

**WILLS, PROBATE AND ADMINISTRATION
(AMENDMENT) BILL 1989**

NEW SOUTH WALES



EXPLANATORY NOTE

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

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

Clause 1 specifies the short title of the proposed Act.

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

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

SCHEDULE 1—AMENDMENTS

Privileged testators

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

Minors

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

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

Wills, Probate and Administration (Amendment) 1989

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

Reform of execution formalities

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

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

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

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

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

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

Witnesses

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

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

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

Wills, Probate and Administration (Amendment) 1989

Effect of marriage and divorce

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

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

Reform of revocation formalities

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

General dispensing power

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

Rectification

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

Rules

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

Savings and transitional provisions

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

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

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

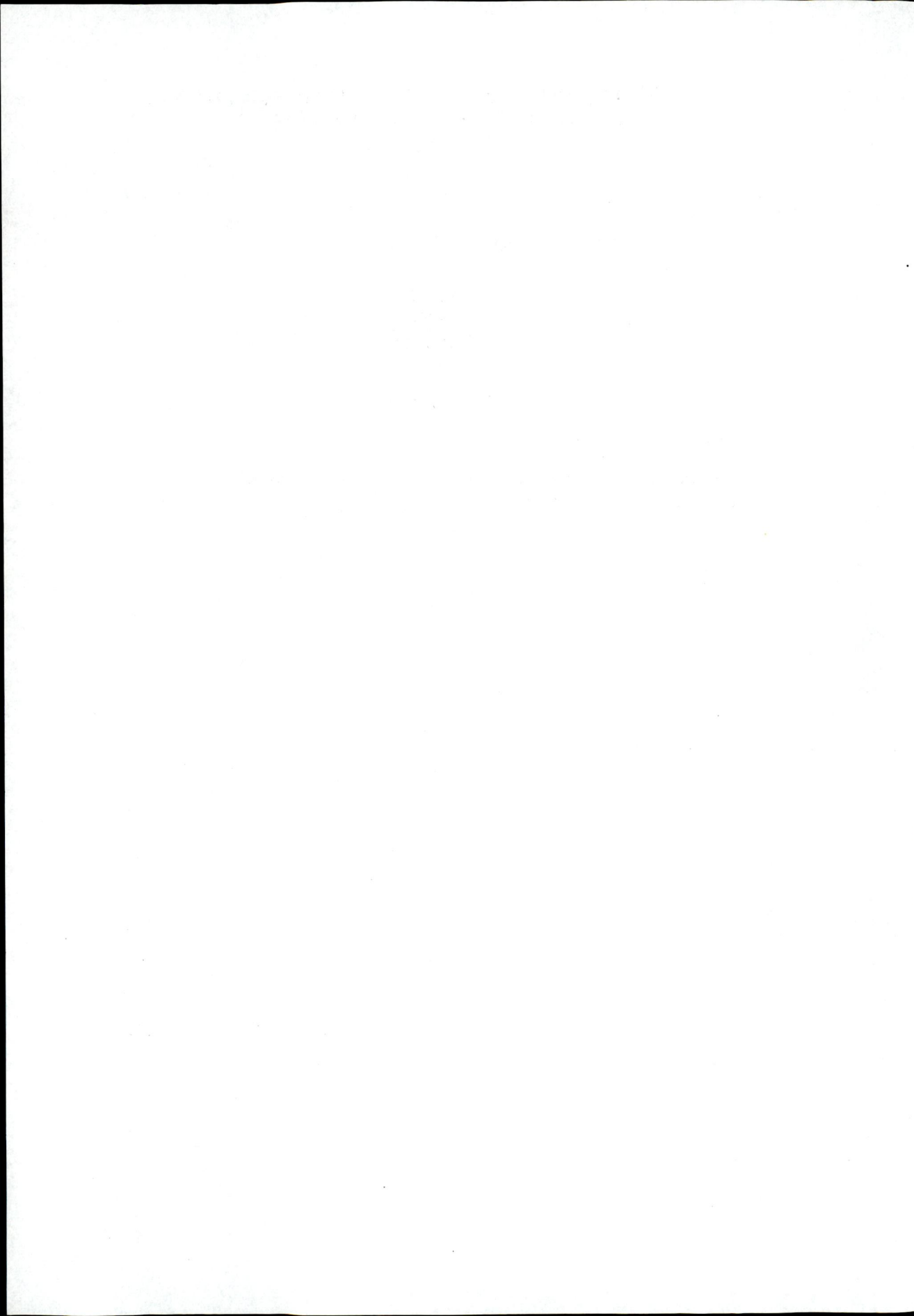
Anything done by a privileged testator before the repeal of provisions of the Principal Act relating to privileged testators is preserved, except that a will made by a privileged testator before the repeal takes effect is invalidated if the testator is living when the repeal takes effect.

