

his explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to restate, with amendments, the law relating to wills in New South Wales in order to implement (with modifications) the recommendations of the National Committee for Uniform Succession Laws regarding the law of wills contained in its final report to the Standing Committee of Attorneys-General in December 1997. Those recommendations were endorsed by the New South Wales Law Reform Commission in Report 85 (1998) Uniform Succession Laws: The Law of Wills.

The Bill repeals those provisions of the Wills, Probate and Administration Act 1898 relating to wills and renames the remaining provisions of that Act as the Probate and Administration Act 1898.

Significant changes to the law of wills effected by the Bill include the following:

- (a) the introduction of court authorised wills for people who lack testamentary capacity,
- (b) the provision of statutory guidance in relation to the matters to be taken into consideration by the court in authorising a minor to make a will,
- (c) new rules about beneficiaries who witness wills,

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- (d) new rules about survivorship,

- (e) revision of the law relating to foreign wills to bring New South Wales law relating to choice of law issues into line with the law in other jurisdictions,

- (f) new provisions about who is entitled to see a will on the death of a testator,

- (g) new provisions for the deposit of wills,

- (h) provisions relating to the admission of limited evidence to aid in the interpretation of wills.

Outline of provisions

Chapter 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 defines certain words and expressions used in the proposed Act and provides that notes included in the proposed Act do not form part of the Act. Some terms and expressions used in the proposed Act are not defined as they are defined in section 21 of the Interpretation Act 1987 (see in particular the definitions in that Act of minor, land and property).

The proposed section also provides that a reference in the proposed Act to the child or issue of a person includes a reference to a child or issue en ventre sa mere provided the child or issue is born alive and remains alive for a period of 30 days.

Chapter 2 Wills

Chapter 2 replaces Parts 1 and 1A of the Wills, Probate and Administration Act 1898 (the WPA Act).

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

Division 1 Making a will

Clause 4 specifies the property that a person may dispose of by will. It replaces and essentially restates section 5 of the WPA Act. A person may dispose of property to which the person is entitled at the time of the person's death (regardless of whether or not the entitlement existed when the will was made) or to which the person's personal representative becomes entitled, in the capacity of personal representative, after the person's death (regardless of whether or not the entitlement existed when the person died). Proposed section 4 expressly excludes property of which the person

is trustee when he or she died.

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Clause 5 replaces sections 6 and 6B of the WPA Act. It provides that a will made by a minor (a person under the age of 18 years) is not valid, except in certain specified circumstances. As is the case under section 6B of the WPA Act, a minor may validly make, alter or revoke a will in contemplation of marriage, but the will is of no effect unless the marriage is solemnised. Clause 5 extends the WPA Act provisions by enabling a minor who is or has been married or who made a will in contemplation of a marriage that was solemnised to make, alter or revoke a will. Section 6A of the WPA Act, which provides for a minor to make a will with the leave of the Court is replaced by proposed section 16.

Division 2 Executing a will

Clause 6 sets out the requirements for a valid execution of a will. It replaces and essentially restates sections 7 and 9 of the WPA Act.

Proposed section 6 (6) makes it clear that these execution requirements do not apply to a court authorised will for a person lacking testamentary capacity (see proposed section 23 on the execution requirements for such wills).

Clause 7 provides that a will that is executed in accordance with the proposed Act is validly executed even if one or more witnesses to the will do not know that the document he or she attested and signed was a will. This reflects the purpose of the requirement to have witnesses to verify the authenticity of the testator's signature and to ensure the testator is signing voluntarily.

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

Clause 8 sets out the circumstances in which the Supreme Court may dispense with the requirements for the execution, alteration or revocation of a will as specified by the proposed Act. The Court may dispense with the requirements if it is satisfied that the deceased person intended the document to constitute his or her will or to amend or revoke his or her will. The proposed section replaces section 18A of the WPA Act. For the purposes of the proposed section the broad definition of document contained in section 21 of the Interpretation Act 1987 is used instead of the narrower definition of document applying elsewhere in the proposed Act (see proposed section 3). The dispensing power is expanded to include parts of documents as defined and to include documents that came into existence within or outside New South Wales. As is currently the case under section 18A (2) of the WPA Act, proposed section 8 (3) provides that the Court may have regard (in addition to the document) to extrinsic evidence of the manner of execution or testamentary intentions of the deceased person. Proposed section 8 (4) makes it clear that the Court is not limited by proposed section 8 (3) in regard to the evidence it may consider.

