent on the face of the will that the testator intended by such signature to give effect to the writing as his will;
- c. that the testator's signature be made or acknowledged by the testator in the presence of at least two witnesses present at the same time; and

- d. that the said witnesses attest and subscribe the will in the presence of the testator but no form of attestation is necessary.

It is noted that the former requirements relating to the position of the testator's signature at the foot or end of the will have been dispensed with.

For some time there have been arguments presented against the retention of the formal requirements in relation to wills. Whilst they were imposed in order to ensure some symbolic formality to the process of bringing a will into being, thereby ensuring due consideration by the testator of the nature of the testamentary act and serving to prevent the possible occurrence of fraud.

The strength of both arguments in favour of the imposition of formal requirements is limited, however. So far as the performance of some symbolic act is concerned, the real issue is whether or not the act in question was intended as a genuine and perhaps considered act of will making. But the imposition of formal requirements is merely one way of ensuring that this was the case. The detraction from the imposition of formal requirements is that there might be numerous cases where there are genuine attempts by persons to make a will, but a failure in the end result to comply strictly with the formal requirements as imposed by law.

Furthermore, one questions whether it is the substance of the act in question rather than the compliance with formal requirements which should be considered important here. Formality tends to imply rigidity in the legal system, a rigidity that has most often been left to the equitable jurisdiction to correct by looking to the substance, which lies behind the formality.

On the issue of fraud it has long been a question whether the existence of formal requirements such as these promote more by way of fraud (equitable or legal) than they prevent. In a similar vein, and in any event, it has sometimes been asked whether the formalities required, particularly those in addition to writing, go beyond those which are necessary to combat any potential fraud and to provide some degree of authenticity to the putative testator's testamentary act. Likewise it can be contended that the imposition of formal requirements really contributes anything more to the process of authentication of the testamentary act than can be guaranteed by the normal probative or evidential process undertaken before the courts. The courts themselves are well enough placed to determine on the evidence presented before them whether or not a putative testator's act is or is not a genuine testamentary act.

It should be noted also that, faced with the interpretation of the formal requirements, the courts in the past have gone to some lengths to adopt a very liberal interpretation of them in order to save reasonable attempts at compliance from invalidity on technical grounds. Similarly, the courts have often made presumptions against intestacy holding, in effect, that they will attempt to uphold a genuine attempt at will making where this is at all possible. This is the case in respect of the construction of wills, for example, where the courts have adopted a rule of construction of a will or a part thereof which will favour the validity of the will rather than an intestacy. This is sometimes called the Golden Rule of construction of wills.<sup>1</sup>

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<sup>1</sup> See, for example. *Re Harrison* (1885) 30 Ch.D. 390 and *Fell v Fell* (1922) 31 CLR 268

Issues such as these have compelled the reconsideration of the imposition of formal requirements such as those found in section 6 of the Act in various other jurisdictions such as the Australian States, New Zealand and various other jurisdictions in the U.S.A. and Canada. After consideration by various law reform bodies in those jurisdictions, the relevant legislatures have passed reforms in the direction of what could be called 'deformalisation'. What has been done is not to dispense with the formal requirements as such. Rather the imposition of formal requirements such as those found in section 6 have been left in place, but the courts have been provided with power, in appropriate cases, to dispense with the compliance with strict compliance with the formalities. It has generally been accepted that the requirement that the will be in writing should be indispensable, although the question here has often been debated in the reform process.

Those parties who made submission on the proposed implementation of some form of deformalisation process, based on the issues outlined in the Discussion Paper were generally in strong support of the implementation of some such reform in Fiji. However the parties concerned did not express any strong view as to which model the reform should implement. Various possibilities were canvassed in the Discussion Paper. The various jurisdictions in Australia, New Zealand and England have gone slightly different ways when it comes to the precise basis upon which the court might dispense with all or some of the formalities. A brief survey of the relevant provisions is as follows :

- (a) South Australia have adopted a provision in 1975 which allowed the court to dispense with formalities but adopts a higher standard of proof before the court that there was a genuine attempt to make a will. This appears as the criminal standard of proof. The court was required to be satisfied that "there can be no reasonable doubt that the deceased intended the document to constitute his will."<sup>2</sup>
- (b) In 1994 South Australia replaced the relevant section with one which imposed only the civil standard of proof requiring merely that the court be satisfied that the document "expresses the testamentary intentions of the deceased".<sup>3</sup>
- (c) Section 9 *Succession Act 1991* of Queensland requires that the court be satisfied that the document be executed in "substantial compliance with the formalities prescribed" and also allows the court specifically to admit extrinsic evidence on this issue, including of statements made by the deceased as to the manner of execution.
- (d) Section 18A of the *Wills, Probate and Administration Act 1898* of New South Wales requires that the court be satisfied that the document constitutes the will of the deceased person. The wording of the section seems to require in the first instance that the court accepts that the document purports to embody the testamentary intentions of a deceased person. The section specifically extends to documents purporting to amend or to revoke a will.
- (e) New Zealand has proposed reform in a similar direction to that of New South Wales.

These different models vary somewhat in fine detail. The main objective of any reform in this area should be to accept that there should be scope for the court to dispense with the formal

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<sup>2</sup> Section 12(2) *Wills Act 1936* (S.A.) as amended 1975

<sup>3</sup> *Wills (Amendment) Act 1994* (S.A.)

requirements in appropriate cases provided that it is satisfied that there has been a genuine attempt on the part of the deceased person to make a will. It is suggested that the reform adopted in Queensland is far too restrictive in the sense that it requires 'substantial compliance' with the formalities. Thus it is more in the nature of a token reform.

It is suggested that the requirement as to writing should be retained because it provides at least some element of symbolic performance on the part of the testator in relation to what is, after all, an important act affecting the testator's property. Its retention should be sufficient to allay the concerns of those who feel that the testamentary act should be accompanied by at least some degree of authenticity, which might appear to be lacking in merely oral performance. It also acknowledges the concerns of those who are of the view that to leave the performance of a testamentary act solely to evidence of oral statements would be to invite a constant flow of disputes before the courts. Such disputes would most likely be not only to whether certain statements were intended to be testamentary, but also as the content of the statements concerned.

Retention of a requirement as to writing would be consistent with those provisions which impose writing as a requirement to enforceability and/or validity in respect of certain contracts, such as those under the Sales of Goods legislation or with respect to the sale or creation of interests in land. Wills, of course, most often purport to achieve an alienation of property of just the type as that to which these provisions apply. Furthermore, the requirement that a will be in writing in order to be valid is one which is well entrenched in the public mind given its long history. Its retention would be justified on such a basis as well.

It is proposed that a provision such as that adopted in New South Wales be adopted for Fiji. Some modification of the wording of that provision is appropriate subject to the expanded definition of a will being adopted as provided for in **Recommendation 1**. This provision also makes allowance for the admission of what would otherwise be extrinsic evidence in order to establish whether or not the writing was made with testamentary intention. This is appropriate bearing in mind the width of enquiry, which the Court should have to make in order to determine whether or not the required element of testamentary intention was present. See also **Recommendation 9** relating to the admission of extrinsic evidence in general.

Whilst, there has been some criticism of such a provision on the basis that it provides the court with some degree of discretion regarding dispensation with the formal requirements. Whilst there have been extensive jurisprudential debates about the merits of discretionary powers as against established rules, it is felt that the interest of justice in these particular cases support such a discretion being provided. However, their safeguards are also provided by the provision. The Court must be satisfied that the writing in question does embody a genuine attempt at will making by the testator and this requires the court to satisfy itself on the evidence available to it that the document was intended to operate as a will.

Other criticism might well be aimed at the breadth of the provision. Following decisions in other jurisdictions it would seem that such a provision could allow the Court to admit a will which is unsigned, or not witnessed, properly or at all. But this is merely an argument against the deformalisation process itself and, as suggested above, this is clearly outweighed by arguments in favour of the process.

## **Recommendation 2**

Accordingly it is recommended that a new section be inserted as section 6A of the *Wills Act* as follows :

“6A(1) A document purporting to embody the testamentary intentions of a deceased person, even though it has not been executed in accordance with the formal requirements under section 6 of this Act, constitutes a will of a deceased person if the Court is satisfied that the deceased person intended the document to constitute his or her will.

(2) In forming its view the Court may have regard (in addition to the document) to any other evidence relating to the manner of execution or testamentary intentions of the deceased person, including evidence (whether admissible before the commencement of this section or otherwise) of statements made by the deceased person.”

### **3. Beneficiaries Who Witness a Will**

The existing law of Fiji via section 11 of the *Wills Act* adopts what was the traditional approach to beneficiaries who also acted as a witness to the will. In short the will was still regarded as valid but the gift to the beneficiary was treated as void. This provision derives from section 15 of the *Wills Act 1837* (U.K.), which was enacted in 1843 to remedy the common law situation where a beneficiary was disbarred from giving evidence. Hence a particular will of which the beneficiary was a witness could not be admitted to probate. Thus section 11 provides:

“11. A disposition other than a charge for payment of a debt, made in a will to a person who or whose husband or wife is a witness to the will, is void but the witness is not, on that account, incompetent to be admitted to prove the execution of the will or the validity or invalidity thereof.”

In Australia this provision has been abolished in South Australia and the Australian Capital Territory. In New South Wales, Victoria and Tasmania it has been extensively modified.<sup>4</sup> There have also been provisions adopted in the United Kingdom and at least four of the Australian States which provide, in effect, where the witnessing beneficiary is a supernumerary, there being two other witness not subject to any disqualification who have witnessed the will, then the gift is not void.<sup>5</sup>

The rule embodied in the section has been subject to a history of restrictive interpretations by the courts. This is a factor which tends, as in the area of formal requirements, to have been indicative of a certain degree of judicial disfavor. The traditional approach appeared to assume that to have a beneficiary as a witness was something which ought to be discouraged on the grounds that there was some nexus between the act of witnessing and the derivation of potential benefits under the document. Put another way, the independence of the testator's testamentary act was something which could be called into question. There are many situations where a person who is a witness to the will could also have been influential in the formation of the testator's intentions regarding the

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<sup>4</sup> See *Wills Probate and Administration Act 1989* (NSW) s. 13; *Wills Act 1958* (Vic) s. 13; *Wills Act 1992* (Tas) ss 44-46

<sup>5</sup> See, for example, section 1 *Wills Act 1968* (UK)

distribution of the estate. Whilst at one level this is both permissible and prevalent, a factor reflected in the traditional refusal of probate courts to apply the equitable doctrine of undue influence to wills, the question is whether the traditional policy underlying the law remains relevant.

Consideration has been given to whether the current provision ought to be retained in its present form. The alternatives are to abolish it altogether or to adopt it in some revised form. There is no doubt that the provision in its current form is reasonably well established, even with modifications in some jurisdictions. One issue for consideration is how far it is affected by the proposed shifting of emphasis away from compliance with the formal requirements. However, the point here is the question of the validity of the gift to the beneficiary, rather than compliance with formal requirements as to validity.

