

# Succession Act 2006 No 80

[2006-80]



New South Wales

## Status Information

### Currency of version

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### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Notes—

- **Does not include amendments by**  
[Succession Amendment \(Family Provision\) Act 2008 No 75](#) (not commenced — to commence on 1.3.2009)

### Authorisation

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# Succession Act 2006 No 80



New South Wales

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# Succession Act 2006 No 80



New South Wales

An Act to restate, with reforms, the law relating to wills in New South Wales; and for other purposes.

## Chapter 1 Preliminary

### 1 Name of Act

This Act is the *Succession Act 2006*.

### 2 Commencement

This Act commences on a day or days to be appointed by proclamation.

### 3 Definitions

(1) In this Act:

**administrator** has the same meaning as it has in the *Probate and Administration Act 1898*.

**Court** means the Supreme Court.

**disposition** includes the following:

- (a) any gift, devise or bequest of property under a will,
- (b) the creation by will of a power of appointment affecting property,
- (c) the exercise by will of a power of appointment affecting property.

**document:**

- (a) except as provided by paragraph (b)—has the same meaning that it is given by section 21 of the *Interpretation Act 1987*, and
- (b) in Chapter 2 (other than section 8)—means any paper or material on which there is writing.

**personal representative** means the executor or administrator of the estate of a deceased person.

**Registrar** means a person who is:

- (a) appointed in accordance with section 120 of the *Supreme Court Act 1970*, and
- (b) nominated by the Principal Registrar of the Court for the purposes of this Act.

**will** includes a codicil and any other testamentary disposition.

**Note—**

The *Interpretation Act 1987* contains definitions of some terms and expressions used in this Act. See, for example, the definitions of **minor**, **land** and **property** in section 21 of that Act.

- (2) A reference in this Act to a child or issue of any person includes a child or issue en ventre sa mere at the death of the person, provided such child or issue is born alive and remains alive for a period of 30 days.
- (3) Notes included in this Act do not form part of this Act.

**Note—**

References in headings to sections of this Act to “WPA” are references to the *Wills, Probate and Administration Act 1898* as in force before it was amended by this Act.

## Chapter 2 Wills

### Part 2.1 The making, alteration, revocation and revival of wills

#### Division 1 Making a will

##### 4 What property may be disposed of by will? (cf WPA 5)

- (1) A person may dispose by will of property to which the person is entitled at the time of the person’s death.
- (2) Subsection (1) applies whether or not the entitlement existed at the date of the making of the will.
- (3) A person may dispose by will of property to which the person’s personal representative becomes entitled, in the capacity of personal representative, after the person’s death.
- (4) Subsection (3) applies whether or not the entitlement existed at the time of the person’s death.
- (5) A person may not dispose by will of property of which the person is trustee at the time of the person’s death.

##### 5 Minimum age for making a will (cf WPA 6 and 6B)

- (1) A will made by a minor is not valid.

- (2) Despite subsection (1):
  - (a) a minor may make a will in contemplation of marriage (and may alter or revoke such a will) but the will is of no effect if the marriage contemplated does not take place, and
  - (b) a minor who is married may make, alter or revoke a will, and
  - (c) a minor who has been married may revoke the whole or any part of a will made while the minor was married or in contemplation of that marriage.
- (3) Subsection (1) does not apply to a will made by an order under section 16 (Court may authorise minor to make, alter or revoke a will).

## **Division 2 Executing a will**

### **6 How should a will be executed?** (cf WPA 7 and 9)

- (1) A will is not valid unless:
  - (a) it is in writing and signed by the testator or by some other person in the presence of and at the direction of the testator, and
  - (b) the signature is made or acknowledged by the testator in the presence of 2 or more witnesses present at the same time, and
  - (c) at least 2 of those witnesses attest and sign the will in the presence of the testator (but not necessarily in the presence of each other).
- (2) The signature of the testator or of the other person signing in the presence and at the direction of the testator must be made with the intention of executing the will, but it is not essential that the signature be at the foot of the will.
- (3) It is not essential for a will to have an attestation clause.
- (4) If a testator purports to make an appointment by his or her will in the exercise of a power of appointment by will, the appointment is not valid unless the will is executed in accordance with this section.
- (5) If a power is conferred on a person to make an appointment by a will that is to be executed in some particular way or with some particular solemnity, the person may exercise the power by a will that is executed in accordance with this section, but is not executed in the particular way or with the particular solemnity.
- (6) This section does not apply to a will made by an order under section 18 (Court may authorise a will to be made, altered or revoked for a person without testamentary capacity).



**7 Must witnesses know that they are signing a will?**

A will that is executed in accordance with this Act is validly executed even if one or more witnesses to the will did not know that the document he or she attested and signed was a will.

