# NSW Legislative Assembly Hansard

## SUCCESSION BILL



**Bill introduced and read a first time.**

### Second Reading

**Mr BOB DEBUS** (Blue Mountains—Attorney General, Minister for the Environment, and Minister for the Arts) [9.50 p.m.]: I move:

That this bill be now read a second time.

Succession laws, or laws relating to wills and the administration of estates, were imported into the Australian colonies from English law. Over time the succession laws applying in each jurisdiction changed and diverged, with the result that there was little consistency between succession laws across the States and Territories. In 1991 the Standing Committee of Attorneys-General [SCAG] initiated the uniform succession laws project. The objective of this project is to develop model legislation to be used as the basis for reform by Australian States and Territories with a view to each jurisdiction adopting uniform, or at least consistent, succession laws. Having uniform or consistent succession laws is expected to make it easier and less costly to administer the estates of people who have moved between, or who have held assets in, different jurisdictions.

In 1995 the National Committee for Uniform Succession Laws, chaired by the Queensland Law Reform Commission, was established to examine four discrete areas of succession law—the law of wills, family provision, intestacy and the administration of estates. In December 1997 the national committee presented a final report to SCAG on the law of wills. The Law Reform Commission in each State and Territory then released the report. The New South Wales Law Reform Commission released report No. 85 on the law of wills in April 1998. The Law Reform Commission reports contain a model wills bill. The model bill was generally based on the Victorian Wills Act 1994, which in turn was based on a bill contained in the Victorian Parliament's Law Reform Committee's 1994 report, "Reforming the Law of Wills."
The Succession Bill largely mirrors the model bill. It also adopts some of the adjustments made in other jurisdictions as they have implemented the model bill. Victoria, the Northern Territory, Queensland and Western Australia have implemented the model bill. The bill will replace parts 1 and 1A of the Wills, Probate and Administration Act 1898 other than sections 30 and 31. The Wills, Probate and Administration Act will be renamed the Probate and Administration Act 1898 and its remaining provisions will continue in force. Some people have queried why the bill is called the Succession Bill rather than the Wills Bill, as it only contains provisions relating to wills. The title is necessary as in the future it is intended to include other provisions relating to the law of succession in the Act. These provisions will be included as New South Wales implements the other Law Reform Commission reports relating to succession.

The bill makes a number of important changes to the law of wills in New South Wales, namely: making provision for court-authorised wills for people who lack testamentary capacity; giving statutory guidance to the court when it considers authorising a minor to make a will; including new rules about beneficiaries who witness wills, survivorship, who is entitled to see a will on the death of a testator and the deposit of wills with the court; revising the law on foreign wills; and including provisions relating to the admission of limited evidence to aid in the interpretation of wills. I will highlight some of the key changes made by the bill that bring the law of wills into the twenty-first century.

In relation to court-authorised wills for persons lacking testamentary capacity, clauses 18 to 26 of the bill expand the Supreme Court's jurisdiction by enabling it to authorise the making, alteration or revocation of a will on behalf of a person who lacks testamentary capacity. Testamentary capacity is essential to the making of a valid will; it requires a testator to know and understand the nature of what they are doing. The testator must also understand the extent of the property they are dealing with by the will and be able to comprehend and appreciate the claims to which they ought to give effect.

A person who lacks testamentary capacity may never have had the capacity to make a will or may have lost capacity, for example, due to injury or disease. Currently when the person dies, their property is distributed according to the intestacy rules. In the case of a person who has lost capacity, the person may have previously made a valid will which is no longer appropriate due to a change of circumstances, for example, the subsequent birth of a child not mentioned in the will. In those circumstances, the child would have to bring a family provision application for a share of their parent's estate. There is no restriction on who can apply for a court-authorised

will for a person lacking testamentary capacity. Having regard to interstate experience, it is anticipated that most applications will be made by the person's spouse, family member or guardian. Important safeguards are built into the process for applying for a court-authorised will. An applicant must first seek leave of the court to apply for an order. The requirement for leave is intended to perform a screening function to allow only adequately founded applications to proceed.

A leave application must be accompanied by comprehensive material including evidence of: the person's lack of testamentary capacity and the likelihood of acquiring or regaining it; the size and character of the person's estate; the person's testamentary wishes; the terms of any previous will; the likelihood of someone bringing a family provision application in respect of the person's estate; the circumstances of any other person for whom the person lacking testamentary capacity might reasonably be expected to make provision for under a will; and any other persons who might be entitled to claim on intestacy. Requiring the applicant to provide such detailed information at this stage will enable the court to gauge the dimensions of the application at an earlier stage of the process. There will be an opportunity for persons with an interest in the proceedings, such as the person alleged to lack testamentary capacity, family members, et cetera, to be separately represented and heard at an application for leave hearing.

