

Probate and Administration Act 1898 No 13

[1898-13]



New South Wales

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

Notes—

- **Previously named**
Wills, Probate and Administration Act 1898
- **See also**
[Relationships Register Bill 2010](#)

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Probate and Administration Act 1898 No 13



New South Wales

An Act to consolidate enactments relating to Wills, Probate and Administration.

Part 1AA Preliminary

1 Name of Act

This Act may be cited as the *Probate and Administration Act 1898*.

2 Repeals and savings

- (1) The Acts mentioned in the First Schedule to this Act to the extent therein expressed are hereby repealed.
- (2) All persons appointed by virtue of the provisions of any Act hereby repealed and holding office at the passing of this Act shall be deemed to have been appointed hereunder.
- (3) All rules of Court made under the authority of any Act hereby repealed, and being in force at the passing of this Act, shall be deemed to have been made under the authority of this Act.

3 Definitions

- (1) In this Act, unless the context or subject matter otherwise indicates or requires:

Administrator includes the NSW Trustee and any other person to whom administration as hereinafter defined is granted.

Administration includes all letters of administration of the real and personal estate and effects of deceased persons whether with or without the will annexed, and whether granted for general, special, or limited purposes, also exemplification of letters of administration or such other formal evidence of the letters of administration purporting to be under the seal of a Court of competent jurisdiction as is in the opinion of the Court deemed sufficient.

The Court means the Supreme Court of New South Wales.

Minor means a person under the age of eighteen years.

NSW Trustee means the NSW Trustee and Guardian constituted under the [NSW Trustee and Guardian Act 2009](#).

Probate includes “exemplification of probate” or any other formal document purporting to be under the seal of a court of competent jurisdiction which, in the opinion of the Court, is deemed sufficient.

Will extends to a testament and to a codicil and to any appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child by virtue of the Imperial Act twelfth Charles the Second, chapter twenty-four, and to any other testamentary disposition.

Real estate extends to messuages, lands, rents, and hereditaments, of freehold or any other tenure, and whether corporeal, incorporeal or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein, and in part 2 includes lands held under building leases or any lease for twenty-one years and upwards.

Personal estate, except in part 2 as hereinbefore mentioned, extends to leasehold estates and other chattels real, and also to moneys, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever, which, prior to the coming into operation of the *Real Estates of Intestates Distribution Act of 1862*, commonly known as “Dr. Lang’s Act,” by law devolved upon the executor or administrator, and to any share or interest therein.

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 Supreme Court for the purposes of this Act.

Rules means rules made or in force by or under the [Supreme Court Act 1970](#).

Seal of the Court means seal of the Court as provided for by the Rules.

Trustee company means a licensed trustee company within the meaning of Chapter 5D of the [Corporations Act 2001](#) of the Commonwealth authorised by an Act of New South Wales to act as trustee.

- (2) Notes in this Act do not form part of this Act.

Part 1 Wills

4-29A (Repealed)

30 Place of original wills

All original wills of which probate or administration with the will annexed is granted under this Act, and such other documents as the Court may direct or the rules may provide shall be preserved under the control of the Court, and may be inspected under the control of the Court and subject to the rules.

31 Official copy of whole or part of will may be obtained

Without limiting section 52 (Delivery of wills by Registrar) of the [Succession Act 2006](#), an official copy of the whole or any part of a will or such other document as the Court shall approve or an official certificate of the grant of any probate or letters of administration may be obtained from the Registrar or custodian on the payment of the fees fixed for the same.

32 (Repealed)

Part 1A

32A-32F (Repealed)

Part 2 Probate and administration

Division 1A Preliminary

32G Interpretation

(1) In this Part:

de facto relationship has the same meaning as in the [Property \(Relationships\) Act 1984](#).

de facto spouse, in relation to a person dying wholly or partly intestate, means someone who was a partner in a de facto relationship with the person.

(2) Except where the contrary intention appears, a reference in this Part to the spouse of an intestate includes a reference to a person who, at the time of death of the intestate, was the de facto spouse of the intestate.

Division 1 Jurisdiction of the Court

33 Jurisdiction

The jurisdiction and authority, prior to the coming into operation of the *Probate Act of 1890*, vested in or exercised by the Court or by the Primary Judge in Equity in respect of the estates of deceased persons, shall be vested in and exercised by the Court.

34-39 (Repealed)

40 Probate or administration may be granted of real or personal estate

The Court shall have jurisdiction to grant probate of the will or administration of the estate of any deceased person leaving property, whether real or personal, in New South Wales.

40A Evidence or presumption of death

- (1) Where the Court is satisfied, whether by direct evidence or on presumption of death, that any person is dead, the Court shall have jurisdiction to grant probate of the person's will or administration of the person's estate, notwithstanding that it may subsequently appear that the person was living at the date of the grant.
- (2) The provisions of this Act, the *Guardianship of Infants Act 1916*, Part 15 of the *Conveyancing Act 1919* and the *Succession Act 2006* relative to a deceased person and of the *Real Property Act 1900* relative to a deceased proprietor shall, unless the context or subject-matter otherwise indicates or requires, extend to any person with respect to whom the Court is satisfied in accordance with subsection (1) is deceased.
- (3) The provisions of this section shall extend to a case where the grant of probate or administration was made before, as well as to a case where the grant is made after the commencement of the *Wills Probate and Administration (Amendment) Act 1932*, provided that nothing in this section shall affect any action or proceeding decided before or pending at the commencement of that Act.

40B Presumption of death

- (1) If a grant of probate or administration is made on presumption of death only, the provisions of this section shall have effect.
- (2) The grant shall be expressed to be made on presumption of death only.
- (3) The estate shall not be distributed without the leave of the Court.

The leave may be given in the grant of probate or administration or by other order, and either unconditionally or subject to such conditions as the Court deems reasonable, and in particular, if the Court thinks fit, subject to an undertaking being entered into or security being given by any person who takes under the distribution that the person will restore any money or property received by the person or the amount or value thereof in the event of the grant being revoked.

- (4) The Court may direct the executor or administrator before distributing the estate to give such notices as the Court deems proper in the circumstances, in order that the person whose death has been presumed, if the person is still living, or if the person has died since the date of the grant, then in order that any person interested in the estate may lodge with the Registrar within such time as may be specified a caveat against the distribution.

If the Court directs any such notice to be given, the executor or administrator shall not

have the benefit of section 92, unless the executor or administrator complies with the direction.

If a caveat is duly lodged within such time as may be specified, the executor or administrator shall not distribute the estate until the caveat is withdrawn or removed.

- (5) An application for leave to distribute the estate and for directions may be made, and a caveat may be lodged withdrawn or removed, as prescribed by the rules, and the Court may make such order in respect of costs and otherwise as it deems proper.
- (6) The provisions of this section, with the exception of subsection (2), shall extend to a case where the grant of probate or administration was made before, as well as to a case where the grant is made after the commencement of the *Wills Probate and Administration (Amendment) Act 1932*, but shall not affect any distribution made before such commencement.

40C Person living at date of grant

- (1) Where the Court grants probate of the will or administration of the estate of any person, and it subsequently appears that the person was living at the date of the grant, the Court shall revoke the grant on such terms, if any, with respect to any proceedings at law or in equity commenced by or against the executor or administrator, and in respect of costs and otherwise, as the Court thinks proper.
- (2) Proceedings for the revocation may be taken either by the person, or if the person has died since the date of the grant, by any person entitled to apply for probate or administration or by any person interested in the estate.
- (3) The Court may at any time, whether before or after the revocation, make such orders, including an order for an injunction against the executor or administrator or any other person, and an order for the appointment of a receiver, as the Court may deem proper for protecting the estate.
- (4) The provisions of this section shall extend to a case where the grant of probate or administration was made before, as well as to a case where the grant is made after the commencement of the *Wills Probate and Administration (Amendment) Act 1932*.

40D Effect of revoking grant

- (1) If a grant of probate or administration is revoked, the provisions of this section shall have effect.
- (2) The executor or administrator under the revoked grant shall be bound duly to account and to pay and transfer all money and property received by or vested in the executor or administrator and then remaining in the executor's or administrator's hands as the Court may direct, but shall not be liable for any money or property paid or transferred by the executor or administrator in good faith under the probate or administration

before the revocation.

Nothing in this subsection shall affect any commission protection indemnity reimbursement or right to which the executor or administrator is entitled under any other provision of this Act.