It is recommended that the provision ought to remain but in a modified form. Although total abolition has been adopted in some other jurisdictions, as noted above, it is felt that there is still a need to provide some protection against the possible interference by a witnessing beneficiary in the process of making a will. To address possible cases of injustice, there should be some power vested in the Courts to dispense with this requirement provided that there is some degree of certainty about the fact that the will was independently made by a testator who knew and approved the contents of the will. Thus it is proposed that the basic provision be retained with some modifications to deal with cases of possible injustice which might arise. The main provisions of the section also need some revision to clarify the meaning of the terms.

### **Recommendation 3**

It is recommended that section 11 of the Act be replaced by the following provision :

“11(1). If any disposition is made by will to a person ("the interested witness") who attests and subscribes the execution of the will or to the interested witnesses' spouse, the disposition is void so far only as it concerns the interested witness or the interested witness's spouse or any person claiming under either of them.

(2) A disposition made by will is not made void by this section if:

- (a) at least two persons who witness the execution of the will are not persons to whom any such disposition is so made or the spouse of any such persons; or
- (b) all the persons who would benefit directly from the avoidance of the disposition consent in writing to the distribution of the disposition according to the will (all the persons having capacity at law to do so); or
- (c) the court is satisfied that :
  - (i) the testator knew and approved of the disposition; and
  - (ii) the disposition was made by the testator freely and voluntarily."

### **4. Rectification of Wills**

Clause 4 of the Discussion Paper raised the question of granting the courts explicit power by

legislation to grant rectification of wills. The doctrine of rectification is an equitable doctrine which allows the equity courts to make an order rectifying the terms of a document essentially on the basis that the document does not accurately reflect what the document purports to embody. Where, for example an oral agreement otherwise amounting to a contract is concluded between two parties but, when the document is reduced to writing, there has been a mistake in the transcription of all of the terms of the agreement, the court has power on the application of one of the parties to grant rectification of the document.

The application of the doctrine is not restricted to contracts. It has been applied for example, to voluntary settlements and other forms of trust instrument, insurance policies and bills of exchange. The existence of rectification does allow some flexibility in making good the error which has occurred. The power to rectify is well established in the equitable jurisdiction and can only be granted subject to certain well-established conditions. It is not necessary that these principles be examined in full here. Suffice it to say that rectification will normally be available only where the document in question does not accurately reflect the common intentions of the parties to the underlying agreement or transaction which continued to exist at the time of execution of the document in question.

Rectification is not the same thing as construction of a will which involves, in the main, an undertaking to ascertain the intention of the makers of a document on the basis of the words used in the document. Clearly enough in a case where there has been an error in transcription of an underlying agreement or transaction, the proper construction of a document might lead to a conclusion which is considerably different from what the parties actually intended. But this is not a relevant or immediate consideration in the construction of documents except in those limited circumstances where the courts will admit extrinsic evidence to aid in construction. Sometimes there are errors in documents which can be satisfactorily resolved by invoking the rules of construction themselves without ordering rectification. This occurs for example where there are typographical errors in the document or obvious omissions from the wording contained in certain clauses. Rectification will not normally be made available where the document in question contains words which the parties concerned actually intended to include. In such a case the matter is one for construction only. However, there is authority to the effect that where the parties are mistaken as to the legal effect of certain words which have been used then rectification should be available.

As was noted in the Discussion Paper, succession courts traditionally have denied that there is any power to rectify a will except perhaps in some limited cases of fraud. The reason for this has most usually been claimed to be that the extension of doctrine of rectification to wills would undercut the importance placed by Wills legislation on the existence of the formal requirements in relation to the making of wills as discussed above.

On this basis any proposal to introduce a scheme for deformalisation of the requirements relating to wills as is recommended above must lead to reconsideration of the grounds for exclusion of rectification. Assuming for the moment that this is the only issue, one would need to ask how far the deformalisation of the will making requirement removes the traditional justification for the exclusion of the remedy of rectification. Certainly conceding power to the courts to dispense with formal requirements tends to erode the traditional requirements in relation to the making of wills in general. This is clearly acknowledged above. However, according to the recommendations made here and indeed in other jurisdictions, there is still a requirement that the will be embodied in a

document. Is it the requirement of the existence of a document embodying the will which is the main reason for the exclusion of rectification or are there other considerations involved, such as a formally signed and witnessed document? Where is the emphasis to be placed?

The authorities on this point tend to be less than clear and to some extent inconclusive. Viewed in terms of the general emphasis that succession law has placed on the importance of a formal will - for example in areas of construction, use of extrinsic evidence, as well as exclusion of rectification - it is suggested that the general emphasis has been on the existence of a formally executed document in the past. It is this concept rather than the mere existence of a document which tends to have taken on most significance and symbolic importance in this context. Thus one could say that the introduction of a system of deformalisation is something which detracts from the traditional grounds for exclusion of the remedy of rectification. Hence if one accepts a scheme whereby the courts can dispense with formal requirements then there is correspondingly greater reason to introduce the possibility of rectification.

But there are other ways of considering the issues involved here. It could be suggested for example that the traditional grounds for exclusion of rectification should themselves be reformed. Given the priority of the document as embodying the will of the deceased, it is also important that the document in question should accurately reflect the intentions of the testator as far as possible. No doubt wills are unilateral documents where the maker, at the relevant time when these issues arise, is dead. Furthermore actual intentions are often matters which, in the absence of the party concerned, are open to dispute and misrepresentation, particularly by interested parties, family members and so on. But in many important respects these are the same grounds which have sometimes been raised to support strict reliance on formal requirements themselves. In simple terms, if one accepts deformalisation then one ought to accept the introduction of rectification.

The common theme is the introduction of a system in relation to proof of wills where the courts are accepted as being sufficiently cautious and conservative in relation to proof of matters justifying rectification to be able to detect frivolous claims. No doubt the courts are capable of applying appropriate standards of scrutiny and proof when matters such as this come before them. No doubt they are capable of taking account of the fact that the maker of the document is not available to provide evidence of actual intention and that parties who often introduce evidence in favour of rectification are parties who are interested in the outcome of the application. The history of the application of the doctrine of rectification by the courts in their equitable jurisdiction evinces sufficient confidence in the performance of their functions here. Accordingly it is suggested that there are good grounds for the introduction of a statutory jurisdiction to rectify wills.

On the general policy underlying rectification of wills it was said in *Re Jensen*<sup>6</sup>:

"there are strong policy reasons for recognising a jurisdiction to rectify .. the object of the exercise is to give effect to the testator's intentions .. Rectification is available for all other documents of this nature including for example, deeds of settlement executed *inter vivos* but called into question after the deceased's death ... In the United Kingdom the legislature has filled the breach with s. 20 of the Administration of Justice Act .. but in the field of Judge-made law it is not always necessary or realistic to wait for legislative intervention. Equity is

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<sup>6</sup> [1992] 2 NZLR 506. See also Maxton *Rectification of Wills: A Case for Reform* [1984] NZLJ 142

not past the age of child bearing (per Harman LJ (1951) 67 LQR 506) and did not cease growing at some climactic date in England per Cooke P. in *Hayward v Giordani* [1983] NZLR 140, 148.”

This measure has been adopted in other jurisdictions but there are differences in approach to be considered. However no similar approaches have been taken in any of the South Pacific jurisdictions. In England such reforms were introduced with effect from 1<sup>st</sup> January 1983. Section 20 of the *Administration of Justice Act 1982* provided, in effect, that the court could rectify a will in order to reflect the intentions of the testator in two cases: firstly where there is a clerical error in transcription of the will; or secondly where the person who prepared the will failed to understand the testator's instructions. A similar provision was recommended for adoption by the Law Commission of New Zealand.<sup>7</sup> The grounds for rectification in such cases were thus rather restricted. One questions whether some of these provisions might not have been dealt with under the rules of construction in any event.

In New South Wales the *Wills Probate and Administration 1898* was amended in 1998 to include section 29A. The purpose of section 29A(1) is to equate the jurisdiction with respect to the rectification of wills more closely to that of the general equitable jurisdiction. In other words the courts could rectify a will where it could be shown clearly that the will did not reflect the actual intentions of the testator. Section 29A(2) requires that any application for rectification must be made within eighteen months of the date of death. There is also a power to extend this period. The South Australian provision is similar although in that case section 25AA of the *Wills Act 1936* requires that the application be made within six months of the date of grant of administration with power granted to the court to consider late applications under certain conditions.

In Tasmania rectification is permitted by section 47 of the *Wills Act 1992* but it requires that the courts satisfy themselves beyond reasonable doubt that the deceased made an error in expressing his or her testamentary intentions in the will. This approach is similar to that formerly taken in South Australia with respect to waiver of the formal requirements, although later revised. The approach here is, however, overly cautious and restrictive in situations where normal civil standards of proof ought to be applied. At the other extreme section 12A(2) of the *Wills Act 1968* of the Australian Capital Territory allows the court to rectify a will in such a way as appears more in the nature of a rewriting. Where in light of circumstances which are unknown, unappreciated or unforeseen by the testator the will does not reflect the trend of the testator's probable intent, the will can be rectified by the court. This permits the courts to reconstruct the testators intention itself assuming that the relevant circumstances were known and to require that the will be in conformity with those reconstructed intentions.

In Queensland section 31 of the *Succession Act 1981* permits rectification. The section applies only where it is shown that the material was 'accidentally or inadvertently omitted' from the will. The section appears limited in scope and might not include situations where the material was excluded owing to a mistake by the testator as to the legal effect of words which appear in the will. It is clearly the case here, as with the English provision, that the parliament did not intend to equate the rectification jurisdiction with that of the equitable jurisdiction to rectify. Applications must be made within six months of the date of the grant.

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<sup>7</sup> *Succession Law: A Succession (Wills) Act*, Report 41, Law Commission of New Zealand, 1997

In conclusion there is clearly a case for conceding to the courts a power of rectification of a will. It is not appropriate to leave it to the courts themselves to develop new principles or approaches in these areas. Legislative intervention is most appropriate. The question is what form should the power of rectification take and what limitation should be placed on applications for rectification. The absence of any time limitation would render the administration of an estate a matter of great uncertainty.

It is suggested that the better approach so far as the nature of the power is concerned are those which are adopted in South Australia and New South Wales as noted above. These approaches equate the general power of revocation with the long held power of the equity courts. So far as the limits on applications is concerned it is suggested that a period which dates from the actual grant of probate would be most appropriate with a power to the court to extend. A period of six months appears entirely reasonable.

#### **Recommendation 4**

That the following provision be inserted as section 17B of the *Wills Act*.

"17B (1) If the Court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, it may order that the will be rectified so as to carry out those intentions.

(2) Subject to sub-section (3), no application under subsection (1) shall be heard by the Court unless the proceedings are instituted before or within a period of six months after the date of grant of probate in Fiji of the will of the deceased person.

(3) Notwithstanding sub-section (2) the Court may, if it is satisfied that reasonable grounds exist to do so, and bearing in mind particularly the state of administration of the estate and the rights or interests of any other person, permit an application to be made outside the stated period of six months, upon such terms and conditions as the Court thinks fit.