Wills, Probate and Administration (Amendment) 1989

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

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

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



WILLS, PROBATE AND ADMINISTRATION (AMENDMENT) BILL 1989

NEW SOUTH WALES



TABLE OF PROVISIONS

1. Short title
2. Commencement
3. Amendment of Wills, Probate and Administration Act 1898 No. 13

SCHEDULE 1—AMENDMENTS

**WILLS, PROBATE AND ADMINISTRATION
(AMENDMENT) BILL 1989**

NEW SOUTH WALES



No. , 1989

A BILL FOR

An Act to amend the Wills, Probate and Administration Act 1898 with respect to the execution, rectification and revocation of wills.

The Legislature of New South Wales enacts:**Short title**

1. This Act may be cited as the Wills, Probate and Administration (Amendment) Act 1989.

5 Commencement

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

Amendment of Wills, Probate and Administration Act 1898 No. 13

3. The Wills, Probate and Administration Act 1898 is amended as set
10 out in Schedule 1.

SCHEDULE 1—AMENDMENTS

(Sec. 3)

(1) Section 3, definition of "Privileged testator"—

Omit the definition.

15 (2) Sections 6–6B—

Omit section 6, insert instead:

Will of minor

6. A will made by a minor is not valid, unless the minor is or has been married or section 6A or 6B applies.

20 **Will of minor pursuant to leave of the Court**

6A. (1) The Court may grant a minor leave to make a will the terms of which have been disclosed to the Court.

(2) Leave may be granted subject to such conditions (if any) as the Court thinks fit.

25 (3) A will made by a minor pursuant to leave granted under this section is valid.

Will of minor in contemplation of a marriage

6B. A will made by a minor who may marry and which is made in contemplation of a marriage is, on the solemnisation of the marriage contemplated, valid.

(3) Sections 7, 8—

Omit the sections, insert instead:

Form and manner of execution of wills

7. (1) A will is not valid unless—

35 (a) it is in writing; and

SCHEDULE 1—AMENDMENTS—*continued*

- (b) it is signed by the testator; and
- (c) it appears, on the face of the will or otherwise, that the testator intended by the signature to give effect to the will; and
- 5 (d) the signature is made by the testator in the presence of 2 or more witnesses present at the same time or the signature is acknowledged by the testator in the presence of 2 or more witnesses present at the same time; and
- 10 (e) at least 2 of those witnesses attest and sign the will in the presence of the testator (but not necessarily in the presence of each other or of any other witness).
- (2) Without limiting paragraphs (d) and (e) of subsection (1), those paragraphs shall be taken to have been complied with if the following things happen in the following order:
- 15 (a) the signature of the testator is made or acknowledged by the testator in the presence of a witness (in this subsection called “the first witness”); and
- (b) the first witness attests and signs the will in the presence of the testator; and
- 20 (c) the signature of the testator is acknowledged by the testator in the presence of one or more other witnesses and also of the first witness present at the same time; and
- (d) the other witness, or at least one of the other witnesses, attests and signs the will in the presence of the testator (but not necessarily in the presence of the first witness or of any
- 25 other witness).
- (3) No form of attestation by a witness is necessary.
- (4) In this section, a reference to the signing of a will by a testator includes a reference to the signing of the will by some
- 30 other person who signs the will in the presence and by the direction of the testator.
- (4) Section 10 (**Will of privileged testator**)—
Omit the section.
- (5) Section 12—
- 35 Omit the section, insert instead:
- Competency of witness**
12. Any person competent to be a witness in civil proceedings in a court, other than a blind person, may be a witness to the execution of a will.

