FIJI LAW REFORM COMMISSION

WILLS AND SUCCESSION LAWS REFERENCE

Wills and Succession Laws in Fiji Discussion Paper

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
Discussion Paper

June 1998

Preface

In February 1998 the Fiji Law Reform Commission was given the following reference by the Attorney-General:

> "**TO ENQUIRE INTO AND REPORT** on the laws relating to Wills and Succession with a view to providing a comprehensive Succession Statute that simplifies the law, enables better effect to be given to the Will maker and takes account of the diversity of Fiji Families.
>
> **AND TO REPORT** thereon by 20 February 2000"

The Attorney-General appointed Professor Robert Hughes as the Commissioner responsible for Wills and Succession Law Reform.

This paper identifies general issues for discussion and reform. The key areas highlighted will be subject to further discussion papers issued by the Commission in due course.

You are invited to make comments and submissions on the options for reform set out in this paper. Your criticism and comments will assist the Commission in preparing a final report to the Attorney General on **Wills and Succession Law Reform.**

Written comments should be sent to:

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Please note that this discussion paper is designed to encourage public participation and debate. It is **not a final report** and does not necessarily represent the final views of the Commission.

June 1998

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Introduction

The purpose of this paper is to identify key areas for discussion of succession law reform in Fiji. It proposes certain such areas, particularly those where, in other common law and Commonwealth jurisdictions such as Australia, New Zealand and the United Kingdom, there have been relatively recent reforms in succession law, which might be appropriate for adoption in Fiji. It also proposes some areas where particular problems unique to Fiji prompt independent consideration.

The areas targeted here will be subject to further discussion papers issued by the Commission in due course. Some of the areas suggested are likely to be more complex and more controversial than others. Submissions are invited on any of the particular areas discussed. However, submissions are also welcome on the general range of areas covered and as to any further areas which might be included for consideration. Thus this paper seeks to promote discussion of succession reform and to assist in the identification of issues, rather than to confine the consideration of reform to particular areas. The views expressed should be taken in that light.

The importance of succession law should not be underrated. Succession principles have been taken to embody the "genetic imprint" of a society. Succession is one of the primary ways in which property is transmitted between the generations. However succession laws are not static. They are subject to change within the general pattern of social and cultural development Hence it is appropriate that the principles of succession law and practice be subject to ongoing review and reform to keep pace where possible with those developments. The issue is not simply one of reform for reform's sake. Nor should reform be guided simply by a willingness to adopt innovations which have taken place in other jurisdictions, however closely comparable. The guiding principle should be whether reform is appropriate to developments within a particular society itself and whether particular reforms can improve the responsiveness and effectiveness of the legal system in the particular area under discussion.

Succession law and practice in Fiji is based primarily on two pieces of legislation the *Wills Act* Cap. 55 and the *Probate and Administration Act* Cap 60. In certain respects the provisions of the *Trustee Act* Cap. 65 is also relevant; for example, in terms of the powers of legal personal representatives. The basic structure of the legislation is very similar to the scheme of legislation in most common law countries. The pattern of regulation of will making, the formal and substantive validity of wills, revocation of wills, grants of administration, and so on, are adaptations of those provisions which were first imported into Fiji through the *Wills Act 1837,* the scheme of intestate distribution and the practice of the probate court of the United Kingdom. That basic structure and its internal requirements is generally well known, not only to lawyers in the jurisdiction but to members of the public as well. Hence it would be a brave, and misguided undertaking, to set upon a radical programme of reform, which purports a complete transformation of this basic structure. However, as indicated above, there are areas where certain modifications of the present legislative scheme are appropriate. These can largely be affected without change to the basic structure of the scheme as it presently stands.

One of the major reform issues is, as will be seen from the following, an alleviation of the strictness of the formal requirements for the making of a valid will. The adoption of reforms in this area alone requires consideration of a number of related issues.

In all there are twelve areas of possible reform highlighted in this paper. However, it serves to reiterate that there might well be other areas where consideration of reform of the current laws of succession of Fiji are warranted. Where appropriate and of sufficient importance any suggested areas might themselves become the subject of further discussion papers related to those particular areas.

One important theme, which guides the succession process, is the improvement of the operation of the laws of succession in Fiji as well as their responsiveness to the needs and values of the country. However another issue is simplicity. The need to achieve simplicity in the operation of the current laws of succession is in fact explicitly stated in the terms of reference to the Commissioner. Hence submissions directed to the question of simplification or clarification of the current laws are also welcome.

We turn now to the main areas identified for discussion.

1. The Definition of Will

1.1 The current definition of a will appears in section 2 of the Wills Act. It is as follows:

> "2. ... "will" includes a codicil and every other testamentary disposition."

The definition is rather trivial in terms. It is an inclusive definition and therefore presupposes the common law definition of a will. The common law clearly includes as a will any document, which merely appoints an executor and makes no disposition of property on death. It would also include documents, which purport no more than the revocation of an existing will or the revocation of the appointment of an executor under an existing will. Clearly it also includes documents, which fail to dispose of the whole of the estate of a deceased person.

1.2 The position relating to documents, which merely appoint a testamentary guardian, is less clear. It does not fit neatly with the concept of a testamentary disposition of property, which is tile main concept of property. Yet in principle it would seem that the appointment of a guardian *who* is to take over on death of the parent is clearly in the nature of a testamentary act. This is in fact the case in the United Kingdom — see section I *Wills Act 1837* (U.K.)

1.3 It is suggested that the definition of 'will' in section 2 of the Act should be widened to include a wider variety of cases. Thus it might be amended to read as follows:

> "'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 tins Act."

2. The Formal Requirements Relating to Wills

2.1 This part of the paper is concerned with the issue of formal validity so far as it relates to the requirement of writing, execution, attestation and subscription. It is not concerned with the conflict of laws provisions as to formal validity which are embodied in Part VI of tile Wills Act and

which follow the Hague Convention of 5th October 1961 on validity of testamentary instruments. Section 6 of the *Wills Act* sets out the formal requirements in this sense for the making of wills. It is in the following terms.

"6. Subject to the provisions of Part V, a will is not valid unless it is in writing and executed in the following manner: -

(a) it is 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;

(b) such signature is made or acknowledged by the testator in the presence of at least two witnesses present at the same time; and

(c) the witnesses attest and subscribe the will in the presence of the testator but no form of attestation is necessary."

Part V of the Act contains the provisions relating to the making of privileged wills. These are subject to further commentary below.

2.2 These requirements as to writing, execution, attestation and subscription are a revised version of what appeared in the *Wills Act 1837* (U.K.) which absorbed provisions formerly established by the *Statute of Frauds.*

2.3 The former requirement that the testator should sign the will at the foot or end of the document has been dispensed with. These provisions have been the subject of a long period of interpretation by the courts. The generally accepted justification of these formal requirements has been the prevention of fraud. In general the provisions have received a very liberal interpretation by the courts, although they still necessarily impose constraints on the type of act or act, which can constitute a valid testamentary act.

2.4 For one thing section 6 embodies the basic principle that a will is essentially a document This is reinforced by reference to the *Interpretation Act* definition of 'writing' which applies directly in this context.