- (3) The revocation shall not invalidate any payment or transfer lawfully made by or to the executor or administrator in the course of administration before the revocation, but nothing in this subsection shall prejudice the right of any person to follow assets into the hands of the persons or any of them among whom the same may have been distributed, or who may have received the same.
- (3A) No action shall lie against the Registrar-General for loss, damage or deprivation suffered in consequence of the registration of a transfer or other dealing with land under the provisions of the *Real Property Act 1900* lawfully made by the executor or administrator before the revocation.
- (4) In any case where a grant of probate or administration is revoked under section 40C the person, or if the person has died since the date of the grant, the executor or administrator to whom a grant of probate or administration is made consequent on the revocation, shall be entitled to receive from the Consolidated Revenue Fund the amount of death duty paid thereto in respect of the revoked grant.
- (5) The Court may make such vesting order as it deems proper.
- (6) The provisions of this section, with the exception of subsection (4), shall extend to a case where the grant of probate or administration was made before, as well as to a case where the grant is made after the commencement of the *Wills Probate and Administration (Amendment) Act 1932*.

41 Probate to one or more executors, reserving leave to others to prove subsequently

The Court may, if it thinks fit, grant probate to one or more of the executors named in any will, reserving leave to the other or others who have not renounced to come in and apply for probate at some future date.

41A (Repealed)

42 Application for probate or administration

- (1) All applications for probate or letters of administration may be made to the Court in such manner as may be prescribed by the rules.
- (2) Notice of such intended application shall be published in such newspaper or newspapers as may be prescribed by the rules at least fourteen days before such application is made.
- (3) Application for probate of a will not deposited as in section 32 provided or for letters

of administration shall be supported by an affidavit that a search has been made in the proper office for a will of the deceased, and stating whether any such will remains deposited with the officer for the time being authorised to have the custody of deposited wills, or by a certificate from the Registrar to the like effect.

- (4) The Court may by order direct that any partial or total failure to comply with the requirements of subsections (2) and (3) shall not bar the granting of probate or letters of administration.
- (5) The Court may refuse to revoke a grant of probate or letters of administration notwithstanding that in respect of the application for the grant there was any partial or total failure to comply with the requirements of subsections (2) and (3).

Note—

On grant of administration in respect of a deceased person to permit an application to be made for a family provision order, see section 91 of the [Succession Act 2006](#).

43 (Repealed)

Division 2 Estates of deceased persons

44 Real and personal estate to vest in executor or administrator

- (1) Upon the grant of probate of the will or administration of the estate of any person dying after the passing of this Act, all real and personal estate which any such person dies seised or possessed of or entitled to in New South Wales, shall as from the death of such person pass to and become vested in the executor to whom probate has been granted or administrator for all the person's estate and interest therein in the manner following, that is to say:
 - (a) On testacy in the executor or administrator with the will annexed.
 - (b) On intestacy in the administrator.
 - (c) On partial intestacy in the executor or administrator with the will annexed.
- (2) Upon the grant, to the Public Trustee or a trustee company, of probate of the will or administration of the estate of a person dying after the commencement of the [Wills, Probate and Administration \(Trustee Companies\) Amendment Act 1985](#), the Public Trustee or the trustee company, as the case may be, shall be:
 - (a) the executor, by representation, of any will of which the person had been granted probate, and
 - (b) the administrator, by representation, of any estate of which the person had been granted administration.

45 Real estate held by testator or intestate to vest in executor or administrator, subject

to equities

All real estate held by any person in trust or by way of mortgage, and vesting as aforesaid under this part, shall as from the death of such person vest in the person's executor or administrator, subject to the trusts and equities affecting the same.

46 Property of deceased to be assets which may be sold or mortgaged

- (1) The real as well as the personal estate of every person dying as aforesaid shall be assets in the hands of the person's executor to whom probate has been granted, or administrator, for the payment of all duties and fees, and for the payment of the person's debts in the ordinary course of administration.
- (2) Such executor or administrator for purposes of administration may sell such real estate, or mortgage the same with or without a power of sale, and convey the same to a purchaser or mortgagee in as full and effectual a manner in law as the deceased person could have done in the person's lifetime.

46A Real and personal estate of person dying after commencement of [Conveyancing \(Amendment\) Act 1930](#) are assets for payment of debts

- (1) The real and personal estate of a person dying after the commencement of the [Conveyancing \(Amendment\) Act 1930](#), to the extent of the person's beneficial interest therein, and the real and personal estate of which a person so dying disposes by the person's will (whenever made) in exercise of a general power, shall be assets for the discharge of the funeral, testamentary and administrative expenses, debts, and liabilities.
- (2) If any person to whom any such beneficial interest devolves or is given, or in whom any such interest vests, disposes thereof in good faith before any proceeding is taken or process is sued out against the person, the person shall be personally liable for the value of the interest so disposed of by the person, but that interest shall not be liable to be taken in execution in the proceeding or under the process.

46B Appointments under general power

- (1) Real and personal estate passing under a gift contained in the will of a testator dying after the commencement of the [Conveyancing \(Amendment\) Act 1930](#) which operates as an appointment under a general power to appoint by will shall vest in the testator's personal representatives as if the testator had been entitled thereto at the testator's death, whether or not the testator was so entitled, and whether or not for an estate or interest not determining on the testator's death.
- (2) Real and personal estate the subject of a gift contained in the will of a testator dying after the passing of the *Probate Act of 1890*, which operated as an appointment under a general power, shall be deemed to have vested under the provisions of that Act, or of this Act, as the case may require, in the testator's executors or administrators as if

that property had been vested in the testator at the time of the testator's death, whether or not the testator was entitled thereto for an estate or interest not determining on the testator's death.

- (3) Nothing in subsection (2) shall affect any right or title accrued before the commencement of this section under any disposition by an appointee which would have been valid if this section had not been passed or shall affect the interpretation of section 44.

46C Administration of assets

- (1) Where the estate of a deceased person is insolvent the deceased person's real and personal estate shall, subject to the provisions of the *Bankruptcy Act 1966* of the Parliament of the Commonwealth, be administered in accordance with the rules set out in Part 1 of the Third Schedule.
- (2) Where the estate of a deceased person is solvent the deceased person's real and personal estate shall, subject to the provisions of any Act as to charges on property of the deceased and to the provisions, if any, contained in the deceased person's will, be applicable towards the discharge of the funeral, testamentary, and administrative expenses, debts, and liabilities, payable thereout in the order mentioned in Part 2 of the Third Schedule.
- (3) In this section:

deceased person means a person dying after the commencement of the *Conveyancing (Amendment) Act 1930*.

solvent means sufficient and **insolvent** means insufficient for the payment in full of the debts and liabilities of the deceased.

46D Application of income of settled residuary real or personal estate

- (1) Where, under the provisions of the will of a person dying after the commencement of the *Conveyancing (Amendment) Act 1930* (in this section called **the deceased**), any real or personal estate included (either by specific or general description) in a residuary gift is settled by way of succession, no part of the income of that property shall be applicable in or towards the payment of the funeral, testamentary, and administrative expenses, debts, and liabilities, or of the interest (if any) thereon up to the date of the death of the deceased, or of any legacies bequeathed by such will.
- (2) The income of the settled property shall be applicable in priority to any other assets in payment of the interest (if any) accruing due on the funeral, testamentary, and administrative expenses, debts, liabilities and legacies, after the date of the death of the deceased and up to the payment thereof, and the balance of such income shall be payable to the person for the time being entitled to the income of the property.

- (3) Where, after the death of the deceased, income of assets which are ultimately applied in or towards payment of the funeral, testamentary, and administrative expenses, debts, liabilities and legacies arises pending such application, that income shall, for the purposes of this section, be deemed income of the residuary estate of the deceased.
- (4) This section shall only affect the rights of beneficiaries under the will as between themselves, and shall not affect the rights of creditors of the deceased.
- (5) This section shall have effect, subject to the provisions (if any) to the contrary contained in the will and to the provisions of any Act as to charges on property of the deceased.

46E Mode of divesting land from an executor or administrator

(1)

- (a) Real estate vested in an executor or administrator shall not be divested from the executor or administrator and vested in another person who may be entitled thereto either beneficially or as a trustee, or an executor or administrator, otherwise than by a registered conveyance, or by an acknowledgment operating under section 83, or by registration under the provisions of the *Real Property Act 1900*.
- (b) This subsection extends to real estate vested in an executor or administrator at the commencement of the *Conveyancing (Amendment) Act 1930* or thereafter becoming so vested.

(2)

- (a) Real estate mentioned in section 83 shall not, as against a purchaser in good faith from an executor or administrator, be held to have been divested from the executor or administrator and vested in another person entitled thereto, except by a registered conveyance, or by an acknowledgment operating under that section.
- (b) This subsection applies to purchases made on or after the fifteenth day of December, one thousand eight hundred and ninety (being the day of the passing of the *Probate Act of 1890*).

47 Real estate to be held upon trusts of will

Subject to the provisions of this part, the real estate of every such deceased person devising such estate by the person's will, shall be held by the person's executor to whom probate has been granted, or the administrator with the will annexed, according to the trusts and dispositions of such will.

48 Executor to have same rights etc as to real estate as personal estate

The executor to whom probate has been granted shall have the same rights and be subject to the same duties with respect to the real estate of the executor's testator that executors heretofore have had or been subject to with reference to personal assets.