#### **5. Privileged Wills**

The provision relating to privileged wills are contained in Part V of the *Wills Act* of Fiji. The position relating to these wills was discussed in section 5 of the Discussion Paper. Privileged wills are wills made by certain privileged persons such as members of the armed forces on actual military service and mariners at sea. They are exceptions to the requirements that a will should comply with the formal requirements as already discussed. Indeed such will might also be made orally.

These wills have a long history dating from classical Roman law. One of the key issues here is whether the introduction of reforms which limit the importance of compliance with the formal provisions necessarily requires that the concept of a privileged will be abolished in Fiji. But one can also ask the general question as to whether such wills ought to be retained.

The current provisions contained in Part V of the *Wills Act* are as follows:

### *Persons entitled to make privileged wills*

“17. The following persons irrespective of age have capacity to make a will and also to revoke a will with or without making a new will :-

(a) any person, whether as a member or not, serving with any of Her Majesty's Forces or any allied forces while in actual military, naval or air service during a war declared or undeclared or other armed conflict in which members of such forces are engaged;

(b) any person who is a mariner or seaman serving at sea.

### **Making of a privileged will**

18. A will made by a person to whom the provisions of section 17 applies need not be executed in the manner required by section 6 but may be made, without any formality, by any form of words, whether written or spoken, if it is clear that he thereby intended to dispose of his property after his death.

### **Revocation of privileged will**

19. Any person who has made a will at a time when this Part applied to him may, after this Part ceases to apply to him and while still under the age of eighteen years, revoke such will by any manner of revocation provided in this Act other than by the making of another will.”

The various arguments for retention or repeal of the privileged will provisions were set out in the Discussion Paper at part 5. A submission made on behalf of the Fiji Armed Forces strongly supported the retention of these provisions. Careful consideration has been given to this submission. However, in the end result and given the proposals for lessening the importance of the formal requirements for will making in Fiji as suggested above, it is felt that there is little warrant to retain these provisions.

Even independently of these reforms it is difficult to justify the creation of specific exceptions for a privileged will relating to these two categories. In particular, the dangers or uncertainties attach to these occupations apply to many other professions as well; for example, firemen and police and security officers but none of these persons fall within the categories of persons entitled to make a privileged will. Surely if there are such dangers attaching categorically to members of the armed forces or to mariners, this alone would be cause for a person to ensure, perhaps with encouragement from the services or employers themselves, that consideration to the making of a proper will well before they embark on armed service or voyages by sea. Providing the possibility for the making of an oral will either on the actual military or at sea does little to encourage the making of a duly considered will. All the provisions do is to encourage the possibility of a last minute, or 'on the spur of the moment' effort at will making in circumstances which might well involve extreme pressure or urgency. Given the importance of the testamentary act itself such due

consideration should be encouraged in the case of all persons.

The telling point is perhaps that persons who fall into the category of a privileged person will be able, on adoption of the above reforms, to make an informal will. There is merit in imposing on such persons the minimal requirement, which will now apply to everyone else, that there be some writing embodying the will. This requirement is indeed a minimal one and compliance with it in the case of members of the armed forces or mariners should not impose any special difficulty, at least not in the modern world. Thus it is to be recommended that the provisions relating to privileged wills be repealed.

#### **Recommendation 5**

It is recommended that sections 17, 18 and 19 of the *Wills Act* be repealed.

### **6. Revocation of Wills**

The Discussion Paper, part 6, raised questions about the adequacy of the current provisions of the *Wills Act* relating to revocation of wills, particularly the grounds for revocation by operation of law. The two relevant provisions here are sections 13 and 15(a) of the *Wills Act*. Read together they provide that the sole ground for revocation of a will by operation of law is subsequent marriage of the testator and that the sole exception to this is where a will is expressed to be made in contemplation of a specific marriage expressed in the will, which marriage is then solemnised. The two provisions are as follows:

“ 13. A will is revoked by the subsequent marriage of the testator except a will made in exercise of a power of appointment when the property thereby appointed would not, in default of such appointment, pass to his executor, administrator or the person entitled in case of intestacy:

Provided that a will expressed to be made in contemplation of a marriage is not revoked by the solemnisation of the marriage contemplated.”

Section 15 reads :

“15. Subject to the provisions of Part V, a will or codicil or any part thereof is not revoked otherwise than-

(a) by marriage, as provided by this Act;...”

The Discussion Paper identified two issues here. The first is whether other grounds for revocation by operation of law ought to be provided for. The second is whether only the contemplation of marriage exception should be widened to allow for what are called general contemplation of marriage.

On the first issue, as the Discussion Paper noted, there are good reasons to include dissolution of marriage as a ground for revocation of a will by operation of law. Those submissions, which were made to the Commission on this point, were supportive of this proposal. Certainly the dissolution of a marriage is an event of equal moment in the affairs of a person to marriage itself. Many other

comparable jurisdictions have adopted this line of reform and it is suggested that the Act be amended to provide accordingly.

Consideration has been given as to whether other grounds for dissolution by operation of law should be added. Clearly enough annulment of a marriage is tantamount to dissolution of marriage at least for these purposes. It should thus also be included as a ground for revocation of marriage. Indeed both provisions ought to be dealt with together.

However it is also suggested that these revocations by termination of marriage should not be regarded as completely revoking the will. It would be inappropriate for example if a will which confers substantial benefits on the children of the testator should be affected by revocation in consequence of marriage. In such a case there is only justification for imposing a partial revocation of marriage and essentially only one which revokes both the testamentary gifts including powers of appointment granted to the former spouse as well as any appointment of the former spouse as executor or trustee. In such cases there might be difficulties with some aspects of what are called “the class closing rules” which determine which of a class of beneficiaries are entitled to take under the class gift. Any amending provision can and should clarify the operation of the rules in this situation.

Furthermore the legislation should allow for situations where it can be established that a testator did not intend that the will should be revoked by the termination of the marriage. This might arise in two cases. Firstly, it might be sufficiently clear on the facts that a testator in a given case did not intend the will to be revoked as regards provisions made in favour of the spouse. It is recommended that provision should be made for such a likely possibility.

Furthermore there should be allowance made for situations where a testator, after the marriage has been terminated has in effect republished the will. The effect of an act of republication is to bring down the will to the date of the act of republication. Republication is clearly an affirmation by a testator that a will is to operate from the date on which the republication is effectuated. It is true that republication at common law only republishes so much of the will as currently represents the will of the testator (see *Fairweather v Fairweather* (1944) 69 CLR 121). But this is hardly to the point here because an act of republication in such a case as this does serve as an affirmation that the will is to remain in existence. There is currently no provision in the *Wills Act* of Fiji, which deals explicitly with the effect of re-execution, republication or revival of a will. There should be and this appears in **Recommendation 8** below.

Finally the rights of a former spouse under the *Inheritance (Family Provision) Act* Cap 61 of Fiji should be expressly reserved. Also the rights of the spouse to any charge or payment of a debt owing by the testator to the former spouse and provided for in the will should be expressly preserved. Without an express provision to this effect an acknowledgement of a debt or a direction to pay a debt or satisfy a liability accrued to the former spouse could be seen as a testamentary gift and thus revoked by the termination of marriage.

In New Zealand judicial separation has been added as a ground for revocation by operation of law. Some doubts are held about this owing to the lack of finality in the severance of the relationship between the testator and the other party. It is not suggested that this line of reform should be adopted in Fiji. It has sometimes been suggested that other events such as *de facto* separation might be considered for inclusion as revoking events. However, such events are legally indefinite and

could add considerable uncertainty to the question of revocation of a will. Thus it is not suggested that any such direction for reform be explored further.

### **Recommendation 6**

It is recommended that section 15 of the *Wills Act* be amended so as amend paragraph (a) and to insert a new paragraph (aa) as follows :

“15.....(a) by marriage as provided for in section 13(1) of this Act;  
(aa) by termination of marriage as provided for in section 13A of this Act;”

Amendments to section 13 of the Act so as to accommodate these amending provisions are given in **Recommendation 7** below

On the question of contemplation of marriage, the main issue is whether the provisions of section 13 as they stand, are too restrictive. In common with all other South Pacific jurisdictions it provides an exception to revocation by subsequent marriage only where the will is expressed to be made in contemplation of marriage to a specific person. A subsequent marriage to that person does not revoke the will.

As noted in paragraph 7.5 of the Discussion Paper the main problem with specific contemplation exceptions is that they are too restrictive or narrow. Often this has led to the validity of a will being treated in terms of rather artificial distinctions between expressions used in a will; for example, whether a particular reference to a person as my fiancé" was merely a descriptive phrase or an expression of contemplation of marriage to a particular person. In the former case it is not necessarily an expression of contemplation of marriage, depending of course on what construction the court might place on the words in the context in which they appear. If the justification for such an exception is that a person who is about to make a will should be allowed to provide in advance for the possibility of marriage then the possibility that a person is contemplating marriage in general should be enough.

There is some merit in retaining the provisions for specific contemplation of marriage clauses but the scope should be widened by allowing for expression of contemplation outside the will itself to be taken into consideration. Often a testator might be certain that his or her will is being made on the basis of an intending marriage to another person, but it might fail because the document itself contains no adequate expression of that contemplation. To allow wills to be saved from revocation by subsequent marriage where it is clear that the will was made in anticipation of an intended marriage to a particular person would be an appropriate reform in this area. In such a case, the required degree of contemplation can be proved as a fact on the evidence available.

However the legislation should also provide for expressions of general contemplation of marriage to save a will from revocation. In this case, it is appropriate to require that the expression of general contemplation of marriage should appear in the document itself. In such cases there is more likelihood that a general intention to marry could be difficult to prove or, at least open to contention. Hence any reform in this regard should require that the expression of general contemplation be in the will itself.

Thus it is proposed that the current section 13 be amended both to widen the scope of specific

contemplation of marriage and to allow for general contemplation of marriage to be permitted to save a will from revocation by subsequent marriage.

**Recommendation 7**

It is recommended that section 13 of the Wills Act be repealed and that the following sections 13 and 13A be inserted in its place:

“13(1) Every will shall be revoked by the subsequent marriage of the testator (except a will made in exercise of a power of appointment when the real or personal estate thereby appointed would not, in default of such appointment, pass to the executor or administrator of the testator).

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

(3) A will made after the commencement of subsection (2) which is expressed to be made in contemplation of marriage generally is not revoked by the solemnisation of a marriage of the testator.”

13A(1) In this section -

'termination of marriage' means either dissolution of marriage by a decree absolute of a court or annulment of a void or a voidable marriage by order of the Court and, in either case, whether or not the testator is to be regarded at fault including any order to such an effect which was made in a place outside Fiji provided that it is recognized by the law of Fiji.

'former spouse', in relation to a testator, means the person who, immediately before the termination of the testator's marriage, was the testator's spouse, or in the case of a purported marriage which is void, was the other party to the purported marriage.