Division 4 Witnessing a will

Clause 9 prevents a person who is unable to see and attest that a testator has signed a document from witnessing a will. It replaces section 12 of the WPA Act which provides that a person competent to be a witness in civil proceedings, other than a

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blind person, may be a witness. Proposed section 9 makes it clear that not only a person who is permanently blind but also one who is temporarily unable to see is prevented from witnessing a will.

Clause 10 replaces section 13 of the WPA Act. It retains the interested witness rule contained in section 13 but unlike that section does not void a beneficial disposition to the spouse of a witness or a person claiming under the spouse of a witness. Under

proposed section 10 a disposition to a person who attests the execution of a will is void unless at least two other attesting witnesses are not beneficiaries under the will, all the other beneficiaries consent in writing to the interested witness taking his or her share under the will (and have the legal capacity to do so) or the Court is satisfied that the testator knew and approved of the disposition and it was given or made freely and voluntarily by the testator.

A consent to the interested witness taking his or her share will not be subject to duty (see proposed section 65 (12A) to be inserted in the Duties Act 1997 by Schedule 3.6).

Division 5 Revocation, alteration and revival of a will

Clause 11 replaces section 17 of the WPA Act. It sets out an exhaustive (and expanded) list of the means by which a will or part of a will may be revoked. The means are:

- (a) by a will made under an order of the Court under proposed section 16 or 18, or
- (b) the testator's marriage to the extent specified in proposed section 12, or
- (c) the testator's divorce or annulment of the testator's marriage to the extent specified in proposed section 13, or
- (d) by a later will, or
- (e) by some writing declaring an intention to revoke the will, executed in the manner in which a will is required to be executed by the proposed Act, or
- (f) by the testator, or some person in his or her presence and by his or her direction, burning, tearing or otherwise destroying the will with the intention of revoking it, or
- (g) by the testator, or by some person in his or her presence and at his or her direction, writing on the will or dealing with the will in such a manner that the Court is satisfied from the state of the will that the testator intended to revoke it.

As proposed section 11 is an exhaustive statement of the means of revoking a will, a will cannot be revoked by any presumption of an intention on the ground of alteration in circumstances. This preserves the effect of section 16 of the WPA Act.

Clause 12 specifies the effect of marriage on a will. It replaces section 15 of the WPA Act. Generally, a will is revoked by the marriage of the testator (proposed section 12 (1)). However, a will made in contemplation of a particular marriage (whether or not that contemplation is expressed in the will) is not revoked by the solemnisation of the marriage concerned and a will that is expressed to be made in

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contemplation of marriage generally is not revoked by the solemnisation of a marriage of the testator (proposed section 12 (3) and (4)). The proposed section also provides that a disposition to the person to whom a testator is married at the time of his or her death and certain other wills are not revoked by marriage (proposed section 12 (2)).

Clause 13 specifies the effect of divorce or annulment on a will. It replaces section 15A of the WPA Act. Proposed section 13 provides that divorce or annulment automatically revokes the following in respect of a person to whom the testator was married immediately before the marriage ended (a former spouse):

- (a) a disposition to the person made by a will in existence at the time of the divorce or annulment,
- (b) an appointment, made by will, of the person as executor, trustee, advisory trustee or guardian,
- (c) any grant, made by will, of a power of appointment exercisable by, or in favour of, the person.

In these circumstances, the testator's will takes effect as if the former spouse

predeceased the testator.

Clause 14 sets out the requirements for validly altering a will. It replaces, and essentially restates (with expansions to cover the proposed new provisions relating to making of statutory wills for persons lacking testamentary capacity), section 18 of the WPA Act.

Clause 15 sets out the circumstances in which a will that has been revoked is revived. It replaces and essentially restates section 19 (1)–(3) of the WPA Act. A revoked will or part of a will can be revived by re-execution or by executing a will showing an intention to revive the will or part. Subject to a contrary intention in the reviving will, the revival of a will that was initially partially revoked and subsequently wholly revoked, operates only to revive the balance of that will remaining after the partial initial revocation. Proposed section 15 (4) deems a revived will to have been executed on the day that it was revived.