49-51 (Repealed)

52 No dower or courtesy

No estate by courtesy or right of dower or any equivalent estate shall arise, after the coming into operation of this Act, out of the real estate as to which any person dies intestate.

53 Value to be accepted instead of partition

A spouse of an intestate who is entitled to share in real estate (other than real estate comprising an interest in real estate the spouse has elected to acquire under section 115 (Spouse's right of election) of the *Succession Act 2006*) shall be bound to accept the value of that real estate instead of partition if all other persons entitled to that real estate with the spouse so desire.

54-56 (Repealed)

57 Court may make special order

The Court may upon the application of the administrator, or in the case of partial intestacy the executor or administrator with the will annexed, as the case may be, or of any person beneficially interested, and after such previous notice to other parties and inquiry as may seem fit, order and direct the course of proceedings which shall be taken in regard to:

- (a) the time and mode of sale of any real estate,
- (b) the letting and management thereof until sale,
- (c) the application for maintenance or advancement or otherwise of shares or income of shares of infants,
- (d) the expediency and mode of effecting a partition if applied for,

and generally in regard to the administration of such real estate for the greatest advantage of all persons interested.

58 Court may order partition in a summary way

- (1) In any case wherein upon such inquiry the Court is satisfied that a partition of such real estate or any part thereof will be advantageous to the parties interested therein, the Court may appoint one or more arbitrators to effect such partition.
- (2) The report and final award of the arbitrators setting forth particulars of the land

allotted to each party interested shall, when signed by them and confirmed by the order of the Court, and when also registered in the office of the Registrar-General, be effectual without the necessity of any further conveyance to vest in each allottee the land so allotted to the allottee, and an office copy of such award so signed, confirmed, and registered as aforesaid, shall for all purposes be equivalent to an indenture of conveyance to each allottee of the lands allotted to the allottee as aforesaid.

- (3) In the case of land subject to the provisions of the *Real Property Act 1900*, the Registrar-General, on being served with an office copy of any such award so signed and confirmed, shall create a folio of the Register kept under that Act for the land so allotted to each allottee.
- (4) If such allotment be made subject to the charge of any money payable to any other party interested for equalising the partition, such charge shall take effect according to the terms and conditions in regard to time and mode of payment and otherwise which shall be expressed in such award without the necessity of any further instrument being made or executed.
- (5) In the case of land subject to the provisions of the *Real Property Act 1900*, the Registrar-General, when creating under subsection (3) a folio of the Register kept under that Act as a consequence of an allotment made under subsection (2), shall make in the folio such recording as the Registrar-General considers appropriate with respect to any charge referred to in subsection (4) that relates to the allotment and that is unsatisfied.

59 Personal representative not required to continue to act against the personal representative's own consent

No personal representative shall be required against the personal representative's own consent to continue the duty of a trustee by managing the property during an enforced suspension of sale, but shall be entitled upon such suspension being ordered to relinquish the personal representative's trust to such person as the Court may appoint.

60 (Repealed)

61 Property of deceased to vest in NSW Trustee

From and after the decease of any person dying testate or intestate, and until probate, or administration, or an order to collect is granted in respect of the deceased person's estate, the real and personal estate of such deceased person shall be deemed to be vested in the NSW Trustee in the same manner and to the same extent as aforesaid the personal estate and effects vested in the Ordinary in England.

Division 2A

61A-61F (Repealed)

Division 3 Probate and administration

62 Practice as to granting administration of real and personal estate of intestate

- (1) The practice and proceedings hitherto in force with reference to granting administration of the personal estate of an intestate shall, save as hereby altered and subject to the rules or Chapter 4 of the *Succession Act 2006*, be applicable to administration granted hereunder, and so far as may be to administration of real estate, and administration of both real and personal estate may be granted in and by the same letters.
- (2) Without limiting subsection (1), if a person dies wholly intestate the real and personal estate of the person is to be distributed or held in trust in accordance with Chapter 4 of the *Succession Act 2006*, and the real estate of that person is to be held as if it were devised to the persons for whom it is held in trust.

63 To whom administration may be granted

The Court may grant administration of the estate of an intestate person to the following persons, not being minors, that is to say to:

- (a) the spouse of the deceased, or
- (b) one or more of the next of kin, or
- (c) the spouse conjointly with one or more of the next of kin,

or if there be no such person or no such person within the jurisdiction:

- (i) who is, of the opinion of the Court, fit to be so trusted, or
- (ii) who, upon being required in accordance with the rules, or as the Court may direct, to pray for administration, complies with the requirement or direction,

then to:

- (d) any person, whether a creditor or not of the deceased, that the Court thinks fit.

64 Administration bond to be executed

- (1) Every person to whom a grant of administration is made shall, previous to the issue of such administration, execute a bond to Her Majesty and her successors with one or more sureties conditioned for duly collecting, getting in, and administering the personal estate or real and personal estate of the deceased, which bond shall be in the form directed by the rules.
- (2) It shall not be necessary for the NSW Trustee or for any person obtaining administration to the use or for the benefit of Her Majesty to execute any such bond.

- (3) No such bond shall be required to be given by or on behalf of a trustee company, except in respect of estates exceeding \$50,000 in value, in which the Court otherwise orders.

65 Amount of penalty in administration bond

Such bond shall be in a penalty equal to the amount under which the property of the deceased is sworn, but the Court may in any case dispense with the bond or with one or both of the sureties, or direct that such penalty be reduced in amount, and may also direct that more bonds than one be given so as to limit the liability of any surety to such amount as the Court thinks reasonable, and may, in place of such bond, accept the security of any incorporated company or guarantee society approved of by the Court in the form and as directed by the rules.

66 Administration may be revoked or further bond required

The Court may at any time, upon the application of any person interested in the estate:

- (a) revoke the administration already granted, or
- (b) order the administrator to execute a further bond in such sum and within such time as may seem right with or without sureties as aforesaid, and
- (c) upon default remove the administrator and appoint an administrator in the removed administrator's place, with power to sue or be sued upon any contract made by the removed administrator.

67 Order may be made to assign the bond

- (1) The Court may, on being satisfied that the condition of any bond given hereunder has been broken, order the Registrar, for and on behalf of Her Majesty, to assign the same to some person to be named in such order.
- (2) Such person the person's executors or administrators shall thereupon be entitled to sue upon the said bond in the person's or their own name or names as if the same had been originally given to the person, and shall be entitled to recover thereon as trustee for all persons interested the full amount recoverable in respect of any breach of the condition of the said bond.

68 Surety may apply to the Court for relief

If, upon application by a surety to an administration bond, it appear to the Court that:

- (a) the estate is being wasted, or
- (b) is in danger of being wasted, or
- (c) the surety is being in any way prejudiced, or in danger of being prejudiced by the act or default of the person administering the estate,

the Court may grant such relief as it may think fit, and for the purpose of making such relief effectual may have and exercise all the powers and jurisdiction of a court of equity.

69 Executor renouncing probate or not acting or not appearing to a citation to be treated as if the executor had renounced

Where, after the passing of this Act:

- (a) any person renounces probate of the will of which the person is appointed executor or one of the executors, or
- (b) an executor appointed in a will survives the testator but dies without having taken probate, or
- (c) an executor named in a will is required in accordance with the rules, or as directed by the Court, to take probate and fails to comply with the requirement or direction,

the right of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of the testator's estate shall, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor.

70 Minority of sole executor

Where a minor is sole executor, administration with the will annexed may be granted to:

- (a) a guardian of the person or of the estate of the minor, or
- (b) such other person as the Court thinks fit,

until the minor attains the age of eighteen years, with full or limited powers to act in the premises until probate is granted to the executor or administration is granted to some other person.

71 Who shall have the same power as where administration is granted durante minore aetate of the next of kin

The person to whom such administration is granted shall have the same powers vested in the person as an administrator by virtue of an administration granted to the person durante minore aetate of the next of kin.

72 Administration to be granted to attorney in certain cases

- (1) When any person named as executor, or any spouse or the next of kin entitled to probate or administration is out of the jurisdiction or is engaged on war service within the meaning of the *Trustee and Wills (Emergency Provisions) Act 1940*, but has some other person within the jurisdiction appointed under power of attorney to act for the person, administration may be granted to such attorney, but on behalf of the person entitled thereto, and on such terms and conditions as the Court thinks fit.

- (2) A grant of administration under this section shall continue in force notwithstanding the death of the donor of the power, unless the grant in terms provides that it shall determine on such event.

73 Administration pendente lite and receiver

- (1) The Court may:

- (a) pending any suit touching the validity of the will of any deceased person, or for obtaining, recalling, or revoking any probate or any grant of administration, or
- (b) during a contested right to administration,

appoint an administrator of the personal estate and the same or any other person to be receiver of the real estate of any deceased person, with such full or limited powers and with or without a bond or sureties as the Court may think right.