SCHEDULE 1—AMENDMENTS—*continued*

(6) Section 13—

Omit the section, insert instead:

Gifts to interested witnesses

5 13. (1) If any beneficial gift is given or made by will to a person (in this section called “the interested witness”) who attests the execution of the will or to the interested witness’s spouse, the gift is void so far only as it concerns the interested witness or the interested witness’s spouse or any person claiming under either of them, unless subsection (2) applies.

10 (2) A beneficial gift given or made by will is not made void by this section if—

(a) at least 2 persons who attest the execution of the will are not persons to whom any such gift is so given or made or the spouses of any such persons; or

15 (b) all the persons who would benefit directly from the avoidance of the gift consent in writing to the distribution of the gift according to the will (all those persons having capacity at law to do so); or

(c) the Court is satisfied—

20 (i) that the testator knew and approved of the gift; and

(ii) that the gift was given or made freely and voluntarily by the testator.

25 (3) Except in the case of a will to which subsection (2) (a) applies, the executor of an estate in relation to which a beneficial gift to an interested witness or an interested witness’s spouse is made shall not distribute that part of the estate the subject of the gift before the expiration of one month after the date on which the executor notifies the interested witness or the interested witness’s spouse (as the case requires) of the executor’s intention to make the distribution, unless—

30 (a) all the persons to whom subsection (2) (b) applies have given the requisite consent; or

(b) the Court is satisfied as to the matters referred to in subsection (2) (c).

35 (4) A consent referred to in subsection (2) (b) is not liable to duty under the Stamp Duties Act 1920.

(5) In this section—

“executor” includes a person to whom letters of administration are granted with the will annexed;

SCHEDULE 1—AMENDMENTS—*continued*

“gift” includes a devise, legacy, estate, interest or appointment of or affecting any real or personal estate, but does not include a charge or direction for the payment of any debt.

5 (7) Section 14 (**Creditor attesting or executor to be admitted a witness**)—
Omit the section.

(8) Section 15 (**Effect of marriage**)—

(a) Section 15 (2)—

After “1930”, insert “and before the commencement of subsection (3)”.

10 (b) Section 15 (3), (4)—

After section 15 (2), insert:

15 (3) A will made after the commencement of this subsection in contemplation of a marriage, whether or not that contemplation is expressed in the will, is not revoked by the solemnisation of the marriage contemplated.

(4) A will made after the commencement of subsection (3) which is expressed to be made in contemplation of marriage generally is not revoked by the solemnisation of a marriage of the testator.

20 (9) Section 15A—

After section 15, insert:

Effect of termination of marriage

15A. (1) If, after a testator has made a will, the testator’s marriage is terminated—

25 (a) any beneficial gift (including any devise, legacy, estate, interest or appointment of or affecting any real or personal estate, but not including any charge or direction for the payment of any debt) in favour of the former spouse of the testator and any power of appointment conferred on a former spouse is revoked; and

30 (b) any appointment under the will of the former spouse of the testator as executor, trustee or guardian shall be taken to be omitted from the will; and

35 (c) any property which would, but for this subsection, have passed to the former spouse of the testator pursuant to a beneficial gift referred to in paragraph (a) shall pass as if the former spouse had predeceased the testator, but no class of beneficiaries under the will shall close earlier than it would have closed if the beneficial gift had not been
40 revoked.

SCHEDULE 1—AMENDMENTS—*continued*

(2) A beneficial gift or power of appointment is not revoked pursuant to subsection (1) (a), and an appointment shall not be taken to be omitted from a will pursuant to subsection (1) (b), if—

5 (a) the Court is satisfied by any evidence, including evidence (whether admissible before the commencement of this section or otherwise) of statements made by the testator, that the testator did not, at the time of termination of the marriage, intend to revoke the gift, power of appointment or appointment; or

10 (b) the gift, power of appointment or appointment is contained in a will which is republished after the termination of the marriage by a will or codicil which evidences no intention of the testator to revoke the gift, power of appointment or appointment.

15 (3) Nothing in this section affects—

(a) any right of the former spouse of a testator to make any application under the Family Provision Act 1982; or

20 (b) any direction, charge, trust or provision in the will of a testator for the payment of any amount in respect of a debt or liability of the testator to the former spouse of the testator or to the executor or administrator of the estate of the former spouse.

(4) In this section—

25 “Family Law Act” means the Family Law Act 1975 of the Commonwealth;

30 “former spouse”, in relation to a testator, means the person who, immediately before the termination of the testator’s marriage, was the testator’s spouse, or, in the case of a purported marriage of the testator which is void, was the other party to the purported marriage.