(2) Where a testator has made a will and the testator's marriage is afterwards terminated -

(a) any beneficial gift under the will, other than a charge given for the payment of any debt, in favour of the former spouse of the testator and any power of appointment conferred on the former spouse is revoked; and

(b) any appointment under the will of the former spouse of the testator as executor, trustee or guardian shall be taken to be omitted from the will;

(c) any property which would, but for this section, have passed to the former spouse of the testator pursuant to a beneficial gift referred to in paragraph (a) shall pass as if the former spouse had predeceased the testator, but no class of beneficiaries under the will shall close earlier than it would have closed if the beneficial gift had not been revoked.

(3) Neither subsection (2)(a) nor subsection (2)(b) shall apply where -

(a) the Court on the balance of probabilities is satisfied by any evidence (whether admissible before the commencement of this section or otherwise), of statements made by the testator, that the deceased did not, at the time of termination of the marriage, intend to revoke the gift, power of appointment or appointment; or

(b) the gift, power of appointment or appointment, as the case may be, is contained in a will which is republished after the termination of the marriage by will or codicil which evidences no intention on the part of the testator to revoke the gift, power of appointment or appointment.

(4) Nothing in this section affects -

(a) any right of the former spouse of a testator to make any application under the *Inheritance (Family Provision) Act* Cap 61; or

(b) any direction, charge, trust or provision in the will of a testator for the payment of any amount in respect of any debt or liability of the testator to the former spouse of the testator or to the executor or administrator of the estate of the former spouse.”

### **Recommendation 8**

It is recommended that the following provision be inserted in the *Wills Act* to provide expressly for the effect of re-execution, republication or revival of a will.

“13B. Every will re-executed or republished or revived by any codicil shall for the purposes of this Act be deemed to have been made at the time at which the same is so re-executed, republished or revived.”

## **7. Extrinsic Evidence**

Since the issue of the Discussion Paper some consideration has been given to the issue of construction of a will. This has proven to be a rather problematic area of legal interpretation. The general policy of the courts has been to uphold the sanctity of the written document and to approach questions of interpretation as an attempt, primarily to gather the intention of the testator from the document alone, that is, without the assistance of extrinsic evidence. The court attempts to gather the intention of the testator by giving effect to the plain or grammatical meaning of the words used in the will, taking the whole will as providing the context for interpretation.

This approach is generally sustained by the view that the legislation imposes formal requirements for the making of a will. This requires that the will be a document but a document specially created in terms of the other formal requirements noted above. To allow extrinsic evidence would thus seem to undermine the importance of the document.

This approach is sometimes called “literalism”. The court is bound to interpret the words contained in the will and give effect to them regardless of what was actually intended by the testator. The certainty and possible neutrality of interpreting the written document is sometimes seen to be of greater importance than giving effect to the testator's actual intention. It can lead to results, which are patently unfair and unreasonable. For example, in *Mahoney v Grainger*<sup>8</sup> where the clear wording of a will was upheld, even though it could be shown that the attorney who drew the will had mistaken the instructions given by the testator and had produced a legal effect which the testator would not have intended. The court viewed the wording in the will as “the final expression of the intent of the person executing it.” Also, in *National Society for the Prevention of Cruelty to Children v Scottish National Society for the Prevention of Cruelty to Children*<sup>9</sup> the House of Lords held that “wherever a bequest, whether made to a person or charity, is perfect and unequivocal in all its parts, no parol evidence is admissible to explain it.”<sup>10</sup>

There are well-established exceptions to this primary literal rule of construction. There is the so-called “armchair principle” of interpretation which permits evidence, not so much of the testator's actual intention, but evidence as to the circumstances surrounding the testator with a view to allowing the court to resolve ambiguities which appear in the will. This can include evidence, for example, of the testator's language, habits or of his or her relationships to other people. The principle was explained in *Allgood v Blake*<sup>11</sup> as follows:

“The general rule is that, in construing a will, the court is entitled to put itself in the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is taken to have used the words in the will, and then to declare what is the intention evidenced by the words used with reference to those facts and circumstances which were (or ought to have been) in the mind of the testator when he used those words .. the meaning of words varies according to the circumstances of and concerning which they are used.”<sup>12</sup>

Where there remains an equivocation which cannot be resolved by the application of the armchair principle, then and only then, can the court permit evidence of actual intention of the testator.<sup>13</sup> Thus it is only by a rather tortuous route that the court can come to consider evidence of the actual intention of the testator even as an aid to interpretation of the contents of the document.

It is suggested that a wider and less literal approach ought to be provided for. It is suggested that the courts ought to be able to take evidence of the actual intention of the testator as an aid to construction of the words in the document. The lessening of the importance of compliance with the formal requirements would encourage reform in this area. There is no doubt that there is still a requirement for a will to be in writing but it is suggested that a more liberal approach to interpretation should be encouraged. Section 35 of the *Probate and Administration Act* Cap 16 of Tonga actually contains a provision which permits such a liberal approach by the Court in construction. It provides an appropriate model, with some adjustments, for Fiji.

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<sup>8</sup> 83 Mass 189, 186 EN 86 cf. *Gale v Gale* [1941] 1 Ch.209

<sup>9</sup> 1915 AC 207

<sup>10</sup> *ibid.* at 214

<sup>11</sup> (1878) LR 8 Exch 160

<sup>12</sup> *Ibid.* at 162; per Blackburn J.

<sup>13</sup> See, for example, *Re Smalley* [1929] 2 Ch 112

### **Recommendation 9**

It is recommended that the following provision be inserted in the *Wills Act* as section 26A :

“26A. The Court shall be entitled to admit extrinsic evidence, including evidence of the actual intention of the testator, in order to show the intention of the testator and to aid in the construction of or to explain any contradiction, ambiguity or equivocal reference in a will.”

### **8. Forfeiture Rule**

The possible reform of the common law rule providing for forfeiture of the interest of a beneficiary who kills the testator was raised in Part 8 of the Discussion Paper. The main issue here concerns the proper scope of the rule. Whilst it applies clearly in the case of murder and manslaughter there has long been uncertainty about whether the rule applies to other forms of homicide, such as causing death by dangerous driving, infanticide, assisted suicide and so on.

The New Zealand Law Reform Commission Discussion Paper on this issue went to considerable lengths to propose the specific exclusion of some of these lesser forms of homicide. Indeed it was proposed that an independent statute be introduced related specifically to this area. The identification of appropriate exceptions required fairly exhaustive consideration and special rules for each case.

A better, and certainly much simpler, approach would be to identify just those forms of homicide to which the rule applies thereby excluding every other category of homicide. Thus it would be more appropriate for the legislation to clarify the scope of the rule in a positive way. If the rule applies only to murder and manslaughter (and there are views that this is the proper limit of the rule) then the legislation should so provide.

Accordingly the following recommendation is, in effect, that the operation of the forfeiture rule in Fiji will be limited to killing which constitutes murder and manslaughter committed by the beneficiary either as principal or accessory as specified in the relevant statutory provisions. By necessary implication all other categories of homicide will not involve the forfeiture rule.

The rule applies both to killing by a beneficiary under a will or a next of kin under the intestacy rules. Thus the provision would be inappropriately located in the *Wills Act*. Rather it should be inserted in the *Succession, Probate and Administration Act* Cap. 60.

### **Recommendation 10**

It is recommended that the following provision be inserted as a new section 19 in the *Succession, Probate and Administration Act* Cap. 60 :

“19. The common law rule known as the forfeiture rule which precludes a beneficiary or next of kin who killed the deceased from taking any benefit shall apply only to the following:

- (a) Murder of the deceased under section 199 of the *Penal Code* Cap. 17.

- (b) Manslaughter of the deceased under section 198 of the *Penal Code* Cap. 17.
- (c) Accessory to murder or manslaughter under section 216 of the *Penal Code* Cap. 17.
- (d) Conspiracy to commit murder or manslaughter under section 217 of the *Penal Code* Cap. 17.”

## **9. Registration of Wills**

It appears that there are situations, which arise with some frequency in Fiji where a testator has made a will but the will cannot be located at or after the death. This poses considerable problems for the administration of the estate. It has been suggested that the position might be alleviated to some extent by the adoption of provisions which permit testators to register wills with the court or the court offices which would in turn maintain a will registry.

Consideration has been given to the possibility of making registration a condition of the validity of a will. But it is felt that this would be largely self-defeating and would impose severe restrictions on the existing concept of a will as essentially a private law document. Again with de-formalisation of will making as proposed above it would seem rather contradictory to be imposing further hindrances by way of compulsory registration.

Thus any scheme should be voluntary. A scheme for voluntary registration of wills by the court was adopted in the United Kingdom in 1982 by the Administration of Justice Act 1982 sections 23-25. Other such provisions exist in some of the South Pacific countries such as Vanuatu and Tonga.

The loss of wills can be the result also of failure of persons who have those documents in their possession after the death of the testator to take some positive action to have the estate administered. In part this can be addressed by requiring those persons to deliver the will to the court. It is thus also suggested that the *Wills Act* should contain a provision, which makes it compulsory for a person who has possession of any testamentary papers of a deceased person to produce and deposit the will to the court within a limited time.

### **Recommendation 11**

It is recommended that the following provision be inserted as section 17 of the *Wills Act* :

“17. (1) Any person may deposit his or her will in any Registry Office of the High Court of Fiji for registration.

(2) Any document so deposited shall be registered in accordance with regulations made under section 31 of this Act.”

**Note** : A provision for making of regulations is a recommended reform -see paragraph 10. The title of Part V of the Act would need to be changed from *Privileged Wills* to *Deposit of Wills*.

It is further recommended that the following provision be inserted as section 18 of the *Wills Act* :

“18. Any person who, having in his possession or under his control any will or codicil of a deceased person or any paper or writing purporting to be such a will or codicil, fails or neglects to produce and deposit the same with the Court, or, where there is reason to believe

that the deceased person's estate is a small estate, with a local magistrate within thirty days of learning of the death of the deceased person, shall be guilty of an offence and liable to a fine of one thousand dollars.”

## **10. Provision for the Making of Regulations**

The current *Wills Act* of Fiji does not contain any provision for the making of regulations. This will be needed if the recommendation relating to registration of wills is adopted but it might be useful for other purposes.

### **Recommendation 12**

That the following provision be inserted as section 32 of the *Wills Act*.

“32(1) The Minister may make regulations for the better carrying out of the provisions and purposes of this Act and without prejudice to the generality of the foregoing power, such regulations may provide for-

(a) anything required by this Act to be prescribed;

(b) fees and charges, to be levied; and

(c) such adaptations and modifications in any other law made or having effect prior to the date of commencement of this Act as appear to him necessary or expedient on account of anything provided by or under this Act.

(2) Any regulations adapting or modifying any Act under paragraph (c) of subsection (1) shall be subject to affirmative resolution and shall not come into operation until a draft of it has been laid before Parliament and approved by a resolution of Parliament.”