- (2) The Court may make such orders for the remuneration of such administrator or receiver out of the personal and real estate of the deceased as it may think right.

74 Power as to appointment of administrator

The Court may, in any case where a person dies:

- (a) intestate, or
- (b) leaving a will, but without having appointed an executor thereof, or
- (c) leaving a will and having appointed an executor thereof, where such executor:
 - (i) is not willing and competent to take probate, or
 - (ii) is resident out of New South Wales,

if it thinks it necessary or convenient, appoint some person to be the administrator of the estate of the deceased or of any part thereof, upon the appointed person giving such security (if any) as the Court directs, and every such administration may be limited as the Court thinks fit.

75 Proceeding where executor neglects to prove will

- (1) In any case where the executor named in a will:

- (a) neglects or refuses to prove the same or to renounce probate thereof within three months from the death of the testator or from the time of such executor attaining the age of eighteen years, or
- (b) is unknown or cannot be found,

the Court may upon the application of:

- (i) any person interested in the estate, or
- (ii) the NSW Trustee or a trustee company, or
- (iii) any creditor of the testator,

order that probate of the said will be granted to such executor or order that administration with such will annexed be granted to the applicant or make such other order for the administration of the estate as appears just.

(2) (Repealed)

75A Delegation

- (1) Any person who has been appointed executor of the will of a deceased person and has not renounced or taken probate thereof may by deed appoint the NSW Trustee or a trustee company to be executor of the will in the person's place or stead or as a co-executor with the person or with the continuing executors (including the appointor), as the case may be, and upon the registration and filing by subsections (8) and (9) directed such will shall be construed and take effect in all respects as if the name of the appointee had been originally inserted in such will as the executor or one of the executors thereof in lieu of the person in whose stead it has been appointed or as an additional executor thereof, as the case may be.
- (2) Any executor who has obtained probate or any administrator who has obtained letters of administration notwithstanding that the executor or administrator has acted in the administration of the deceased's estate and notwithstanding the existence of any other executor or administrator may by deed appoint the NSW Trustee or a trustee company to be executor or administrator in the executor's or administrator's place or stead or as co-executor or co-administrator with the executor or administrator or with the continuing executors or administrators (including the appointor) as the case may be and upon the registration and filing by subsections (8) and (9) directed the estate of the deceased left unadministered and all rights, powers and obligations in respect thereof shall without any conveyance or other assurance except as otherwise provided in this section vest in the appointee as executor or administrator as the case may be, either solely or jointly with the appointor as the case may be, or, when the appointor is one of several executors or administrators then in the appointee and the continuing executors or administrators or in the appointor, the appointee and the continuing executors or administrators as the case may be, as joint tenants:

Provided that where any portion of such estate is:

- (a) subject to the provisions of the [Real Property Act 1900](#) such portion shall not vest until either:
 - (i) the appropriate transfer is executed and registered so that such portion is duly transferred, or

- (ii) an entry of the vesting is made by the Registrar-General. Any such entry shall have the same effect as if the portion were duly transferred, or
- (b) subject to the provisions of the Closer Settlement Acts, the *Crown Lands Act 1989*, the *Mining Act 1992* or the *Offshore Minerals Act 1999* or any other Act relating to Crown lands such portion shall not vest until either:
 - (i) the appropriate transfer is executed and registered so that such portion is duly transferred, or
 - (ii) an entry of the vesting is made in the appropriate register kept under the provisions of the Act to which such portion is subject. Any such entry shall have the same effect as if the portion were duly transferred.

Until such transfer is so executed and registered or such entry of the vesting is made, such executor or administrator shall in any case in which the executor or administrator has appointed the appointee in the executor's or administrator's place or stead not be discharged from the trusts in respect of such portion of the estate.

An executor or administrator who has appointed the appointee in the executor's or administrator's place or stead shall not (except as mentioned in the foregoing proviso) be in any way liable in respect of any act or default in reference to such estate subsequent to the registration and filing of such deed other than the act or default of the executor or administrator or of persons other than the executor or administrator for whose conduct the executor or administrator is in law responsible.

- (3) No such appointment shall be made under subsection (1) or subsection (2) if the testator has by the testator's will directed or intimated that the office of executor should not be delegated or that the proposed appointee should not act in the trusts of the will.
- (4) Prior to making any appointment under subsection (1) or subsection (2) the person proposing to make such appointment shall give twenty-eight days' notice in writing thereof to:
 - (a) the co-executor or co-administrator (if any) of such person, and
 - (b) such of the persons entitled beneficially under the will or in consequence of the intestacy of the deceased person of whose will or estate the person proposing to make the appointment is executor or administrator, as are ordinarily resident in the Commonwealth of Australia and have attained the age of eighteen years:

Provided that the Court may, on the application of the person proposing to make the appointment, direct that service of any notice required by this paragraph be dispensed with.
- (5) Any person who is or who ought to be served or who if the person were ordinarily

resident in the Commonwealth ought to be served with the notice required by subsection (4) (whether or not the Court has directed that service of notice on that person be dispensed with) may at any time prior to the expiration of the period of 28 days' notice given to that person under subsection (4), or, where the Court has directed that service of notice on that person be dispensed with, the period of 28 days after the giving of that direction, lodge with the Registrar a notice in the form prescribed by the rules that the person objects to such appointment being made and serve a copy of such notice on the person proposing to make the appointment mentioned in subsection (1) or subsection (2).

- (6) In the event of any such notice of objection being filed and a copy thereof served as aforesaid:
- (a) the person proposing to make an appointment under subsection (1) shall not make such appointment unless the Court, on application made by the person, directs that the appointment be made; notice of such application shall be served on such persons as the Court may direct or as may be prescribed by the rules,
 - (b) the person proposing to make an appointment under subsection (2) shall not make such appointment under that subsection.
- (7) In the case of the appointment of a trustee company the capital both paid and unpaid and all other assets of the company and the manager, assistant manager and directors and their respective estates shall be liable for the due administration of the estates of which the company shall be so appointed executor or administrator.
- (8) Any such deed as is referred to in subsection (1) or in subsection (2) shall be registered in the office of the Registrar-General in the manner and on payment of the fees prescribed by regulation under the [Conveyancing Act 1919](#).
- (9) A duly verified copy of any such deed as is referred to in subsection (1) or in subsection (2) shall be filed in the registry of the Court.
- (10) (Repealed)

76 If executor or administrator out of jurisdiction special administrator may be appointed

If, at the expiration of six months from the death of any person, the executor to whom probate has been granted or the administrator is then residing out of the jurisdiction, the Court may, upon the application of any creditor, legatee, or next of kin, or the NSW Trustee or a trustee company, grant to such creditor, legatee, or next of kin, or the NSW Trustee or a trustee company so applying special letters of administration of such deceased person, nevertheless to cease upon an order being made for the rescission thereof as hereinafter mentioned.

77 Special administrator to make certain affidavits

The person applying for any such special grant as aforesaid shall, in addition to the oath usually taken by administrators, satisfy the Court by affidavit that:

- (a) the executor or administrator of such deceased person is resident out of the jurisdiction, and
- (b) except in the case of the Public Trustee or a trustee company, the applicant is thereby delayed in recovering or obtaining payment of moneys or the possession of goods and chattels, or real estate, to which the applicant is by law entitled, or
- (c) the estate is liable to loss or waste.

78 On return of original executor or administrator special administration to be rescinded

- (1) On the return within the jurisdiction of the executor to whom probate has originally been granted, or the administrator, such executor or administrator may apply to the Court to rescind such special grant of administration.
- (2) The Court may make an order to rescind such special grant of administration upon such terms and conditions as to security, costs, or otherwise as to the Court may seem reasonable, and thereafter the original probate or administration shall be and remain as valid and effectual as if such special grant of administration had never been made.

79 On order being made for rescission special administrator to account and pay over moneys

Upon any order being made by the Court for the rescission of any grant of special administration as aforesaid, the special administrator shall be bound duly to account to the original executor or administrator, and to pay over all moneys received by the person as special administrator, and then remaining in the special administrator's hands undisposed of as the Court may order.

80 Original executor or administrator liable although special administration not rescinded

If such executor or administrator neglects to apply for an order for the rescission of such special administration, the executor or administrator shall, notwithstanding that such special administration remains unrescinded, be liable to answer and make good all claims and demands against the estate of the deceased to the extent of the assets which have come to the executor's or administrator's hands or which might have come to the executor's or administrator's hands but for the executor's or administrator's wilful neglect or default, including the neglect herein mentioned.

81 Revocation of grants not to prejudice actions or suits

- (1) Where any proceedings at law or in equity have been commenced by or against any

executor or administrator lawfully acting as such, and the grant of probate or administration is, pending such proceedings, revoked or rescinded, the court in which such proceedings are pending may order that a suggestion be made upon the records of:

- (a) the revocation or rescission of such probate or administration, and
- (b) the grant or restoration of probate or administration which has been made consequent thereon.

