

# WILLS

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## No. 11 of 1968

### An Ordinance to make Provisions in relation to the Execution and Interpretation of Wills, and for other Purposes.

#### PART I.—PRELIMINARY.

- Short title.** 1. This Ordinance may be cited as the *Wills Ordinance 1968*.\*
- Parts.** 2. This Ordinance is divided into Parts, as follows:—  
     Part I.—Preliminary (Sections 1-6).  
     Part II.—Wills (Sections 7-15).  
     Part III.—Testamentary Dispositions by Members of the Defence Force (Section 16).  
     Part IV.—Miscellaneous (Sections 17-34).
- Repeal and saving.** 3.—(1.) The Wills, Probate and Administration Act, 1898, of the State of New South Wales, to the extent to which it applied to the Territory immediately before the commencement of this Ordinance, ceases to apply to the Territory as a law of the Territory.  
     (2.) The *Wills (War Service) Ordinance 1942* is repealed.  
     (3.) Notwithstanding the preceding provisions of this section, the Wills, Probate and Administration Act, 1898, of the State of New South Wales, to the extent referred to in sub-section (1.) of this section, and the *Wills (War Service) Ordinance 1942*, continue to apply to and in relation to a will or testamentary disposition of a person who died before the commencement of this Ordinance.
- Definitions.** 4. In this Ordinance, unless the contrary intention appears—  
     “personal property” includes leasehold property, and a share or interest in personal property;  
     “real property” includes an estate, right or interest in real property;  
     “the Registrar” means the Registrar of Probates holding office under the *Administration and Probate Ordinance 1929-1967*;  
     “will” includes a codicil.
- Application of Ordinance.** 5. Except as otherwise provided by this Ordinance, this Ordinance applies to and in relation to a will or testamentary disposition of a person who dies after the commencement of this Ordinance, whether the will or testamentary disposition was made before or after the commencement of this Ordinance.
- Administration of Ordinance.** 6. This Ordinance shall be administered by the Attorney-General.

\* Made on 7 June 1968; notified in the *Commonwealth Gazette* and commenced on 13 June 1968.

## PART II.—WILLS.

7.—(1.) A person may, by his will, devise, bequeath or dispose of any real property or personal property to which he is entitled at the time of his death, whether he became entitled to the property before or after the execution of his will.

Person may dispose of all his property by will.

(2.) Without limiting the generality of the last preceding sub-section, a person may, by his will, dispose of—

- (a) property that, if not disposed of by his will, would devolve on the executor of his will or the administrator of his estate;
- (b) an estate *pur autre vie*, whether there is or is not a special occupant of the estate, whether the estate is freehold or of any other tenure and whether the estate is a corporeal or incorporeal hereditament;
- (c) a contingent, executory or future interest in real property or personal property, whether he becomes entitled to the interest by virtue of the instrument by which the interest was created or by virtue of a disposition of the interest by deed or will and whether he has or has not been ascertained as the person or one of the persons in whom the interest may become vested; and
- (d) a right of entry for conditions broken and any other right of entry.

8.—(1.) Subject to the next succeeding sub-section, a will is not valid unless it is made by a person who has attained the age of eighteen years.

Person under eighteen cannot make will.

(2.) Nothing in the last preceding sub-section shall be taken to affect the operation of section 16 of this Ordinance.

9.—(1.) Subject to this Ordinance, a will is not valid unless—

- (a) it is in writing;
- (b) it is signed at the foot or end by the testator, or by another person in the presence of and by the direction of the testator;
- (c) the signature of the testator is made, or the signature of the person who signs the will by the direction of the testator is acknowledged, by the testator in the presence of two or more witnesses present at the same time; and
- (d) two or more of those witnesses each attest that signing of the will or that acknowledgement of the signing of the will and subscribe the will in the presence of the testator and of the other witness or witnesses.

Will to be in writing and signed before two witnesses.

(2.) The last preceding sub-section shall not be taken to require any form of attestation on a will.

10.—(1.) A will, so far only as regards the position of the signature of the testator on the will, is not invalid if the signature is so placed at, after, following, under, beside or opposite to the end of the will that it is apparent on the face of the will that the testator intended to give effect by that signature to the writing signed as his will.

When signature to a will shall be deemed valid.

(2.) Without limiting the generality of the last preceding subsection, the validity of a will is not affected by reason of the fact—

- (a) that the signature of the testator does not follow, or is not immediately after, the foot or end of the will;
- (b) that a blank space intervenes between the concluding word of the will and the signature;
- (c) that the signature—
  - (i) is placed among the words of the testimonium clause or of the clause of attestation;
  - (ii) follows, or is after or under, the clause of attestation, whether or not a blank space intervenes between the concluding word of that clause and the signature; or
  - (iii) follows, or is after, under or beside, the names, or one of the names, of the subscribing witnesses;
- (d) that the signature is on a side, page or other portion of the paper or papers containing the will on which no clause, paragraph or disposing part of the will is written above the signature; or
- (e) that there appears to be sufficient space for the signature on or at the bottom of the preceding side, page or other portion of the paper on which the will is written.