(5) For the purposes of this section, the termination of a marriage occurs or shall be taken to occur—

(a) when a decree of dissolution of the marriage pursuant to the Family Law Act becomes absolute; or

35 (b) on the making of a decree of nullity pursuant to the Family Law Act in respect of a purported marriage which is void; or

40 (c) on the annulment of the marriage in accordance with the law of a place outside Australia if the annulment is recognised in Australia pursuant to the Family Law Act.

SCHEDULE 1—AMENDMENTS—*continued*(10) Section 17 (**Manner of revocation**)—

(a) Section 17 (1)—

After “15”, insert “or 15A”.

(b) Section 17 (3) (a)—

5 Omit “sections 7 and 8”, insert instead “section 7”.

(c) Section 17 (3) (c)—

Omit the paragraph, insert instead:

10 (c) by some writing on the will, or by any dealing with the will, by the testator or by some person in the presence of the testator and by the testator’s direction, if the Court is satisfied from the state of the will that the writing was made or the dealing was done with the intention of revoking the will.

(11) Section 18 (**Effect of alteration in a will**)—

15 Section 18 (2)—

Omit the subsection, insert instead:

20 (2) Subsection (1) applies to and in respect of an obliteration, interlineation or other alteration made in the will of a minor who may make a valid will under this Act in the same way as it applies to and in respect of an obliteration, interlineation or other alteration made in the will of a testator who is not a minor.

(12) Section 18A—

After section 18, insert:

Certain documents to constitute wills etc.

25 18A. (1) A document purporting to embody the testamentary intentions of a deceased person, even though it has not been executed in accordance with the formal requirements of this Act, constitutes a will of the deceased person, an amendment of such a will or the revocation of such a will if the Court is satisfied that
30 the deceased person intended the document to constitute his or her will, an amendment of his or her will or the revocation of his or her will.

35 (2) In forming its view, the Court may have regard (in addition to the document) to any other evidence relating to the manner of execution or testamentary intentions of the deceased person, including evidence (whether admissible before the commencement of this section or otherwise) of statements made by the deceased person.

SCHEDULE 1—AMENDMENTS—*continued*(13) Section 19 (**Revival**)—

(a) Section 19 (1) (b)—

Omit “sections 7 and 8”, insert instead “section 7”.

(b) Section 19 (2)—

5 Omit the subsection.

(14) Section 29A—

After section 29, insert:

Power of the Court to rectify wills

10 29A. (1) If the Court is satisfied that a will is so expressed that it fails to carry out the testator’s intentions, it may order that the will be rectified so as to carry out the testator’s intentions.

(2) An application for an order under this section shall not be made after the expiration of the period of 18 months after the death of the testator, except as provided by subsection (3).

15 (3) The Court may grant leave to make an application for an order under this section after the expiration of the 18-month period if the Court is satisfied that sufficient cause is shown for the failure to make the application within that period.

20 (4) Nothing in this section renders the executor of the estate of a testator liable for having distributed the assets, or any part of the assets, of that estate if the executor has complied with section 92.

25 (5) Nothing in subsection (4) prevents a person who becomes a beneficiary in respect of assets of the estate of a testator by virtue of an order under this section from recovering the assets if the assets have, or any part of the assets has, been distributed.

(6) In this section—

“executor” includes a person to whom letters of administration are granted with the will annexed.

30 (15) Section 152A—

After section 152, insert:

Rules of Court

35 152A. (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.

(16) Section 154—

SCHEDULE 1—AMENDMENTS—*continued*

After section 153, insert:

Savings and transitional provisions arising from amendments to this Act

154. The Fifth Schedule has effect.

5 (17) Fifth Schedule—

After the Fourth Schedule, insert:

**FIFTH SCHEDULE—SAVINGS AND TRANSITIONAL PROVISIONS
ARISING FROM AMENDMENTS TO THIS ACT**

(Sec. 154)

10 **PART 1—WILLS, PROBATE AND ADMINISTRATION (AMENDMENT)
ACT 1989**

Definition

1. In this Part—

15 “the 1989 Act” means the Wills, Probate and Administration
(Amendment) Act 1989.

Application of amendments—generally

20 2. (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.