2.5 However, the retention of such a concept of a formally valid will is a matter which has prompted some extensive consideration by law reform bodies in countries throughout the world over tile last twenty years. It has been argued that the requirement of a document which is executed by the testator and witnesses takes no account of other possible modes of expression of the testamentary intentions of a testator. It has been suggested that other technological modes of expression ought to be taken into account. These might include the likes of cassettes, videotapes and electronic mail. But the main issues in these cases are, firstly, how effectively these alternate modes of expression can be effectively and reliably authenticated as the act of the testator and, secondly, whether the difficulty of formulating new criteria of authentication is a problem worthy of concerted attention, especially when current the documentary and execution requirements are broadly known and generally understood. It would be exceptional that a person would expect or derive any particular advantage from being accorded tile right to make a will in non-documentary form. Cases of potential injustice where a person has purported to make a will by means other than documentary form would again be limited. Whilst it can be admitted that the use of electronically based technologies is becoming more prevalent in all parts of the world it is questionable whether the alternative is yet of such proportions as to displace the use of written

documents as the primary mode formal expression and especially of legal expression. It can at least be doubted tether it is likely to do so in Fiji for some time to come. In other words, there are good grounds to doubt whether Acre is anything to be gained by seeking to amend the current provisions, which entrench the basic idea, in conformity with common understanding, that a will is a document.

2.6 On the other hand, whilst much has been said about the need for formalities as a means of prevention of fraud the trend in other common law jurisdictions has been to adopt provisions which permit the courts to admit documents to probate which do not strictly comply with the stated formalities. The general concern here has been that reliance on the formalities can often defeat a well-established testamentary intention on the part of the testator. This can be acknowledged without expressing any view on the hackneyed view that the formalities can be the instrument of fraud rather than the prevention of it in particular cases.

2.7 Several of the jurisdictions in Australia have now introduced special provisions which, under certain circumstances, will excuse the non-compliance by a testator with the formal requirements in relation to the making of a will. Similar provisions were introduced in the United States in 1990[1]. Apart from providing substantial relief from the formal compliance rules there are also consequences for the way in which wills are to be interpreted by the courts. The formal requirements reinforce the view that wills in a common law system ought to be interpreted literally or at least in the sense of not going beyond the document in order to ascertain the true meaning of the testator. It has long been the case that the document itself is assumed to be the expression of the testator's intention without searching for answers as to what the testator really meant. The formal legal effect of the words which were actually used by the testator must be determined by the court, largely without the aid of extrinsic evidence. Although there have been acknowledged exceptions to the strictness of this rule a literalism on the part of the court has predominated testamentary interpretation. The introduction of these provisions which limit the formal requirements themselves would appear to require reassessment of tins literal approach to the interpretation of wills.

2.8 To provide an appropriate example, section ISA of the *Wills, Probate and Administration Act 1898* (N.S.W.) was introduced in New South Wales in 1989 following a report from the Law Reform Commission of that State. The Commission considered a number of possibilities for the reform of the provisions relating to the formal requirements in relation to the making of wills. It considered as options, dispensing with the requirements altogether. It also considered the Canadian reforms in relation to oral wills, wills by videotape and so on. It elected to retain the formal requirements but to abate their rigour by empowering the court to overlook the requirements in certain instances. The section, which was influenced to some degree by the South Australian provision, reads as follows:

[1] By section 2-503 of the Uniform Probate Code which provides: "Although a document or writing added upon a document in compliance with Section 2.502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing established by clear and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent's will, (ii) a partial or complete revocation of the will, (iii) an addition to or alteration of the will, or (iv) a partial or complete revival of his (or her) formerly revoked will or of a formerly revoked portion of the will" The Preparatory Note suggests that the provision was introduced in view of "the decline of the formalism pro intent-serving policies" Uniform Probate Code Preparatory Notes p. 24. On the background of the provision and it's complete endorsement see *Matter of the Will of Ranney*, 589 A 2d 1339 (NJ 1991) See also Langbein R. *Substantial Compliance with the Wills Act 1975 88* Harvard Law Review 489

> *"18A(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 of this Act, constitutes a will of the deceased person, an amendment of such a will or the revocation of such a will if the Court is satisfied that the deceased person intended the document to constitute his or her will, and, amendment of his or her will or the revocation of his or her will.*
>
> *(2) Informing its view, the Court may have regard (in addition to the document) to any other evidence relating to the manner of execution or the 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. "*

2.9 The provisions in the other Australian States are different in material respects but the motivation for adoption was similar. Section 12(2) of the South Australian section provides:

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

The cases on the South Australian provision suggest that a very liberal approach is appropriate[2] Of course there must still be a document but the section allows the admission to probate of a document which might include alterations which would otherwise be ineffective. There is no need to show any attempt by the testator to comply with the formal requirements. The Queensland provision is different in this regard in that it requires substantial compliance. However, under the South Australian and the N.S.W. provisions there are no minimum requirements such as signature by the testator on the document. Where there has been a very substantial departure from the formal requirements the courts will be inclined to scrutinise the document more closely in applying the section.

2.10 These provisions do not abate the requirement that the will should be in writing. In *In the Estate of Masters dec'd*[3] it was said that the New South Wales provision (above), despite Ac breadth of its expression, did not permit the court to admit to probate a putative will which was not a document, as this was intrinsic to the concept of a will itself. What was required was there be a document and that tile document should exhibit a testamentary nature as opposed, say, to an intention to operate *inter vivos.* Provisions of this nature have enabled admission to probate of documents which have not been signed properly or at all by the testator, which have not been duly attested or which have not been signed by the required number of witnesses or at all.

2.11 The justification for empowering the courts, in effect, to waive the formal requirements, has been put as giving effect to a genuine intention of the testator to undertake a disposition of his or her property on death. Provided that appropriate safeguards are established which require that the

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[2] See *In Estate of Graham* (1978) 20 SASAR 198; *In Estate of Blakely* (1983) 32 SASR 473 and *In Estate of Williams* (1984) 36 SASR 423

[3] (1994) 33 NSWLR 446

courts satisfy themselves of this element to an appropriate standard, effect should be given to the intention of the testator even though the formalities were not properly complied with or complied with at all. It has been suggested that the adoption of these provisions introduces an appropriate degree of flexibility into the law of testate succession. For one thing, it accords with the general trend of liberal interpretation of the formal requirements by the courts as mentioned before.

3. The Beneficiary Who Witnesses a Will

3.1 In some jurisdictions there have been suggestions regarding reform of the rule that a gift by will to a person who witnesses that will is null and void.

3.2 The legislation of South Pacific jurisdictions generally follows the pattern provided by the *Wills Act 1837* (UK) in providing that where a beneficiary is an attesting and subscribing witnesses to a will this factor does not destroy the validity of the will. However, the interest given to that beneficiary under the will is void.[4] The courts have held that these provisions do not apply in the case of privileged wills where attestation is not a formal requirement.[5] Section 10 of the Wills Act (Fiji) provides that a creditor or the spouse of a creditor is competent to provide the will. Section 9 preserves the competency of an executor who witnesses. Section 11 of the Act is Ac key section in this context. It provides as follows:

> "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 tile execution of the will or the validity or invalidity thereof."

3.3 The rule was designed to ensure that the execution of a will takes place independently of those who have a more or less direct benefit bringing the will into being. Thus tile issue is largely one of ensuring that the will is formally valid and free from promotion by persons who are interested in upholding it.

