*Richard Bullen**

CHANGES TO THE LAW IN SOUTH AUSTRALIA RELATING TO WILL MAKING

NEARLY twenty years ago South Australia led the way in reforming the law on formal requirements for executing wills with the introduction in 1975 of a general dispensing power to admit to probate a document intended to constitute a will but not executed in compliance with the formalities.[1] Now other jurisdictions have not only followed but gone beyond this move and the amendments to the *Wills Act* 1936 (SA) which came into force on 1 July 1994[2] largely bring this State abreast of new developments elsewhere.

CHANGES TO THE FORMAL REQUIREMENTS

The new s8 makes two changes to the old. Both are identical in effect, although not exactly in words, to changes made to the *Wills Act* 1837 (UK) in 1982 as a result of the twenty-second report of the UK Law Reform Committee.

The first relates to the former requirement that the testator sign at the foot or end of the will. Although this requirement, originally strictly interpreted, was relaxed to a limited extent by the rather cumbersome elaboration in s9 to the effect, basically, that the testator's signature did not have to be the very last entry on the document, many wills have failed on this ground over the years. Under the previous regime, and before 1975, a conclusion that the testator's signature was not at the foot or end meant that the whole of the will was invalid unless what followed the testator's signature was not dispositive, in which case the part preceding the signature could be admitted to probate.[3] With the enactment of s12(2) in 1975, a Supreme Court application was needed to have the will admitted notwithstanding the failure to comply with the "foot or end" requirement. The Court had to be satisfied

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1 *Wills Act* 1936 (SA) s12(2).

2 *Wills (Miscellaneous) Amendment Act* 1994 (SA).

3 *Elders Trustee & Executor Co Ltd v Walker* (1976) 15 SASR 63.

beyond reasonable doubt that the deceased intended the document to constitute their will, but there was no difficulty in this respect with a merely misplaced signature.[4]

Now, no matter where the testator signs, no Court hearing is required - it is enough, according to s8(b), that "it must appear, on the face of the will or otherwise, that the testator intended by the signature to give effect to the will". It is difficult to understand fully what is meant by this. The object would seem to be to distinguish a "signature" from an "identification", which would be the only other reason for a testator to write his or her name on a will. But if so, s8(b) is superfluous because, in the context of making a will, "signature" means a sign or mark made with the intention of authenticating the document, that is, "to give effect to the will". Section 8(b) does make it clear that this intention can be supplied by extrinsic evidence but, again, this seems superfluous as on any question relating to the validity of a will, the evidence is always at large.

With the abolition of the "foot or end" requirement, s9 is no longer needed and has been repealed.[5]

The other change is to the requirements of witnessing. It is still the case that the testator's signature must be made or acknowledged in the presence of two or more witnesses present at the same time (s8(c)) and that the witnesses must attest and sign the will (s8(d)). However, by s8(e), the witnesses may now either sign *or acknowledge* a previously appended signature in the testator's presence. Under the old s8, the choice of signing or acknowledging afforded the testator was not given to the witnesses - they had to sign.

Re Gramp is an example of a number of cases over the years which failed because of the sequence in which the witnesses signed.[6] The deceased signed his will in his hospital bed before one witness who then signed. The matron then entered the room and the witness said to her: "This is the last will and testament of Mr Gramp." The matron then added her signature. It was held that although the deceased's silent acquiescence in the witness's statement and the fact that the matron could have seen the deceased's

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4 *In the Estate of Roberts* (1985) 38 SASR 324. Indeed there have been three successful applications under s12(2) with respect to wills not signed by the testator at all: *In the Estate of Williams* (1984) 36 SASR 423; *In the Estate of Vauk* (1986) 41 SASR 242; *In the Estate of Dezsery* (1990) 158 LSJS 184.

5 *Wills (Miscellaneous) Amendment Act* 1994 (SA) s6.

6 [1952] SASR 12.

signature had she been interested enough to look for it, amounted to acknowledgment in the presence of two witnesses, the fact that one of the witnesses had signed before this acknowledgment in the presence of both witnesses meant s8 had not been complied with.