## **11. Simple Form of Will**

In Part 12 of the Discussion Paper it was suggested that it might be advantageous for a simple form of will or wills to be published by the legislation to enable the public to have available a common form of will. This does something to promote the idea of will-making itself throughout the country. Whilst there are some reservations about the effectiveness of this it is considered appropriate that such an attempt be made. The use of legislation for these purposes is perhaps unusual in the modern sense of legislation but it is now unknown in legal history. Thus the legislation should provide that simple form or forms of will might be prescribed by regulation for use by the public.

### **Recommendation 13**

It is recommended that a new section 33 be added to the *Wills Act* Cap 59

“33. The regulations may prescribe simple forms of will to be available for use by citizens of Fiji.”

## 12. The Scheme of Intestate Distribution

Part 9 of the Discussion Paper dealt with possible reform of the intestate distribution rules in Fiji which apply under the *Succession, Probate and Administration Act* Cap. 60. The current scheme is set out in section 6 of the Act which for convenience sake is set out as follows:

### *Succession to property on intestacy*

“6.(1) Subject to the provisions of Part II, the administrator on intestacy or, in the case of partial intestacy, the executor or administrator with the will annexed, shall hold the property as to which a person dies intestate on or after the date of commencement of this Act on trust to distribute the same as follows:

- (a) if the intestate leaves a wife, or husband, with or without issue, the surviving wife or husband shall take the personal chattels absolutely, and-
  - (i) if the net value of the residuary estate of the intestate, other than the personal chattels, does not exceed \$2,000, the residuary estate absolutely; or
  - (ii) if the net value of the residuary estate exceeds \$2,000, the sum of \$2,000 absolutely;
- (b) if the intestate leaves no issue, the surviving wife or husband shall, in addition to the interests taken under paragraph (a), take one-half of the residuary estate absolutely;
- (c) if the intestate leaves issue, the surviving wife or husband shall, in addition to the interests taken under paragraph (a), take one-third only of the residuary estate absolutely, and the issue shall take *per stirpes* and not *per capita* the remaining two-thirds of the residuary estate absolutely;
- (d) if the intestate leaves issue, but no wife or husband, the issue of the intestate shall take *per stirpes* and not *per capita* the whole estate of the intestate absolutely;
- (e) if the intestate leaves no issue but both parents, then, subject to the interests of a surviving wife or husband, the father and mother of the intestate shall take the residuary estate of the intestate absolutely in equal shares;
- (f) if the intestate leaves no issue, but one parent only, then subject to the interests of a surviving wife or husband, the surviving father or mother shall take the residuary estate of the intestate absolutely;
- (g) if the intestate leaves no issue or parent, the surviving husband or wife shall take the residuary estate of the intestate absolutely;

(h) if the intestate leaves no husband or wife and no issue or parents, then the brothers and sisters of the whole blood, and the children of deceased brothers and sisters of the whole blood of the intestate shall take the whole estate of the intestate absolutely in equal shares, such children taking *per stirpes* and not *per capita*;

(i) if the intestate leaves no husband or wife, and no: issue or parents or brothers or sisters of the whole blood ,or children of deceased brothers or sisters of the whole blood then the brothers and sisters of the half blood and children of deceased brothers and sisters of the half blood shall take the whole estate of the intestate absolutely in equal shares, such children taking *per stirpes* and not *per capita*;

(j) if the intestate leaves no husband or wife and no issue or parents or brothers or sisters of the whole blood or of the half blood, or children of deceased brothers or sisters of the whole blood or of the half blood, then the grandparents of the intestate shall take the whole estate of the intestate absolutely, and if more than one survives the intestate they shall take absolutely in equal shares, but if there is no grandparent, then the uncles and aunts of the whole blood, and children of deceased uncles and aunts of the whole blood, of the intestate, being brothers and sisters of the whole blood of children of deceased brothers and sisters of the whole blood, of a parent of the intestate, shall take the whole estate of the intestate absolutely in equal shares, such children taking *per stirpes* and not *per capita*;

(k) if the intestate leaves no husband or wife and no issue or parents or brothers or sisters of the whole blood or of the half blood or children of deceased brothers or sisters of the whole blood or of the half blood and no grandparents or uncles or aunts of the whole blood or children of deceased uncles or aunts of the whole blood of the intestate being brothers and sisters of the whole blood of children of deceased brothers and sisters of the whole blood, of a parent of the intestate, then the uncles and aunts of the half blood and children of deceased uncles and aunts of the half blood of the intestate shall take the whole estate of the intestate absolutely in equal shares, such children taking *per stirpes* and not *per capita*;

(l) in default of any person taking an absolute interest under any of the foregoing provisions of this section the residuary estate of the intestate shall belong to the Crown as bona vacantia, and in lieu of any right to escheat, and the Crown may, out of the whole or any part of the property devolving on it, provide for dependants, whether kindred or not, of the intestate, and other persons for whom the intestate might reasonably have been expected to make provision.

(2) For the purposes of subsection (1)-

(a) the net value of the property of a deceased person is the net value of that property at the date of the death of that person as finally assessed by the Commissioner of Estate and Gift Duties for the purpose of the *Estate and Gift Duties Act*;

(b) any income derived from the property of a deceased person shall be distributed among the persons entitled in distribution to that property in the same respective

proportions to which they are entitled to share in the distribution of that property.

(3) In this section-

“child” -

(a) in relation to an intestate, means any child, whether legitimate or illegitimate of the intestate;

(b) in relation to any person entitled under the provisions of this Act to share in the property of an intestate, means any child legitimate or illegitimate of that person; "issue" includes a child or any other issue whether legitimate or illegitimate, in any generation, of an intestate.

(4) For the purposes of this section, an illegitimate relationship between a father and his child shall not be recognised unless there is proof that the paternity of the father has been admitted by or established against the father while both the father and the child were living.”

Some areas of potential reform were set out in the Discussion Paper. The first is in relation to the entitlement of the spouse to residuary estate over and above a prescribed amount which is currently specified by the legislation to be \$2,000. The second concerns the extent of the interest of the surviving spouse particularly in cases where there are no issues. The third is in relation to the possible entitlement of the spouse to the matrimonial home.

In relation to the first matter the amount of \$2,000 as is presently provided for is considered much too small. Obviously the economic conditions of Fiji are considerably different from those in other jurisdictions. Thus comparison with other jurisdictions where the amount is much higher is not so informative. However one of the problems in stipulating an amount in the legislation itself is that there are problem in updating the provision on a regular basis. In view of this it is suggested that the legislation should simply make provision for a prescribed amount and this would allow the relevant sum to be reviewed by regulation from time to time.

The second issue concerns the extent of the interest which is provided to a spouse where the deceased dies without any issue. Currently section 6(1)(a)(i), 6(1)(a)(ii) and 6(1)(a)(iii) and 6(1)(b) above provide that where there is a spouse but no issue surviving, the spouse (husband or wife) would be entitled to the personal chattels, the amount specified (to be the prescribed amount) and one half only of the residuary estate. It is suggested that the entitlement of the spouse in such a case ought to be improved.

The tendency of modern legislation in the area of succession law has been to improve the position of the spouse at the expense perhaps of remoter issue. One can possibly relate these developments to a structure which emphasises the role of the nuclear family and/or an attempt to improve the lot, particularly, of female spouses as indeed women more generally. However, if one takes the example of the Australian States there still remains some variation on the question of entitlement of the spouse. In Victoria and New South Wales, for example, the spouse is entitled to the whole of the estate whilst in Queensland the provision remains the same as is current in Fiji. One could argue, against reforms in the direction of New South Wales and Victoria, that in Fiji these are not

factors, which maintain the relevance, which they do in other countries. But the facts of contemporary Fiji society which has been subject to the forces of both modernisation and urbanisation, would suggest that time is appropriate for change. Thus it is recommended that the spouse should be accorded the whole of the estate of the intestate where there are no issue.

No change is recommended in situations where the deceased is survived by a spouse and issue. In such a situation the spouse will take preemptively the prescribed amount and the personal chattels along with a one third share only of the residuary estate. The issue will take the remaining two third shares on a *per stirpes* basis. The following amended form of subsection 6(1) and 6(3) accommodates both of the first two issues.

Consideration was given to the possible inclusion in the definition of 'spouse' for these purposes of a *de facto* spouse of the deceased person. Obviously there are family situations where the parties have not legally married and thus *de facto* spouses could be considered to have some claim on the estate of the testator especially where they are in a dependent situation. However, it is suggested that the inclusion of the right of a *de facto* spouse to apply in the case of either testate or intestate estates under the family provision legislation proposals below would sufficiently satisfy the interests of such a person. The right of application and the right to an order under these proposals is independent of there being a preexisting legal entitlement. The entitlement and order under family provision legislation is based on dependency and this is the most appropriate context to deal with the rights of these persons.

#### **Recommendation 14**

It is recommended that subsections 6(1)(a) and 6(3) of the *Succession, Probate and Administration Act* CAP 60 be amended to read as follows :

“(a) if the intestate leaves a wife, or husband, without issue, the surviving wife or husband shall take the whole of the estate absolutely; and-

(b) if the intestate leaves issue, the surviving wife or husband shall take the prescribed amount and the personal chattels and one-third only of the residuary estate absolutely, and the issue shall take *per stirpes* and not *per capita* the remaining two-thirds of the residuary estate absolutely.”

By insertion into subsection 6(3) the following definition:

‘prescribed amount’ in this section means such amount as may be prescribed from time to time by regulation but if no amount should be so prescribed then the sum of \$20,000.”

On the third issue, that of entitlement to the matrimonial home, the legislation could provide that the spouse is entitled in all cases absolutely to the matrimonial home as well as personal effects. At the present time the spouse is only preemptively entitled to personal effects. The right of a spouse to take the matrimonial home could be seen by some as so clearly as is the claim to personal chattels. However, this is a debatable proposition.

It is clear that the arrangement between married couples is often such that there is a range of different contributions, some financial, others not, some direct, others indirect, which are made in

relation to the acquisition and maintenance of the family home. It is not easy to quantify or describe these contributions with any exactitude in any to hypothesise any general model. There are considerable variations from case to case. In numerous cases there might be expectations on the part of spouses as to inheritance of the former matrimonial home. But again it is not clear how general this expectation is.

An alternative to putting the matrimonial home on the same footing as personal chattels would be to create for the spouse an entitlement to take the matrimonial home in satisfaction or partial satisfaction of the share which is otherwise taken out of the estate. It could be provided, in effect, that the spouse of the deceased has the first right to acquire the matrimonial home so long as appropriate limitations are placed on the exercise of the right so as to ensure that the administration of the estate is not unduly prolonged. This would go at least some way towards satisfying the interest which the spouse might have in the matrimonial home. A model for such a provision exists in various part of the Australia States<sup>14</sup> and particularly in the New South Wales<sup>15</sup> legislation which, with some modification in order to overcome poor drafting, is recommended for adoption in Fiji.

### **Recommendation 15**

It is recommended that the following new provisions be inserted in the *Succession, Probate and Administration Act Cap. 60* following section 6.