3.4 Obviously, before the rule can be applied it is necessary that the court construe the will in question in order to determine whether the witness was indeed a beneficiary. The rule applies only to gifts, which are made by will to the witness. Hence, a gift which is conferred by way of some independent trust is not rendered void because of the witnessing of the will.[6] Furthermore it must have been possible to foresee that the witness would have become entitled as a beneficiary under the will at the time that it was executed.[7] Where a beneficiary under the will witnesses a later codicil the rule will not be applicable. That will even be so where the codicil affirms the terms of the will. The rule would only be invoked as regards a benefit conferred by virtue of tile codicil itself.[8]

3.5 The rule applies only as regards persons *who* have a beneficial interest by virtue of the will and to persons who claim through them. Where there is a gift to the witness for life with remainder to

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[4] This applied following the section 15 of the Wills *Act 1837* (UK).
[5] *Re Limmond; Limmondv Cunliffe* [1915] 2 Ch. 240
[6] *Re Young; Young v Young* [1951] Ch 344
[7] *Re Royce 's Will Trusts; Tildesby v Tildesby* [1959] Ch 626
[8] *Gaskin v Rogers* (1866) LR 2 Eq 284

their children, it has been held that the reminder interest stands and the children would take absolutely.[9] However were the gift to the witness or the children on a substitutional basis then the whole gift would be invalid.[10] If the gift by will were to two persons including the witness as joint tenants, the effect of the rule would be that the whole of the property would pass to the other joint tenant.[11] Where, however, the gift was to the witness as a trustee or in some other representative capacity only, the gift would be valid.[12] For these purposes where the will gives a right to a solicitor/executor or trustee to charge profit costs for work to be done the rule applies so that the if the solicitor witnesses the will the provision is void.[13] A solicitor who fails to advise a beneficiary-witness of the consequence of witnessing the will might be liable in negligence.[14]

3.6 The continuing relevance of this rule is brought into question with the move away from the rigidity of the formal requirements themselves. In addition, it can be questioned why the credibility of a beneficiary under a will in proving due execution of the will should be immediately ruled out merely because the witness concerned has a beneficial interest under the will itself. On the first point, the introduction of reforms to abate the rigidity of the formal requirements, as are discussed in 2 above, would tend to negate the need for such a rule. If the courts can admit to probate a will which has no witnesses at all, for example, the act witnessing by a beneficiary would always be, in effect, superfluous. As mentioned above, superfluous attestations have always been regarded as outside the scope of the rule. On the second point, there are means whereby the courts can legitimately and effectively assess the credibility of wills which have been witnessed by persons with an interest in the will. This is part of the normal function of the courts in any event

3.7 One course of action, subject to the adoption of the recommendations in 2 above would simply be to repeal sections 9, 10 and 11 of the Act With the introduction of those recommendations all three would be anachronistic.

4. Rectification of Wills

4.1. The remedy of rectification of documents was developed by the courts of equity to deal with situations where there had been a failure to transcribe the terms of a concluded agreement into written form. The courts of probate were not prepared to formulate any such document themselves and this also was largely a result of the high level of priority accorded to the formal requirements of wills. In many other jurisdictions this situation has been redressed by statute consequent on reforms such as those indicated in 2 above. To downgrade the importance of the formal requirements in will-making would suggest that a court ought to be able on the basis of adequate evidence to rectify the terms of a will which does not accurately reflect the actual intentions of the testator.

4.2 The main question here is that of appropriate safeguards with respect to the exercise of the power of rectification. Stringent requirements could be prescribed by the legislation. However, it

[9] *Jull v Jacob* (1876) 3 Ch D 703: *Re Clark v Randall* (1885) 31 Ch D 72
[10] *Aplin v Stone* (1904) 1 Ch 543; *Re Dolan's Will Trusts, Westminister Bank Ltd v Phillips* (1970) Ch 267
[11] *Re Fleetwood, Sidgreaves v Brewer* (1880) 15 Ch 1954
[12] *Creswell v Creswell* (1868) LR 8 Eq 69
[13] *Re Pooley* (1888) 40 Ch D1
[14] See *Ross v Caunters* (1980) Ch 297

should be noted that the exercise of the jurisdiction to rectify in equity is subject to considerable restraints imposed by the courts themselves and one could perhaps assume that the same cautious approach would be adopted were such a general power accorded to courts exercising probate jurisdiction.

5. Privileged Wills

5.1 In some of the South Pacific jurisdictions specific legislative provision exists for the making of privileged wills. Where they do exist, they have been derived largely from the provision of the UK *Wills Act 1837* or their United States counterparts. Specific provision is made in Fiji, Samoa the Marshall Islands, parts of Micronesia and the Solomon Islands. Where these provisions do not specifically exist they may be inferred by common law as the *Wills Act* itself adopted common law practices. The relevant legislation makes no provision for privileged wills in Tonga, Kiribati, Tuvalu, Tokelau and Vanuatu. In Nine, Nauru and the Cook Islands privileged wills may be made in conformity with the *Wills Act 1837 (as amended)* (U.K.).

5.2 Privileged wills are those which can be made by specific classes of persons and which need not conform to the normal formalities relating to wills. They are not necessarily oral wills although that is a common form in which they are made. They are in fact informal wills which need not comply with the restrictions as to age or the other formal requirements discussed in 2 above. A privileged will can also be revoked informally under particular conditions.

5.3 The Western concept of privileged wills derives from Roman Law. They were first given statutory recognition in England in the late seventeenth century. There is a considerable diversity here between the States in Australia and in the Pacific in relation to privileged wills. In New South Wales, the possibility of making a privileged will has been abolished, as it was regarded as anachronistic.[15] The extension of the privilege has often been criticised as unjustifiable and particularly in those jurisdictions where the strictness of the formal requirements in relation to wills has been softened.[16]

5.4 In Fiji the provisions relating to privileged wills is contained in Part V of the Wills Act. The provisions closely follow the pattern established under the *Wills Act 1837* (UK). Section 17 allows the making of a privileged will by two classes of persons. The first is a person 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. The person need not be an actual member of the forces. The second is any person who is a mariner or seaman at sea. Section 18 permits such a will to be made in any form, whether written or spoken, and without compliance with the section 6 formalities. It must merely be clear that it was intended thereby to make a disposition of property.

5.5 Hence, in simple terms, a privileged will is a will made by a specified class of persons who might be under age (currently eighteen years in Fiji) and without compliance with the formal requirements. The conventional justification for these provisions is that in terms of age it is

[15] *Wills, Probate and Administration (Amendment) Act* 1989 (N.S.W.)
[16] On the general history of privileged wills see Lang A. *Privileged Will – A Dangerous Anachronism* (1985) 8 U Tas. LR 166

appropriate to allow persons of this class the right to dispose of their property in view of the fact that they are engaged on activities which are likely to endanger their lives. Similarly, the class of persons concerned are conventionally conceived as those who, in the face of peril to their lives, might well be in no position to comply with the formalities relating to the making of wills.

5.6 The position in relation to age might be a legitimate one if the general policy of permitting specific classes of persons to make a privileged will is maintained. However, a more relevant exception to the minimum age requirement might be to permit persons of say sixteen years and above to make wills where they are married. Such a provision appears in the Wills Act 1975 of Samoa. It is appropriate to concede to all persons *who* are married the right of testation provided that they have adequate edacity for judgment.