- (2) Thereupon the proceedings shall be continued in the name of the executor or administrator authorised to act as such by such grant or restoration of probate or administration as if the proceedings had been originally commenced by or against such last-mentioned executor or administrator, but subject to such conditions and variations (if any) as such court may direct.
- (3) If the grant of probate or administration is revoked under the provisions of section 40C the court in which the proceedings are pending may in lieu of the suggestion referred to in subsection (1), order that such suggestion be made as it deems proper, and thereupon the proceedings shall be continued in the name of such person as the court directs as if the proceedings had been originally commenced by or against that person, but subject to such conditions and variations, if any, as the court directs, or the court may stay the proceedings on such terms in respect of costs or otherwise as it thinks just.

81A Disclosure of assets and liabilities of deceased

- (1) A person who applies for a grant of probate or administration in respect of the estate of a person who dies on or after 31 December 1981 shall, in accordance with the rules of Court, disclose to the Court the assets and liabilities of the deceased.
- (2) An executor, administrator or trustee of the estate of a person who dies on or after 31 December 1981 shall, in accordance with the rules of Court, disclose to the Court any assets and liabilities of the deceased which have not previously been disclosed to the Court.

81B Power to deal with assets etc

- (1) Nothing in this Part enables an executor, administrator or trustee of the estate of a person who dies on or after 31 December 1981 to complete the disposition of, and such an executor, administrator or trustee shall not complete the disposition of, any property of the deceased vested in the deceased which has not been disclosed to the Court pursuant to section 81A (1) or (2).
- (2) Nothing in subsection (1) prevents an executor or administrator from effecting an appointment pursuant to section 75A.

- (3) Nothing in subsection (1) affects any interest in any property acquired from an executor, administrator or trustee referred to in that subsection by a person where the interest was acquired in good faith, for valuable consideration and without notice that the property had not been disclosed to the Court pursuant to section 81A (1) or (2).

82 All debts to stand in equal degree, and retainer abolished

- (1) In the administration of the estate of every person dying after the passing of this Act, all the creditors of every description of such person shall be treated as standing in equal degree and be paid accordingly out of the assets of such deceased person whether such assets are legal or equitable, any statute or law to the contrary notwithstanding.
- (2) In the administration of the estate of any person dying before or after the commencement of this Act, in respect of which probate or letters of administration is or are granted after such commencement, no debt or liability of such person shall be entitled to any priority or preference by reason only that it is due to an executor or administrator of such estate.
- (3) This Act shall not prejudice or affect any mortgage, lien, charge, or other security which any creditor may hold or be entitled to for payment of the debt concerned.
- (4) Nothing herein contained shall affect the provisions of any Acts protecting life assurance or other policies against creditors.

83 Executor may sign acknowledgment in lieu of conveyance

- (1) When any real estate not under the provisions of the *Real Property Act 1900* is devised to any person by a will duly proved under the provisions of this Part, the executor of the will or the administrator with the will annexed may, as such executor or administrator, instead of executing a conveyance to such person, sign an acknowledgment in the form prescribed by the rules that the devisee is entitled to such real estate for the estate for which the same is devised for the devisee.
- (2) Such acknowledgment may be registered under the Acts in force regulating the registration of deeds; and upon registration thereof such real estate shall vest in the devisee for such estate as aforesaid in the same way and subject to the same trusts and liabilities as if the executor or administrator had executed a conveyance of the same.

84 Application for legacy etc

If the executor or administrator, after requesting in writing, neglects or refuses to:

- (a) sign such acknowledgment, or
- (b) execute a conveyance of land devised to the devisee, or

(c) pay or hand over to the person entitled any legacy or residuary bequest,
the Court may, on the application of such devisee or person, make such order in the matter as it may think fit.

84A Interest on legacies and annuities

- (1) Subject to subsection (2), where interest is payable on any legacy or on any arrears of an annuity in accordance with the will or instrument pursuant to which the legacy or annuity is payable or with any enactment or rule of law, that interest shall, unless the will or instrument otherwise provides, or the Court otherwise orders, be payable at the relevant rate or such other rate as may be prescribed in a regulation made under section 153.
- (2) Where an executor or administrator, in accordance with any power conferred on the executor or administrator in that behalf, appropriates any property in or towards satisfaction of any legacy (other than an annuity), the legatee shall be entitled to the income from the property so appropriated, and interest shall not be payable out of any other part of the estate on so much of the legacy as has been satisfied by the appropriation.
- (3) In this section, **relevant rate** of interest means the rate that lies 2% above the cash rate last published by the Reserve Bank of Australia before 1 January in the calendar year in which interest begins to accrue.

85 Executor, administrator or trustee to pass accounts

- (1) In respect of the estate of a person who died before 31 December 1981 every person to whom probate or administration has been or is granted shall file an inventory of the estate of the deceased and file or file and pass the person's accounts relating thereto within such time, and from time to time, and in such manner as may be fixed by the rules, or as the Court may order.
- (1AA) In respect of the estate of a person who dies on or after 31 December 1981 every person to whom probate or administration has been or is granted and who is:
 - (a) a creditor of the estate of the deceased,
 - (b) the guardian of a minor who is a beneficiary of the estate of the deceased,
 - (c) the executor or administrator of the estate where the whole, or a part which, in the opinion of the Court, is a substantial part, of the estate passes to one or more charities or public benevolent institutions,
 - (d) a person, not being a beneficiary, or, in the opinion of the Court, a substantial beneficiary, of the estate, selected at random by the Court, or
 - (e) a person otherwise required to do so by the Court,

shall verify and file or verify, file and pass the person's accounts relating to the estate within such time, and from time to time, and in such manner as may be fixed by the rules, or as the Court may order.

- (1A) Every trustee of the estate of a deceased person shall verify and file or verify, file and pass the trustee's accounts relating thereto within such time, and from time to time, and in such manner as may be fixed by the rules, or as the Court may order.

Nothing in this subsection affects the operation of section 32 of the *NSW Trustee and Guardian Act 2009*.

- (1B) In respect of the estate of a person who dies on or after 31 December 1981 every person to whom probate or administration has been or is granted and who is not a person to whom subsection (1AA) applies may verify and file or verify, file and pass the person's accounts relating to the estate within such time, and from time to time, and in such manner as may be fixed by the rules, or as the Court may order.
- (2) Every such person shall be subject to any order that the Court may on the application of any person interested make as to the production and verification of the accounts concerned.
- (3) The order of the Court allowing any such account shall be prima facie evidence of the correctness of the same, and shall, after the expiration of three years from the date of such order, operate as a release to the person filing the same, excepting so far as it is shown by some person interested therein that an error or omission or fraudulent entry has been made in such account.
- (4) Where the Court, in passing any such accounts, disallows in whole or in part the amount of any disbursement, the Court may order the executor, administrator or trustee to refund the amount disallowed to the estate of the deceased.

Nothing in this subsection alters or diminishes the right of any person to proceed in equity in the same way as if this subsection had not been enacted.

- (5) Every executor, administrator or trustee of the estate of a deceased person shall verify and file an inventory of the estate of the deceased within such time, and from time to time, and in such manner as may be fixed by the rules, or as the Court may order.

86 Executors etc may be allowed commission

- (1) The Court may allow out of the assets of any deceased person to the deceased person's executor, administrator, or trustee for the time being, in passing the accounts relating to the estate of the deceased person, such commission or percentage for the executor's, administrator's or trustee's pains and trouble as is just and reasonable, and subject to such notices (if any) as the Court may direct.

- (2) No such allowance shall be made to any executor, administrator, or trustee who neglects or omits without good reason to pass the accounts relating to the estate of the deceased person pursuant to the rules or an order of the Court.
- (3) Where any executor, administrator or trustee renounces the executor's, administrator's or trustee's right to such commission in respect of any particular year, the executor, administrator or trustee shall be entitled to indemnity out of the said assets for the amount of the executor's, administrator's or trustee's Australian legal practitioner's charges and disbursements, as moderated in accordance with the relevant professional scale, for non-professional work performed in that year, to an amount not exceeding that which the executor, administrator or trustee would have been in the opinion of the Court allowed by way of such commission for that year had the executor, administrator or trustee not so renounced but had applied therefor.

86A Reduction of excessive commission etc

Where the Court is of the opinion that a commission or amount charged or proposed to be charged in respect of any estate, or any part of any such commission or amount, is excessive, the Court may, of its own motion, or on the motion of any person interested in the estate, review the commission, amount or part and may, on that review, notwithstanding any provision contained in a will authorising the charging of the commission, amount or part, reduce that commission, amount or part.