This decision is consistent with previous cases involving the same sort of sequence, going back to *Moore v King*[7] where Sir Herbert Jenner Fust said: "I am inclined to think that the Act is not complied with, unless both witnesses shall attest and subscribe after the testator's signature shall have been made and acknowledged to them when both are actually present at the same time."[8] No real explanation has, however, ever been given by a court as to why the old s8 necessarily implied this sequence. The answer, of course, is that when the witnesses sign they are subscribing to the fact that they witnessed the testator either sign or acknowledge in the presence of them both. The conclusion reached in these cases often occasioned expressions of regret by the court that what was clearly intended as a will should fail on such a technicality.[9] Since 1975 a Court hearing would, of course, have cured the defect; now a case like *Gramp* would, subject to the following comment, comply with the amended s8.

South Australia, again, followed the change made to the UK Act in 1982. New South Wales, however, solved the problem in a more explicit, if more cumbersome, way. The amendment made in 1989 to s7(2) of the *Wills, Probate and Administration Act* 1898 (NSW) provides that the requirements of witnessing shall be taken to have been complied with if the following things happen in the following order:

> (a) the signature of the testator is made or acknowledged by the testator in the presence of a witness (in this subsection called "the first witness"); and
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> (b) the first witness attests and signs the will in the presence of the testator; and
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> (c) the signature of the testator is acknowledged by the testator in the presence of one or more other witnesses and also the first witness present at the same time; and

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7 (1842) 163 ER 716.

8 At 719.

9 See for example: *Wyatt v Berry* [1893] P 5 at 10; *Re Colling* [1972] 3 All ER 729 at 731.

(d) the other witness, or at least one of the other witnesses, attests and signs the will in the presence of the testator (but not necessarily in the presence of the first witness or of any other witness).

The New South Wales Law Reform Commission declined to follow the UK model for the reason that they considered that while it overcame a situation like that in *Re Colling*[10] where the first witness expressly acknowledged in the presence of the testator and the second witness, it was inapt to cover other cases like *Wyatt v Berry*[11] and *In the Estate of Davies*,[12] where the first witness, though remaining present, said nothing.[13]

Notwithstanding this view, s8(e) arguably works equally as well as the New South Wales provision because there is no formal requirement for acknowledgment. Instead of anything being said, acknowledgment can be made simply by gesture.[14] Furthermore, nothing positive is necessarily required - in *Gramp* it was sufficient constructive acknowledgment by the testator just that he remained passively silent when the first witness asked the second to sign his will. Arguably, then, it should be enough that the first witness's signature can be seen by the testator when the latter signs or acknowledges in the presence of both witnesses. Moreover, s8(e) would cover a situation where both witnesses have signed before the testator signs or acknowledges in the presence of them both, a situation which would fall foul of the New South Wales provision.

Finally, s8(e) makes it clear that the witnesses need not *sign* in the presence of each other. This has never been a requirement, but is the almost universal practice.

CHANGES TO THE DISPENSING POWER UNDER SECTION 12(2)

South Australia pioneered a dispensing power allowing a court to admit informal wills to probate. The original s12(2) enacted in 1975,[15] and since copied in some form in most other states and in some overseas jurisdictions, imposed the criminal standard of proof. The court had to be "satisfied that

10 [1972] 3 All ER 729.
11 [1893] P 5.
12 [1951] 1 All ER 920.
13 NSW, Law Reform Commission, *Community Law Reform Program* (eighth report) para 4.42.
14 *In the Goods of Davies* (1850) 163 ER 1337.
15 *Wills Act Amendment Act* 1975 (SA) s9.

there can be no reasonable doubt that the deceased intended the document to constitute his or her will". In recommending that the basic South Australian measure be adopted in New South Wales, the Law Reform Commission there thought the civil standard more appropriate.[16] While noting that decisions in South Australia did not disclose any difficulty with this issue, the Commission considered it anomalous to impose a criminal standard of proof when, for all other issues of validity of a will, for example testamentary capacity or testamentary intention in properly executed wills, the civil standard applies. As the Commission pointed out, that is not to suggest that the court should not carefully scrutinise the evidence on so important an issue, rather that the standard of proof approximating that for rectification should be considered: there should be "clear and convincing proof" that a document expresses testamentary intentions.

South Australia has now followed suit. The new s12(2) provides:

> Subject to this Act, if the Court is satisfied that a document that has not been executed with the formalities required by this Act expresses testamentary intentions of a deceased person, the document will be admitted to probate as a will of the deceased person.