(3.) The signature of the testator on a will does not operate to give effect to a disposition or direction that is underneath or follows that signature, or that is inserted in the will after that signature is made.

(4.) In this section, references to the signature of the testator shall, in relation to a will signed by a person by the direction of the testator, be read as references to the signature of that person.

Appointments  
by will.

**11.—**(1.) Where a testator purports to make an appointment by his will in exercise of a power of appointment by will, the appointment is not valid unless the will is executed in accordance with this Part.

(2.) Where power is conferred on a person to make an appointment by a will that is executed in some particular manner or with some particular solemnity, the person may exercise the power by a will that is executed in accordance with this Part but is not executed in that manner or with that solemnity.

Alteration in  
a will not to  
have effect  
unless executed  
as a will.

**12.—**(1.) An obliteration, interlineation, or other alteration made in a will after the execution of the will is not valid or effectual for any purpose, except so far as a word in the will or the effect of the will before the alteration is not apparent, unless—

- (a) the obliteration, interlineation or alteration is signed by the testator or by another person in the presence of and by the direction of the testator;
- (b) the signature of the testator is made, or the signature of the person who signs the will by the direction of the testator is acknowledged, by the testator in the presence of two or more witnesses present at the same time; and

- (c) two or more of those witnesses each attest that signing or that acknowledgment of that signing and subscribe the obliteration, interlineation or alteration in the presence of the testator and of the other witness or witnesses.

(2.) An obliteration, interlineation or other alteration made in a will after the execution of the will shall be deemed to comply with the provisions of the last preceding sub-section if the signature of the testator or of the person who signs on behalf of the testator and the subscription of the witnesses, in relation to the obliteration, interlineation or other alteration, are made—

- (a) in the margin, or on some other part of the will, opposite or near to the obliteration, interlineation or other alteration; or
- (b) at the foot or end of, or opposite to, a memorandum that refers to the obliteration, interlineation or other alteration and is written at the end, or at another part, of the will.

**13.** The validity of a will that has been executed in accordance with the provisions of this Part is not affected by reason that a person who subscribed the will as a witness was unaware that the document was a will.

Publication of will unnecessary.

**14.** The validity of a will that has been executed in accordance with the provisions of this Part is not affected by reason that a person who subscribed the will as a witness was, at the time of the execution of the will, incompetent to be admitted as a witness to prove the execution of the will or became so incompetent at any time after the execution of the will.

Will not voided by incompetence of witness.

**15.** Where any devise, legacy, estate, interest, gift or appointment of or affecting real property or personal property (other than a charge or direction for the payment of debts) is, by will, given to, or made in favour of, a person who attested the signing of the will or the acknowledgment of the signing of the will, or the spouse of such a person, to be held by that person or spouse beneficially—

Gifts to attesting witnesses to be void.

- (a) the devise, legacy, estate, interest, gift or appointment is null and void to the extent only that it entitles that person, the spouse of that person or another person claiming under that person or that spouse to take property under it; and
- (b) the person is not disqualified, by reason of the devise, legacy, estate, interest, gift or appointment contained in the will, from being admitted as a witness to prove the execution, or the validity or invalidity, of the will.

### PART III.—TESTAMENTARY DISPOSITIONS BY MEMBERS OF THE DEFENCE FORCE.

**16.—(1.)** A testamentary disposition of real or personal property made by a person included in a class of persons specified in sub-section (6.) of this section, that is to say, a declaration, either oral or in writing, of such a person's intention with respect to the disposal of property

Wills of soldiers, etc.

upon or after his death, is as valid and effectual as it would have been if it had been made in a will executed in accordance with the provisions of Part II. of this Ordinance.

(2.) An appointment made, either orally or in writing, by a person included in a class of persons specified in sub-section (6.) of this section of another person to be the guardian of his infant children after his death is as valid and effectual as it would have been if it had been made in a will executed in accordance with the provisions of Part II. of this Ordinance.

(3.) In any proceedings, evidence of a matter specified in the next succeeding sub-section that relates to a declaration referred to in sub-section (1.) of this section or an appointment referred to in the last preceding sub-section that has been made by a person is admissible for the purpose of proving that the person intended the declaration or appointment to have effect upon or after the person's death.