5.7 The need for the second of these requirements, relating to specified classes of persons, could quite easily be disposed of if the Forces themselves maintained a policy of encouraging their members and those who serve with them to make and maintain valid wills on entry into service or at least before embarking on service. The making of a formally valid will is, after all not such an onerous or time consuming task that it could not readily be attended to. The adoption of such a policy by the Armed Forces in Australia was one reason why the Queensland Law Reform Commission moved to abolish the privilege.

5.8 It is suggested that there are some anomalies in the maintenance of tile current regime relating to privileged wills. The specified classes of persons are those who probably have greater reason to consider the making of a will at the time they join or become members of the occupations in which they are engaged than is the case with most people. Furthermore to allow such persons to make wills under trying and highly stressful conditions is hardly likely to encourage considered decision making. In such situations it appears largely to have been the urgency of the engagement, and perhaps the fear of impending death, which encouraged the liberal concession of informal will making. Not only is the quality of the decision likely to be prejudiced, the question of production of reliable evidence in such circumstances is one of the major difficulties.

5.9 One means of addressing these problems might be to introduce amendments which abolish the privilege which is extended to members of the armed forces and so on. If the proposals to abate the formal requirements discussed in 2 above were put in place then these persons, as with everyone else, have the right to make informal wills. It might be appropriate, at the same time, to provide simply that a person who is sixteen years and above may make a will if they are married.

6. Revocation of Wills on Dissolution of Marriage

6.1 In Fiji the sole ground for revocation of a will by operation of law (sometimes called involuntary revocation) is by subsequent marriage. This is provided for by the combined operation of sections 13 and 15(a) of the *Wills Act.* Section 13 provides an exception in the case of marriages made in contemplation of specific marriage but this issue is addressed below.

6.2 The concept of revocation by operation of law is based on the notion that where there is a substantial change in the circumstances of the testator such that his relationship to family members and those who are the proper objects of his or her bounty are substantially altered by an event subsequent to the making of a will, the will is revoked. This is because the event is such as to

require the testator) as a matter of policy, to reconsider his or her testamentary dispositions. The justification is thus wholly different from that of a voluntary revocation which is based on the concept of freedom of testation.

6.3 Dissolution of marriage however is a change in circumstances of the same order as that of marriage itself and certainly creates a substantial change in the circumstances of a testator sufficient to require him or her to reconsider his testamentary provisions. Final dissolution sets aside the formal ties of marriage. More often than not this will also see a severance of, or at least a significant qualitative change in the personal relationship between former husband and wife. In many cases it will affect the relationships which the testator has with the children of the marriage. This may not be so where tile children are adult but the practical effect of custody orders of younger children in favour of one of the parties can and frequently does affect tile relationship between the parent (custodial and non-custodial) and tile children. This will be so whether or not one or both of the parents remarry after dissolution. In addition, the property relationships of the parties are usually substantially changed by way of property orders in consequence of the dissolution of marriage.

6.4 In jurisdictions such as Australia, New Zealand and the United Kingdom,[17] the legislation has been altered to provide that dissolution of the marriage of a testator revokes that person's will. These reforms are indicative of the factors suggested above. It is suggested that the same conditions are significant factors in Fiji society at the present time and provide and appropriate impetus to reform.

6.5 In New Zealand, an order for judicial separation will also revoke a will although the difficulty with such a provision is that an order for judicial separation does not have the finality of dissolution itself. In the United Kingdom section ISA of the *Wills Act 1837* includes an order for annulment of marriage as a ground for revocation. It is suggested that in terms of practical effect, at least for the present purposes, there is little to distinguish an annulment from a dissolution.

". Section ISA of the Wills Act 1837 (UK) introduced in 1982
6.6 It is suggested that there is a need for reform of the law of Fiji here. Section 15 of the Wills Act ought to be amended to add subsequent dissolution or annulment of marriage as a ground for automatic revocation of a will of a testator. 'Dissolution* here would have its normal meaning in this context as established by case law, that is, a final dissolution constituted by the granting of a decree absolute. Likewise annulment should be taken as a final order of the court annulling the marriage.

7. Revocation of Wills Made in Contemplation of Marriage

7.1 Section 13 of the Wills Act in its present form provides an exception to the provision in section 15 of the Act that a subsequent marriage will automatically revoke a will. Section 13 also exempts certain types of powers of appointment under which the testator is, in effect, deemed to be the owner of the property concerned i.e. general powers of appointment. This provision has been in force since the Wills Act 1837 (UK) and there is little need to address it. Section 13 is as

[17] Section 18A of the Wills Act 1837 (UK) introduced in 1982

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 in contemplation of marriage is not revoked by the solemnisation of the marriage contemplated."

7.2 The section creates an exception in relation to wills expressed to be in contemplation of marriage. But the exception is limited to cases of specific contemplation of marriage as is indeed the case in most other South Pacific jurisdictions. There is, however, an issue as to whether general contemplation of marriages ought also to stand as an exception. A general contemplation of marriage is one where the will merely states that it is made in contemplation of marriage to anyone or someone. The testator need not have had anyone in mind and, in feet any subsequent marriage will not revoke the will.

7.4 In cases of specific contemplation the will must express that the will is made in contemplation of marriage to a specific person and, furthermore, the marriage must take place to that person.[18] However the courts have been reasonably lenient in holding that the former requirement has been met For example, a gift of property 'to my fiancée X' has been held sufficient,[19] as have gifts 'to my wife X' or 'to my future husband X'.[20]However, there has been some conjecture about whether all gifts to 'my fiancée', 'to my husband' and 'to my wife' even where the intended spouse is named in some way as well. Much will depend upon whether or not the court views the matter as one of description of tile person concerned rather than an expression of contemplation of marriage. If it is seen as a matter of description alone then the subsequent marriage would revoke the will.[21] The issue is not simplified by the reluctance of the courts to go outside the terms of the will and admit extrinsic evidence; particularly evidence of actual intention of the testator. However, it would be plausible to say that descriptive expressions such as these (if in fact they are descriptive), usually give rise to some degree of ambiguity. This would allow the court to invoke the armchair principle of constriction and receive evidence of the circumstances surrounding the execution of the will. This would allow extrinsic evidence to be admitted to determine whether the will was executed in contemplation of marriage.[22] It is submitted that such an approach is the preferable one.

7.5 In some Australian jurisdictions the legislation has been amended to permit expressions of general contemplation of marriage to stand as an exception to the revocation of the will by any subsequent marriage. The main justification for widening the exception to include general contemplation can be put in terms of the fact that specific contemplations are themselves too narrow to be justifiable. If tile justification for including specific contemplations is a testator ought to be able to order his or her affairs in view of likely marriage, *why* should this be confined to

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[18] See *Sallis v Jones* (1936) P43; *Re Hamilton* (1941) VLR 60

[19] *In the Estate of Langston* [1953] P 100

[20] *In the Will of Foss* [1973] I NSWLR 180

[21] This was the case in *Re Taylor* (1949) VLR 201 where the gift was "to my wife Alice Jane Luisa Maud Taylor". The decease was living with one Alice DeLittle at the time of making the will and married her shortly afterwards. The Court held that the phrase was to be taken as a description of the person concerned. Hence the subsequent marriage revoked the will

[22] See *In re Foss*, above; *Keong v Keong* (1973) Qd R 516*; Layer v Burns Philp Trustee Co. Ltd* (1986) 6 NSWLR 60

occasions where marriage to a specific person is contemplated? The likelihood of any marriage ensuing is not necessarily increased. The testator's appreciation of his or her family obligations likely to arise on marriage are not necessarily capable of greater certainty where the contemplation is specific rather than general. A person who has a general intention to many might have just as much appreciation of how he or she should make a testamentary arrangement of their affairs pending a marriage as where marriage to a particular person is contemplated. Added to this, it is the case that a testator can make a conditional will which is to come into effect only in the event of his or her marrying. There is some scope for confusion between a will which is made on condition of marriage and one which is considered in contemplation of marriage. Nonetheless, in this context, it is anomalous that in such a case the condition need not be marriage to any specific person. Marriage in general would be a sufficient condition to prevent the will coming into effect. If that is the case, an expression of general contemplation of marriage ought to stand as exception to the revocation by marriage exception.

