

WILLS AMENDMENT BILL

EXPLANATORY NOTE

SECTION 33 of the Wills Act 1837 of the United Kingdom Parliament provides as follows:

“Where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.”

The section has attracted repeated criticism, partly because (under the section) the issue whose existence prevents the lapse of a gift to say a son of the testator do not take the gift, which falls into the son's estate and may pass to his wife in terms of his will or to his creditors if he is insolvent; partly because, as a result of the gift falling into the son's estate, it attracts estate duty in the estates of both the father and the son, a point that is not rendered wholly unimportant by section 19 of the Estate and Gift Duties Act 1955 which gives partial relief in such cases; and partly because the Courts have held that the section does not apply to class gifts.

The primary purpose of this Bill is to extend the legislation to class gifts, and provide for the children of the deceased beneficiary to take instead of his estate. To preserve the benefit of English cases and textbooks, the wording of the existing section has been adhered to as closely as the changed scheme permits. Legislation that is similar in principle, though not identical in form, appears in section 31 of the Wills Act 1928 of Victoria, as substituted by section 2 of the Wills (Amendment) Act 1947 of that State. In 1957 the Commissioners on the Uniformity of Legislation in Canada recommended similar legislation in that country, and effect has been given to that recommendation in three Canadian Provinces.

Clause 2 is an incidental provision that provides for the repeal in New Zealand of section 36 of the Wills Act 1837, a spent provision which provides as follows:

“This Act may be amended, altered, or repealed by any Act or Acts to be passed in this present session of Parliament.”

Clause 3 contains the material provisions of the Bill, which are being inserted as section 16 of the Wills Amendment Act 1955. That Act contains all the legislation of the New Zealand Parliament relating to wills.

The new *subsection (1)* is the key provision. It provides that, unless a contrary intention appears by the will, where any person is a child or other issue of the testator to whom (whether as a designated or named person or as a member of a class) any property is given by will, and that person dies in the lifetime of the testator leaving any children living at the time of the death of the testator there shall be a statutory substitutional gift to those children.

The new *subsection (2)* preserves existing drafting practice and provides that the section is not to apply to a gift which is in any way expressed to be conditional on the person being alive at or after the time of the death of the testator or any subsequent time or event. It also declares that any other unfulfilled condition excludes the statutory substitutional gift.

The new *subsection (3)* declares that the statutory substitutional gift is not to apply to specific gifts of personal chattels within the meaning of the Administration Act 1952. It would not be appropriate in many cases in relation to such articles. *Subsection (3)* makes it clear that the new section, like the existing section, does not apply to a gift to a person as one of two or more joint tenants.

The new *subsection (4)* sets out definitions for the purposes of the section. These definitions extend the section to illegitimate issue of the testator who are beneficiaries under the will, and extend the substitutional gift to illegitimate children of a deceased beneficiary in cases where those illegitimate children would take on the intestacy of the deceased beneficiary. The definition of the term "appointment" extends the section to special powers of appointment in cases where all the persons to take under the statutory gift over are objects of the power.

The new *subsection (5)* declares that for the purposes of the section an illegitimate relationship between a father and 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.

The new *subsections (6), (7), and (8)* are transitional provisions designed to make clear the cases where the existing law is to apply and those where the new provision is to apply.

Hon. Mr Mason

WILLS AMENDMENT

ANALYSIS

Title		2. Repeal
1. Short Title		3. Statutory substitutional gift

A BILL INTITULED

An Act to amend the law relating to wills

BE IT ENACTED by the General Assembly of New Zealand
in Parliament assembled, and by the authority of the same,
5 as follows:

1. Short Title—This Act may be cited as the Wills Amendment Act 1958, and shall, for the purposes of the law of New Zealand, be read together with and deemed part of the Wills Act 1837 of the United Kingdom Parliament.

10 **2. Repeal**—Section fifteen of the Wills Amendment Act 1955 is hereby amended by omitting the words “and thirty-two”, and substituting the words “thirty-two, and thirty-six”.

3. Statutory substitutional gift—The Wills Amendment Act 1955 is hereby amended by adding the following section:
15 “16. (1) Unless a contrary intention appears by the will, where any person is a child or other issue of the testator to whom (whether as a named or designated person or as a member of a class) any property is devised or bequeathed or appointed in terms that would enable that person to take the
20 property for any estate or interest not determinable at or

before the death of that person if that person survived the testator, and that person dies in the lifetime of the testator (whether before or after the testator makes the will) leaving any child or children living at the time of the death of the testator, the devise or bequest or appointment shall take effect as if the will had contained a substitutional gift devising or bequeathing or appointing the property to such of the children of that person as are living at the time of the testator's death and if more than one in equal shares. 5

“(2) Without restricting the manner in which a testator may show an intention to negative the operation of subsection one of this section, it is hereby declared that that subsection shall not apply— 10

“(a) To a devise or bequest or appointment to any person which is in any way expressed to be conditional on the person being alive at or after the time of the death of the testator or any time or event which in the events that happen is subsequent to the time of the death of the testator; or 15

“(b) Where any devise or bequest or appointment is in any way expressed to be conditional on the fulfilment of any other contingency and that contingency has not been fulfilled before the time of the testator's death. 20

“(3) This section shall not apply to— 25

“(a) Any specific bequest or specific appointment of any personal chattels:

“(b) Any devise or bequest or appointment to any person as one of two or more joint tenants.

“(4) In this section— 30

“‘Appointment’ means an appointment made by will in exercise of a general power of appointment; and also means an appointment made by will in exercise of a special power of appointment if every child in whose favour this section would operate is an object of the power; and the terms ‘appointed’ and ‘appointing’ have corresponding meanings: 35

“‘Child’,—

“(a) In relation to a testator, means any child (whether legitimate or illegitimate) of the testator: 40

“(b) In relation to any person to whom any property is devised or bequeathed or appointed as aforesaid, means a legitimate child of that person; and also, in relation to any woman, includes any illegitimate child of that woman:

“‘Issue’, in relation to a testator, means any issue (whether legitimate or illegitimate in any generation) of the testator:

5 “‘Personal chattels’ means personal chattels within the meaning of the Administration Act 1952:

“‘Property’ includes any real and personal property, and any estate or interest in any property, and any debt, and any thing in action, and any other right or interest.

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

15 “(6) This section shall not apply to any will made before the first day of January, nineteen hundred and fifty-nine.

20 “(7) For the purposes of the law of New Zealand, section thirty-three of the principal Act shall not apply to any will made on or after the first day of January, nineteen hundred and fifty-nine.

25 “(8) For the purposes of this section every will which is re-executed or confirmed or revived by any codicil shall be deemed to have been made at the time when it was first made, and not at the time when it was re-executed or confirmed or revived.”