**Division 3 Dispensing with requirements for execution, alteration or revocation of a will**

**8 When may the Court dispense with the requirements for execution, alteration or revocation of wills?** (cf WPA 18A)

- (1) This section applies to a document, or part of a document, that:
  - (a) purports to state the testamentary intentions of a deceased person, and
  - (b) has not been executed in accordance with this Part.
- (2) The document, or part of the document, forms:
  - (a) the deceased person's will—if the Court is satisfied that the person intended it to form his or her will, or
  - (b) an alteration to the deceased person's will—if the Court is satisfied that the person intended it to form an alteration to his or her will, or
  - (c) a full or partial revocation of the deceased person's will—if the Court is satisfied that the person intended it to be a full or partial revocation of his or her will.
- (3) In making a decision under subsection (2), the Court may, in addition to the document or part, have regard to:
  - (a) any evidence relating to the manner in which the document or part was executed, and
  - (b) any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person.
- (4) Subsection (3) does not limit the matters that the Court may have regard to in making a decision under subsection (2).
- (5) This section applies to a document whether it came into existence within or outside the State.

**Division 4 Witnessing a will**

**9 Persons who cannot act as witnesses to wills** (cf WPA 12)

A person who is unable to see and attest that a testator has signed a document may not

act as a witness to a will.

**10 Can an interested witness benefit from a disposition under a will?** (cf WPA 13)

- (1) This section applies if a beneficial disposition is given or made by will to a person (the **interested witness**) who attests the execution of the will.
- (2) The beneficial disposition is void to the extent that it concerns the interested witness or a person claiming under the interested witness.
- (3) A beneficial disposition is not void under subsection (2) if:
  - (a) at least 2 of the people who attested the execution of the will are not interested witnesses, or
  - (b) all the persons who would benefit directly from the avoidance of the disposition consent in writing to the distribution of the disposition under the will and have the capacity to give that consent, or
  - (c) the Court is satisfied that the testator knew and approved of the disposition and it was given or made freely and voluntarily by the testator.

**Note—**

Consent under section 10 (3) (b) is not liable to duty. See section 65 (12A) of the [Duties Act 1997](#).

- (4) In this section:

**beneficial disposition** does not include a charge or direction for the payment of:

- (a) a debt, or
- (b) reasonable remuneration to an executor, administrator, legal practitioner or other person acting in relation to the administration of the testator's estate.

**Division 5 Revocation, alteration and revival of a will**

**11 When and how can a will be revoked?** (cf WPA 16 and 17)

- (1) The whole or any part of a will may be revoked but only:
  - (a) if the revocation (whether by a will or other means) is authorised by an order under section 16 or 18, or
  - (b) by the operation of section 12 or 13, or
  - (c) by a later will, or
  - (d) by some writing declaring an intention to revoke it, executed in the manner in which a will is required to be executed by this Act, or

- (e) by the testator, or by some person in his or her presence and by his or her direction, burning, tearing or otherwise destroying the will with the intention of revoking it, or
  - (f) by the testator, or by some person in his or her presence and at his or her direction, writing on the will or dealing with the will in such a manner that the Court is satisfied from the state of the will that the testator intended to revoke it.
- (2) No will or part of a will may be revoked by any presumption of an intention on the ground of an alteration in circumstances.

**12 Effect of marriage on a will** (cf WPA 15)

- (1) A will is revoked by the marriage of a testator.
- (2) Despite subsection (1), the following are not revoked by the marriage of the testator:
  - (a) a disposition to the person to whom the testator is married at the time of his or her death,
  - (b) an appointment as executor, trustee, advisory trustee or guardian of the person to whom the testator is married at the time of his or her death,
  - (c) a will made in the exercise of a power of appointment if the property in relation to which the appointment is exercised would not pass to the executor, administrator or Public Trustee if the power of appointment was not exercised.
- (3) A will made in contemplation of a particular marriage, whether or not that contemplation is expressed in the will, is not revoked by the solemnisation of the marriage concerned.
- (4) A will that is expressed to be made in contemplation of marriage generally is not revoked by the solemnisation of a marriage of the testator.

**13 What is the effect of divorce or an annulment on a will?** (cf WPA 15A)

- (1) The divorce of a testator or annulment of his or her marriage revokes:
  - (a) a beneficial disposition to the testator's former spouse made by a will in existence at the time of the divorce or annulment, and
  - (b) an appointment of the testator's former spouse as an executor, trustee, advisory trustee or guardian made by the will, and
  - (c) a grant made by the will of a power of appointment exercisable by, or in favour of, the testator's former spouse.
- (2) Subsection (1) does not apply if a contrary intention appears in the will.

- (3) The divorce of a testator or the annulment of his or her marriage does not revoke:
- (a) the appointment of the testator's former spouse as trustee of property left by the will on trust for beneficiaries that include the former spouse's children, or
  - (b) the grant of a power of appointment exercisable by the testator's former spouse exclusively in favour of the children of whom both the testator and the former spouse are the parents.
- (4) If a disposition, appointment or grant is revoked by this section, the will takes effect in respect of the revocation as if the testator's former spouse had died before the testator.
- (5) Nothing in this section affects:
- (a) any right of the former spouse of a testator to make any application under the *Family Provision Act 1982*, or
  - (b) any direction, charge, trust or provision in the will of a testator for the payment of any amount in respect of a debt or liability (including any liability under a promise) of the testator to the former spouse of the testator or to the executor or the administrator of the estate of the former spouse.

- (6) In this section:

**annulment**, in relation to a testator, means:

- (a) the annulment of the testator's marriage by the Family Court of Australia, or
- (b) the annulment of the testator's marriage under a law of a place outside Australia, if the annulment is recognised in Australia under the *Family Law Act 1975* of the Commonwealth.