“6A(1) In this section -

‘dwelling house’ means -

(a) a building that is designed to be used, or designed to be used principally, as a separate residence for one family or person, together with the land which forms the curtilage of the building; or

(b) an apartment or flat that is so designed, together with any interest in any part of the building of which the apartment or flat forms a part, or in any part of the curtilage of that building, that is owned or otherwise held in conjunction with that apartment or flat.

‘interest’ in relation to a matrimonial home, means -

(a) an estate in fee simple;

(b) a leasehold estate which has not less than 14 years to run or, in the case of a leasehold estate having less than 14 years to run, which confers a right of renewal for one or more terms of not less than 14 years in the aggregate; or

(c) an exclusive right to occupy conferred by virtue of a holding of shares in a company that owns the land on which is erected the building in which the matrimonial home is included, and includes an interest held by an intestate as a

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<sup>14</sup> SA s. 721(1) WA s 14(6) Sch 4; ACT ss 49F-49N; NT ss 72-79

<sup>15</sup> S.61D

tenant in common (but only if there is only one other tenant in common and that tenant in common is the surviving husband or wife of the intestate) but does not include an interest so held as a joint tenant.

'matrimonial home' in relation to an intestate's estate, means a dwelling house in which the intestate held an interest in respect of which the surviving husband or wife of the intestate is entitled to exercise the right conferred by this section.

(2) Subject to this section, where:

(a) an intestate dies leaving a husband or wife and issue;

(b) the value of the estate of the intestate (excluding any personal chattels) exceeds the prescribed amount;

(c) the intestate, at the time of his or her death, held an interest in a dwelling house which is situated in Fiji; and

(d) that dwelling house was, at that time, occupied by the intestate and his or her husband or wife as the case may be, as their only or principal residence, the surviving husband or wife of the testator shall have the right to acquire the matrimonial home in accordance with the provisions of this section and sections 6B to 6F inclusive for an amount equal to the value of the matrimonial home as fixed in accordance with the provisions of section.

(3) The right conferred by subsection (2) shall be exercisable by notification in writing:

(a) where there is a sole administrator who is not the surviving husband or wife of the intestate, delivered to that administrator; or

(b) where there are two or more administrators, delivered to each of those administrators (other than one who is the surviving husband or wife of the intestate); or

(c) where there is a sole administrator who is the surviving husband or wife of the intestate, filed in the office of the Registrar of the court.

(4) A notification delivered or filed under subsection (3) of this clause shall not be revocable except with the consent of the Court.

(5) Upon delivery or filing of the notification under subsection (3) of this section the administrator shall hold the matrimonial home in trust for the husband or wife.

(6) For the purpose of enabling the surviving husband or wife to decide whether or not to exercise the right conferred by subsection (2), he or she may require the administrator to ascertain and fix the value of the interest of the intestate in the matrimonial home pursuant to subsections (7), (8) and (9) and to inform him or her of that value.

(7) The administrator of the estate of an intestate may, for the purposes of this section, from time to time, ascertain and fix the value of:

(a) the intestate's estate;

(b) a share of any person in the intestate's estate; or

(c) subject to subsection (5), the value of the interest of the intestate in the matrimonial home

(8) Any valuation made under the preceding subsection so made in good faith shall be binding on all persons interested in the intestate's estate.

(9) In ascertaining and fixing the value of the interest of an intestate in a matrimonial home the administrator shall :

(a) ascertain the market value of the matrimonial home as at the date at which the value is required to be ascertained;

(b) ascertain the amount (if any) which was, at that date, outstanding under any mortgage, charge or other encumbrance to which the home was subject as at that date; and

(c) fix the value of the matrimonial home as the difference between the market value ascertained under paragraph (a) and the amount (if any) ascertained under paragraph (b).

6B. (1) The right conferred by section 6A(2) shall not be exercisable:

(a) after the death of the surviving husband or wife of the intestate;

(b) after the expiration of 12 months from the date on which letters of administration were first taken out in respect of the estate of the intestate;

(c) if the interest of the intestate in the matrimonial home is required by the administrator to meet funeral and administration expenses, debts and other liabilities payable out of the estate of the intestate; or

(d) in any case in which the transfer or conveyance by the administrator to the husband or wife of the interest of the intestate in the matrimonial home would require compliance with the provisions of

(i) the *Local Government Act* CAP 125, the *Property Law Act* CAP 130, and any other Act with respect to the manner of dividing land into parts, and with respect to any requirement incidental to the manner of dividing land into parts; or

(ii) the *Unit Titles Act* CAP 274, with respect to the manner of subdividing land within the meaning of the section of that Act or of any lot within the

meaning of the section of that Act, and with respect to any requirement incidental to the manner of subdividing any such land or lot, unless those provisions would be complied with.

(2) Without limiting subsection (1) of this section, where:

(a) the matrimonial home forms part of a building and an interest in the whole of the remainder of the building is comprised in the intestate's estate;

(b) the matrimonial home is held with land used for agricultural, pastoral or horticultural purposes and an interest in that land is comprised in that estate:

(c) the whole or a part of the matrimonial home was, at the time of the intestate's death, used as a hotel or lodging house; or

(c) a part of the matrimonial home was, at that time, used for purposes other than residential purposes,

the right conferred by section 6A(2) shall not be exercisable unless the Court, on the application of the administrator or the surviving husband or wife of the intestate (not being the sole administrator), makes an order declaring itself to be satisfied that the exercise of that right is not likely to diminish the value of assets in the estate (disregarding household chattels, if any, and the interest of the intestate in the matrimonial home) or to make those assets more difficult to dispose of.

(3) During the period of 12 months referred to in subsection (1)(b) of this section the administrator (not being the surviving husband or wife of the intestate) shall not, except as authorised under subsection (4) of this clause, without the written consent of the surviving husband or wife sell or otherwise dispose of the interest of the intestate in the matrimonial home except in the course of administration due to want of other assets.

(4) Where in respect of an application made under subsection (2) of this section the Court does not order that the right conferred by section 6 1D shall be exercisable by the surviving husband or wife, it may authorise the administrator to dispose of the interest of the intestate in the matrimonial home before the expiration of the period of 12 months referred to in subsection (1)(b) of this section.

6C. (1) Where, in any case in which the surviving husband or wife of an intestate exercises the right conferred by section 6A(2) in relation to a building referred to in paragraph (a) of the definition of "dwelling-house" in section 6A(1), the area of:

(a) the land on which the building is erected; and

(b) the land which is attached to and occupied with the building for the amenity or convenience of the building,

does not exceed 2,500 square metres and no estate or interest in any land contiguous with the land comprised in that area is comprised in the intestate's estate, the land

referred to in paragraph (b) shall be presumed, until the contrary is proved, to form the curtilage of the building.

(2) Where the surviving husband or wife of an intestate exercises the right conferred by section 6A(2) in relation to a building referred to in paragraph (a) of the definition of "dwelling-house" in section 6A(1), but a question arises as to the curtilage of the building, the administrator or any person beneficially interested in the estate of the intestate may apply to the Court for an order to determine the question, and on any such application being made, the Court may make such order with respect to the question as it thinks just.

6D. Where the right conferred by section 6A(2) is exercised in respect of a matrimonial home, being:

(a) a dwelling-house referred to in paragraph (a) of the definition of "dwelling - house" in section 6A(1) which is contiguous with other land in which an estate or interest is comprised in the intestate's estate; or

(b) a dwelling-house referred to in paragraph (b) of the definition of "dwelling-house" in section 6A(1) which is contiguous with another part of the building of which the dwelling-house forms part and in which an estate or interest is comprised in the intestate's estate,

the administrator, when transferring or conveying the interest of the intestate in the matrimonial home or, as the case may be, the estate or interest in the other land or the other part of the building may, by the instrument of transfer or conveyance create such easements or restrictions as to user benefiting or burdening the matrimonial home or benefiting or burdening that other land or part of the building as he considers necessary for the purpose of rendering usable that other land or part of the building or, as the case may be, the matrimonial home.

6E. A requirement or consent made or given under this section by a surviving husband or wife who is a minor is as valid and effective as it would be if he or she had attained his or her majority.

6F (1) Nothing in sections 6A to 6E inclusive confers on the surviving husband or wife of an intestate whose estate includes a matrimonial home any right as against any person who has in good faith purchase for value from the administrator the interest of the intestate in the matrimonial home.

(2) Where the surviving husband or wife of an intestate whose estate includes a matrimonial home is one of two or more administrators, the rule that a trustee may not be a purchaser of trust property shall not prevent the husband or wife from purchasing out of the intestate's estate any interest of the intestate in the matrimonial home.

6G(1) Where a person dies having made a will which effectively disposes of only part of his estate, sections 6A to 6F inclusive, so far as applicable and subject to the modifications specified in subsection (2), shall apply to and in relation to the part of his or her estate

that is not disposed of by the will as if the last-mentioned part had comprised the whole of his estate.

(2) For the purpose of applying subsection (1):

(a) references in the sections referred to in subsection (1) to the estate of a person who dies wholly intestate or to the estate of an intestate shall be construed as references to that part of the estate of a person who dies having made a will referred to in that subsection that is not disposed of by that will; and

(b) reference in those sections to a person who dies wholly intestate or to an intestate shall be construed as references to a person who dies as referred to in subsection (1).

(3) The executor or administrator of the estate of a person who dies leaving a will referred to in subsection (1) shall, subject to the rights and powers conferred on him by law for the purposes of the administration of the estate, be a trustee for the persons entitled under this Division in respect of any part of that estate that is not expressly disposed of, unless it appears from the will that he is intended to take that part beneficially.”

### 13. Locke King's Act

Standard provisions known as Locke King's Act provisions are common in contemporary succession legislation. They relate to the payment of debts charged on the property of a deceased person. They derive from the 19th Century English legislation known as Locke King's Act which have been refined from time to time since including in England by section 35 of the *Administration of Estates Act 1935*. No such provision appears in the legislation of Fiji. It is unclear why this omission has occurred. It might be that some form of the legislation which was in force in 1875 does apply in Fiji. But it is desirable that the contemporary form of the legislation be applied as it does in other Pacific jurisdictions including Australia and New Zealand.

The Locke King's Act provisions are concerned with the allocation of the burden payment of debts which are charged on particular assets of the deceased. The provisions do not impose any obligation on the beneficiary personally to pay the debt in question but obviously enough they would need to do so in some cases where they wished to receive the asset.<sup>16</sup> Nor does it afford the creditor under the charge with any special rights against the beneficiaries. The provisions do not apply except to beneficiaries who take under the deceased estate or, as is said, through the deceased. Where, for example, a person is entitled to the property charged on death of the deceased under an *inter vivos* trust the provision does not apply.<sup>17</sup>

At common law a devisee of real estate was not obliged to pay or discharge any debt charged by the deceased on the real estate. The debt charged would need to be satisfied out of the general personal estate of the deceased so that the devisee, in effect, would take the property unencumbered. This was limited to those charges which the testator had himself or herself created

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<sup>16</sup> *Sver v Gladstone* (1885) 30 Ch D 614

<sup>17</sup> *Re Fison's Will Trusts; Fison v Fison* [1950] Ch 394

or adopted. Where the testator had not so created or adopted the liability the devisee took the property subject to the charge. Where the property concerned is leasehold, the rule still applicable is that the beneficiary of the leasehold takes it subject to the obligations imposed by the lease itself.<sup>18</sup> The executors may be liable to perform the covenants under the lease, including the covenant to pay rent. But it is to be remembered that they have the benefit of the indemnities discussed above.