Part 2.2 Wills made or rectified under Court authorisation

Division 1 Wills by minors

Clause 16 replaces section 6A of the WPA Act. Section 6A empowers the Supreme Court to grant a minor leave to make a will on terms disclosed to the Court and subject to such conditions as the Court sees fit. Proposed section 16 enables a minor, or his or her representative, to apply to the Court for an order authorising the minor to make or alter a will in specific terms approved by the Court or to revoke all or part of a will. Before making an order, the Court must be satisfied that the minor understands the nature and effect of his or her testamentary proposal and the extent of any property disposed of by it, as well as being satisfied that the proposal

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accurately reflects the minor's testamentary intentions and that it is reasonable in all the circumstances to make the order (proposed section 16 (4)). The order may be made subject to conditions (proposed section 16 (3)). A will made under proposed section 16 is only valid if executed in accordance with the requirements specified for execution of wills in proposed Part 2.1 of Chapter 2, and if one of the attesting witnesses is the Registrar (proposed section 16 (5)). The will is required to be deposited with the Registrar, although a failure to comply with this requirement does not affect the validity of the will (proposed section 16 (6) and (7)).

Clause 17 recognises a court authorised will for a minor made in another jurisdiction.

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

Division 2 confers new powers on the Supreme Court to make orders authorising the making, alteration and revocation of wills for persons lacking testamentary capacity. The Division establishes a two-stage process—the seeking of leave to make an application for an order (proposed section 19) and the making of an application once leave has been obtained (proposed section 18). However, provision is made to enable the two applications to be merged (proposed section 20) to expedite the proceedings and avoid duplication of costs.

Clause 18 enables any person to apply to the Court for an order authorising a will to be made or altered in specific terms approved by the Court, or authorising all or part of a will to be revoked, on behalf of a person who lacks testamentary capacity. The person on behalf of whom the application is made must be alive when the order is made.

The section enables the Court to make a statutory order for a minor for whom the Court cannot make an order under proposed section 16 because the minor lacked the requisite degree of understanding or had a particular incapacity (proposed section 18

(4)).

Clause 19 requires a person to obtain the leave of the Court to make an application under proposed section 18 for an order to make, alter or revoke a statutory will for a person lacking testamentary capacity. Proposed section 19 (2) sets out the extensive range of information the applicant must provide to the Court in applying for leave.

Clause 20 enables the Court to merge the application for leave with an application for an order. It also enables the Court to revise the terms of any draft of the proposed will, alteration or revocation for which authorisation is sought.

Clause 21 provides that in conducting the hearing of an application for leave the Court is not bound by the rules of evidence. It may consider any information provided to it under proposed section 19 and may inform itself of any other matter in any manner it sees fit.

Clause 22 requires the Court to be satisfied about certain specified matters before granting leave.

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Clause 23 requires a Court authorised will to be in writing, signed by the Registrar and sealed with the seal of the Court. The will is to be deposited with the Registrar.

Clause 24 requires the Registrar to hold a will made following an order under proposed section 18 until the Court makes an order revoking the will or the person for whom it was made acquires or regains testamentary capacity.

Clause 25 enables the Court to order that a person who lacks testamentary capacity be separately represented in proceedings under the proposed Division.

Clause 26 deems a statutory will made according to the law of a place where the deceased was resident at the time of execution of the will to be a valid will.

Division 3 Rectification of wills by Court

Clause 27 replaces section 29A of the WPA Act, which enables the Supreme Court to rectify a will if satisfied that it is so expressed that it fails to carry out the testator's intentions. The new section empowers the Court to make an order to rectify a will to carry out the intentions of a testator. However, the Court may only do so if it is satisfied that the will does not carry out the testator's intentions because a clerical error was made or because the will does not give effect to the testator's instructions. An application for such an order must be made within a period of 18 months after the death of the testator or, if the Court has made an order under section 17 of the Family Provision Act 1982 specifying a lesser period in relation to an application concerning the testator under that Act, the lesser period. The Court may however extend the period if it considers it necessary to do so provided a final distribution of the estate has not been made.

Clause 28 protects an executor from liability in respect of certain distributions made to a beneficiary as if the will had not been rectified under proposed section 27. The protection afforded by this section applies only in respect of maintenance distributions made under proposed section 92A to be inserted in the WPA Act by Schedule 2 [7] or at least 6 months after the death of the testator and without notice of any application being made under proposed section 27 or under the Family Provision Act 1982 and only if the executor complies with the current notice requirements set out in section 92 of the WPA Act.

Part 2.3 Construction of wills

Division 1 General rules about the construction of wills

Clause 29 specifies the interest in property that may be disposed of by will. It replaces, and essentially restates, section 20 of the WPA Act. It provides that where, subsequently to the making of a will, the testator disposes of a part interest in the property disposed of by will, the will operates to dispose of a remaining interest in the property. It is designed to prevent the failure of a disposition, which otherwise

would cause the remaining interest to fall into the testator's residuary estate under proposed section 31.

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Clause 30 provides that a will takes effect as if it had been executed immediately before the death of the testator. It replaces section 21 of the WPA Act. It is designed to ensure that property acquired by the testator after he or she made the will can be disposed of by it.

