

TRUSTEE AND WILLS (EMERGENCY PROVISIONS) ACT.

Act No. 32, 1940.

An Act to facilitate the execution of trusts; to amend the law with respect to the limitation of certain actions, suits and proceedings during the present war and for a certain period thereafter; to amend the law with respect to testamentary dispositions by soldiers and sailors and with respect to the grant of administration of the estates of deceased persons; to validate certain matters; to amend the Wills, Probate and Administration Act, 1898-1938, the Trustee Act, 1925-1938, and certain other Acts in certain respects; and for purposes connected therewith. [Assented to, 11th November, 1940.]

George VI.
No. 32, 1940.

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

PART I.

PRELIMINARY.

1. (1) This Act may be cited as the "Trustee and Wills (Emergency Provisions) Act, 1940."

Short title,
division into
Parts and
citation.

(2) This Act is divided into Parts as follows:—

PART I.—PRELIMINARY—ss. 1, 2.

PART II.—EXECUTION OF TRUSTS—ss. 3-11.

PART III.—LIMITATION OF ACTIONS—s. 12.

PART IV.—AMENDMENT OF THE WILLS, PROBATE AND ADMINISTRATION ACT, 1898-1938—s. 13.

(3).

Trustee and Wills (Emergency Provisions) Act.

No. 32, 1940.

(3) The Trustee Act, 1925-1938, as amended by this Act, may be cited as the Trustee Act, 1925-1940.

(4) The Wills, Probate and Administration Act, 1898-1938, as amended by this Act, may be cited as the Wills, Probate and Administration Act, 1898-1940.

Interpreta-
tion.

2. For the purposes of this Act a person shall be deemed to be "engaged on war service" if—

(a) he is bound to continuous service for the duration of the present war between His Majesty and Germany and her Allies (whether or not he has agreed to serve or does serve beyond the limits of the Commonwealth of Australia and those of any Territory under the authority of the Commonwealth)—

(i) as a member of His Majesty's naval, military or air forces; or

(ii) as a member of the Army Medical Service; or

(iii) as a member of the Medical Corps Nursing Service of His Majesty's naval, military or air forces; or

(b) he is engaged on service in any work outside New South Wales, of the British or Australian Red Cross Society or of the Saint John Ambulance Association or of any religious or patriotic organisation, being work in connection with the present war between His Majesty and Germany and her Allies; or

(c) he is, in connection with the present war between His Majesty and Germany and her Allies, a prisoner of war in the enemy's country or is interned in the country of any neutral power; or

(d) he is engaged outside New South Wales in making munitions or in any other service in connection with the present war between His Majesty and Germany and her Allies.

PART II.

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EXECUTION OF TRUSTS.

3. (1) This Part of this Act shall be read and construed with the Trustee Act, 1925-1938. Construction.

(2) Without prejudice to the generality of subsection one of this section expressions used in this Act shall have the meanings respectively ascribed thereto in the Trustee Act, 1925-1940.

4. (1) Notwithstanding anything in any enactment or any rule of law or equity a trustee (whether a sole trustee or a trustee with others) may, subject to subsection two of this section, by registered deed, delegate to any person the execution, during any period for which the trustee is engaged on war service and a further period of twelve months thereafter, of any trust of which he is trustee. Delegation of trusts. cf. Act No. 26, 1917, s. 2 (1).

(2) Nothing in subsection one of this section shall authorise— cf. Act 2 & 3 Geo. VI, c. 114, s. 1 (3).

- (a) the delegation of the execution of a trust to any person who is not capable of being appointed a trustee of that trust;
- (b) the delegation of the execution of any implied or constructive trust;
- (c) the delegation of the execution of a trust by one of two trustees to the other unless that other is the Public Trustee or a trustee company;
- (d) the delegation of the execution of a trust by one of two or more trustees to any person to whom the execution of the trust has been delegated, whether under the authority of this section or otherwise, by the other trustee or, as the case may be, all the other trustees, unless that person is the Public Trustee or a trustee company.

(3) A delegation given under the authority of this section by a trustee who is the legal representative of a deceased person shall, unless the contrary is expressed in the deed of delegation, operate to delegate not only the execution of the duties incident to the office of legal representative of such deceased person (including the exercise and discharge of all the powers, authorities, duties

No. 32, 1940. duties and functions of the trustee as such legal representative) but also the execution of the trusts which devolve upon such trustee when the administration of the estate of such deceased person is completed.

cf. Act No.
4705 (Vict.)
s. 3 (2).