**divorce** means the ending of a marriage by:

- (a) a divorce order in relation to the marriage taking effect under the *Family Law Act 1975* of the Commonwealth, or
- (b) a decree of nullity in respect of the marriage by the Family Court of Australia, or
- (c) the dissolution of the marriage in accordance with the law of a place outside Australia, if the dissolution is recognised in Australia under the *Family Law Act 1975* of the Commonwealth.

**spouse** includes a party to a purported or void marriage.

**testator's former spouse** means the person who was the testator's spouse immediately before the testator's marriage was ended by divorce or annulment.

**14 How a will may be altered** (cf WPA 18)

- (1) An alteration to a will after it has been executed is not effective unless the alteration:
  - (a) is executed in the manner in which a will is required to be executed under this Part, or
  - (b) is made by a minor by the authority of an order of the Court under section 16 and is executed in accordance with, and satisfies the requirements for such a will set out in, section 16 (5), or
  - (c) is made for and on behalf of a person who does not have testamentary capacity by the authority of an order under section 18 and satisfies the requirements for such a will set out in section 23.
- (2) Subsection (1) does not apply to an alteration to a will made by or at the direction of the testator, or signed by the Registrar under section 23, if the words or effect of the will are no longer apparent because of the alteration.
- (3) If a will is altered, it is sufficient compliance with the requirements for execution if the signatures of the testator and of the witnesses to the alteration are made:
  - (a) in the margin, or on some other part of the will beside, near or otherwise relating to the alteration, or
  - (b) as authentication of a memorandum referring to the alteration and written on the will.

**Note—**

Section 21 of the [Interpretation Act 1987](#) defines **sign** to include making a mark.

**15 How a revoked will may be revived** (cf WPA 19)

- (1) A will or part of a will that has been revoked is revived by re-execution or by execution of a will showing an intention to revive the will or part.
- (2) A revival of a will that was partly revoked and later revoked as to the balance only revives that part of the will most recently revoked.
- (3) Subsection (2) does not apply if a contrary intention appears in the reviving will.
- (4) A will that has been revoked and is later wholly or partly revived is taken to have been executed on the day on which the will is revived.

## **Part 2.2 Wills made or rectified under Court authorisation**

### **Division 1 Wills by minors**

#### **16 Court may authorise minor to make, alter or revoke a will** (cf WPA 6A)

- (1) The Court may make an order authorising a minor:
  - (a) to make or alter a will in the specific terms approved by the Court, or
  - (b) to revoke a will or part of a will.
- (2) An order under this section may be made on the application of a minor or by a person on behalf of the minor.
- (3) The Court may impose such conditions on the authorisation as the Court thinks fit.
- (4) Before making an order under this section, the Court must be satisfied that:
  - (a) the minor understands the nature and effect of the proposed will or alteration or revocation of the will or part of the will and the extent of the property disposed of by it, and
  - (b) the proposed will or alteration or revocation of the will or part of the will accurately reflects the intentions of the minor, and
  - (c) it is reasonable in all the circumstances that the order should be made.
- (5) A will is not validly made, altered or revoked, in whole or in part, as authorised by an order under this section unless:
  - (a) in the case of the making or alteration of a will (in whole or in part)—the will or alteration is executed in accordance with the requirements of Part 2.1, and
  - (b) in the case of a revocation of a will (in whole or in part):
    - (i) if made by a will—the will is executed in accordance with the requirements of Part 2.1, and
    - (ii) if made by other means—is made in accordance with the requirements of the order, and
  - (c) in addition to the requirements of Part 2.1, one of the witnesses to the making or alteration of the will under this section is the Registrar, and
  - (d) the conditions of the authorisation (if any) are complied with.
- (6) A will that is authorised to be made, altered or revoked in part by an order under this section must be deposited with the Registrar under Part 2.5.

(7) A failure to comply with subsection (6) does not affect the validity of the will.

**17 Will made by minor under an order of a foreign court**

(1) A will of a deceased person that is a court authorised will for a minor is a valid will.

(2) A will is a ***court authorised will for a minor*** if:

- (a) a court, in a place outside New South Wales, made an order authorising a minor to make the will, and
- (b) the will was executed according to the law of the place relating to wills of minors, and
- (c) the minor was a resident in the place at the time the will was executed.

**Division 2 Court authorised wills for persons who do not have testamentary capacity**

**18 Court may authorise a will to be made, altered or revoked for a person without testamentary capacity**

- (1) The Court may, on application by any person, make an order authorising:
- (a) a will to be made or altered, in specific terms approved by the Court, on behalf of a person who lacks testamentary capacity, or
  - (b) a will or part of a will to be revoked on behalf of a person who lacks testamentary capacity.

**Note—**

A person may only make an application for an order if the person has obtained the leave of the Court—see section 19.

- (2) An order under this section may authorise:
- (a) the making or alteration of a will that deals with the whole or part of the property of the person who lacks testamentary capacity, or
  - (b) the alteration of part only of the will of the person.
- (3) The Court is not to make an order under this section unless the person in respect of whom the application is made is alive when the order is made.
- (4) The Court may make an order under this section on behalf of a person who is a minor and who lacks testamentary capacity.
- (5) In making an order, the Court may give any necessary related orders or directions.