7.6 Thus, consideration should be given to the merits of including wills made in general contemplation of marriage as a further exception to the revocation by marriage provision by the introduction of an amendment to section 13 of the Wills Act.

8. The Forfeiture Rule

8.1 Where a person who is entitled, on the face of it, to share in the estate of a deceased person, has unlawfully killed the deceased, then they will lose their entitlement. This applies both where they are named as a beneficiary under the will of the deceased or where they would have been entitled to benefit under the intestacy rules.[23] The general principle which applies in such cases is that a person is not entitled to profit from their own unlawful conduct Hence it is based on firm public policy grounds which some regard as the principle of unjust enrichment.[24]Some such principle is recognised in most legal systems and there is no doubt that it applies in the South Pacific jurisdictions as well. A person *who* kills the deceased would also be disqualified from obtaining a grant of probate or administration.[25]

8.2 Clearly enough the rule applies in the case of what, according to the criminal law, would amount to murder or manslaughter. However there is some authority with respect to cases of manslaughter which suggest that the rule might not apply. Manslaughter can be constituted by criminal negligence and can vary considerably in terms of the degree of moral culpability involved. Some decisions of the Australian courts have held that the issue of moral culpability has to be assessed by the court before the forfeiture rule would apply.[26] This would also apply to similar types of unlawful homicide such as causing death by culpable driving.

8.3 The same approach should be applied in other cases where there is technically speaking criminal liability for homicide of some type or other. Cases such as assisted suicides and mercy killings, killings by negligent acts, infanticide and abortion are instances that have provoked some considerably debate in the past on this issue. Most or all of such cases do not fit in with the policy

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[23] *Bridgeman v Green* (1757) Wilm 58; 97 ER 22; *Hall v Knight and Baxter* [1914] PI, 7; *Cleaver v Mutual Reserve Fund Life Association* 30 NZLR 577; *Re Pechar* [1969] NZLR 575;

[24] *Public Trustee v Fraser* (1987) 9 NSWLR 433

[25] *Hall v Knight and Baxter*, above; *Re Crippen* (1911) P 108

[26] 26 *Public Trustee v Evans* (1985) 2 NSWLR 188; *Public Trustee v Fraser* (1987) 9 NSWLR 433.

in relation to forfeiture which is the prevention of a person obtaining benefits by their own unlawful design. Certainly causing death by negligent driving does not fell under such a principle. In the United Kingdom the *Forfeiture Act 1982* confers a discretion on the judges to determine the issue "according to the justice of the case" but that has merely lead to disagreement as to how the principle is to be applied.[27] Similar legislation applies in the Australian Capital Territory.[28] The requirement is that there should be an appropriate degree of 'wrongfulness' in the killing to be able to disqualify the killer from entitlement. But that consideration always rests on policy rather than clearly defined legal principle.[29] On this basis the recent discussion paper of the Law Reform Commission of New Zealand recommended a statute be enacted containing clearly defined categories of exclusion from the forfeiture rule along the lines mentioned above.[30]

8.4 Although the matter is one which involves some notion of criminal liability the standard of proof to be applied in determining the application of the forfeiture rule is the civil standard: proof on the balance of probabilities.[31] The rule in *Hollington v Hewthorn*[32] is that a previous conviction for the crime involved cannot be relied on in determining that the forfeiture rule must be applied. The civil court is required to make its own determination that will apply whether the person concerned was convicted or acquitted in previous criminal proceedings.[33]

8.5 The main issue for consideration is whether it is possible in the legislation to clarify the scope of application of the forfeiture rule. One suggestion might be to provide for those instances of homicide where the rule should not have any application at all; that is, following the New Zealand recommendations above. Possible classes of exclusion, some of them clearly contentious, might be in cases such as assisted suicides and mercy killings, killings by negligent act, certain forms of infanticide and abortion.

9. The Scheme of Intestate Distribution

9.1 The rules of intestate distribution in Fiji are based largely on those rules first developed in England and embodied in the *Statute of Distributions 1670* and which now appear in a refined form in the *Administration of Estates Act 1925,*

9.2 However, the current scheme has not kept pace with more recent developments in other jurisdictions such as Australia, New Zealand and the United Kingdom in some respects, particular in relation to the question of entitlement to spouses in relation to the former matrimonial home.

9.3 The scheme of intestate distribution in Fiji is established under section 6(1) of the *Succession Probate and Administration Act* Cap. 60. The scheme adopts the *per stirpes* basis for distribution in respect of all classes of entitlement. The term is specifically employed in the legislation although it is not defined. The legislation does not employ the concept of a statutory trust as does Samoa and

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[27] See Buckley *Manslaughter and the Forfeiture Rule* (1995) 111 LQR 196; *Re H* [1990] Fam Law 175 (Ch D) and *Jones v Roberts* [1995] Fam Law 673
[28] *Forfeiture Act 1991* (ACT)
[29] *Troja v Troja* (1994)
[30] Law Commission (New Zealand) Report 38 *Succession Law: Homicidal Heirs,* July 1997
[31] *Public Trustee v Fraser,* above
[32] (1943) I KB 587
[33] *Helton v Alien* (1940) 63 CLR 691

other jurisdictions.

9.4 All references to the entitlement of children under the scheme is specifically provided to include legitimate and illegitimate children. Furthermore, references to 'issue' are deemed to include "a child or any other issue whether legitimate or illegitimate, in any generation, of an intestate". [34] However, section 6(4) states that for these purposes 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.

9.5 In the following paragraphs the effect of the current scheme will be briefly summarised. Where the deceased dies with or without issue but with a husband or wife that person is entitled immediately to the personal chattels of tile deceased as defined in section 2.[35]In addition, where the net value of the residuary estate, other than personal estate, does not exceed $2,000 the husband or wife is also entitled the residuary estate absolutely. If the net value of the residuary estate does exceed that amount then the husband or wife is entitled to $2,000. For these purposes, net value is the net value of the property of the deceased as determined for estate duty purposes.[36]

9.6 Where there is a surviving husband or wife with no issue then the spouse takes one half of the estate in addition to the entitlements above absolutely. Whether the spouse takes the other half of the residue depends whether there are parents *who* also survive as is discussed below. Where there is a spouse and children surviving, the spouse takes one third of the estate and the children the other two thirds in equal shares on a *per stirpes* basis. Where there are issue surviving but no wife or husband the children will take the whole of the estate on a *per stirpes* basis.

9.7 After this there follows the entitlement of parents of the deceased. In cases where there is no issue, but a husband or wife also surviving, the parents or the survivor of them will take the balance of the estate subject to the interests of the surviving spouse as mentioned above. If both parents survive they take that interest in equal shares. If only one parent survives then that parent takes the whole of the interest. Then if there are neither issue nor parents surviving, the surviving husband or wife will take the whole of the residuary estate absolutely.