What practical difference will be seen is difficult to assess. Most of the failed applications in New South Wales have been with respect to documents in the nature of draft wills, instructions, notes and so on.[17] An example is *Re Application of Brown; Estate of Springfield.*[18] The deceased, gravely ill in hospital, was visited, at the deceased's request, by a Mr Brown, a business adviser to the deceased, who brought with him a stationer's will form. The deceased told Mr Brown what he wanted in his will and Mr Brown took down notes from which to draw up the will. Before this was done the deceased died. An application to have the unsigned notes admitted was rejected. Powell J said:

> [T]he document now sought to be propounded can, in my view, be regarded as no more than notes by Mr Brown as to his understanding of what it was that the Deceased, at the relevant time, wished to have included in a formal will which

16 NSW, Law Reform Commission, *Community Law Reform Program* (eighth report) para 6.34.

17 See Powell, *Recent Developments in New South Wales in the Law relating to Wills* (1993) 67 *ALJ* 25.

18 (1991) 23 NSWLR 535.

> he would later execute, it following that the document cannot be admitted to probate.[19]

This is not to suggest that instructions or a draft would never qualify for probate. *In the Estate of Vauk*[20] was a case where an unsigned draft will which the deceased had never seen was admitted to probate under the old s12(2). The deceased visited the Public Trustee's office on 25 July 1985 and gave instructions to an officer there to prepare a new will. These instructions were written down by the officer but not signed by the deceased. It was arranged that the will would be prepared and ready for execution on 29 July. A draft will in accordance with the instructions was prepared but on 28 July the deceased committed suicide in his car. On the car seat underneath his head was found a piece of paper which was only partly legible but on which appeared the words "There will the Pu Trustee (unsigned - changed : to be valid!" This note plus the fact that the draft will was consistent with pencilled alterations to an earlier will, satisfied Legoe J that there could be no reasonable doubt that the deceased intended the document prepared by the Public Trustee to constitute his will.

Since the leading Full Court decision in *In the Estate of Williams*[21] that s12(2) could save a document not executed by the testator at all, only one instance has been reported of a rejection by the Supreme Court of South Australia of a s12(2) application. *In the Estate of Parkinson*[22] concerned a testator who had made a will in favour of her husband. After they divorced she arranged with her solicitor to prepare a new will in favour of her children. She told him that no money was to be paid to her husband as she said he was a habitual gambler and she also told him that she no longer considered her previous will to be in force. A draft was prepared to which she suggested some amendments. She asked her solicitor to prepare a revised draft incorporating these amendments and forward it to her with a letter setting out in simple terms what the will meant. This revised draft was forwarded to her the day after she died. White J distinguished *Vauk* where, although the deceased had never seen the document, it was admitted to probate. Here the matter was still on the basis of a draft which she wished to see. Undoubtedly the draft contained most, indeed virtually all, of her testamentary intentions, but there could be reasonable doubt as to the draft containing all her final testamentary intentions.[23] So the previous will

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19 *Re Application of Brown; Estate of Springfield* at 544.
20 (1986) 41 SASR 242.
21 (1984) 36 SASR 423.
22 (1988) 143 LSJS 336.
23 At 341.

leaving everything to the divorced gambling husband stood. This is a situation, then, which might well be decided differently under the reduced standard of proof introduced by the new s12(2) even though it will still be the case that drafts generally will not qualify to be admitted to probate under this provision.

A new s12(3) has been added to make it clear that an informal revocation can be recognised as valid in the same way as an informal will under subsection (2). Revocation is governed by s22 which requires any revoking instrument to be executed in the manner in which a will is required to be executed. Although there was no reference to revocation in the former s12(2) there were decisions that the provision was equally applicable to save informal alterations.[24] In the case of *In the Estate of Bennett*[25] Bollen J had no hesitation in applying s12(2) to just a "crossing out" which had been signed and dated but not witnessed. But doubt was cast on this in *Public Trustee v Gibbons*[26] where, although the facts did not require a decision on the point, Prior J said: "Whilst acknowledging the authorities cited, I remain to be convinced that s12(2) can apply to s22 at all."[27] The learned Judge concluded by saying: "New South Wales has made the law there plain. Perhaps our Parliament should do the same."[28] Section 12(3) does just this.

Section 12(4) overcomes any doubt that the section applies to a document created outside South Australia but propounded for probate here.