**Note—**

The power of the Court to make orders includes a power to make orders on such terms and conditions as the Court thinks fit—see section 86 of the *Civil Procedure Act 2005*. The Court also has extensive powers to make directions under sections 61 and 62 of that Act.

- (6) A will that is authorised to be made or altered by an order under this section must be deposited with the Registrar under Part 2.5.
- (7) A failure to comply with subsection (6) does not affect the validity of the will.

### **19 Information required in support of application for leave**

- (1) A person must obtain the leave of the Court to make an application to the Court for an order under section 18.
- (2) In applying for leave, the person must (unless the Court otherwise directs) give the Court the following information:
  - (a) a written statement of the general nature of the application and the reasons for making it,
  - (b) satisfactory evidence of the lack of testamentary capacity of the person in relation to whom an order under section 18 is sought,
  - (c) a reasonable estimate, formed from the evidence available to the applicant, of the size and character of the estate of the person in relation to whom an order under section 18 is sought,
  - (d) a draft of the proposed will, alteration or revocation for which the applicant is seeking the Court's approval,
  - (e) any evidence available to the applicant of the person's wishes,
  - (f) any evidence available to the applicant of the likelihood of the person acquiring or regaining testamentary capacity,
  - (g) any evidence available to the applicant of the terms of any will previously made by the person,
  - (h) any evidence available to the applicant, or that can be discovered with reasonable diligence, of any persons who might be entitled to claim on the intestacy of the person,
  - (i) any evidence available to the applicant of the likelihood of an application being made under the *Family Provision Act 1982* in respect of the property of the person,
  - (j) any evidence available to the applicant, or that can be discovered with reasonable diligence, of the circumstances of any person for whom provision might reasonably be expected to be made by will by the person,



- (k) any evidence available to the applicant of a gift for a charitable or other purpose that the person might reasonably be expected to make by will,
- (l) any other facts of which the applicant is aware that are relevant to the application.

## **20 Hearing of application for leave**

- (1) On hearing an application for leave the Court may:
  - (a) give leave and allow the application for leave to proceed as an application for an order under section 18, and
  - (b) if satisfied of the matters set out in section 22, make the order.
- (2) Without limiting the action the Court may take in hearing an application for leave, the Court may revise the terms of any draft of the proposed will, alteration or revocation for which the Court's approval is sought.

## **21 Hearing an application for an order**

In considering an application for an order under section 18, the Court:

- (a) may have regard to any information given to the Court in support of the application under section 19, and
- (b) may inform itself of any other matter in any manner it sees fit, and
- (c) is not bound by the rules of evidence.

## **22 Court must be satisfied about certain matters**

The Court must refuse leave to make an application for an order under section 18 unless the Court is satisfied that:

- (a) there is reason to believe that the person in relation to whom the order is sought is, or is reasonably likely to be, incapable of making a will, and
- (b) the proposed will, alteration or revocation is, or is reasonably likely to be, one that would have been made by the person if he or she had testamentary capacity, and
- (c) it is or may be appropriate for the order to be made, and
- (d) the applicant for leave is an appropriate person to make the application, and
- (e) adequate steps have been taken to allow representation of all persons with a legitimate interest in the application, including persons who have reason to expect a gift or benefit from the estate of the person in relation to whom the order is sought.

## **23 Execution of will made under order**

- (1) A will that is made or altered by an order under section 18 is properly executed if:

- (a) it is in writing, and
  - (b) it is signed by the Registrar and sealed with the seal of the Court.
- (2) A will may only be signed by the Registrar if the person in relation to whom the order was made is alive.

#### **24 Retention of will**

- (1) Despite section 52 (Delivery of wills by Registrar), a will deposited with the Registrar in accordance with this Part may not be withdrawn from deposit with the Registrar by or on behalf of the person on whose behalf it was made unless:
- (a) the Court has made an order under section 18 authorising the revocation of the whole of the will, or
  - (b) the person has acquired or regained testamentary capacity.
- (2) On being presented with a copy of an order under section 18 authorising the revocation of the whole of a will, the Registrar must withdraw the will from deposit.

#### **25 Separate representation of person lacking testamentary capacity**

If it appears to the Court that the person who lacks testamentary capacity should be separately represented in proceedings under this Division, the Court may order that the person be separately represented, and may also make such orders as it considers necessary to secure that representation.

#### **26 Recognition of statutory wills**

- (1) A statutory will made according to the law of the place where the deceased was resident at the time of the execution of the will is to be regarded as a valid will of the deceased.
- (2) In this section:

**statutory will** means a will executed by virtue of a provision of an Act of New South Wales or other place on behalf of a person who, at the time of execution, lacked testamentary capacity.

### **Division 3 Rectification of wills by Court**

#### **27 Court may rectify a will** (cf WPA 29A)

- (1) The Court may make an order to rectify a will to carry out the intentions of the testator, if the Court is satisfied the will does not carry out the testator's intentions because:
- (a) a clerical error was made, or

(b) the will does not give effect to the testator's instructions.

