The Law Society
OF WESTERN AUSTRALIA
The voice of the legal profession in Western Australia

BRIEFING PAPER

WILLS FOR MINORS

THE ESSENTIAL MEMBERSHIP FOR
THE LEGAL PROFESSION

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WILLS FOR MINORS

Background

The *Wills Act 1970(WA)* (**Wills Act**) currently provides in section 7 that a will made by a person under the age of 18 years is not valid.

Provision to enable wills to be made for persons without testamentary capacity were introduced in the *Wills Amendment Act 2007 (WA)* that came into force on 8 February 2008. Those provisions are contained in Part XI of the Wills Act – "*Wills for Persons who Lack Testamentary Capacity*". The provisions in Part XI allow the Supreme Court to make a Statutory Will on behalf of a person who lacks testamentary capacity.

There have only been a few incidences of Statutory Wills being made in Western Australia. Section 40(2)(b) of the Wills Act specifically prohibits the court from making an order as to the making or alteration of a will unless, at the time when the order is made, the person concerned has reached the age of 18 years.

A situation can arise where an incapable minor who has considerable estate may not wish to benefit one or other members of their immediate family, and there is no provision currently that allows the Supreme Court to make a statutory will in that situation.

Position in Other Australian States

Victoria

In Victoria the Wills act 1997 under section 5 provides that a Will made by a minor is not valid. However, section 6 provides for Wills by minors who are married in the following terms: -

"Despite section 5 –

a) A minor may make a Will in contemplation of marriage, and may alter or revoke such a Will, but if the Will is of no effect if the marriage contemplated does not take place;
b) A minor who is married may make, alter, or revoke a Will;
c) A minor who has been married may revoke the whole or any part of a will made while the person was married or in contemplation of that marriage".

Part 3 of the Victorian Act deals with Wills made or rectified under court authorization, Division 1 of that Act deals with court authorized wills by minors.

Division 2 of Part 3 deals with Court authorised Wills for persons who do not have testamentary capacity. The same information requirements that apply to an application for an order for persons who have attained their majority who do not have testamentary capacity as set out in section 28 of that Act apply also to applications made on behalf of a minor.

New South Wales

In New South Wales the position is governed by the Succession Act 2006 No. 80.

Under Part 2.2 - Wills made or rectified under Court authorization, Division 1 dealing with Wills by minors provides that a court may authorize a minor to make, alter or revoke a Will. Further under section 17 of the New South Wales Act the Will of a deceased person that is a court authorized will for a minor is a valid Will. A court authorized Will for a minor will berecognised where a court in a place outside of New South Wales has made an order authorizing a minor to make the Will or the Will was executed according to the law of the place relating to the Wills of minors and the minor was a resident in that place at the time the Will was executed.

Under division 2 of the Succession Act the court may make authorized Wills for person who do not have testamentary capacity.

Queensland & South Australia
In Queensland and South Australia the position is similar to that in the other States above.

In summary it can be seen that it is possible in each of the other States:

a) for a minor to make a Will in contemplation of marriage;
b) for a married minor to make a Will;
c) for a minor to make a Will after an application to the Court with authorization from the Court if the Court is satisfied that the minor understands the nature and effect of the proposed Will, alteration or revocation and that the proposed Will reflects the intentions of the minor and that it is reasonable in all the circumstances that the orders should be made; and
d) where a minor lacks testamentary capacity the Court may authorise the making of a Will for that minor as well as for an adult who lacks testamentary capacity.

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Policy Position

The Law Society of Western Australia seeks amendments to the WA Wills Act be introduced so as to avoid a situation where:

- A minor who has married and has responsibilities towards a spouse or, potentially a child, can thus reflect their intentions as to the disposal;
- A situation where an incapable minor child, who has a considerable estate, and has valid reasons for not wishing to consider one or other of their parents or siblings as beneficiaries of their estate if they should die before 18, have the ability to make such a Will; or
- In the case of a minor who is incapacitated either since birth or through subsequent injury and often has a considerable estate, again may not wish to benefit one or other members of their immediate family.

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