The effect of the legislation is to change the position relating to the position of a devisee or beneficiary of property which is subject to a charge created by the deceased. It applies to any property which at the time of death of the deceased is charged with the payment of money. It will be noted that, as against the beneficiaries of the deceased, it is the property charged which is the primary source of payment of the debt charged. A devisee of real estate can no longer claim that he or she is entitled to the property free of the charge except where the section does not apply. In some cases, this might mean that the beneficiary obtains nothing whatsoever, for example, where the debt exceeds the value of the property. The creditor entitled to the charge is not limited to pursuing satisfaction out of the subject property. Indeed the creditor may claim any unsatisfied balance out of the general estate of the deceased.

Reform in this area would clarify the rights of creditors and beneficiaries as well as the position of the administrator in the administration of the estate. Thus it is proposed that the standard provision (which in this case is adapted from section 19 of the *Administration Act 1975* of Samoa) be adopted.

#### **Recommendation 16**

That the following provision be inserted in the *Succession, Probate and Administration Act* Cap. 60 as section 19A:

“19A(1) Where a person dies possessed of, or entitled to, or under a general power of appointment by his will disposes of, an interest in property, or where an interest in property passes by survivorship on the death of a person, and at the time of his death the interest is charged with the payment of money, whether by way of mortgage, charge, or otherwise, and the deceased has not, by will, deed, or other document, signified a contrary or other intention, the interest so charged shall, as between the different persons claiming through the deceased, be primarily liable for payment of all amounts charged thereon; and every part of the said interest, according to its value, shall bear a proportionate part of the amounts charged on the whole thereof.

(2) Such a contrary or other intention shall not be deemed to be signified –

(a) by a general direction for payment of debts or of all the debts of the testator out of his personal estate, or his residuary real and personal estate, or his residuary real estate, or his residuary personal estate; or

(b) By a charge of debts upon any such estate –

unless that intention is further signified by words expressly or by necessary

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<sup>18</sup> See *Eccles v Mills* [1898] AC 360; *Re Daly's Will Trusts* [1962] 3 All ER 699

implication referring to all or some part of the charge on the interest in property.

(3) Nothing in this section shall affect the right of a person entitled to the payment with which the interest in property is charged to obtain payment or satisfaction thereof out of the other assets of the estate or otherwise.”

#### **14. Jurisdiction of the Court**

The range of jurisdiction of the court with respect to administration of deceased estates is specified in section 3 of the *Succession, Probate and Administration Act* Cap. 60. It provides as follows:

“ 3(1) Subject to the provisions of this Act, and to any rules made hereunder the court shall have jurisdiction in contentious and non-contentious probate matters and proceedings and in the granting or revoking of probate of wills and administration of estates of persons dying leaving property in Fiji.

(2) The jurisdiction vested in the court by the provisions of subsection (1) shall, subject to any modifications effected by any rules made under the provisions of section 52, be in conformity with the law and practice in force in England on the 1<sup>st</sup> day of January, 1967, or on such later date as the Chief Justice may from time to time appoint by notice in the Gazette, so far as the same can be read as capable of application to local circumstances.”

Subsection 3(1) limits the power to make grants only to those situations where the deceased died leaving property in Fiji. In this respect the subsection restates one of the traditional limitations on grants of probate developed by the courts in England, namely that there must be property of the deceased within the jurisdiction.<sup>19</sup> This traditional limitation has been retained in all Australian jurisdictions, except Queensland. It is suggested that this limitation is anachronistic given modern global trends. It is suggested that it be widened to permit the court to make a grant even in cases where there is no property of the deceased in the jurisdiction at the time of death. This would follow the example provided by section 5 of the *Administration Act 1975* of Samoa.

#### **Recommendation 17**

It is recommended, firstly, that subsection 3(1) be amended by deleting the words "leaving property" occurring before the words "in Fiji". Secondly, it is recommended that a new subsection 3(1A) be inserted in the *Succession, Probate and Administration Act* Cap 60 as follows:

“3(1A) Without restricting subsection (1) of this section or any other enactment, the court shall have jurisdiction to make a grant of probate or letters of administration in respect of a deceased person, whether or not the deceased person left any estate in Fiji or elsewhere, and whether or not the person to whom the grant is made is in Fiji.”

#### **15. Statutory Order for the Payment of Debts and Liabilities out of the Estate**

Unlike other jurisdictions the current legislation of Fiji does not make any explicit provision as to the order for the payment of debts and liabilities out of the estate. This is not to say that the

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<sup>19</sup> Of course with respect to grants of probate it is also necessary to show that the will of the deceased affected that property

relevant statutory order developed by the courts last century does not apply as a result of the reception of English law in Fiji (as at 1875). However it is desirable that the contemporary order which is explicitly adopted in other jurisdictions also be specifically applied by legislation in Fiji.

It is suggested that the current schedule of order of payment of debts to be found in section 34(3) of the *Administration of Estates Act 1975* (U.K.) be adopted with one variation. One of the problems which has arisen with the application of that order is that there appear to be rights or interests such as options granted to a beneficiary to purchase property of the deceased which do not fit squarely within any of the established categories. It is suggested that to cover these situations there should be an addition to at the end of the order to cover property of this nature. This would be to confirm the way in which the courts have applied the order with respect to these interests in any event.<sup>20</sup>

### **Recommendation 18**

That the following provision be inserted in the *Succession, Probate and Administration Act* Cap. 60 as section 19B

“19B(1). Where the estate of a deceased person is solvent his real and personal estate shall, subject to the rules of court and to section 19A and, to the provisions, if any, contained in the will, be applicable towards the discharge of the funeral testamentary and administration expenses, debts and liabilities payable out of the estate in the following order:

- (a) Firstly, property of the deceased not disposed of by will subject to retention out of it of a fund sufficient to pay pecuniary legacies;
- (b) Secondly, property of the deceased not specifically devised or bequeathed by will but included (either by a specific or general description) in a residuary gift, subject to the retention out of it of a fund sufficient to meet any pecuniary legacies, so far as not provided for as above;
- (c) Thirdly, property of the deceased specifically appropriated or devised or bequeathed (either by a specific or general description) for the payment of debts;
- (d) Fourthly, property of the deceased charged with, or devised or bequeathed (either by a specific or general description) subject to a charge for the payment of debts;
- (e) Fifthly, the fund, if any, retained to meet pecuniary legacies;
- (f) Sixthly, property specifically devised or bequeathed, rateably according to value;
- (g) Finally, property appointed by will under a general power, rateably according to value.
- (h) Any other right or interest of the testator in or in relation to property.

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<sup>20</sup> See *Re Eve; National Provincial Bank Ltd. v Eve* [1956] 479

(2) The order of application may be varied by the will of the deceased."

## **16 Family Provision**

The background relating to family provision legislation in Fiji and other jurisdictions is discussed in Part 10 of the Discussion Paper. Currently the family provision scheme is contained in *Inheritance (Family Provision) Act* Cap. 61 of Fiji. In essence the scheme operating in Fiji is similar in some respects to the provisions of other schemes operating in Australia and New Zealand and in some other Pacific common law jurisdictions. See for example Part VII *Wills, Probate and Administration Act 1987* of the Solomon Islands and Part IV *Administration Act 1975* of Samoa

However, as noted in the Discussion Paper, there are several respects in which the current legislation is either outmoded or unsatisfactory in its scope and operation. It is quite clear that the legislation is outdated in many respects and has not been amended to keep pace with the development of society in Fiji. The main areas of difficulty with the current scheme are:

**Firstly**, those provisions which define the range of family members who are entitled to apply for an order for provisions are extremely restrictive and exclude a worthy range of claimants against the bounty of the deceased's estate (See section 3(1) of the current Act);

**Secondly**, the types of orders which the court can make for provision out of the estate are also very limited and restrict the court largely to the possibility of providing a periodical payments out of the income of the estate of the deceased person. *In specie* orders for the transfer of property to an applicant, however deserving, are not permitted at all. Orders for the payment of capital to an applicant are subject to severe restrictions (see section 3(4) of the current Act); and

**Thirdly**, applications and orders can only be made in respect of testate estates. Yet in many cases there might be persons dependent on the deceased or family members in the traditional sense who are seriously deprived of support by reason of the operation of the rules relating to intestacy or, in other words by the failure of the testator to leave a valid will relating to the whole or part of their property.

The scope of potential applicants is defined by section 3(1) of the Act. At the present time it includes the following eligible persons only:

- (a) a wife or a husband;
- (b) a daughter who has not been married, or who is, by reason of some mental or physical disability, incapable of maintaining herself;
- (c) an infant son;
- (d) a son who is, by reason of some mental or physical disability incapable of maintaining himself; or
- (e) a parent who is on account of old age or by reason of some mental or physical disability incapable of maintaining himself or herself.

By section 2 a son and daughter includes children not yet born at the date of the testator. An infant son is a son under the age of twenty-one years.<sup>21</sup>

As noted in the Discussion Paper the class of applicants is much less generous than in other jurisdictions. The class is restricted in a number of ways which are no longer tenable given the fluidity of relationships of dependency in a modern society. As noted in the Discussion Paper there are numerous justifications for family provision legislation. Clearly in recent times most other jurisdictions have moved in the direction of creating scope for orders to be made in favour of dependent persons rather than for the members of a family in the classical sense of that term. Thus these schemes now in place tend to provide for a class of dependent persons, rather than family members in terms of legally defined relationships as those who are eligible to make application. This view is at least consistent with one of the objectives of family provision legislation and this is that of relieving the State of some of the obligation of providing for dependants of deceased persons by shifting that onus onto the estate of a deceased person in appropriate cases. Whilst this is not the only justification for employing a more liberal concept of family relationships or dependants, it is a considerable one.

Currently, only a legal husband or wife of the deceased is eligible to make application. In modern times this seems remarkably restrictive and clearly at odds with the facts of contemporary life including that in Fiji. There should be scope for *de facto* partners to apply for provision under the Act especially where the relationship is a reasonably long and well-established one. Admitting the possibility of such an application does not necessarily defeat a claim by the legal husband or wife of the deceased (where there is one). Finally, it would be left to the court to determine what provision ought to be made to each after assessment of the merits of the claims of each.

Adult sons are precluded from applying unless they fall within paragraph (d); that is in cases where there is some disability. In other jurisdictions adult children are recognised as having a right to apply particularly where, as a result of expectations created by the deceased they have given up other opportunities in order to provide some form of service to the deceased. The case of an adult child who has, so to speak, stayed on and worked the family farm for the deceased usually fits into this category.

