

WILLS, PROBATE AND ADMINISTRATION (AMENDMENT) BILL 1989

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The object of this Bill is to amend the Wills, Probate and Administration Act 1898 to give effect to the recommendations of the New South Wales Law Reform Commission in its report entitled "Wills—Execution and Revocation" (LRC 47). Those recommendations generally seek to clarify and simplify the law relating to the execution, rectification and revocation of wills.

Clause 1 specifies the short title of the proposed Act.

Clause 2 provides for the proposed Act to commence on a proclaimed day or days.

Clause 3 is a formal provision that gives effect to the Schedule of amendments.

SCHEDULE 1—AMENDMENTS

Privileged testators

The Bill omits section 10 (Will of privileged testator) and the definition of "privileged testator" from section 3 (Definitions) of the Principal Act in light of the Law Reform Commission's recommendation that no class of persons should have the status of being privileged testators. Consequently, other references in the Principal Act to privileged testators are removed. (Schedule 1 (1), (4), (6), (10) (c), (11) and (13) (b)).

Minors

The Bill replaces section 6 (Will of minor) of the Principal Act with a new section that will allow a valid will to be made by a minor who is or who has been married. (Schedule 1 (2)).

The Bill also inserts proposed sections 6A and 6B into the Principal Act. Proposed section 6A gives the Supreme Court power to enable a minor to make a valid will in terms which have been disclosed to the Court. Proposed section 6B provides that a will made in contemplation of marriage by a minor who may marry is validated when the marriage takes place. (Schedule 1 (2)).

Wills, Probate and Administration (Amendment) 1989

The Bill also extends section 18 (Effect of alteration in a will) of the Principal Act concerning the validity of alterations in wills to include wills made by minors. (Schedule 1 (11)).

Reform of execution formalities

The Bill omits section 7 (Every will to be in writing, and signed in the presence of two witnesses) and section 8 (When signature to a will shall be deemed valid) and inserts proposed section 7 (Form and manner of execution of wills). (Schedule 1 (3), (10) (b) and (13) (a)). Proposed section 7 provides that for a will to be valid, it must appear (on the face of the will or otherwise) that the testator intended to give effect to the will by signing it or directing someone else to sign it on his or her behalf. It also provides that 2 witnesses are required to attest and sign the will in the presence of the testator (though not necessarily in each other's presence).

A will, as a consequence of the proposed amendments, will be validly executed if it is executed in accordance with any of the following examples (which are given by way of illustration only and are not necessarily exhaustive):

Example 1: The testator signs the will in the presence of 2 witnesses present together. Each witness attests and signs the will in the presence of the testator. It does not matter whether or not the witnesses attest and sign the will in the presence of each other.

Example 2: The testator signs the will in the presence of one witness. The witness attests and signs the will in the presence of the testator. A second witness joins the testator and the first witness. The testator acknowledges his or her signature in the presence of the 2 witnesses present together. The second witness attests and signs the will in the presence of the testator. It does not matter whether or not the second witness attests and signs the will in the presence of the first witness.

Example 3: The testator signs the will when no witnesses are present. Two witnesses join the testator. The testator acknowledges his or her signature in the presence of the 2 witnesses present together. Each witness attests and signs the will in the presence of the testator. It does not matter whether or not the witnesses attest and sign the will in the presence of each other.

In each of these examples, a reference to the signing of a will by a testator could be replaced with a reference to the signing of the will by some other person who does so in the presence and by the direction of the testator.

Witnesses

The Bill omits section 12 (Will not void by incompetency of witness), section 13 (Gift to an attesting witness void) and section 14 (Creditor attesting or executor to be admitted a witness) from the Principal Act and inserts proposed section 12 (Competency of witness) and proposed section 13 (Gifts to interested witnesses). (Schedule 1 (5), (6) and (7)).

Proposed section 12 provides that any person who is competent to be a witness in civil proceedings (other than a blind person) may be a witness to a will.

Proposed section 13 provides that a gift to a witness (or his or her spouse) will generally be void. There are, however, 3 exceptions to this principle. Such a gift will not be void if there are at least 2 other witnesses to the will who are not interested witnesses, if all the persons who would benefit from the gift being void consent to the distribution of the gift according to the will or if the Supreme Court is satisfied that the testator knew and approved of the gift and freely and voluntarily made it.

Wills, Probate and Administration (Amendment) 1989

Effect of marriage and divorce

The Bill amends section 15 (Effect of marriage) of the Principal Act to provide that wills made in contemplation of marriage (whether or not that is expressed in the will) will not be revoked when the marriage takes place. (Schedule 1 (8)).

The Bill also inserts proposed section 15A (Effect of termination of marriage) to provide for the modification of certain provisions of wills on divorce or the annulment of a marriage. (Schedule 1 (9) and (10) (a)).

Reform of revocation formalities

The Bill amends section 17 (Manner of revocation) of the Principal Act to provide that a will may be revoked by the testator by any writing or dealing with the will if done with the intention to revoke. (Schedule 1 (10) (c)).

General dispensing power

The Bill inserts proposed section 18A (Certain documents to constitute wills etc.) into the Principal Act. (Schedule 1 (12)). Proposed section 18A enables the Supreme Court to treat as valid a testamentary document which lacks formal requirements if the Court is satisfied that the testator intended the document to constitute his or her will or an amendment or the revocation of his or her will. It also provides that the Court may have regard to extrinsic evidence (such as statements made by the testator) in determining the testator's intentions.

Rectification

The Bill inserts proposed section 29A (Power of the Court to rectify wills) into the Principal Act. (Schedule 1 (14)). Proposed section 29A empowers the Supreme Court to rectify a will if the Court is satisfied that the will fails to carry out the testator's intentions. An application for rectification is generally required to be made within 18 months after the testator's death.

Rules

The Bill inserts proposed section 152A (Rules of Court) into the Principal Act. (Schedule 1 (15)). Proposed section 152A enables the making of rules under the Supreme Court Act 1970 regulating practice and procedure in respect of proceedings under the Principal Act.

Savings and transitional provisions

The Bill inserts proposed section 154 and a Fifth Schedule into the Principal Act. (Schedule 1 (16) and (17)). Proposed section 154 is a formal provision which gives effect to the proposed Schedule, which contains savings and transitional provisions.

These provide that an amendment made by the proposed Act (with certain exceptions) are to apply to a will (whenever made) if the maker dies after the commencement of the amendment.

The amendment made by Schedule 1 (2) which relates to the will of a minor applies only to wills made after the commencement of the amendment. The application of the relevant law in force before that commencement is specifically preserved for minors' wills made before that time.

Anything done by a privileged testator before the repeal of provisions of the Principal Act relating to privileged testators is preserved, except that a will made by a privileged testator before the repeal takes effect is invalidated if the testator is living when the repeal takes effect.

Wills, Probate and Administration (Amendment) 1989

The amendment made by Schedule 1 (9) which relates to the effect of the termination of a marriage is to apply to a will (whenever made) if the testator's marriage is terminated after the commencement of the amendment.

The amendment made by Schedule 1 (14) which relates to rectification of wills is to apply to any will (whenever made) if the will is not admitted to probate, or letters of administration with the will annexed are not granted, before the commencement of the amendment.

The application of the law relating to gifts to interested witnesses in force immediately before the commencement of Schedule 1 (6) is specifically preserved if the testator dies before that commencement.