Wills of minors

25 3. (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.

30 (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.

Privileged testators

35 4. (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

40 (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.

SCHEDULE 1—AMENDMENTS—*continued*

(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.

Effect of termination of marriage

5. 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.

Power of the Court to rectify wills

6. (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.

Gifts to interested witnesses

7. 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.

**WILLS, PROBATE AND ADMINISTRATION
(AMENDMENT) ACT 1989 No. 17**

NEW SOUTH WALES



TABLE OF PROVISIONS

1. Short title
 2. Commencement
 3. Amendment of Wills, Probate and Administration Act 1898 No. 13
- SCHEDULE 1—AMENDMENTS**
-



**WILLS, PROBATE AND ADMINISTRATION (AMENDMENT) ACT
1989 No. 17**

NEW SOUTH WALES



Act No. 17, 1989

An Act to amend the Wills, Probate and Administration Act 1898 with respect to the execution, rectification and revocation of wills. [Assented to 18 April 1989]

Wills, Probate and Administration (Amendment) 1989

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Wills, Probate and Administration (Amendment) Act 1989.

Commencement

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

Amendment of Wills, Probate and Administration Act 1898 No. 13

3. The Wills, Probate and Administration Act 1898 is amended as set out in Schedule 1.

SCHEDULE 1—AMENDMENTS

(Sec. 3)

(1) Section 3, definition of "Privileged testator"—

Omit the definition.

(2) Sections 6–6B—

Omit section 6, insert instead:

Will of minor

6. A will made by a minor is not valid, unless the minor is or has been married or section 6A or 6B applies.

Will of minor pursuant to leave of the Court

6A. (1) The Court may grant a minor leave to make a will the terms of which have been disclosed to the Court.

(2) Leave may be granted subject to such conditions (if any) as the Court thinks fit.

(3) A will made by a minor pursuant to leave granted under this section is valid.

Will of minor in contemplation of a marriage

6B. A will made by a minor who may marry and which is made in contemplation of a marriage is, on the solemnisation of the marriage contemplated, valid.

(3) Sections 7, 8—

Omit the sections, insert instead:

Form and manner of execution of wills

7. (1) A will is not valid unless—

(a) it is in writing; and

SCHEDULE 1—AMENDMENTS—*continued*

- (b) it is signed by the testator; and
 - (c) it appears, on the face of the will or otherwise, that the testator intended by the signature to give effect to the will; and
 - (d) the signature is made by the testator in the presence of 2 or more witnesses present at the same time or the signature is acknowledged by the testator in the presence of 2 or more witnesses present at the same time; and
 - (e) at least 2 of those witnesses attest and sign the will in the presence of the testator (but not necessarily in the presence of each other or of any other witness).
- (2) Without limiting paragraphs (d) and (e) of subsection (1), those paragraphs shall be taken to have been complied with if the following things happen in the following order:
- (a) the signature of the testator is made or acknowledged by the testator in the presence of a witness (in this subsection called “the first witness”); and
 - (b) the first witness attests and signs the will in the presence of the testator; and
 - (c) the signature of the testator is acknowledged by the testator in the presence of one or more other witnesses and also of the first witness present at the same time; and
 - (d) the other witness, or at least one of the other witnesses, attests and signs the will in the presence of the testator (but not necessarily in the presence of the first witness or of any other witness).
- (3) No form of attestation by a witness is necessary.
- (4) In this section, a reference to the signing of a will by a testator includes a reference to the signing of the will by some other person who signs the will in the presence and by the direction of the testator.
- (4) **Section 10 (Will of privileged testator)—**
Omit the section.
- (5) **Section 12—**
Omit the section, insert instead:
Competency of witness
12. Any person competent to be a witness in civil proceedings in a court, other than a blind person, may be a witness to the execution of a will.

SCHEDULE 1—AMENDMENTS—*continued*

(6) Section 13—

Omit the section, insert instead:

Gifts to interested witnesses

13. (1) If any beneficial gift is given or made by will to a person (in this section called “the interested witness”) who attests the execution of the will or to the interested witness’s spouse, the gift is void so far only as it concerns the interested witness or the interested witness’s spouse or any person claiming under either of them, unless subsection (2) applies.