87 Effect of neglect to file etc inventory or accounts

- (1) Where an executor, administrator or trustee neglects to file, or verify and file, an inventory of the estate of the deceased or to file, or file and pass, or verify and file, or verify, file and pass, the accounts relating to the estate in accordance with a requirement made by or under section 85 within one month after the expiration of the time fixed for compliance, the Registrar shall cause the executor, administrator or trustee to be notified of the executor's, administrator's or trustee's neglect.
- (2) Where, on the expiration of one month after having been so notified, an executor, administrator or trustee further neglects to comply with the requirement in respect of which the notification under that subsection was given, the Court may, of its own motion, order the executor, administrator or trustee to show cause before the Court why the executor, administrator or trustee should not be ordered to file, or verify and file, an inventory of the estate of the deceased or to file, or file and pass, or verify and file, or verify, file and pass, the accounts relating to the estate, as the case may require, in the Court forthwith.
- (3) Where an executor, administrator or trustee to whom subsection (2) applies fails to show cause as referred to in that subsection, the executor, administrator or trustee shall be liable to punishment for contempt of court or to the payment of a fine not exceeding 20 penalty units.

- (4) An executor, administrator or trustee to whom subsection (2) applies shall, unless the Court otherwise orders, be personally liable for the cost and expenses of any proceedings pursuant to this section.

88 Proceedings under section 87 not to prejudice proceedings on bond

Proceedings being taken under the last preceding section shall not prejudice the right to proceed against the executor, administrator or trustee for an account and administration, or prevent the Court from ordering the assignment of any bond to any person with a view of enforcing the penalty thereof as hereinbefore mentioned.

89 Judge may make order as to disposal of moneys in hands of executor etc

- (1) The Court may make such order with reference to the distribution or application of any moneys which the executor or administrator or NSW Trustee may have in hand, or as to the residue of the estate as it may think fit.
- (2) No final order for distribution shall be made except upon notice to all the parties entitled.

90 Payments under revoked probates or administrations valid

- (1) (Repealed)
- (2) The executor or administrator who has acted under any revoked or rescinded probate or administration may retain and reimburse the executor or administrator or shall be entitled to be reimbursed in respect of any payments made by the executor or administrator which the person to whom probate or administration is afterwards or was originally granted might have lawfully made.

91 Persons etc making payments upon probates granted for estate of deceased person to be indemnified

- (1) All persons making or permitting to be made any payment or transfer, bona fide, upon any probate or administration or order granted in respect of the estate of any deceased person under the authority of this part shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of such probate or administration or order not then known to such persons.
- (2) In respect of the estate of a person who dies on or after 31 December 1981, the indemnity and protection conferred by subsection (1) shall apply only in relation to property of the estate of the deceased which is listed in a document issued by the Court in relation to the probate, administration or order.

92 Distribution of assets after notice given by executor or administrator

- (1) The executor or administrator of the estate of a testator or an intestate may distribute the assets, or any part of the assets, of that estate among the persons entitled having

regard to the claims of beneficiaries (including children conceived but not yet born at the date of the death of the testator or intestate), creditors and other persons in respect of the assets of the estate of which the executor or administrator has notice at the time of distribution if:

- (a) the assets are distributed at least 6 months after the testator's or intestate's death, and
 - (b) the executor or administrator has given notice in the form approved under section 17 of the *Civil Procedure Act 2005* that the executor or administrator intends to distribute the assets in the estate after the expiration of a specified time, and
 - (c) the time specified in the notice is not less than 30 days after the notice is given, and
 - (d) the time specified in the notice has expired.
- (2) An executor or administrator who distributes the assets or any part of the assets of the estate of a testator or an intestate in accordance with subsection (1) is not liable in respect of those assets or that part of those assets to any person who has a claim in respect of those assets or that part unless the executor or administrator had notice of the claim at the time of the distribution or the distribution was not made in the circumstances described in subsection (2) (a) or (b) of section 28 (Protection of personal representatives who distribute as if will had not been rectified) or section 125 (Sharing between spouses) or 126 (Distribution orders) or Part 4.4 (Indigenous persons' estates) of the *Succession Act 2006*.
- (3) In relation to a distribution of the assets of a testator or intestate dying after the commencement of the *Children (Equality of Status) Act 1976*, an executor or administrator referred to in subsection (2) shall be deemed to have notice of the claim of any person whose entitlement to the assets or to any part of them would have become apparent if the executor or administrator had applied for and obtained a certificate under section 50 of the *Births, Deaths and Marriages Registration Act 1995*.

92A Personal representatives may make maintenance distributions within 30 days

- (1) This section applies if a person (the **survivor**):
 - (a) survives a deceased person, and
 - (b) at the time of the deceased person's death, was wholly or substantially dependent on the deceased person, and
 - (c) will be entitled to part or all of the deceased person's estate if the person survives the deceased person for 30 days or, if that or another period for survival appears in the will, within the period appearing in the will (the **specified period**).
- (2) The executor or administrator of the deceased person's estate may make a

distribution that is an adequate amount for the proper maintenance, support or education of the survivor at any time after the death of the deceased person, including within 30 days, or the specified period, after the death of the deceased person.

- (3) The executor or administrator may make the distribution even though the executor or administrator knows, when the distribution is made, of a pending application, or an intended application, for an order under the *Family Provision Act 1982* in relation to the deceased person.
- (4) The executor or administrator is not liable for a distribution under subsection (2) that is made in good faith.
- (5) An amount distributed under subsection (2) to a survivor must be deducted from any share of the estate to which the survivor becomes entitled.
- (6) However, if the survivor does not survive the deceased person for 30 days, or the specified period, the distribution is to be treated as an administration expense.
- (7) An authorised deposit-taking institution does not incur any liability in relation to any transaction concerning an account of the deceased person kept with the institution or with some other financial institution that it is authorised to make by the executor or administrator of the deceased person for the purposes of a distribution under subsection (2).
- (8) Subsection (7) does not relieve an authorised deposit-taking institution from any liability or obligation it would have apart from that subsection.

93 Claims barred against executor or administrator in certain cases

- (1) When the executor or administrator of the estate of a testator or an intestate has published the notices referred to in section 92 (1) and a claim in respect of the assets of that estate is submitted to the executor or administrator, the executor or administrator may, if the executor or administrator disputes the claim, serve on the person by whom or on whose behalf the claim was submitted a notice calling on the person to take proceedings to enforce the person's claim within a period of 3 months from the date of service of the notice and to prosecute the person's claim.
- (2) If, after a notice has been served on a person in accordance with subsection (1) and the period of 3 months referred to in the notice has expired, that person does not satisfy the Court that the person is prosecuting the person's claim, the Court may, on an application in that behalf made by the executor or administrator:
 - (a) make an order barring the claim of that person as against the executor or administrator, subject to such conditions (if any) as it thinks just and equitable, or
 - (b) make such other order in respect of the application as it thinks just and equitable,

having regard to the circumstances of the case.

(3) Where:

- (a) in its capacity as executor or administrator, the NSW Trustee or a trustee company:
 - (i) disputes any claim upon an estate (whether the claimant claims to be a creditor or to have a beneficial interest in the estate), and
 - (ii) has served on the claimant a notice in accordance with subsection (1), and
- (b) the claimant has not, within the period of 3 months referred to in the notice served in accordance with subsection (1), commenced proceedings to enforce the claim,

the NSW Trustee or the trustee company may serve a further notice on the claimant that unless, within the period of 2 months from the date of service of that further notice, the NSW Trustee or the trustee company is duly served with process of court issued in proceedings to enforce the claim, the NSW Trustee or the trustee company will distribute the estate without regard to the claim.

- (4) If, within the period of 2 months referred to in a notice served on a claimant in accordance with subsection (3), the NSW Trustee or a trustee company has not been duly served with process as referred to in that subsection, the claimant's claim shall thereupon be barred and become irrecoverable as against the NSW Trustee or the trustee company and the NSW Trustee or the trustee company may proceed to distribute the estate without regard to the claim.
- (5) The NSW Trustee or a trustee company may, if it thinks fit, waive any objection which it might, by virtue of subsection (4), take to proceedings commenced by a claimant after the expiration of the period of 2 months referred to in a notice served on the claimant in accordance with subsection (3).
- (6) The powers conferred on the NSW Trustee or a trustee company by subsections (3) and (4) are in addition to the powers exercisable under subsection (2).

94 Distribution of estate by executor or administrator

- (1) Where the executor or administrator of the estate of a testator or an intestate:
 - (a) is, in the executor's or administrator's capacity as such, liable in respect of:
 - (i) the rents, covenants or agreements contained in a lease, or in an agreement for a lease, granted or assigned to the testator or intestate, or
 - (ii) the rents, covenants or agreements contained in any conveyance on chief rents or rent charges, or in an agreement for any such conveyance, made and

entered into with the testator or intestate, and

(b) has:

- (i) satisfied all liabilities under the lease or agreement for a lease, or, as the case may be, under the conveyance or agreement for a conveyance, that have accrued and been claimed up to the time of the assignment or conveyance referred to in subparagraph (iii),
- (ii) set aside an amount sufficient to meet any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee or grantee to be expended in respect of the property leased or agreed to be leased, or conveyed or agreed to be conveyed, although the period for expending that sum may not have arrived, and
- (iii) assigned the lease or agreement for a lease or conveyed the property or assigned the agreement for the conveyance of the property, as the case may be, to a purchaser or to a legatee, devisee or other person entitled,

the executor or administrator may distribute those assets of the estate remaining in the executor's or administrator's hands among the parties entitled without appropriating any part or any further part of those assets, as the case may be, to meet any future liability under the lease, agreement for a lease, conveyance or agreement for a conveyance.