9.8 When all of the above classes fail the property of the deceased passes in order, to the brothers and sisters of the whole blood of the deceased take the estate. Children of deceased brothers and sisters take the share of their parents *per stirpes.* Following this there are brothers and sisters of the half blood. Then it is the surviving grandparents, if more than one, in equal shares, then uncles and aunts of the whole blood and children thereof, uncles and aunts of the half blood and children thereof. Failing the above, the residuary estate goes to the Crown as *bona vacantia* but the Crown may make provision out of the estate to provide for dependants, whether kindred or not, of the intestate, and other persons for whom the intestate might reasonably be expected to have

[34] Section 6(3)

[35] By section 2 'personal chattels' "means livestock, vehicles and accessories, furniture, furnishings, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, jewellery and other articles of household or personal use or ornament, musical and scientific instruments and apparatus, wines, liquors and consumable stores, but does not include any chattels used at the death of the intestate for business purposes nor money nor security for money." Note that the definite is exhaustive for these purposes.

[36] Section 6(2)(a)

made provision.[37]

9.9 There are a number of possible areas of reform of the scheme as it stands which invite consideration. Firstly it ought to be considered whether there is justification for widening the entitlement of the spouse of the deceased in order to give him or her specific rights to the former matrimonial home. Some consideration would need to be given to how one defines 'matrimonial home' for these purposes. The entitlement could be either by according to the spouse a preemptive right to the house, along with personal chattels, before the entitlements to the net estate are determined. An alternative would be to permit the house to be taken *in specie* by the spouse in satisfaction of his or her share of the net estate, where this is appropriate.

9.10 A second issue concerns the stipulation of the amount of $2,000 in the legislation, as noted in 9.5 above. Perhaps the amount should be increased given changes in economic conditions. It appears obvious that the amount needs to be adjusted from time to time. It might be more effective to provide that this amount can be increased by ordinance thereby avoiding the need to amend the legislation each time some revision of the amount is called for.

9.11 A third possible area of reform concerns the possible inclusion *of defacto* spouses within the scheme of entitlement under the legislation. This is an issue which depends to some degree on the cultural or societal tolerance of these relationships as sufficient to give rise to substantive proprietary claims. Whilst this has been the direction taken in many other jurisdictions such as Australia and New Zealand, it can always be argued they are not to be tolerated, or tolerated to this particular degree, in other jurisdictions. Were these relationships to be accepted as giving rise to substantive proprietary claims consideration would need to be given to the difficult but crucial question as to how one defines the relationship in appropriate terms. Usually some minimum limit on the length of the relationship is imposed although there are problems with such a criterion *per se* for example, in cases where a shorter-term relationship has produced a child or children. Consideration would need also to be given to the particular rights of the *defacto* spouse. One approach is simply to equate the *de facto* spouse to a legitimate spouse for the purposes of the order. But that would mean that the claims of any existing legitimate spouse would need to be excluded and, of course, the legitimate spouse could still have considerable and justifiable claims against the estate of a deceased person, notwithstanding the *defacto* relationship. Another approach might be to treat the *defacto* spouse as in a special category with rights to particular property such as either personal chattels or the matrimonial home or both.

10. Family Provision

10.1 Family provision has long been one of the more controversial areas of succession law. This is particularly so because the legislation confers on the court a discretionary power to interfere with the freedom of a person to make a will disposing of property as he or she sees fit Many regard this right of free testation as a highly prized political right which ought not be interfered with.

10.2 However most contemporary legal systems, whether common law, civil or otherwise, qualify this power in one-way or another. In most civil law countries and in Scotland, following the Roman Law principle of *legitim,* this has been based on a legal guarantee that certain close

[37] Section 6(1)(1)

members of the deceased's family are accorded a set share of the estate of the deceased. In common law countries the tendency has been to allow will makers to retain the semblance of free power of testation whilst providing the court with a discretion to interfere in appropriate cases in the interests of family members.

10.3 Family provision legislation now exists in New Zealand, in all of the Australian States and in the United Kingdom[38] as well as in the countries of the South Pacific region. The original family provision scheme, or testators' family maintenance legislation as it was then called, on which current forms are based, was of New Zealand origin by virtue of the *Testator's Family Maintenance Act 1900* (N.Z.). This was subsequently replaced by the *Family Protection Act 1908* (N.Z.).

10.4 The interpretation of the legislation, or at least the attempt to find some underlying rationale for it has always been controversial. The questions raised in this regard often go to the very purpose underlying succession law in the first place; for example, whether this legislation exists for the purpose of providing for the needs of family members of a deceased, for the relief of the obligation of the State to provide for disappointed family members, whether it ensures the fulfillment of some general ethical obligation of a person to provide for family members in general, whether it encourages family cohesion or serves to retain wealth within the confines of a particular family group.

10.5 The usual form of the legislation provided that the order was to be made with reference to circumstances as they existed at the date of death of the testator. Furthermore, the legislation usually provides that any order was to take effect as if it were a codicil to the will of the deceased. This has reinforced the view, in both New Zealand and Australia, that the court are obliged to view the matter from the position of the testator and to determine whether testator had failed in his or her moral duty to provide for family members. The knowledge of the testator is the primary consideration. Hence, even where the needs of the family members concerned may have been clearly demonstrable, and there may have been adequate funds to provide for them, the courts did not feel warranted in interfering with the judgement of the testator.[39]

10.6 The issues here are very complex. The moral duty approach, because it is based on a rather nebulous principle, has, if anything, allowed the courts to adopt a very flexible approach to family provision orders at the inevitable risk of accusations of inconsistency and lack of clarity in terms of legal guidelines. There are tensions in the legislation itself between the need to redress the moral failure of a given testator and the objective or provision of maintenance. Whilst some have suggested that the approach of the courts is a mere gloss on the legislation or a judicial invention, it seems clear enough that the source of the tensions is the legislation itself. The courts themselves cannot be fairly accused of arbitrary judicial policy in this arena. In fact the very notion of basing family provision on the failure of moral duty seems to have been part of the design of the New Zealand legislators in the original legislation.

10.7 Whilst the approach mandated by the legislation will always be open to criticism by those who dislike judicial policy making or the operation of judicial discretion, it seems that there is little point in undertaking a general revision of the overall approach to family provision as it is currently entrenched in the legislation of common law countries such as Fiji. In fact the only

[38] Under the *Inheritance (Provision for Family and Dependants) Act 1975* (UK)
[39] See *Bosch v Perpetual Trustee Co. Ltd.* [1938] AC 463 and *Coates v National Trustee, Executors and Agency Co. Ltd.* (1965) 494.

reliable way to retain some principle of free testation as well as ensuring some basis for provision to family members is to do so within the constraints of that scheme. The civil law alternative of providing guaranteed shares to particular family members is as unattractive as the other extreme of doing away with family provision altogether.

10.8 The question for consideration is whether the current scheme adopted in Fiji is adequate to provide some reasonable basis for the marriage of these two extremes. There are also certain issues as to whether the class of dependants who are entitled to claim are sufficiently wide to accommodate all senses of family relationships appropriate to Fijian society at the present time. The scheme applies only in respect of testate estates, total or partial, and this is a matter which requires reconsideration. Additionally, the nature of the provision which can be made by the Court seems unduly restrictive under the present regime. Finally it may be appropriate to reconsider the power of the Court to prevent attempts by persons to avoid the operation of the scheme itself.