(4) A delegation given under the authority of this section—

- (a) shall, if it does not expressly refer to some particular trust or trusts, be construed as relating to all trusts the execution of which the trustee has power to delegate;
- (b) may be limited to any particular trust or trusts or to any particular part of any trust or trusts;
- (c) shall operate within the scope of the authority conferred by this Act notwithstanding that it is not expressly limited to the period or periods referred to in subsection one of this section.

cf. Act No.
14, 1925,
s. 64 (6).

cf. Act 2 & 3
Geo. VI,
c. 114, s. 2
(1).

(5) Two or more trustees may delegate concurrently.

(6) In any proceedings brought against a trustee who has given a delegation under this Act, in respect of any act or default of the delegate, it shall be a defence for the trustee to prove that the delegate was appointed by him in good faith and without negligence.

cf. *Ibid.*
s. 2 (2).

(7) All jurisdiction and powers of any court shall apply to the delegate under any delegation given under this Act, in the same manner, so far as respects the execution of the trust to which the delegation relates, as if the delegate were acting in relation to the trust in the same capacity as the trustee who gave the delegation.

Consent to
exercise of
trust or
power.

cf. Act No.
14, 1925,
s. 65.

5. (1) Where a person whose consent is required by any instrument to the exercise of a trust or power is or is about to become engaged on war service he may, by registered deed, delegate to the Public Trustee or a trustee company the right to consent during any period for which such person is engaged on war service and a further period of six months thereafter.

(2) Two or more persons may delegate concurrently.

(3) The person who delegates and the delegate shall be severally liable for any improper exercise of the right to consent.

6. The power of delegation conferred by this Act shall be in addition to, and not in derogation from, any other power of delegation, whether conferred by statute or otherwise.

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Other powers of delegation.
cf. Act 2 & 3
Geo. VI, c.
114, s. 1 (6).

7. (1) The provisions of sections sixty-six, sixty-seven and sixty-eight of the Trustee Act, 1925-1940, shall, mutatis mutandis, apply to and in respect of delegations given under the authority of this Act in all respects as if they were delegations authorised by Part II of the Trustee Act, 1925-1940.

Application of certain provisions of Trustee Act, 1925.

(2) A statutory declaration by the delegate under a delegation given pursuant to this Act, that the trustee or person giving the delegation is engaged on war service within the meaning of this Act, shall be accepted as sufficient evidence of the fact by any person dealing with the delegate.

cf. Act No. 26, 1917, s. 2 (4).

8. A trustee or person who has given a delegation pursuant to this Act shall, for the purposes of this Act, be presumed to remain alive until definite news of his death has been received or such death has been presumed by a court of competent jurisdiction, and the fact that he is reported "missing" or "missing and believed to be killed" or any similar report shall not be construed as giving to persons having knowledge of such report actual notice of his death, although in fact it has occurred.

Persons reported missing.
cf. *Ibid.*
s. 4.

9. Every delegation given before the commencement of this Act by a trustee or, as the case may be, by a person referred to in section five of this Act, who was at the time of the execution of the instrument of delegation or who has since been engaged on war service, and every deed, act, matter or thing heretofore or hereafter executed or done by virtue of such delegation shall be deemed to have been and to be as good, valid and effectual as if this Act had been in force at the time of the execution of the instrument of delegation.

Validation.
cf. *Ibid.*
s. 5.

10. Every delegation under this Act by a person who, at the time of the execution of the deed of delegation, was engaged on war service, executed by such person and purporting to be attested by an officer as defined in the Defence Act, 1903-1939, of the Parliament of the Commonwealth, shall be deemed to have been duly executed.

Attestation of deed of delegation.
cf. *Ibid.*
s. 6.

11.

Trustee and Wills (Emergency Provisions) Act.**No. 32, 1940.**

Amendment
of Act No.
14, 1925.
Sec. 6.
(Appoint-
ment of new
trustees.)