(2) An executor or administrator who:

- (a) has assigned a lease or an agreement for a lease, made or executed a conveyance or assigned an agreement for a conveyance, as referred to in subsection (1) (b) (iii), and
- (b) has, where necessary, set aside a sufficient amount as referred to in subsection (1) (b) (ii),

shall not be personally liable in respect of any subsequent claim under any such lease, agreement for a lease, conveyance or agreement for a conveyance.

(3) In this section:

assignment and **conveyance** include an acknowledgment within the meaning of section 83.

lease includes an under lease.

95 Right to follow assets

Nothing contained in section 92, 93 or 94 prejudices the right of any beneficiary, creditor or other person who has a claim in respect of the assets of the estate of a testator or an

intestate or the right of a lessor or grantor under a lease, agreement for a lease, conveyance or agreement for a conveyance referred to in section 94, or any person claiming under any such lessor or grantor, to follow those assets or any part of those assets into the hands of the persons or any of the persons among whom those assets or that part may have been distributed or who may have received those assets or that part.

96 (Repealed)

97 Every executor etc to be deemed resident in New South Wales

- (1) Every executor or administrator:
 - (a) named in any probate or letters of administration granted by any court of competent jurisdiction in any portion of Her Majesty's dominions and making application under the provisions of Division 5 for the sealing of such probate or administration, or
 - (b) appointed under this Part,shall be deemed to be resident in New South Wales.
- (2) Where not actually so resident, the executor or administrator shall, before the issue or sealing of any probate or administration, file with the Registrar an address, as prescribed by the rules, within New South Wales, at which notices and processes may be served upon the executor or administrator; and all services at such registered address shall be deemed personal service.

Division 4 Small estates

98 District agents

- (1) For the purpose of receiving applications for probate or administration under this division, a person may be appointed, as provided by the rules, in any town beyond 48 kilometres from Sydney, where the Local Court sits, to act as district agent for the Registrar.
- (2) Any person holding the office of district registrar immediately prior to the commencement of the [Supreme Court Act 1970](#) shall be deemed to have been appointed as provided by the rules.

99 Power to administer oaths

- (1) All district agents may for the purposes of this part:
 - (a) administer oaths, and
 - (b) take declarations and affirmations, and
 - (c) exercise any other powers which can be exercised by commissioners of the Court.

- (2) Applicants under this division may be sworn, and may execute all necessary documents before a commissioner of the Court.

100 (Repealed)

101 Application to be made to Registrar or to district agent

In all cases where a person dies leaving property not exceeding \$15,000 in value or, where some other amount is prescribed, not exceeding that other amount so prescribed in value, application for probate or administration may be made to the Registrar or to a district agent for the Registrar.

102 Duties of Registrar or district agent

- (1) The Registrar or district agent shall, upon being satisfied as to:

- (a) the identity of the applicant, and
- (b) the right of the applicant to administer the estate of the deceased, and
- (c) the value of the estate,

furnish the applicant with all necessary information for the purpose of enabling the applicant to fill up the advertisements, affidavits, and documents necessary for obtaining probate or administration, as the case may be.

- (2) The Registrar or district agent may:

- (a) swear the applicant and every deponent, and
- (b) attest the execution of the administration bond.

- (3) The Registrar or district agent shall receive payment of all proper fees in connection with the application.

103 District agent to send all papers to Registrar

The district agent shall forthwith transmit to the Registrar all affidavits, documents, and fees received by the district agent, and upon receipt of the probate or letters of administration shall deliver the same to the applicant upon demand.

104 Registrar to issue probate or administration in the name of the Court

- (1) The Registrar shall, upon being satisfied:

- (a) with the sufficiency of the evidence in support of the application, and
- (b) that the estate does not exceed the amount in value determined in accordance with section 101, and
- (c) that no caveat has been entered against the application, and

(d) that no will has been deposited with the Registrar or with the NSW Trustee (search for which it shall be the duty of the Registrar to make), and

(e) that the fees have been duly paid,

cause probate or letters of administration (as the case may be) to be issued and delivered to the applicant on demand, or shall forward the same to the district agent for delivery by the district agent to the applicant.

(2) Such probate or administration shall be issued in the name and under the seal of the Court.

105 Where Registrar not satisfied with the material before the Registrar

(1) In any case where the Registrar is not satisfied as aforesaid, the Registrar shall state the matters in respect of which the Registrar is not satisfied either to the applicant or to the district agent transmitting the application.

(2) Such agent shall then inform the applicant accordingly, and shall take such further steps as may be proper to enable the applicant to satisfy the Registrar in respect of such matters.

106 Registrar not bound to grant probate in certain cases

In no case shall the Registrar be under any obligation by reason of this division to deal with any application which the Registrar may think proper to be dealt with by the Court, or to be placed in the hands of an attorney or Australian legal practitioner.

Division 5 Foreign probates and letters of administration

107 Probates and letters of administration granted in other colonies or the United Kingdom to be of like force as if granted in New South Wales on being resealed

(1) When any probate or letters of administration already granted or hereafter to be granted by any court of competent jurisdiction in any portion of Her Majesty's dominions is or are produced to and a copy thereof deposited with the Registrar by any person being the executor or administrator therein named, or by any person duly authorised by power of attorney in that behalf under the hand and seal of such executor or administrator therein named, or by any person duly authorised by power of attorney in that behalf under the hand and seal of such executor or administrator such probate or letters of administration may be sealed with the seal of the Court.

(2) When so sealed such probate or letters of administration shall have the like force and effect and the same operation in New South Wales, and every executor and administrator thereunder shall perform the same duties and be subject to the same liabilities as if such probate or administration had been originally granted by the Court.

- (3) The Court may require any such executor or administrator or person authorised as aforesaid to give security for the due administration of the estate in respect of matters or claims in New South Wales.
- (4) For the purposes of this Division the word **executor** shall be deemed to include executor by representation.

108 Seal not to be affixed till duty is paid etc

- (1) The seal of the Court shall not be affixed to any such probate or letters of administration until all such probate, stamp, and other duties, if any, have been paid as would have been payable if such probate or administration had been originally granted by the Court.
- (2) Such letters of administration shall not be so sealed until such bond has been entered into as would have been required if such administration had been originally granted by the Court.

109 Notice of intention to apply

The seal of the Court shall not be affixed as aforesaid except upon an affidavit that notice of the intention to apply in that behalf has been published as prescribed by rules of Court fourteen days before the making of such affidavit, and that no caveat has been lodged in respect thereof.

110 Not to apply to public officer or NSW Trustee

No provision in this Act as to the sealing of probates or letters of administration shall apply to any public officer or to the NSW Trustee.

Division 6 Curator of intestate estates

111-137 (Repealed)

Division 7 Caveats and orders to produce

138-143 (Repealed)

144 Caveat may be lodged

- (1) Any person may lodge in the registry of the Court a caveat against any application for probate or administration, or for the sealing of any probate or letters of administration under Division 5, at any time previous to such probate or administration being granted, or to the sealing of any such probate or letters of administration.
- (2) Every such caveat shall set forth the name of the person lodging the same, and an address for service in accordance with the rules.

145 Application may proceed on notice

In every case where a caveat is lodged against an application the applicant may, subject to the giving of such notice to the caveator as the rules may require or the Court may direct, proceed, in accordance with the rules or as the Court may direct, with the application.

146 Court may order application to proceed

The Court, on the application of the caveator, may order that the application for grant or sealing, as the case may be, proceed and may give directions relating thereto.

147 (Repealed)

148 Caveats may be withdrawn

A caveat may be withdrawn at any time with the leave of the Court, subject to such order as to costs or otherwise as it may direct.

149 (Repealed)

150 Order to produce an instrument purporting to be testamentary

- (1) The Court may, on the application of any person, whether any proceedings are or are not pending in the Court with respect to any probate or administration, order any person to produce and bring into the registry any paper or writing, being or purporting to be testamentary, or otherwise material to the matter before the Court, which may be shown to be in the possession or under the control of such person.
- (2) If it is not shown that any such paper or writing is in the possession or under the control of such person, but it appears that there are reasonable grounds for believing that the person has the knowledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined in open Court or upon interrogatories respecting the same.
- (3) Such person shall be bound to answer such questions or interrogatories, and (if so ordered) to produce and bring in such paper or writing, and shall be subject to punishment for contempt in case of default in not attending or in not answering such questions or interrogatories, or not bringing in such paper or writing.
- (4) (Repealed)

Division 8 General matters

151 Oaths

The Registrar, Australian legal practitioners, commissioners for taking affidavits and justices of the peace shall have power to administer oaths under this part.