The provision in s12(5) that Rules of Court may authorise the Registrar to exercise the powers of the Court under the section is not legally required because such a rule has been in place since 1984. Under Rule 61 of the *Rules of the Supreme Court (Administration and Probate Act)* 1984 (SA) an application under s12(2) may be heard by the Registrar of Probates where the gross value does not exceed $10,000 and all those affected consent, with a discretion to dispense with such consent if appropriate. No doubt the very modest scope of this power will be extended by new rules. Rules of Court passed in New South Wales in 1992 give the Registrar power to determine applications without limit as to the value of the interests in all cases where those affected consent, and even if there be no consent, in all

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24 *In the Estate of Standley* (1982) 29 SASR 490; *In the Estate of Possingham* (1983) 32 SASR 227; *In the Estate of Ryan* (1986) 40 SASR 305.
25 (1986) 40 SASR 350.
26 (1993) 169 LSJS 240.
27 At 243.
28 At 244.

cases where the value of the interests affected does not exceed $20,000. In both jurisdictions the Registrar may refer any particular application to the Court. These rules are of course designed to avoid the expense and delay of a Court hearing where that is not warranted.

MINORS' WILLS

Section 5(1), providing that a minor (a person under the age of 18) cannot make a valid will, has now been qualified. By s5(2) a minor who is or has been married may make, alter or revoke a will, and by subsection (3) the same applies to a will made by a minor in contemplation of marriage if the marriage contemplated takes place. Since the 1991 amendment to s11 of the *Marriage Act* 1961 (Cth) making 18 the marriageable age for all persons[29] (prior to this amendment the age for females was 16), subsections (2) and (3) of s5 will be relevant only to a person between 16 and 18 who obtains special permission from a judge or magistrate under s12 of the *Marriage Act* to marry a person who is at least 18 on the ground that "the circumstances of the case are so exceptional and unusual as to justify" special permission.

The more important provision is a new s6. This section enables any minor to apply to the Court for an order authorising the minor to make or alter a will in terms approved by the Court. Again this follows an amendment to the New South Wales Act. The Law Reform Commission there expressed concern about a minor entitled to a substantial award of damages or who is or becomes the owner of considerable assets. In some circumstances it might be inappropriate for the whole estate to devolve upon intestacy entitling the surviving parents to the exclusion of siblings or others to whom a moral duty may be owed.[30]

In South Australia, subject to certain exceptions, the relationship of parent and child exists, for the purpose of the law of the State, between a person and their natural father or mother.[31] Under the previous law the possibility of a windfall in favour of a parent who had had little or nothing to do with the child, as is sometimes the case, particularly with a biological father, could not be avoided. Section 6 now brings the law with respect to will making into line with that relating to minors contracting: s6 of the *Minors Contracts (Miscellaneous Provisions) Act* 1979 (SA) provides that a contract with a minor has the effect as if the minor had attained majority if,

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29 *Sex Discrimination Act* 1991 (Cth) s12.

30 NSW, Law Reform Commission, *Community Law Reform Program* (eighth report) para 12.10.

31 *Family Relationships Act* 1975 (SA) s6(1).

before the contract was entered into, its terms were approved by the Supreme Court.

RECTIFICATION OF WILLS

The power of the Probate Court to correct mistakes was severely limited under the old regime. Only a limited kind of mistake could be dealt with. Nothing could be done about a mistake as to the legal effect of the wording used: the testator was bound by the words used by the draftsperson or the testator personally even though the effect was not what was intended. But a clerical error, a mistake in recording the testator's intention, could be severed, leaving a blank.[32] That was as far as the Court could go however: there was no power to rectify by adding or altering words; moreover mere severance was refused where it would alter the sense of the remaining words.[33]

Now s25AA(1) provides: "If the Court is satisfied that a will does not accurately reflect the testamentary intentions of a deceased person, the Court may order that the will be rectified so as to give proper expression to those intentions."

This is similar in effect to the less appositely worded provision enacted in New South Wales in 1989.[34] The New South Wales Law Reform Commission considered two previous models but rejected both as not going far enough. One was in the *Succession Act* 1981 (Qld). Section 31(1) provides that:

> [T]he Court shall have the same jurisdiction to insert in the probate copy of a will material which was accidentally or inadvertently omitted from the will when it was made as it has hitherto exercised to omit from the probate copy of a will material which was accidentally or inadvertently inserted in the will when it was made.