(2) A beneficial gift given or made by will is not made void by this section if—

- (a) at least 2 persons who attest the execution of the will are not persons to whom any such gift is so given or made or the spouses of any such persons; or
- (b) all the persons who would benefit directly from the avoidance of the gift consent in writing to the distribution of the gift according to the will (all those persons having capacity at law to do so); or
- (c) the Court is satisfied—
 - (i) that the testator knew and approved of the gift; and
 - (ii) that the gift was given or made freely and voluntarily by the testator.

(3) Except in the case of a will to which subsection (2) (a) applies, the executor of an estate in relation to which a beneficial gift to an interested witness or an interested witness’s spouse is made shall not distribute that part of the estate the subject of the gift before the expiration of one month after the date on which the executor notifies the interested witness or the interested witness’s spouse (as the case requires) of the executor’s intention to make the distribution, unless—

- (a) all the persons to whom subsection (2) (b) applies have given the requisite consent; or
- (b) the Court is satisfied as to the matters referred to in subsection (2) (c).

(4) A consent referred to in subsection (2) (b) is not liable to duty under the Stamp Duties Act 1920.

(5) In this section—

“executor” includes a person to whom letters of administration are granted with the will annexed;

SCHEDULE 1—AMENDMENTS—*continued*

“gift” includes a devise, legacy, estate, interest or appointment of or affecting any real or personal estate, but does not include a charge or direction for the payment of any debt.

- (7) Section 14 (**Creditor attesting or executor to be admitted a witness**)—
Omit the section.
- (8) Section 15 (**Effect of marriage**)—
- (a) Section 15 (2)—
After “1930”, insert “and before the commencement of subsection (3)”.
- (b) Section 15 (3), (4)—
After section 15 (2), insert:
- (3) A will made after the commencement of this subsection in contemplation of a marriage, whether or not that contemplation is expressed in the will, is not revoked by the solemnisation of the marriage contemplated.
- (4) A will made after the commencement of subsection (3) which is expressed to be made in contemplation of marriage generally is not revoked by the solemnisation of a marriage of the testator.
- (9) Section 15A—
After section 15, insert:
- Effect of termination of marriage**
- 15A. (1) If, after a testator has made a will, the testator’s marriage is terminated—
- (a) any beneficial gift (including any devise, legacy, estate, interest or appointment of or affecting any real or personal estate, but not including any charge or direction for the payment of any debt) in favour of the former spouse of the testator and any power of appointment conferred on a former spouse is revoked; and
- (b) any appointment under the will of the former spouse of the testator as executor, trustee or guardian shall be taken to be omitted from the will; and
- (c) any property which would, but for this subsection, have passed to the former spouse of the testator pursuant to a beneficial gift referred to in paragraph (a) shall pass as if the former spouse had predeceased the testator, but no class of beneficiaries under the will shall close earlier than it would have closed if the beneficial gift had not been revoked.

SCHEDULE 1—AMENDMENTS—*continued*

(2) A beneficial gift or power of appointment is not revoked pursuant to subsection (1) (a), and an appointment shall not be taken to be omitted from a will pursuant to subsection (1) (b), if—

- (a) the Court is satisfied by any evidence, including evidence (whether admissible before the commencement of this section or otherwise) of statements made by the testator, that the testator did not, at the time of termination of the marriage, intend to revoke the gift, power of appointment or appointment; or
- (b) the gift, power of appointment or appointment is contained in a will which is republished after the termination of the marriage by a will or codicil which evidences no intention of the testator to revoke the gift, power of appointment or appointment.

(3) Nothing in this section affects—

- (a) any right of the former spouse of a testator to make any application under the Family Provision Act 1982; or
- (b) any direction, charge, trust or provision in the will of a testator for the payment of any amount in respect of a debt or liability of the testator to the former spouse of the testator or to the executor or administrator of the estate of the former spouse.

(4) In this section—

“Family Law Act” means the Family Law Act 1975 of the Commonwealth;

“former spouse”, in relation to a testator, means the person who, immediately before the termination of the testator’s marriage, was the testator’s spouse, or, in the case of a purported marriage of the testator which is void, was the other party to the purported marriage.

(5) For the purposes of this section, the termination of a marriage occurs or shall be taken to occur—

- (a) when a decree of dissolution of the marriage pursuant to the Family Law Act becomes absolute; or
- (b) on the making of a decree of nullity pursuant to the Family Law Act in respect of a purported marriage which is void; or
- (c) on the annulment of the marriage in accordance with the law of a place outside Australia if the annulment is recognised in Australia pursuant to the Family Law Act.