(2) A person who wishes to make an application for an order under this section must apply to the Court:

(a) within 18 months after the date of the death of the testator, or

(b) if the Court has made an order under section 17 of the *Family Provision Act 1982* specifying a lesser period in relation to an application concerning the deceased testator under that Act—within that period.

(3) However, the Court may, at any time, extend the period of time for making an application specified in subsection (2) if:

(a) the Court considers it necessary, and

(b) the final distribution of the estate has not been made.

**28 Protection of personal representatives who distribute as if will had not been rectified** (cf WPA 29A)

(1) This section applies if:

(a) a will is rectified under section 27, and

(b) a personal representative made a distribution to a beneficiary as if the will had not been rectified.

(2) A personal representative is not liable if:

(a) the distribution was made under section 92A (Personal representatives may make maintenance distributions within 30 days) of the *Probate and Administration Act 1898*, or

(b) the distribution was made at least 6 months after the date of the death of the testator and at the time of making the distribution the personal representative was not aware of an application in respect of the estate having been made under section 27 or under the *Family Provision Act 1982*,

and the personal representative has complied with the requirements of section 92 (Distribution of assets after notice given by executor or administrator) of the *Probate and Administration Act 1898*.

## **Part 2.3 Construction of wills**

### **Division 1 General rules about construction of wills**

**29 What interest in property does a will dispose of?** (cf WPA 20)

If:

- (a) a testator has made a will disposing of property, and
  - (b) after the making of the will and before his or her death, the testator disposes of an interest in that property,
- the will operates to dispose of any remaining interest the testator has in the property.

**30 When a will takes effect** (cf WPA 21)

- (1) A will takes effect, with respect to the property disposed of by the will, as if it had been executed immediately before the death of the testator.
- (2) This section does not apply if a contrary intention appears in the will.

**31 Effect of failure of a disposition** (cf WPA 22)

- (1) If, and to the extent that, a disposition of property under a will is ineffective wholly or in part, the will takes effect as if the property or undisposed part of the property were part of the residuary estate of the testator.
- (2) This section does not apply if a contrary intention appears in the will.
- (3) In this section:

***disposition of property*** does not include the exercise of a power of appointment.

**32 Use of extrinsic evidence to construe wills**

- (1) In proceedings to construe a will, evidence (including evidence of the testator's intention) is admissible to assist in the interpretation of the language used in the will if the language makes the will or any part of the will:
  - (a) meaningless, or
  - (b) ambiguous on the face of the will, or
  - (c) ambiguous in the light of the surrounding circumstances.
- (2) Despite subsection (1), evidence of the testator's intention is not admissible to establish any of the circumstances mentioned in subsection (1) (c).
- (3) Despite subsection (2), nothing in this section prevents evidence that is otherwise admissible at law from being admissible in proceedings to construe a will.

**33 Effect of a change in testator's domicile** (cf WPA 32F)

The construction of a will is not altered because of a change in the testator's domicile after executing the will.

### **34 Income on contingent, future or deferred dispositions**

A contingent, future or deferred disposition of property, whether specific or residuary, includes any intermediate income of the property that has not been disposed of by will.

### **35 Beneficiaries must survive testator by 30 days**

- (1) If a disposition of property is made to a person who dies within 30 days after the testator's death, or, if that or another period for survival appears in the will, within the period appearing in the will, the will is to take effect as if the person had died immediately before the testator.
- (2) This section does not apply if a contrary intention appears in the will.
- (3) A general requirement or condition that a beneficiary survive the testator does not indicate a contrary intention for the purposes of this section.

## **Division 2 Construction of particular provisions in wills**

### **36 What a general disposition of land includes** (cf WPA 23 (1))

- (1) A general disposition of land, or of land in a particular area, includes leasehold land whether or not the testator owns freehold land.
- (2) This section does not apply if a contrary intention appears in the will.

### **37 What a general disposition of property includes** (cf WPA 23 (2) and (3))

- (1) A general disposition of:
  - (a) all or the residue of the testator's property, or
  - (b) all or the residue of his or her property of a particular description,includes all of the property, or all of the property of the relevant description, over which he or she has a general power of appointment exercisable by will and operates as an exercise of the power.
- (2) This section does not apply if a contrary intention appears in the will.

### **38 Effect of devise of real property without words of limitation** (cf WPA 24 and 26)

- (1) A disposition of real property to a person without words of limitation is to be construed as passing the whole estate or interest of the testator in that property to that person.
- (2) This section does not apply if a contrary intention appears in the will.

### **39 How dispositions to issue operate**

A disposition to a person's issue, without limitation as to remoteness, must be distributed

to that person's issue in the same way as the person's estate would be distributed if that person had died intestate leaving only issue surviving.

**40 How are requirements to survive with issue construed?** (cf WPA 25)

(1) If a disposition to a person is expressed to fail if there is:

- (a) a want or failure of issue of that person either in his or her lifetime or at his or her death, or
- (b) an indefinite failure of issue of that person,

the words used are to be construed to mean a want or failure of issue in the person's lifetime or at the person's death and not an indefinite failure of his or her issue.

(2) This section does not apply if a contrary intention appears in the will, except where the result would be to cause a failure of the disposition.