Clause 31 operates to avoid a partial intestacy by providing that if any disposition of property is ineffective the will takes effect as if the property were part of the residuary estate of the testator. Property that is the subject of a power of appointment is excluded because, if the power of appointment fails, the property passes according to the provisions of any gift over contained in the instrument creating the power.

Proposed section 31 replaces section 22 of the WPA Act.

Clause 32 is a new provision that specifies the circumstances in which extrinsic evidence is admissible to clarify a will. It permits the Court to admit extrinsic evidence of the testator's actual intention for the purpose of construing a will, where the language used in it is meaningless or ambiguous (either on the face of the will or in the light of surrounding circumstances). Evidence of the testator's intention may not be admitted to establish any surrounding circumstances. Proposed section 32 (3) preserves the admissibility of extrinsic evidence otherwise admissible at law, for example, evidence of the testator's intention to fortify or rebut equitable presumptions of intention or where wording of the will is found to be equivocal.

Clause 33 replaces and essentially restates section 32F of the WPA Act. It provides that the construction of a will is not altered by a change in the testator's domicile after the execution of his or her will.

Clause 34 provides that a contingent, future or deferred disposition of property, whether specific or residuary, includes any intermediate income of the property which has not been disposed of by the will.

Clause 35 requires a beneficiary to survive a testator by 30 days before receiving a benefit under the testator's will, subject to a contrary intention appearing in the will.

Complementary to this section is proposed section 92A to be inserted in the WPA Act by Schedule 2 [7] which enables a personal representative to make a maintenance distribution to certain beneficiaries during the 30-day period.

Division 2 Construction of particular provisions in wills

Clause 36 provides that, subject to a contrary intention expressed in the will, a general disposition of land or of the land in a particular area includes leasehold land whether or not the testator owns freehold land. It replaces section 23 (1) of the WPA Act.

Clause 37 specifies what property is, subject to a contrary intention expressed in the will, included in a general disposition of property by the testator. It replaces section 23 (2) and (3) of the WPA Act.

Clause 38 replaces and essentially restates sections 24 and 26 of the WPA Act. It provides that, subject to a contrary intention expressed in the will, a disposition of real property without words of limitation operates to pass the testator's whole estate or interest in the property.

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Clause 39 specifies how a disposition to a person's issue is to operate. It provides that, subject to a contrary intention expressed in the will, a disposition of property to a person's issue, without limitation as to remoteness, must be distributed to those issue according to the intestacy rules that apply when a person is survived only by

issue (see sections 61B (4) and 61C of the WPA Act).

Clause 40 specifies the manner of construing a disposition which contains a requirement that the disposition will fail if the beneficiary dies without issue. It replaces and essentially restates section 25 of the WPA Act.

Clause 41 replaces section 29 of the WPA Act. It operates as an exception to the lapse rule contained in proposed section 35 in circumstances where a beneficiary, who is the issue of the testator, fails to survive the testator for 30 days but leaves issue who do survive the testator for this period. In these circumstances, the original beneficiary's share passes to his or her surviving issue, who take the share according to the intestacy rules that apply when a person is survived only by issue (see sections 61B (4) and 61C of the WPA Act).

The section does not apply in specified circumstances, for example, if the original beneficiary fails to fulfil a condition imposed on the beneficiary by the will or if a contrary intention appears in the will. However, the section states that a general requirement or condition that issue survive the testator or reach a specified age does not of itself show a contrary intention.

Clause 42 specifies how a residuary disposition is to be construed. Proposed section 42 (1) operates (subject to a contrary intention appearing in the will) to prevent a partial intestacy occurring in circumstances where a disposition of all, or of the residue, of the testator's estate refers only to the testator's real property or only to the testator's personal property. It provides for the reference to be construed as a reference to include both. Proposed section 42 (2) deals with how property passes if a disposition of the whole or residue of the testator's estate fails as a fractional part. It operates (subject to a contrary intention appearing in the will), so that the part that fails is added to the other fractional parts proportionally.

Clause 43 sets out the requirements for administering a disposition of property to an unincorporated association (proposed section 43 (2)–(5)). It operates to save a disposition to an unincorporated association of persons that would otherwise be invalid either on the grounds that it could be construed as a trust for non-charitable purposes or that it breaches the rule against perpetuities. Proposed section 43 (1) deems certain dispositions of property to be an augmentation of the general funds of the beneficiary association. Dispositions to associations that are charities are expressly excluded because the grounds of invalidity the proposed section seeks to avoid do not apply to charities. If an unincorporated association has aims, objectives or purposes which are exclusively charitable or which can be considered to be exclusively for charitable purposes, then both the validity and the administration of the gift to the association are governed by the law relating to charities. Proposed section 43 (6) saves dispositions to an unincorporated association that might fail because, for example, a list of members of the association at the time of the testator's death cannot be compiled.