The use of criteria such as infant son and unmarried daughter perhaps reflected certain cultural attitudes in Fiji at the time of this legislation. But those attitudes seem no longer prevalent. Nor should they be encouraged. In fact, little justification can be maintained for the particular differentiations which are imposed throughout the categories applied by section 3(1). It would be far better to remove those restrictions and simply define a range of family members who are eligible to apply for provision out of the estate. Whether they are deserving in terms of the general criteria involved for applying are matters which could and should be left to the court, as indeed they are in other jurisdictions.

The legislation ought specifically to include children, as well as step children and adopted children. Former husbands and wives of a deceased who has been divorced ought also to be included assuming that they have not remarried at the time of death as they could clearly fall within the category of a person who is dependant on the deceased and proper objects of his or her

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<sup>21</sup> Section 3(2)(c) reinforces that view.

bounty. *De facto* spouses should also be included in the group of potential applicants where they have been cohabiting with the deceased for a period of say five years prior to the death of the deceased person.

The class of potential applicants should also include a relatively open class of family members and dependant persons. Dependant persons are those who are not related by blood or marriage to the deceased but who are dependant on the deceased at the time of death. Parents of the deceased, without the current restriction, and a parent of any child of the deceased person should also be included in the class of potential applicants.

Some consideration has been given to the fact that under the current legislation a deceased person might defeat the operation of the Act by entering into transactions with family members or others in order to defeat the possibility of claims being made by others under the legislation after that person's death. In New South Wales under the *Family Provision Act 1975*, the legislation contains sophisticated machinery relating to what is called notional estate. This permits the courts to include in the net estate of the deceased person, for the purposes of considering an order under the Act, property which has been transferred during a period of three years prior to the date of death and which was not a *bonafide* transaction.

The criticism of such a wide-ranging provision is that it interferes unduly with the power of a person to dispose of their property during their lifetime as they see fit. Whilst the family provision legislation does clearly interfere with a person's right to free right to dispose of property on death (the so-called 'free right of testation') it could be argued that the right of a person to dispose of property during his or her lifetime is a matter of a different order. Against this, it could be suggested that in cases of impending death, a person can often be encouraged to enter into a transaction which would prevent potential claimants from defeating the potential claims of dependants under the Act.

It is suggested that a fair compromise of these arguments would be a situation where the court is granted power to set aside certain transactions made within a stipulated period before the time of actual death and which are made with the intention of defeating the rights of potential claimants under the Act.

### **Recommendation 19**

It is recommended that the *Inheritance (Family Provision) Act* Cap. 61 be repealed in its entirety and replaced with the following :

1. This Act may be cited as the *Inheritance (Family Provision) Act* Cap. 61.

2. In this Act unless a contrary intention appears:

“child” means, in relation to a deceased person, any child, stepchild or adopted child of that person and includes a child *en ventre sa mere*,

“court” means the High Court of Fiji;

“dependant” means, in relation to a deceased person, any person who was being wholly

or substantially maintained or supported (otherwise than for full valuable consideration) by that deceased person at the time of his death being-

- (a) a parent of that deceased person;
- (b) the parent of a surviving child under the age of eighteen years of that deceased person;
- (c) a person under the age of eighteen years; or
- (d) a person who-
  - (i) has lived in a connubial relationship with that deceased person for a continuous period of five years at least terminating on the death of that deceased person; or
  - (ii) within the period of six years terminating on the death of that deceased person, has lived in a connubial relationship with that deceased person for periods aggregating five years at least, including a period terminating on the death of that deceased person;

“spouse” means, in relation to a deceased person, the husband or wife of that person and includes a husband or wife who has been divorced whether before or after the commencement of this Act by or from that person and who has not remarried before the death of that person, if he or she is receiving or entitled to receive maintenance from that person at the time of that person's death;

“stepchild” means, in relation to a deceased person, a child of that person's spouse who is not a child of the deceased person.

“will” has the meaning ascribed to it by section 2 of the *Wills Act* Cap. 59

3. (1) If any person (hereinafter called "the deceased person") dies whether testate or intestate and in terms of the will or as a result of the intestacy, adequate provision is not made from the estate of the deceased person for the proper maintenance and support of the deceased person's spouse, child or dependant, the Court may, in its discretion, on application by or on behalf of the said spouse, child or dependent, order that such provision as the Court thinks fit be made out of the estate of the deceased person for such spouse, child or dependant:

Provided that the Court shall not make an order in respect of a dependant unless it is satisfied, having regard to the extent to which the dependant was being maintained or supported by the deceased person before his death, the need of the dependant for the continuance of that maintenance or support and the circumstances of the case, that it is proper that some provision should be made for the dependant.

- (2) The Court may:

- (a) attach such conditions to the order as it thinks fit; or
- (b) if it thinks fit, by the order direct that the provision shall consist of a lump sum or a periodical or other payment; or
- (c) refuse to make an order in favour of any person whose character or conduct is such as, in the opinion of the Court, disentitles him or her to the benefit of an order, or whose circumstances are such as make such refusal reasonable.
- (3) The incidence of the payment or payments ordered shall, unless the Court otherwise directs, fall rateably upon the whole estate of the deceased person or upon so much thereof as is or may be made directly or indirectly subject to the jurisdiction of the Court.
- (4) An order made under this section shall have effect as if it were a codicil to the will of the deceased or, in the case of intestacy, as if it were a will of the deceased person.
- (5) The court may, by such order or any subsequent order, exonerate any part of the estate of the deceased person from the incidence of the order, after hearing such of the parties as may be affected by such exoneration as it thinks necessary, and may for that purpose direct the personal representative to represent, or appoint any person to represent, any such party.
- (6) The court may at any time fix a periodic payment or lump sum to be paid by any beneficiary in the estate, to represent, or in commutation of, such proportion of the sum ordered to be paid as falls upon the portion of the estate in which he is interested, and exonerate such portion from further liability, and direct in what manner such periodic payment shall be secured, and to whom such lump sum shall be paid, and in what manner it shall be invested for the benefit of the person to whom the commuted payment was payable.
- (7) Where an application has been filed on behalf of any person it may be treated by the court as, and, so far as regards the question of limitation, shall be deemed to be, an application on behalf of all persons who might apply.
- (8) The personal representative or The Public Trustee of Fiji, or any person acting as the next friend of any infant or any mentally ill person, may apply on behalf of any person being an infant, or being mentally ill in any case where such person might apply, or may apply to the Court for advice or directions as to whether he ought so to apply; and, in the later case, the Court may treat such application as an application on behalf of such person for the purpose of avoiding the effect of limitation.
- (9) Unless the Court otherwise directs, no application shall be heard by the Court at the instance of a party claiming the benefit of this Part unless the proceedings for such application be instituted within nine months after the death of the deceased person; but the Court may at its discretion hear and determine an application under this Part although a grant has not been made.
- (10) A person who, if a declaration of legitimacy were made upon his application under

the provisions section 5 of the *Legitimacy Act Cap 57*, would be entitled to make an application under this Part, may make an application under this Part but such application shall not be proceeded with until he has obtained a declaration of paternity under that Act; and the Court may give such directions and act as it thinks fit to facilitate the making and determination of all necessary applications on behalf of that person under that Act and this Part.

(11) Upon any order being made, the portion of the estate comprised therein or affected thereby shall be held subject to the provisions of the order.

(12) No mortgage, charge or assignment of any kind whatsoever of or over such provision, made before the order is made, shall be of any force, validity or effect, and no such mortgage, charge or assignment made after the order is made shall be of any force, validity or effect unless made with the permission of the Court.

4. (1) Where, within a period of one year immediately preceding the date of death the deceased person entered into a transaction whereby the property of the deceased was disposed in favour of a person who was other than a bona fide purchaser for full valuable consideration, and the court considers that the transaction was entered into with an intention by the deceased person to avoid the rights of any potential claimant under this Act, the court may in its discretion, set aside that transaction and order that the property be included in the estate of the deceased person for the purposes of this Act.

(2) In considering the exercise of its discretion under the preceding subsection the court shall have regard to the rights and interests of any third party which might be affected by the making of such an order.

(3) Where any sum of money or other property is received by any person as a *donatio mortis causa* made by the deceased person that sum of money or that other property shall be treated for the purposes of this Part as part of the estate of the deceased; but this subsection shall not render any person liable for having paid that sum or transferred that other property in order to give effect to that *donatio mortis causa*.

5. (1) Where (whether before or after the commencement of this Act) the Court has ordered a periodical payment or has ordered any part of an estate or a lump sum to be invested for the benefit of any person, it may from time to time on the application of any person inquire whether any party deriving benefit under the order is still living or has become possessed of or entitled to provision for his or her proper maintenance or support and into the adequacy of the provision, or whether the provision made by the order for any such party remains adequate, and may increase or reduce the provision so made or discharge, vary or suspend the order, or make such other order as is just in the circumstances:

Provided that the Court shall not increase the provision so made unless the income of the estate or, as the case may be, the capital or income of the part of the estate or lump sum invested for the benefit of the person concerned in pursuance of the original order is considered by the Court to be sufficient for the purposes of such increase and all other

lawful payments (if any) therefrom.

(2) Without derogating from the provisions of subsection (1) of this section, where the Court has increased the provision so made for the benefit of any person and at any subsequent date the income of the estate or, as the case may be, the capital or income of the part of the estate or lump sum invested for the benefit of the person concerned is considered by the Court to be insufficient for the purposes of such provision and all other lawful payments (if any) therefrom, the Court may reduce or suspend any increase or discharge, vary or suspend the original order, or make such other order as is just in the circumstances.

6. (1) This section shall apply notwithstanding the provisions of section 61 of the *Trustee Act Cap. 65*

(2) No action shall lie against the personal representative by reason of his having distributed any part of the estate and no application or order under this Part shall disturb the distribution, if it was properly made by the personal representative for the purpose of providing for the maintenance or support of the wife, husband or any child of the deceased person totally or partially dependent on the deceased person immediately before the death of the deceased person whether or not the personal representative had notice at the time of the distribution of any application or intended application under this Part in respect of the estate.

(3) No person who may have made or may be entitled to make an application under this Part shall be entitled to bring an action against the personal representative by reason of his having distributed any part of the estate if the distribution was properly made by the personal representative after the person (being of full legal capacity) has notified the personal representative in writing that the person either:

(a) consents to the distribution; or

(b) does not intend to make any application that would affect the proposed distribution.

(4) No action shall lie against the personal representative by reason of his having distributed any part of the estate if the distribution was properly made by the personal representative after the expiration of six months from the death of the deceased person and without notice of any application or intended application under subsection (1) of section 3 or under section 4 in respect of the estate.

(5) For the purposes of this section notice to a personal representative of intention to make any application under this Part shall be in writing signed by the applicant or his solicitor and shall lapse and be incapable of being renewed, and the personal representative may act as if he had not received the notice, unless, before the expiration of three months after the day on which he first receives notice of intention to make the application, the personal representative receives notice in writing that the application has been made to the Court or is served with a copy of the application:

Provided that nothing in this subsection shall prevent the subsequent making of an application within any other period allowed by or pursuant to this Part.

APPENDIX A  
DISCUSSION PAPER