**41 Dispositions not to fail because issue have died before testator** (cf WPA 29)

(1) This section applies if:

- (a) a testator makes a disposition of property to a person, whether as an individual or as a member of a class, who is issue of the testator (**the original beneficiary**), and
- (b) under the will, the interest of the original beneficiary in the property does not come to an end on or before the original beneficiary's death, and
- (c) the disposition is not a disposition of property to the testator's issue, without limitation as to remoteness, and
- (d) the original beneficiary does not survive the testator for 30 days or, if that or another period for survival appears in the will, for the period appearing in the will.

(2) The issue of the original beneficiary who survive the testator for 30 days or, if that or another period for survival appears in the will, for the period appearing in the will, take the original beneficiary's share of the property in place of the original beneficiary as if the original beneficiary had died intestate leaving only issue surviving.

(3) Subsection (2) does not apply if a contrary intention appears in the will.

(4) (Repealed)

(5) A gift to persons as joint tenants on its own indicates a contrary intention for the purposes of subsection (3).

**42 Construction of residuary dispositions**

(1) A disposition of all, or the residue, of the estate of a testator that refers only to the

real estate of the testator, or only to the personal estate of the testator, is to be construed to include both the real and personal estate of the testator.

- (2) If a part of a disposition in fractional parts of all, or the residue, of the testator's estate fails, the part that fails passes to the part that does not fail, and, if there is more than one part that does not fail, to all those parts proportionally.
- (3) This section does not apply if a contrary intention appears in the will.

#### **43 Dispositions to unincorporated associations of persons**

- (1) Each of the following dispositions of property has effect as a disposition in augmentation of the general funds of the association to which the disposition is made:
  - (a) a disposition to an unincorporated association of persons that is not a charity,
  - (b) a disposition to or on trust for the aims, objects or purposes of an unincorporated association of persons that is not a charity,
  - (c) a disposition to or on trust for the present and future members of an unincorporated association of persons that is not a charity.
- (2) Property, a disposition of which is, or has effect under subsection (1) as, a disposition in augmentation of the general funds of an unincorporated association, must be:
  - (a) paid into the general fund of the association, or
  - (b) transferred to the association, or
  - (c) sold or otherwise disposed of on behalf of the association, with the proceeds being paid into the general fund of the association.
- (3) If a personal representative pays an amount to an unincorporated association under a disposition, the receipt of the treasurer or a like officer of the association (however described) is an absolute discharge for the payment.
- (4) If a personal representative transfers property to an unincorporated association under a disposition, the transfer of the property to a person nominated in writing by any two persons holding the offices of president, chairperson, treasurer or secretary of the association, or like officers of the association (however described), is an absolute discharge to the personal representative for the transfer of the property.
- (5) Subsections (3) and (4) do not apply if a contrary intention appears in the will.
- (6) It is not an objection to the validity of a disposition to an unincorporated association of persons that:
  - (a) a list of persons who were members of the association at the time of the testator's death cannot be compiled, or

(b) the members of the association may not divide assets of the association beneficially among themselves.

(7) In this section:

**charity** means a body constituted primarily for a purpose that is a charitable purpose under the general law.

#### **44 Can a person, by will, delegate the power to dispose of property?**

A power or a trust to dispose of property, created by will, is not void on the ground that it is a delegation of the testator's power to make a will, if the same power or trust would be valid if made by the testator by instrument during his or her lifetime.

#### **45 Effect of referring to a valuation in a will**

(1) This section applies if:

(a) there is an express or implied requirement in a will that a valuation of property be made or accepted for a purpose, and

(b) either:

(i) the will does not provide an effective method of valuation, or

(ii) the method of valuation is not provided for by a law of New South Wales or of another place.

(2) The reference to the valuation in the will is to be construed, to the extent the method of valuation is not provided for as mentioned in subsection (1) (b) (i) or (ii), as if the reference were a reference to a valuation of the property at the date of the testator's death made by a competent valuer.

(3) Subsection (2) does not apply if a contrary intention appears in the will.

#### **46 Operation of wills relating to transgender persons** (cf WPA 14)

A beneficiary under a will does not, except in so far as the will may otherwise expressly provide, lose any right or entitlement under the will merely because the beneficiary is a transgender person as referred to in Part 3A of the [Anti-Discrimination Act 1977](#).

### **Part 2.4 Wills under foreign law**

#### **47 Definition of "internal law"** (cf WPA 32A (1))

In this Part:

**internal law**, in relation to a place, means the law applying in a case where no question of the law in force in any other place arises.



**48 General rule as to the validity of a will executed in a foreign place** (cf WPA 32C and 32D)

- (1) A will is taken to be properly executed if its execution conforms to the internal law in force in the place:
  - (a) where it is executed, or
  - (b) that was the testator's domicile or habitual residence, either at the time the will was executed or at the time of the testator's death, or
  - (c) of which the testator was a national, either at the time the will was executed or at the time of the testator's death.
- (2) The following wills are also taken to be properly executed:
  - (a) a will executed on board a vessel or aircraft in conformity with the internal law in force at the place with which the vessel or aircraft may be taken to have been most closely connected having regard to its registration and other relevant circumstances,
  - (b) a will, to the extent that it disposes of immovable property, executed in conformity with the internal law in force in the place where the property is situated,
  - (c) a will, to the extent that it revokes:
    - (i) a will, or a provision of a will, that has been executed in accordance with this Act, or
    - (ii) a will, or a provision of a will, that is taken by this Act to be properly executed, if the later will has been executed in conformity with any law under which the earlier will or provision would be taken to have been validly executed.
- (3) A will to which this section applies is not, to the extent that it exercises a power of appointment, to be taken to have been improperly executed only because it has not been executed in accordance with the formalities required by the instrument creating the power.