SCHEDULE 1—AMENDMENTS—*continued*(10) Section 17 (**Manner of revocation**)—

(a) Section 17 (1)—

After “15”, insert “or 15A”.

(b) Section 17 (3) (a)—

Omit “sections 7 and 8”, insert instead “section 7”.

(c) Section 17 (3) (c)—

Omit the paragraph, insert instead:

- (c) by some writing on the will, or by any dealing with the will, by the testator or by some person in the presence of the testator and by the testator’s direction, if the Court is satisfied from the state of the will that the writing was made or the dealing was done with the intention of revoking the will.

(11) Section 18 (**Effect of alteration in a will**)—

Section 18 (2)—

Omit the subsection, insert instead:

- (2) Subsection (1) applies to and in respect of an obliteration, interlineation or other alteration made in the will of a minor who may make a valid will under this Act in the same way as it applies to and in respect of an obliteration, interlineation or other alteration made in the will of a testator who is not a minor.

(12) Section 18A—

After section 18, insert:

Certain documents to constitute wills etc.

18A. (1) A document purporting to embody the testamentary intentions of a deceased person, even though it has not been executed in accordance with the formal requirements of this Act, constitutes a will of the deceased person, an amendment of such a will or the revocation of such a will if the Court is satisfied that the deceased person intended the document to constitute his or her will, an amendment of his or her will or the revocation of his or her will.

(2) In forming its view, the Court may have regard (in addition to the document) to any other evidence relating to the manner of execution or testamentary intentions of the deceased person, including evidence (whether admissible before the commencement of this section or otherwise) of statements made by the deceased person.

SCHEDULE 1—AMENDMENTS—*continued*(13) Section 19 (**Revival**)—

(a) Section 19 (1) (b)—

Omit “sections 7 and 8”, insert instead “section 7”.

(b) Section 19 (2)—

Omit the subsection.

(14) Section 29A—

After section 29, insert:

Power of the Court to rectify wills

29A. (1) If the Court is satisfied that a will is so expressed that it fails to carry out the testator’s intentions, it may order that the will be rectified so as to carry out the testator’s intentions.

(2) An application for an order under this section shall not be made after the expiration of the period of 18 months after the death of the testator, except as provided by subsection (3).

(3) The Court may grant leave to make an application for an order under this section after the expiration of the 18-month period if the Court is satisfied that sufficient cause is shown for the failure to make the application within that period.

(4) Nothing in this section renders the executor of the estate of a testator liable for having distributed the assets, or any part of the assets, of that estate if the executor has complied with section 92.

(5) Nothing in subsection (4) prevents a person who becomes a beneficiary in respect of assets of the estate of a testator by virtue of an order under this section from recovering the assets if the assets have, or any part of the assets has, been distributed.

(6) In this section—

“executor” includes a person to whom letters of administration are granted with the will annexed.

(15) Section 152A—

After section 152, insert:

Rules of Court

152A. (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.

(16) Section 154—

Wills, Probate and Administration (Amendment) 1989

SCHEDULE 1—AMENDMENTS—*continued*

After section 153, insert:

Savings and transitional provisions arising from amendments to this Act

154. The Fifth Schedule has effect.

(17) Fifth Schedule—

After the Fourth Schedule, insert:

**FIFTH SCHEDULE—SAVINGS AND TRANSITIONAL PROVISIONS
ARISING FROM AMENDMENTS TO THIS ACT**

(Sec. 154)

**PART 1—WILLS, PROBATE AND ADMINISTRATION (AMENDMENT)
ACT 1989**

Definition

1. In this Part—

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

Application of amendments—generally

2. (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.

Wills of minors

3. (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.

Privileged testators

4. (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

SCHEDULE 1—AMENDMENTS—*continued*

- (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.

Effect of termination of marriage

5. 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.

Power of the Court to rectify wills

6. (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.

Wills, Probate and Administration (Amendment) 1989

SCHEDULE 1—AMENDMENTS—*continued*

Gifts to interested witnesses

7. 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.

[*Minister's second reading speech made in—
Legislative Assembly on 22 February 1989
Legislative Council on 11 April 1989*]