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32 *In the Goods of Boehm* [1891] P 247.

33 *Re Horrocks* [1939] P 198; *Ebert v The Union Trustee Co of Australia Ltd* (1960) 104 CLR 346 at 351; *Osborne v Smith* (1960) 105 CLR 153 at 159-162.

34 The *Wills, Probate and Administration Act* 1898 (NSW) s29A(1) states: "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 the testator's intentions."

The other, going slightly further, was s20(1) of the *Administration of Justice Act* 1982 (UK):

> If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence (a) of a clerical error, or (b) of a failure to understand his instructions, it may order that the will shall be rectified so as to carry out his intentions.

The New South Wales Law Reform Commission thought both these circumscribed by the unjustifiable limits of the old regime and that the power to rectify should be extended to other sorts of mistake which can vitiate the testator's true intention, for example, a failure to understand the legal effect of the words used.[35]

The equitable doctrine of rectification is traditionally associated with contracts but it is clear that it extends to unilateral transactions such as voluntary settlements.[36] It might be thought that s25AA goes beyond the confines of the equitable doctrine - a mistake as to the meaning of the words in a contract cannot be rectified.[37] There is, however, a difference between a contract where writing mutually accepted as the expression of the accord overtakes what might have been one or other or indeed both of the parties' intention, and a unilateral document intended to express the actual intention of the maker. There are decisions rectifying voluntary settlements where the legal effect of the words did not reflect the actual intention.[38] In *Re Butlin's Settlement Trusts* Brightman J said:

> [R]ectification is available not only in a case where particular words have been added, omitted or wrongly written as the result of careless copying or the like. It is also available where the words of the document were purposely used but it was mistakenly considered that they bore a different meaning from their correct meaning as a matter of true construction.[39]

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35 NSW, Law Reform Commission, *Community Law Reform Program* (eighth report) para 7.21.

36 See, for example, *Kent v Brown* (1942) 43 SR (NSW) 124.

37 *Rose v Pim* [1953] 2 QB 450; *Pukallus v Cameron* (1982) 43 ALR 243.

38 See, for example, *Kent v Brown*.

39 [1976] Ch 251 at 260.

There are even recent signs that courts may be prepared to extend this to bilateral documents such as contracts.[40]

Furthermore the Probate Court is not necessarily confined to the ambit of the equitable doctrine - it exercises not an equitable jurisdiction but one derived from the old Ecclesiastical Courts. In a case involving the new s29A of the New South Wales Act, *In the Estate of Spinks - Application of Mortensen*,[41] Needham AJ considered that the use of the word "rectified" would lead one to conclude that the equitable rules as to rectification are to be taken into account[42] but on appeal to the Court of Appeal Sheller JA commented that

> it may be productive of error in a particular case when determining whether an order should be made under s29A to pay over much regard to the principles evolved by equity as part of the doctrine of rectification. Primarily the Court is concerned with the meaning of the language of the section.[43]

The facts of this case will be considered shortly.

There have been six cases on the issue in the jurisdictions where the power to rectify a will has been enacted. Of these, four have been successful applications. In *Re Hess*[44] a will in favour of the testator's "sons" was rectified to name his three natural sons. The evidence was that he did not intend his three adopted sons to inherit and the solicitor used the word "sons" in ignorance of the fact that the testator had adopted sons. In the case of *In the Estate of Bray*[45] the testator crossed out certain named beneficiaries but neither was this alteration signed or attested nor did it obliterate the words. Powell J thought it prima facie a case for the New South Wales equivalent of s12(2), but if the words were simply struck out by the Probate Court, the rest could be left for a court of construction to interpret, so ultimately it was more appropriate to rectify the will by deleting the words. *In the Estate of Gillespie*[46] was a case of a husband and wife

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40 *Winks v WH Heck & Sons Pty Ltd* [1986] 1 Qd R 226; *Anfrank Nominees Pty Ltd v Connell* (1989) 1 ACSR 365 at 387-388, per Kennedy J.

41 Unreported, NSW Supreme Court, 22 August 1990.

42 *Mortensen and Anor v State of New South Wales* (Unreported, NSW Court of Appeal, 12 December 1991) p4 of the transcript of the appeal citing *In the Estate of Spinks - Application of Mortensen*, per Needham AJ.