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Clause 44 puts it beyond doubt that the creation of a power of appointment by will does not constitute an unacceptable delegation of a testator's will-making power.

Clause 45 specifies how a reference, whether express or implied, to a valuation in a will is to be construed. It operates (subject to a contrary intention appearing in the will) to provide a default method of valuation of property when a will makes specific reference to a valuation that it is not possible to make. In those circumstances the valuation is to be a valuation of the property as at the testator's death, made by a competent valuer.

Clause 46 replaces and essentially restates section 14 of the WPA Act. It provides that a beneficiary does not (except in so far as the will otherwise expressly provides) lose any right or entitlement under the will merely because the person is a

transgender person.

Part 2.4 Wills under foreign law

Part 2.4 replaces and essentially restates Part 1A of the WPA Act.

Clause 47 defines internal law for the purposes of the proposed Part.

Clause 48 sets out the general rules for determining the validity of wills made outside the jurisdiction of New South Wales. Proposed section 48 (1) replaces and essentially restates section 32C of the WPA Act and proposed section 48 (2) and (3) replace and essentially restate section 32D of that Act. The proposed section identifies which jurisdiction's domestic law is to be applied to the determination of whether a will has been validly executed. The new definition of internal law operates to exclude a jurisdiction's rules of private international law (which might have the effect of applying the domestic law of another jurisdiction).

Clause 49 sets out the process for ascertaining which system of law applies to a will where there is more than one system of internal law relating to the formal validity of a will operating in the place. It replaces and essentially restates section 32A (2) of the WPA Act.

Clause 50 sets out the manner for construing the law applying to wills where there may have been an alteration to the relevant law. It also provides guidance as to the way in which the requirements of a foreign law are to be applied to the determination of whether a will has been validly executed in that jurisdiction. It distinguishes requirements for formal and essential validity. It replaces and essentially restates section 32A (4) of the WPA Act.

Part 2.5 Deposit of and access to wills

Clause 51 provides for the deposit of wills in the office of the Registrar.

Clause 52 provides for the delivery of deposited wills by the Registrar.

Clause 53 ensures that a failure by the Registrar to retain a will as required by the proposed Act does not affect the validity of the will.

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Clause 54 specifies the persons who are entitled to inspect and make copies of a will of a deceased testator.

Chapter 3 Miscellaneous

Clause 55 makes provision for the service of documents under the proposed Act.

Clause 56 enables the making of court rules for the purposes of the proposed Act.

Clause 57 enables the Governor to make regulations for the purposes of the proposed Act.

Clause 58 is a formal provision that gives effect to the savings, transitional and other provisions set out in Schedule 1.

Clause 59 is a formal provision that gives effect to the amendments to the Acts and regulation set out in Schedules 2 and 3.

Clause 60 provides for the review of the proposed Act in 5 years.

Schedule 1 Savings, transitional and other provisions

Schedule 1 contains savings, transitional and other provisions consequent on the enactment of the proposed Act.

Schedule 2 Amendment of Wills, Probate and Administration Act 1898

Schedule 2 [1]–[3] and [5] amend the WPA Act to omit provisions relating to wills.

Schedule 2 [4] makes an amendment that is consequential on the enactment of section 52 of the proposed Succession Act 2006.

Schedule 2 [6] makes an amendment that is consequential on the enactment of section 28 of the proposed Succession Act 2006.

Schedule 2 [7] inserts section 92A into the WPA Act. The proposed section enables

a personal representative to make a maintenance distribution from an estate during or after the 30-day period following the deceased person's death to a person who was wholly or substantially dependent on the deceased person when the deceased person died or who would be (provided he or she survives the deceased person for 30 days) entitled to a share in the deceased person's estate. The distribution may be made only for the recipient's maintenance, support or education. The fact that the personal representative is aware of a pending or intended family provision application is not an impediment to the making of a maintenance distribution under this section. Under proposed section 92A (5), such a maintenance distribution is treated as an advance distribution of the person's share of the estate and accordingly, the amount is to be deducted from the person's final entitlement.

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Schedule 3 Amendment of other Acts and regulation

Schedule 3 amends the Acts and regulation specified in the Schedule to make consequential amendments. The majority of these relate to the change of name of the Wills, Probate and Administration Act 1898.