10.9 In Fiji family provision is covered by the *Inheritance (Family Provision) Act* Cap. 61. By way of general approach the provisions are fairly restrictive both as to the class of parsons who might apply and the types of orders which can be made. The possibility of the Court ordering a transfer of property to a claimant in satisfaction of their interest is denied and provisions for lump sum payment are circumscribed to such an extend that the Court is denied a proper degree of flexibility for adjusting the rights of family members. Primarily, the type of order provided for is by way of periodical payments although there are severe limitations on these as well.

10.10 The range of matters to which the Court is to have regard to in determining the appropriate order would suggest that the matter is to be approached from the point of view of the testator, as is standard under the testator's family maintenance provisions. This is particularly so in requiring reference to the conduct of the dependant in relation to the testator. Furthermore, section 5(1) states that the effect of any order made under the Act, including for death duty purposes, is that the will has effect with such variations as effectuated by the order as from the date of death of the testator. The result is the same as if the order were deemed to have effect as a codicil to the will.

10.11 Except in the case of variation orders, no order can be made unless the application is made within six months from the date of first grant of representation in the estate.[40] The Act applies as regards the estate of testators who die domiciled in Fiji. By section 3 of the Act the jurisdiction under the Act extends only to testate estates. The provisions seem to anticipate that the provisions apply to partial intestacies. Section 3(1) requires that Acre be a will left by the testator but does not say that the will need to be effective as to the whole of the estate. Section 5(3) refers directly to an order being annexed to the letters of administration with the will annexed. However it is, again, anomalous as to why partial intestacies should be included and not total intestacies. A will appointing an executor only is still a will without effective disposing of any property. In such a case the property will be fully disposed of by the rules of intestate distribution. Hence, in principle, there is little difference between these cases and total intestacies. Thus consideration needs to be given to extending the provisions wholesale to intestate estates as well as testate estates. As a matter of principle there would seem to be little basis for excluding intestacies at all. The failure to make a will might just as easily amount to a moral failure on the part of a deceased persons as the making of a will in the wrong way.

[40] Section 4. As to variation orders, see below.

10.12 Section 3(1) governs the class of persons who may apply for family provision. The following classes of persons may apply as dependants:

(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, be (sic) reason of some mental of (sic) 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 tile age of twenty-one years.[41]

10.13 The class of applicants is much less generous than in other jurisdictions. For example, adult sons are precluded from applying unless they fall within paragraph (d). 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 married daughter might reflect certain cultural attitudes in Fiji but it is possible to argue that these attitudes have changed in fundamental ways. Hence a revision of the class of applicants is highly appropriate. Consideration might be given to the inclusion of de facto spouses for example in the class or person entitled to apply. Consideration might also be given to the inclusion of dependants on the deceased person who do not fit into the narrow legal concept of a member of a family. Again these are areas which are likely to be contentious but they are appropriate areas to be considered in the area of possible reform.

10.14 Paragraph (b) of the class list above imposes some difficulties which might well be removed by amending the legislation. It would seem to preclude a daughter who has been married but is subsequently divorced. But it also, in the second part, seems to include a daughter who is or was once married, but *who* cannot by reason of the conditions mentioned, maintain herself. It is difficult to fathom, given that the preceding paragraph precludes married or formerly married daughters from applying, presumably on the basis that they are or have been supported by their spouses. The criterion referred to is that such a woman is incapable of maintaining herself by reason of the condition mentioned. It is not whether she is being maintained by someone else. Hence any married daughter who is subject to such a condition and incapable because of it might apply even if they are supported by a very rich and supportive husband. It would make more sense if it implied only to daughters who are divorced and currently incapable of supporting themselves by virtue of such a condition.

10.15 Section 3 empowers tile Court to make an order where it is of the opinion that the will does not make reasonable provision for the maintenance of the applying dependant. The Court is empowered to order that such reasonable provision as it thinks fit be made out of the testators net

[41] Section 3(2)(c) reinforces that view.

estate for the maintenance of that dependant and to impose such conditions or restrictions as it thinks fit.

10.16 Some applications on behalf of dependants within the classes above will be disqualified under section 3(1). No application can be made under section 3(1) by any person where the testator has bequeathed not less than two thirds of the income of the net estate to a surviving spouse and the only other dependants, if any, are the child or children of the surviving spouse. There are two conditions here (1) the bequest of a certain proportion of income and (2) the fact that the spouse and the children of the surviving spouse are the only other dependants. The children here must also be children of the deceased otherwise they would not be dependants by virtue of section 3(1). Presumably the receipt of two thirds of the income from the net estate was taken as a sufficient provision for a spouse to support themselves and any children. This one could argue is somewhat miserly and in need of re-evaluation.

10.17 Despite the width of section 3(1) in reference to the powers of the Court there are limitations on the types of order which can be made. The primary type of order for maintenance of a dependant is one for periodical payments of income.[42] Order for lump sum or capital payment can only be made where the testator's net estate does not exceed $4,000. [43] Even in this regard section 3(4) only provides for a payment of capital. There is no provision whereby the court may order the transfer *in specie* of part of the testator's estate, such as a house property, in satisfaction of the entitlement of a dependant. This and the limitation on value seems unduly restrictive especially where very often the best way to provide support to a family member, particularly to a spouse is the provision the matrimonial home.

In relation to periodical payments the Act imposes limitations on tile possible duration of any such payment order. In relation to spouses the order is to terminate on remarriage. In the case of unmarried daughters or those subject to a disability the order can continue only until marriage or the cessation of the disability respectively. In respect of an infant son the order may continue until the son turns twenty-one years of age. Where the son is under a disability the order may continue until the cessation of the disability or his earlier death. In the case of a parent it might continue until the death of that parent.

10.18 Certain factors are specified to be taken into consideration by the Court in determining the amount of the periodical payment or the capital payment and the effective date of the order. These are as follows:

(a) the Court is required by section 3(5) to have regard to the nature of the testator's property representing the net estate.

(b) The Court is forbidden from making an order which would result in a realisation that would be improvident having regard to the interests of the testator's dependants and of other persons *who* would be entitled to that property.[44]

(c) It must have regard to any past, present or future capital or income from any source of the dependant of the testator who makes the application.

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[42] Section 3 (2)
[43] Section 3 (4)
[44] Section 3 (5)

(d) It is also to have regard to the conduct of the dependant in relation to the testator and otherwise. 'Or otherwise' would be taken *ejusdem generis*,

(e) It must also take account of any other matter or thing which in the circumstances of the case the court may consider to be relevant or material in relation to that dependant, to the beneficiaries under the will or otherwise. [45]The term 'or otherwise' would, again, be taken *ejusdem generis.* It is not entirely clear why conduct in relation to the beneficiaries under the will is a point of reference here. Why should a person be disqualified from support for conduct in relation to beneficiaries when he or she may well not know, as is frequently the case, who the beneficiaries in fact are. Presumably the legislator had in mind some reference to conduct in relation to the family of the deceased but this is not what the current legislation provides.