43 At p6 of the transcript.

44 [1992] 1 Qd R 176.

45 Unreported, NSW Supreme Court, Powell J, 25 October 1991.

46 Unreported, NSW Supreme Court, 25 October 1991.

inadvertently signing each other's "mirror will", the mistake remaining unnoticed until after the husband's death. The husband's will was admitted to probate as if the husband's signature was substituted for the wife's under s29A. In *Wordingham v Royal Exchange Trust Co Ltd*[47] the testator had made a will including a power of appointment but then arranged for her solicitor to prepare a new will intended to be the same as the earlier except for certain specified changes. The solicitor's inadvertent omission of the power of appointment was rectified by restoring the power (the same result would have been achieved even without rectification under the doctrine of dependent relative revocation).

Two applications have failed. In *Re Allen*[48] the will left land described as "Portion 43V West Wooroolin" to the applicant. The applicant sought to tender evidence that declarations made by the testator before and after the making of the will showed he intended to leave the applicant the adjoining land Portion 34V as well (both portions had been farmed as one property). It was held that the terms of s31(1) of the *Succession Act* 1981 (Qld), that the Court has the same jurisdiction to insert as it has hitherto exercised to omit, meant that the evidence sought to be tendered was inadmissible - in fact admissible evidence is probably confined to evidence of actual instructions for a will. Under the wider South Australian provision, of course, this evidence would have been admissible. *In the Estate of Spinks*[49] concerned an attempt to rectify the lapse of a gift which had occurred when an intended beneficiary predeceased the testator. Needham AJ in the Supreme Court of New South Wales held that a comparison of the terms of the will and the testator's intentions is determined at the time of execution and not at the date of the testator's death: "rectification is available for mistakes, not for lack of vision or perception or knowledge".[50] This decision was upheld by the Court of Appeal and the same result would presumably follow from the wording of the South Australian provision.

Gillespie and *Bray* raise the question of an overlap of the ambit of s25AA and that of s12(2). The particular mistake in *Gillespie*, a husband inadvertently signing his wife's mirror will instead of his own, occurred in *In the Estate of Blakely*.

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47 [1991] TLR 568.

48 [1988] 1 Qd R 1.

49 *In the Estate of Spinks - Application of Mortensen* (Unreported, NSW Supreme Court, Needham AJ, 22 August 1990).

50 *Mortensen and Anor v State of New South Wales* (Unreported, NSW Court of Appeal, 12 December 1991) p4 of the transcript of the appeal citing *In the Estate of Spinks - Application of Mortensen*, per Needham AJ.

White J ordered

> that the husband's will, the document in the name of the husband, be admitted for probate as if his signature and the signature of the two witnesses, all appearing on the wife's will, all appeared on the husband's will, and as if the wife's signature were expunged therefrom.[51]

This of course amounts to a notional rectification but it must be questioned whether s12(2) authorises an order in such terms - it allows a document to be admitted to probate notwithstanding that it "has not been executed with the formalities" not as if it had been. The question is raised whether a South Australian Court would now deal with such a case under s25AA rather than s12(2). Notwithstanding the New South Wales case it would seem that s12(2) is more appropriate than s25AA: the latter is concerned with a mistake as to the meaning of the contents of the will not one as to its formal validity. Furthermore there is the possibility, subject to the relevant Rule of Court, that the sort of situation in *Blakely* could be dealt with under s12(2) by the Registrar, whereas s25AA can be invoked only by the Supreme Court.

Another apparent overlap is that between s25AA and the Court's equitable jurisdiction relating to the construction of wills. If the true meaning of a document can be determined by construing it, it might be thought that there is then no case for rectification. However the Privy Council has held that rectification may be granted even if the correct meaning can be adduced by a process of construction. In *Standard Portland Cement Co Pty Ltd v Good*[52] a contract for the sale of land on which was erected a cement mill as a fixture did not expressly exclude the mill from the sale but did contain a clause allowing the vendor to remove it provided that was done within twelve months. The Judicial Committee thought that the proper construction of the contract, in the light not only of the clause but also extrinsic evidence of correspondence between the parties, was that the mill was implicitly excluded, but added that the vendor was entitled *ex abundanti cautela* to have the contract rectified to make this exclusion clear.[53] One might consider the case of *In the Goods of Boehm*.[54] The testator wished to leave two sums of £10,000 each to his two daughters Georgiana and

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51 (1983) 32 SASR 473 at 480.
52 (1982) 47 ALR 107.
53 At 112.
54 [1891] P 247.