**49 Deciding system of law to apply if more than one system of law** (cf WPA 32A (2))

- (1) This section applies if:
  - (a) the internal law in force in a place must be applied under section 48, and
  - (b) there is more than one system of internal law in force in that place relating to the formal validity of wills.
- (2) The system of law to be applied under section 48 is to be determined as follows:

- (a) if there is a rule in force throughout the place that indicates which system of internal law applies to the will, that rule must be followed,
- (b) if there is no rule, the system of internal law is that with which the testator was most closely connected:
  - (i) if the matter is to be determined by reference to circumstances prevailing at the testator's death—at the time of the testator's death, or
  - (ii) in any other case—at the time of execution of the will.

**50 Construction of the law applying to wills under foreign law** (cf WPA 32A (4))

- (1) In determining, for the purposes of section 48, whether a will has been executed in conformity with a particular law, regard must be had to the formal requirements of that law at the time of execution, but account may be taken of a later alteration of the law affecting wills executed at that time, if the alteration enables the will to be treated as properly executed.
- (2) If a law outside New South Wales is applied to a will (whether or not for the purposes of section 48), a requirement of that law that special formalities must be observed by testators of a particular description, or that the witnesses to the execution of the will must have certain qualifications, is taken to be a formal requirement only, despite any rule of law to the contrary.

**Note—**

Section 17 provides for the recognition in New South Wales of a court authorised will for a minor made in another jurisdiction. Section 26 provides for the recognition of statutory wills (including such wills made in other jurisdictions) made for persons lacking testamentary capacity.

## **Part 2.5 Deposit of and access to wills**

**51 Will may be deposited with Registrar**

- (1) Any person may deposit a will in the office of the Registrar.
- (2) A will is not to be deposited unless it is in a sealed envelope that has written on it the following information:
  - (a) the testator's name and address (as they appear in the will),
  - (b) the name and address (as they appear in the will) of any executor,
  - (c) the date of the will,
  - (d) the name of the person depositing the will.
- (3) A will that is deposited must be accompanied by the fee prescribed by the regulations.

- (4) Despite subsection (3), a fee is not payable for the deposit of a will if:
- (a) the will is deposited:
    - (i) in accordance with section 16 or 18, or
    - (ii) because a local legal practitioner has died, or has ceased, or is about to cease practising law in New South Wales, or
  - (b) the fee is waived by the Registrar in accordance with regulations made under the *Civil Procedure Act 2005*.

**52 Delivery of wills by Registrar** (cf WPA 32)

- (1) If a will has been deposited with the Registrar under this Act, the testator may at any time apply in writing to the Registrar to be given the will or to have the will given to another person authorised by the testator in writing to receive it.
- (2) On receiving the application, the Registrar must give the will to the testator or the person authorised by the testator unless the testator is a minor or a person who lacks testamentary capacity.
- (3) If a will has been deposited with the Registrar under this Act and the testator has died, any executor named in the will or any person entitled to apply for letters of administration with the will annexed may apply in writing to the Registrar to be given the will.
- (4) On receiving the application referred to in subsection (3), the Registrar must give the will to the executor or other person or to any Australian legal practitioner or trustee company nominated by the executor or person.
- (5) The Registrar may examine any will to enable the Registrar to comply with this Part.
- (6) The Registrar must ensure that an accurate copy of every will given to a person under this section is made and retained by the Registrar.
- (7) If there is any doubt as to whom a will should be given, the Registrar, or any other person, may apply to the Court for directions as to whom the Registrar should give the will.

**53 Failure to retain does not affect validity of will**

Any failure of the Registrar to retain a will as required by this Act does not affect the validity of the will.

**54 Persons entitled to inspect will of deceased person**

- (1) In this section:  
*will* includes a revoked will, a document purporting to be a will, a part of a will and a

copy of a will.

- (2) A person who has possession or control of a will of a deceased person must allow any one or more of the following persons to inspect or be given copies of the will (at their own expense):
- (a) any person named or referred to in the will, whether as a beneficiary or not,
  - (b) any person named or referred to in an earlier will as a beneficiary of the deceased person,
  - (c) the surviving spouse, de facto partner (whether of the same or the opposite sex) or issue of the deceased person,
  - (d) a parent or guardian of the deceased person,
  - (e) any person who would be entitled to a share of the estate of the deceased person if the deceased person had died intestate,
  - (f) any parent or guardian of a minor referred to in the will or who would be entitled to a share of the estate of the testator if the testator had died intestate,
  - (g) any person (including a creditor) who has or may have a claim at law or in equity against the estate of the deceased person,
  - (h) any person committed with the management of the deceased person's estate under the *Protected Estates Act 1983* immediately before the death of the deceased person,
  - (i) any attorney under an enduring power of attorney made by the deceased person,
  - (j) any person belonging to a class of persons prescribed by the regulations.
- (3) A person who has possession or control of a will of a deceased person must produce it in a court if the court requires the person to do so.