(f) The Court must have regard to the testator's reasons, so far as ascertainable, for making the dispositions made by his will or for not making any provision or any further provision for the dependant.[46] The usual problem with provisions such as this is proof by admissible evidence. Most such evidence tends in the direction of hearsay. Section 3(7) provides that the Court may accept such evidence of those reasons as it considers sufficient. Presumably this permits the Court to admit evidence which would otherwise be excluded under the normal rules of evidence. The section provides specifically that such evidence might include any statement in writing signed by the testator and dated. This would seem to permit reference to any statement in the will itself, although that is not directly provided for and perhaps ought to be. However, in relation to the weight to be attached to any such statement the Court must have regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement.

(g) The Court cannot make an order pursuant to these provisions entitling the dependant under the will as varied, by the order, to more than certain fractions of tile annual income of the net estate. If the testator left both a spouse and one or more children, the fraction is two thirds. If the testator leaves no spouse or leaves a spouse and no other dependant, tile fraction is one half.[47] It might be questioned whether these limitations remain relevant or whether they arc appropriate to all types of estates with which the Court might be confronted.

10.19 As noted above, section 5(1) provides that any order is deemed to have effect as variations to the testator's will as from the date of death. The Court is empowered to make consequential directions as it thinks fit for giving effect to the order, although such orders cannot set aside any further part of the net estate as would have been sufficient to provide the income provided for at the date of the order. Any order made under the Act is to be filed in the registry and the order endorsed on or permanently annexed to tile grant.

There is provision made for subsequent variation of orders by the Court. These can be dealt with even though the six months period mentioned in section 4 has expired. However, these arc limited in scope. The order can only be made as regards property the income of which is, at the

[45] Section 3(6)
[46] Section 3(7)
[47] Section 3 (3)

date of application applicable for the maintenance of a dependant of the testator. In terms of section 6(1) this seems to encompass only two cases. In fact there arc three. The first is where variation is sought on the ground that any material fact was not disclosed to the Court when the order was made.[48] The second is where there has been a substantial change in the circumstances of the dependant or of a beneficiary interested under the will in the property of the deceased.[49] In either of these cases tile application may be made by or on behalf of a dependant, by the trustees of the property or by or on behalf of a beneficiary who is personally interested in the property.[50] The third is where the order is sought by another dependant for his or her maintenance[51]

10.20 The courts in Fiji do have some power to remedy the consequences of attempting to avoid the provisions of the Act This might arise where, for example, a person purports to transfer their assets to a particular family member during their lifetime, thereby avoiding the obligation to provide for other family members. This power arises under section 59 of the Trustee Act of Fiji. The section permits the court to follow the assets transferred by a deceased person during their lifetime. The section can be invoked by a person who is an applicant under the *Inheritance (Family Provision) Act.* It is to be noted that the Court has a relatively wide discretion as to the nature of the orders which can be made and is not necessarily confined to ordering the restitution of particular assets. However, if one is to suggest reform, it might be more reasonable to import ant avoidance provisions directly into the legislation itself. There are various mechanisms by which this might be done. The provisions could be refined more specifically to deal with the situation confronting attempts to defeat the family provision scheme itself. One alternative might be the English model of treating transactions to defeat the provisions within a preceding period of six years as voidable at the option of the Court. Another alternative might be by creating some concept of a notional estate as is done in New South Wales, the notional estate can be referred to by the court in determining the appropriateness of any order for provision in favour of particular claimants.

11. Unadministered Estates

11.1 It is understood that a problem exists in parts of Fiji in relation to estates, which have not been administered despite the fact that several years have passed since the death of a particular testator. Expectant relatives have been in possession of the property of the deceased but are unable to gain legal title to that property or, in fact, to establish that they are the legitimate beneficiaries with respect to it. In general, tile problem seems to be that deceased may have left a will, perhaps with a former solicitor practising in the region but it can no longer be traced. It has been indicated to the Commission that this is a problem which often arises in the Western region of Viti Levu.

11.2 It has been suggested that one means of resolving this problem would be to impose a requirement of registration of wills in a public registry. The current legislation contains no requirement of registration. Indeed, consistent with other common law jurisdictions section 7 of the Wills Act states that publication is not necessary for the validity of a will.

11.3 In some South Pacific jurisdictions provision is made for the registration of wills with the

[48] Section 6 (1) (a)
[49] Section 6 (1) (a)
[50] Section 6(2)
[51] Section 6 (1) (b)

court within a certain time after they are made. There is such a scheme in the United Kingdom. Section 23(1) of Ac *Administration of Justice Act 1982* (U.K.) creates the Principal Registry of the High Court of Justice as tile registering authority with the duty of maintaining safe and convenient depositories of wills of living persons. There is no such provision either in Fiji, as mentioned, the Marshall Islands or Nauru. However, section 8 of the Tongan legislation requires testamentary papers to be deposited with the Court. Similarly so in Vanuatu where section 10 of the *Wills Act* provides that a will may be forwarded to the Registrar of the Supreme Court for safe keeping or lodged with the District Commissioner for the district in which the testator resides, who must then forward it on to the Registrar. In Tuvalu[52] and Nine the requirement is that what are termed 'native wills' be deposited with the court. The requirement is expressed in mandatory terms. It does not appear from the legislation, however, that the requirements impose registration as a precondition to validity of the will. Clear wording would be required to achieve that effect. The provisions are more in the nature of administrative nature, imposed in a order to ensure safe-keeping.

11.4 One of the difficulties with a scheme of registration of wills, especially one which posits registration as a requirement for validity, is that it envisages a return to a regime whereby formal requirements are strictly imposed. This is counter to the general tendency in other jurisdictions and counter to some of the directions for reform suggested above. In jurisdictions where a scheme of statutory registration has been established in respect of property - for example the so-called Torrens Title scheme in Australia, and share registry schemes elsewhere - the courts have usually gone to some lengths to invent doctrines which, in effect, soften the registration requirement in order to provide justice in {appropriate cases. Hence elaborate and needlessly complex doctrines such as unmediated and deferred indefeasibility of the registered proprietor's title in Australia.

11.5 However registration does have its advantages especially in resolving problems such as this. It may be that a formal requirement of registration when coupled with the power of the court to abate the formal requirement in line with the recommendations above would be the appropriate starting point for consideration of this issue.

11.6 There are a number of other issues for consideration in this. Firstly on whom would the obligation to register be imposed? If registration is unopposed as a formal requirement, for example as an amendment to section 6 of the *Wills Act* above, then obviously the duty is primarily on the testator who seeks to create a valid will. Where the testator employs a legal practitioner for this purpose this would generally be assumed as incidental to the instructions provided to the lawyer. However, should the duty be imposed more directly on legal practitioners and/or other persons who are responsible for and instrumental in the execution of wills?

12. Simple Will Forms

12.1 It has been suggested that there is a need to provide for a simple form of will capable of being used by the people of Fiji in making their own wills. Sometimes these forms are provided by commercial outlets. But there might be advantages in prescribing a simple form of will in the legislation.

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[52] *Native Lands Act* (Tu.) s.19

12.2 This can be done very simply by providing a simple and standard form of will which is capable of adaptation to individual circumstances in the Schedule to the legislation.

12.3 The question here is whether the availability of such a form of will is likely become widely known and therefore widely used.

12.4 Another alternative might be to make provision to the effect that in any simple will certain standard clauses or provisions are to be taken as implied by statute, unless specifically excluded. This is often done, for example, in certain types of conveyancing documents. The danger in this context is, of course, that the legal effect of these implied conditions might radically change the original intention of the testator. Hence any implied terms might have to be seen as terms of an administrative rather than a substantive or dispositive nature.