The court cannot grant leave unless satisfied that: the applicant is an appropriate person to make the application; adequate steps have been taken to allow all persons with a proper interest in the application to be represented; there are reasonable grounds for believing the person does not have testamentary capacity; the applicant's testamentary proposal is, or may be, what the person would have done if he or she had testamentary capacity; and it is, or may be, appropriate for an order to be made in relation to the person. Once leave has been granted, the next stage is for the court to consider the actual application. In this regard, the bill allows for the merger of the leave application and the application proper. When it considers the actual application, the court may consider any of the information given to it in support of the application, may inform itself of any other matter in any manner it sees fit and is not bound by the rules of evidence. The will must be signed by the Registrar of the Supreme Court and retained by the registrar until further court order, or the person dies or acquires or regains testamentary capacity.

This new aspect of the court's jurisdiction also applies to minors; it is intended to complement the court's jurisdiction in respect of competent minors. This means the court can make a statutory will for a minor to whom the court cannot otherwise give authorisation because the minor lacks the requisite degree of understanding, for example, because of immaturity or because of a particular incapacity. Many aspects of the bill reinforce previous reforms to shift the emphasis from matters of "form" to the intent of the testator; it moves us from a system where formalities were paramount to one where the court has greater discretion to interpret the testator's intentions. This underlines the policy thrust of the bill: that the greatest possible effect should be given to the testator's intentions.

I turn now to court-authorised wills for minors. Clause 16 of the bill gives statutory guidance of the matters that the Supreme Court may consider when authorising a minor to make a will. Before exercising this jurisdiction, the court must be satisfied: that the minor understands the nature and effect of the proposed will; of the extent of the property to be disposed under it; that the will reflects the minor's intentions and that it is reasonable in all the circumstances that the order should be made. The Registrar of the Supreme Court must be a witness to the will and must retain it in safe custody.

I refer to new rules about beneficiaries who witness wills. Clause 10 of the bill changes the interested witness rules that operate to disqualify the spouse of an attesting witness or a person claiming under the spouse of an attesting witness from benefiting under the will. These rules are usually justified on the basis that allowing a spouse of a beneficiary to witness a will provides an opportunity for the person to exert undue influence over the testator. Unintended consequences flowed from the application of these rules. For example, wills have been witnessed by spouses of persons who were not contemplated at the time of execution as being a potential beneficiary, but who through the passage of time became a beneficiary because others died before the testator. The rule meant that any dispositions to these witnesses failed. To address this, the bill provides that a gift to an attesting witness or interpreter for a will is void: unless the court is satisfied that the testator knew and approved the making of the gift and the gift was made freely and voluntarily; or all of the people who would benefit if the gift to the witness was void consent to the witness receiving the gift; or there are at least two other witnesses to the will who do not receive a gift under the will.

I refer to the anti-lapse rule. Clause 41 replaces section 29 of the Wills, Probate and Administration Act, which contains the anti-lapse rule. The anti-lapse rule provides that a benefit left to children or other issue by a will does not lapse if the person fails to survive the testator. Instead the gift passes to the children who survive the original beneficiary. I refer to the law relating to foreign wills. Clauses 47 to 50 essentially restate part 1A of the Wills, Probate and Administration Act. However, the definition of "internal law" has changed slightly to reflect the definition used in other jurisdictions.

I refer to new rules about who is entitled to see the will of a deceased person. As a general principle, only a named beneficiary has a right to see the will. The bill inserts a new provision in the Act that will require the

person who has custody or control of a will of a deceased person to allow certain categories of people to inspect the will and copy it. The entitlement extends to a part of a will and to purported wills and revoked wills, and parts thereof, as well as copies. These testamentary instruments can be significant to the determination of questions concerning, for example, the testator's capacity, undue influence or interpretation.

The provision is intended to ensure that persons with a proper interest can see the contents of a will prior to the will's admission to probate, upon which it becomes a public document. Providing individuals with a right to see the will may assist those who wish to make a claim against the estate, for example, dependants of the deceased person who wish to make a family provision application. The categories of persons eligible to access a will represent persons considered to have a proper interest in the will, for example, possible beneficiaries or other claimants against the deceased's estate, such as a person entitled to make a family provision application. The provision will apply to all wills, regardless of when they were made.

I refer to savings and transitional arrangements. I stress that valid wills made prior to this legislation will continue to be effective. People do not have to remake their wills just because we have a new Act. However introduction of this legislation is a good reminder for people to make a will or to review their will. A large number of people do not have a will, even though they may own property or have children. Other people may have made a will many years ago when their circumstances were very different. It is important to have a will. A will allows a person to say how he or she wishes to have their property distributed after their death. If someone dies without a will, their estate is distributed according to the intestacy rules, which may not reflect the person's wishes.

I refer to implementation and education arrangements. The bill will have a wide impact on the people of New South Wales. It is important that people are made aware of the impact of its changes. My department has formed a committee to plan how to implement the bill and educate the legal profession and community about the changes. The committee includes representatives from the Supreme Court, the Public Trustee and trustee organisations, the legal profession, legal educators and government. I expect that it will take some months to complete these preparations. The bill will commence once these preparations are complete. This bill reforms and modernises the law of wills in New South Wales. It represents a step closer to achieving consistency of succession law across Australia. It is my hope that more people will be encouraged to make wills and to keep them up to date. I commend the bill to the House.

**Debate adjourned on motion by Mr Russell Turner.**

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