## Chapter 3 Miscellaneous

### 55 Service of documents

A document that is authorised or required by this Act or the regulations to be served on any person may be served in accordance with rules for the various methods of service of documents under the *Uniform Civil Procedure Rules 2005*.

**Note—**

On the enactment of this section, Rule 10.5 of the *Uniform Civil Procedure Rules 2005* contained the rules for general service of documents.

## 56 Rules of Court

- (1) Rules of Court may be made under the *Supreme Court Act 1970* for or with respect to the practice and procedure to be followed in respect of proceedings under this Act and any matters incidental to, or relating to, such practice and procedure.

### Note—

Under section 9 (2) and clause 30 of Schedule 3 to the *Civil Procedure Act 2005* rules may also be made under that Act.

- (2) Without limiting subsection (1), rules of court may be made for or with respect to the following:
  - (a) the service of documents (including the service of documents outside New South Wales),
  - (b) the giving of notices under this Act,
  - (c) applications under this Act,
  - (d) matters relating to costs in proceedings under this Act.
- (3) This section does not limit the rule-making powers conferred by the *Supreme Court Act 1970*.

## 57 Regulations

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

## 58 Savings, transitional and other provisions

Schedule 1 has effect.

## 59 (Repealed)

## 60 Review of Act

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

## Schedule 1 Savings, transitional and other provisions

(Section 58)

### Part 1 General

#### 1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:

this Act

[Statute Law \(Miscellaneous Provisions\) Act \(No 2\) 2007](#), to the extent that it amends this Act

- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
- (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
  - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.
- (4) Regulations made as referred to in subclause (1) may have effect despite the terms of any savings or transitional provisions contained in this Schedule, if the regulations so provide.

### Part 2 Provisions consequent on enactment of this Act

#### 2 Definition

In this Part:

**repealed provisions** means the provisions of the [Wills, Probate and Administration Act 1898](#) repealed by Schedule 2.

#### 3 Transitional provisions

- (1) Sections 4, 5, 6, 17, 19–26, 32, 35, 39, 41 and 42 apply to wills made on or after the commencement of this clause.
- (2) Despite subclause (1), section 41 (Dispositions not to fail because issue have died before testator) applies to a will made before the commencement of this clause if the

testator has died on or after the death of the issue and the deaths occurred on or after the commencement.

- (3) Sections 7, 8, 10, 27–31, 33, 34, 36–38, 40, 43–54 apply to a will whenever made, if the testator dies on or after the commencement of this clause.
- (4) Sections 5, 11, 14 and 15 apply to the alteration, revocation or revival of a will on or after the commencement of this clause even if the will was made before the commencement.
- (5) The Court may make an order under section 16 or 18 with respect to the alteration or revocation of a will or part of a will even if the will was made before the commencement of this clause.
- (6) The repealed provisions, as in force immediately before the commencement of this clause, continue to apply to wills made before the commencement, in so far as they are not affected by the operation of subclauses (7), (8) and (9) or by the operation of the sections specified in subclause (1), (2), (3) or (4).
- (7) Section 9 (Persons who cannot act as witnesses to wills) extends to a document that alters or revokes a will and that is made on or after the commencement of this clause even if the will was made before the commencement.
- (8) Section 12 (Effect of marriage on a will) extends to a will made before the commencement of this clause, in relation to a marriage solemnised on or after the commencement.
- (9) Section 13 (What is the effect of divorce or an annulment on a will?) extends to a will made before the commencement of this clause, if the divorce or the annulment of the marriage occurs on or after the commencement.

#### **4 Will of minor pursuant to leave of Court**

Despite the repeal of section 6A of the *Wills, Probate and Administration Act 1898*, a will may be made by a minor after repeal of that section pursuant to (and in accordance with any conditions of) leave granted under that section before its repeal.

#### **5 (Repealed)**

#### **6 Construction of references**

Subject to this Schedule and the regulations, in any Act (other than this Act) or instrument:

- (a) a reference to a repealed provision for which there is a corresponding provision in this Act extends to the corresponding provision of this Act, and
- (b) a reference to any act, matter or thing referred to in a repealed provision for which

there is a corresponding provision in this Act extends to the corresponding act, matter or thing referred to in the corresponding provision of this Act.

## **7 Pending proceedings**

- (1) Subject to this Schedule and the regulations, this Act and the rules apply to proceedings commenced before the commencement of this clause in relation to the repealed provisions in the same way as they apply to proceedings commenced on or after the commencement.
- (2) The Court may in such proceedings make such orders dispensing with the requirements of this Act or the rules in relation to the proceedings, and such consequential orders (including orders as to costs) and directions, as are appropriate in the circumstances.

## **8 Wills deposited in registry of Court**

A will deposited in the registry of the Court under section 32 of the *Wills, Probate and Administration Act 1898*, as in force immediately before the repeal of that section by this Act, is taken to have been deposited with the Registrar under section 51 (Will may be deposited with Registrar).

## **Schedules 2, 3 (Repealed)**