11. The Trustee Act, 1925-1938, is amended—

- (a) by inserting at the end of subsection two of section six the following proviso:—

Provided that a new trustee may not be appointed on the sole ground that a trustee remains out of New South Wales for more than two years if such trustee has delegated the execution of the trust pursuant to the Trustee and Wills (Emergency Provisions) Act, 1940, and such delegation remains in force.

- (b) by inserting next after subsection three of section sixty-four the following new subsection:—

(3A) A delegation given under the authority of this section by a trustee who is the legal representative of a deceased person shall, unless the contrary is expressed in the deed of delegation, operate to delegate not only the execution of the duties incident to the office of legal representative of such deceased person (including the exercise and discharge of all the powers, authorities, duties and functions of the trustee as such legal representative) but also the execution of the trusts which devolve upon such trustee when the administration of the estate of such deceased person is completed.

This subsection shall be deemed to have commenced on the first day of March, one thousand nine hundred and twenty-six.

Sec. 64
(Execution
of trust.)

PART III.**LIMITATION OF ACTIONS.**

Certain
rights
preserved.
cf. Act No.
26, 1917,
s. 8.

12. Any right of entry, and any right to commence any action, suit or other proceeding, possessed by or existing against any person engaged on war service at the time he becomes engaged on war service or which accrues to or becomes available against him while engaged on war service, shall not be barred by the expiration, during the time he is engaged on war service or within twelve months thereafter, of the period of limitation fixed by any Act with respect to any such right.

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In the event of such expiration such entry may be made or such action, suit or proceeding commenced at any time before the expiration of the said period of twelve months.

This section shall have effect in any case where such person became engaged on war service or such right accrued or became available before as well as in any case where such person becomes engaged on war service or such right accrues or becomes available after the commencement of this Act.

PART IV.

AMENDMENT OF THE WILLS, PROBATE AND ADMINISTRATION ACT, 1898-1938.

13. The Wills, Probate and Administration Act, 1898-1938, is amended—

Amendment
of Act No. 13,
1898.

(a) by inserting at the end of section ten the following words and new subsections:—

Sec. 10.
(Soldiers' and
mariners'
wills.)
cf. Act 7 & 8
Geo. V, c. 58,
s. 1.

This subsection authorises and shall be deemed always to have authorised any soldier being on actual military service or any mariner or seaman being at sea, to dispose of his personal estate as he might have done before the coming into operation of this Act, though under the age of twenty-one years.

(2) Subsection one of this section shall extend to any member of His Majesty's naval or marine forces, not only when he is at sea but also when he is so circumstanced that, if he were a soldier, he would be on actual military service within the meaning of that subsection.

cf. *Ibid.*
s. 2.

(3) A testamentary disposition of any real estate in New South Wales made by a person to whom subsection one of this section applies, and who dies after the commencement of the Trustee and Wills (Emergency Provisions) Act, 1940, shall, notwithstanding that the person making the disposition was, at the time of making

cf. *Ibid.*
s. 3 (1).

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making it, under twenty-one years of age, or that the disposition has not been made in such manner or form as was, immediately before such commencement, required by law, be valid in any case where the person making the disposition was of such age and the disposition has been made in such manner and form that, if the disposition had been a disposition of personal estate made by such a person domiciled in New South Wales, it would have been valid.

cf. Act
7 & 8
Geo. V, c. 58,
s. 4.

(4) Where any person dies after the commencement of the Trustee and Wills (Emergency Provisions) Act, 1940, having made a will which is, or which, if it had been a disposition of property, would have been rendered valid by the foregoing provisions of this section, any appointment contained in that will of any person as guardian of the infant children of the testator shall have the like force and effect as a similar appointment contained in a will which would have been valid without the aid of this section.

(5) Any person who, being then under the age of twenty-one years, has made a will which is rendered valid by the foregoing provisions of this section, and who thereafter ceases to be a person to whom subsection one of this section applies, may revoke such will, although at the time of such revocation he is still under the age of twenty-one years, in any manner (other than by the making of another will) in which this Act provides that a will may be revoked.

cf. *Ibid.*
s. 5 (2).

(6) In this section the expression "soldier" includes a member of His Majesty's air forces.

Sec. 72.
(Adminis-
tration to
be granted
to attorney
in certain
events.)

(b) by inserting in subsection one of section seventy-two after the words "out of the jurisdiction" the words "or is engaged on war service within the meaning of the Trustee and Wills (Emergency Provisions) Act, 1940."