Florence but the solicitor inadvertently inserted "Georgiana" twice and omitted "Florence" altogether. The Probate Court held that the second "Georgiana" could be struck out, leaving a blank. Although this would not leave the will as it was intended to be, the blank at least rendered the clause ambiguous or insensible and its correct meaning could be an easy matter for the court of construction. Now the Probate Court would simply substitute "Florence" for the second "Georgiana".

Subsection (2) of s25AA requires the application to be made within six months of the grant of probate or letters of administration, except with the consent of the Court. Subsection (3) makes it clear that a personal representative who, after giving the prescribed notice inviting claims, lawfully distributes before notice of any such application is protected.

Finally, any fear that s25AA will open a floodgate of applications by individuals claiming oral promises in their favour by a now deceased person should be allayed. The words "testamentary intentions" mean specifically that which the deceased intended to express in a will, not generally what a deceased might have been minded to say to others during his or her lifetime as to who should be entitled to what upon death. The relevant question will always be which property was intended to be *disposed of by will* to whom, not just which property was intended to go to whom. There is nothing in s25AA to support an argument that the section might work to undermine the basic requirement of s8 that a will must be in writing.

RECENT CHANGES IN OTHER JURISDICTIONS NOT FOLLOWED IN SOUTH AUSTRALIA

To conclude, comment might be made about recent changes to the law in other jurisdictions not followed in South Australia. The most significant of these is statutory revocation of a will upon divorce, which is now the law in New South Wales, Queensland, Tasmania and New Zealand and has been proposed in Victoria. This is consistent with the "clean break" divorce introduced by the Commonwealth *Family Law Act* in 1975. One could hardly conceive any objection to a provision in the terms of the New South Wales 1989 amendment. By s15A of the *Wills, Probate and Administration Act* 1898 (NSW) any disposition in a will in favour of a spouse is revoked upon divorce in the absence of a contrary intention. The Hon C J Sumner, who was Attorney-General when the South Australian Bill was prepared, commented in Parliament during debate when the Bill was passed that the present law that divorce has no effect on a will has the advantage of certainty and with adequate information to the community ought not to cause

problems.[55] The result in *In the Estate of Parkinson*[56] discussed above suggests otherwise.

In the United Kingdom the court has power to authorise a will to be made on behalf of a person who has not the mental capacity to make a will.[57] This was proposed here by the former Government[58] but not included in the final Bill. Although one can imagine situations where a loss of capacity may cause problems, for example a will in favour of named children made by a parent who has a further child before succumbing to a mental illness depriving the requisite capacity to alter the will to include the youngest child, such problems are arguably better dealt with under the *Inheritance (Family Provision) Act* 1972 (SA). Lack of testamentary capacity involves either an inability to understand the nature of making a will and the effects of doing so, an inability to understand the extent of property being disposed of, or an inability to comprehend and appreciate the claims to which the will maker ought to give effect. Embarking upon an attempt to draft and have executed a will on behalf of such a person seems a dubious process.

Finally, New South Wales has abolished privileged wills (the *Wills Probate and Administration (Amendment) Act* 1989 (NSW) repealed s10 of the principal Act). The New South Wales Law Reform Commission recommended that it was more appropriate to deal with such cases under the general dispensing power in s18A.[59] The issue has not often been raised in recent times but arguably s11 of the *Wills Act* 1936 (SA)allowing a person who is on active service as a member of a military, naval or air force of the Commonwealth to make a nuncupative will should be retained. A nuncupative will could not be saved under s12(2) as there would at least have to be some writing. Writing is a formal requirement of s8 but not one of execution which is all s12(2) deals with.

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55 SA, Parl, *Debates* (22 March 1994) at 235.
56 *In the Estate of Parkinson* (1988) 143 LSJS 336.
57 *Mental Health Act* 1983 (UK) ss96, 97.
58 SA, Parl, *Debates* (22 March 1994) at 235.
59 NSW, Law Reform Commission, *Community Law Reform Program* (eighth report) para 11.35.