152 Registrar to keep record of probates etc

- (1) The Registrar shall cause entries to be made in a book to be kept for that purpose of:
 - (a) all grants of probate and administration,
 - (b) the filing, passing, and allowance of the accounts of executors and administrators, and of
 - (c) any special order extending the time for passing such accounts,
 - (d) all deeds copies whereof are filed pursuant to section 75A (9).
- (2) Such book shall set forth:
 - (a) the dates of such grants,
 - (b) the names of the testators or intestates,
 - (c) the place and time of death,
 - (d) the names and description of the executors or administrators,
 - (e) the sworn value of the estates,
 - (f) the dates of the filing, passing, allowance of, and special orders with reference to, the said accounts,
 - (g) the dates and the names of parties to the deeds whereof copies are filed pursuant to section 75A (9).

152A Rules of Court

- (1) Rules of Court may be made under the [Supreme Court Act 1970](#) regulating practice and procedure in respect of proceedings under this Act.
- (2) Subsection (1) does not limit the rule-making powers conferred by the [Supreme Court Act 1970](#).

153 Regulations

- (1) The Governor may make regulations for or with respect to:
 - (a) prescribing an amount for the purpose of paragraph (b) of the definition of **prescribed amount** in section 61A (2),
 - (b) prescribing a rate of interest for the purpose of section 84A (1), and
 - (c) prescribing an amount for the purposes of section 101.
- (2) (Repealed)

154 Savings and transitional provisions arising from amendments to this Act

The Fifth Schedule has effect.

155 (Repealed)

First Schedule

(Section 2 (1))

Number of Act	Title or short title	Extent of repeal
5 Wm IV No 8	An Act for adopting and applying certain Acts of Parliament, &c, &c, in the Administration of Justice in New South Wales in like manner, &c, &c.	So far as it adopts the Act of Parliament 11 Geo IV and 1 Wm, IV, cI 40.
3 Vic No 5	An Act for adopting a certain Act of Parliament intituled <i>An Act for the amendment of the Laws with respect to Wills in the Administration of Justice in New South Wales in like manner as other laws of England are applied therein.</i>	The whole.
17 Vic No 5	An Act to amend the Law with respect to the Execution of Wills.	The whole.
26 Vic No 12	Trust Property Act of 1862	Sections 27, 28, 29, 65.
54 Vic No 25	Probate Act of 1890.	The whole, except sections 21 and 98.
56 Vic No 30	Probate Act of 1890 Amendment Act	The whole.

Second Schedule (Repealed)

Third Schedule

(Section 46C)

Part 1 Rules as to payment of debts and liabilities where the estate is insolvent

- 1 The funeral, testamentary, and administration expenses have priority.
- 2 Subject as aforesaid, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, and as to the priorities of debts and liabilities as are in force at the death of the deceased person under the law of bankruptcy with respect to the assets of persons adjudged bankrupt.

In the application of such rules the date of the death of the deceased person shall be substituted

for the date of the sequestration order.

Part 2 Order of application of assets where the estate is solvent

- 1** Assets undisposed of by will, subject to the retention thereof of a fund sufficient to meet any pecuniary legacies.
- 2** Assets not specifically disposed of by will but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid.
- 3** Assets specifically appropriated or disposed of by will (either by a specific or general description) for the payment of debts.
- 4** Assets charged with or disposed of by will (either by a specific or general description) subject to a charge for the payment of debts.
- 5** The fund, if any, retained to meet pecuniary legacies.
- 6** Assets specifically disposed of by will, rateably according to value.

Fourth Schedule (Repealed)

Fifth Schedule Savings and transitional provisions arising from amendments to this Act

(Section 154)

Part 1A Provisions consequent on enactment of *Wills, Probate and Administration (De Facto Relationships) Amendment Act 1984*

1A Persons dying wholly or partially intestate before commencement of *De Facto Relationships Act 1984*

- (1) The amendments made to this Act by the *Wills, Probate and Administration (De Facto Relationships) Amendment Act 1984* do not apply to or in respect of the estate of a person who died wholly or partially intestate before 1 July 1985 (the day appointed and notified under section 2 (2) of the *De Facto Relationships Act 1984*), and any such estate is to be distributed in accordance with the enactments and rules of law in force at the date of death of that person.
- (2) This clause is taken to have commenced on 1 July 1985.
- (3) Subclause (1) re-enacts (with minor modification) section 4 of the *Wills, Probate and Administration (De Facto Relationships) Amendment Act 1984* and is a transferred provision to which section 30A of the *Interpretation Act 1987* applies.

Part 1 Provisions consequent on enactment of *Wills, Probate and*

Administration (Amendment) Act 1989

1 Definition

In this Part:

the 1989 Act means the *Wills, Probate and Administration (Amendment) Act 1989*.

2 Application of amendments—generally

- (1) An amendment to this Act made by the 1989 Act applies in relation to a will (whenever made) if the maker of the will dies after the commencement of the amendment to this Act, except in so far as another clause of this Part applies.
- (2) In this clause, a reference to a will includes a reference to a document (whenever made) which is held by the Court under section 18A to constitute a will.

3 Wills of minors

- (1) The law in force immediately before the commencement of the *Minors (Property and Contracts) Act 1970* relating to testamentary capacity continues to apply to a will of a minor made before that commencement.
- (2) Section 6, as in force immediately before the commencement of Schedule 1 (2) to the 1989 Act, continues to apply to a will of a minor made after the commencement of the *Minors (Property and Contracts) Act 1970* and before the commencement of Schedule 1 (2).
- (3) This clause has effect subject to clause 4.

4 Privileged testators

- (1) Where a will was made by a person as a privileged testator before section 10 was omitted by Schedule 1 (4) to the 1989 Act, then:
 - (a) if the testator died before the commencement of that item—the omission does not affect the continued validity of the will, or
 - (b) if the testator dies after that commencement—the omission invalidates the will to the extent that its validity depended on the testator's status as a privileged testator at the relevant time.
- (2) Where a will was made by a person as a privileged testator before section 13 (2) was omitted by Schedule 1 (6) to the 1989 Act, then:
 - (a) if the testator died before the commencement of that item—the omission does not affect the continued validity of a gift in the will, or
 - (b) if the testator dies after that commencement—the omission invalidates a gift in

the will to the extent that the validity of the gift depended on the testator's status as a privileged testator at the relevant time.

(3) The omission of sections 17 (3) (c), 18 (2) and 19 (2) by amendments made by the 1989 Act does not affect the continued validity of:

- (a) the revocation of a will, or
- (b) the obliteration, interlineation or alteration of a will, or
- (c) the revival of a will,

effected before the commencement of the relevant amendment by a person as a privileged testator, whether or not the person died before or dies after the commencement of the amendment.

(4) References in this clause to a privileged testator extend to a person to whom section 10 applied before its substitution by the *Minors (Property and Contracts) Act 1970*.

5 Effect of termination of marriage

Section 15A applies in relation to a will (whenever made) if the termination of the marriage (within the meaning of that section) of the testator occurs after the commencement of that section.

6 Power of the Court to rectify wills

- (1) Section 29A applies in relation to a 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 that section.
- (2) Nothing in this clause affects the period determined in accordance with section 29A within which an application for an order under that section may be made.

7 Gifts to interested witnesses

Section 13, as in force immediately before the commencement of Schedule 1 (6) to the 1989 Act, continues to apply in relation to a will made before that commencement if the maker of the will dies before that commencement.

Part 2 Provisions consequent on enactment of *Succession Amendment (Family Provision) Act 2008*

8 Distribution of assets after notice given by executor or administrator

Section 92 (1), as in force immediately before the commencement of Schedule 2.9 [4] to the *Succession Amendment (Family Provision) Act 2008*, continues to apply to and in respect of the estate of testator or intestate who died before that commencement.

Part 3 Provision consequent on enactment of [Succession Amendment \(Intestacy\) Act 2009](#)

9 Persons dying wholly or partially intestate before commencement of [Succession Amendment \(Intestacy\) Act 2009](#)

The amendments made to this Act by the [Succession Amendment \(Intestacy\) Act 2009](#) do not apply to or in respect of the estate of a person who died wholly or partially intestate before the commencement of those amendments, and any such estate is to be distributed in accordance with the enactments and rules of law in force at the date of death of that person.

Part 4 Provision consequent on enactment of [Trustee Companies Amendment Act 2009](#)

10 Trustee companies

Any act, matter or thing done by a trustee company that had effect under this Act as in force immediately before its amendment by the [Trustee Companies Amendment Act 2009](#) is taken to have effect under this Act as amended.