(4.) The following matters are specified for the purpose of the last preceding sub-section:—

- (a) any statement made by the person, either orally or in writing, at or about the time when he made the declaration or appointment;
- (b) the circumstances in which the person made the declaration or appointment;
- (c) if the person made the declaration or appointment orally—the relationship between the person and the other person to whom the declaration or appointment was made; and
- (d) if the person made the declaration or appointment in writing—the relationship between the person and any other person—
  - (i) to whom the person gave that writing;
  - (ii) in whose presence the person wrote or signed that writing; or
  - (iii) who wrote that writing at the request or by the direction of the person.

(5.) Sub-section (3.) of this section is in addition to and not in substitution for any rules of law or procedure concerning evidence that is admissible in proceedings.

(6.) Each of the following classes of persons is specified for the purposes of this section:—

- (a) members of the Military Forces of the Commonwealth who are in actual military service;
- (b) members of the Naval Forces of the Commonwealth or of the Air Force of the Commonwealth who are so circumstanced that, if they were members of the Military Forces of the Commonwealth, they would be in actual military service;
- (c) persons subject to the *Defence Act* 1903-1917, or that Act as amended, by virtue of section 117A of that Act or of that Act as amended who are so circumstanced that, if they were members of the Military Forces of the Commonwealth, they would be in actual military service;

- (d) persons employed outside Australia as representatives of organizations rendering philanthropic, welfare or medical service to members of the Defence Force; and
- (e) prisoners of war or persons interned in a country under the sovereignty, or in the occupation, of the enemy or in a neutral country who became prisoners of war or were so interned as a result of war or war-like operations and were, immediately before their capture or internment, persons included in a class of persons specified in a preceding paragraph of this sub-section.

(7.) A person is not excluded from a class of persons specified in the last preceding sub-section by reason only of the fact that he has not attained the age of eighteen years.

#### PART IV.—MISCELLANEOUS.

17. In this Part, "will" includes a testamentary disposition made by a person to whom section 16 of this Ordinance applies.

Meaning of "will".

18. Where a testator, by will, charges real property or personal property with payment of a debt due to a creditor and the creditor, or the spouse of the creditor, attests the signing of the will or the acknowledgment of the signing of the will, the creditor or spouse, as the case may be, is not, by reason of that charge, disqualified from being admitted as a witness to prove the execution, or the validity or invalidity, of the will.

Creditor to be admitted as witness.

19. A person who is an executor of a will is not, by reason of being such an executor, disqualified from being admitted as a witness to prove the execution, or the validity or invalidity, of the will.

Executor to be admitted as witness.

20.—(1.) Subject to the next succeeding sub-section, where a person marries after having made a will, the will is revoked by the marriage unless the will was expressed to have been made in contemplation of that marriage.

Will to be revoked by marriage of testator.

(2.) Where a testator marries after he has made a will by which he has exercised a power of appointing real property or personal property by will, the marriage does not revoke the will in so far as it constitutes an exercise of that power if the property so appointed would not, in default of the testator exercising that power, pass to an executor under any other will of the testator or to an administrator of any estate of the testator.

21. Subject to the last preceding section, a will or part of a will is not revoked except—

Revocation of wills.

- (a) where the testator is a person to whom section 16 of this Ordinance applies, by the testator expressing his intention to revoke the will or part of the will in a manner in which he is entitled to dispose of his property under that section; and

- (b) whether or not the testator is a person to whom section 16 of this Ordinance applies—
- (i) by a subsequent valid will of the testator;
  - (ii) by the testator executing a document in like manner as a will is required by Part II. of this Ordinance to be executed that shows his intention to revoke the will or part; or
  - (iii) by the burning, tearing or otherwise destroying of the will or part by the testator, or by a person acting in the presence of and by the direction of the testator, with the intention of revoking the will or part.

**Revival of  
revoked will.**

**22.—(1.)** A will, or a part of a will, that has been revoked is not revived unless—

- (a) the testator re-executes it in the manner in which a valid will is required by Part II. of this Ordinance to be executed; or
- (b) the testator executes, in the manner in which a valid will is required by Part II. of this Ordinance to be executed, a valid codicil that shows the intention of the testator to revive the will.

(2.) Where a testator who has revoked the remainder of a will after having previously revoked part of the will revives the will, the revival operates, unless the contrary intention appears, to revive only so much of the will as was last revoked.

(3.) A will that is revoked and subsequently revived shall, for the purposes of this Ordinance, be deemed to have been made at the time when it is revived.

**Will disposes of  
balance of  
property of  
testator at  
his death.**

**23.** Where, after a testator has made a will containing a disposition of real property or personal property, the testator conveys the property or does any other act relating to the property (not being an act that revokes the will), the operation of the will with respect to any estate or interest in the property that the testator has power to dispose of by will at the time of his death is not affected by the conveyance or other act.

**Will speaks  
from death of  
the testator.**

**24.** A will shall, unless a contrary intention appears in it, be construed as speaking and taking effect so far as the real property and personal property referred to in it are concerned as if it had been executed immediately before the death of the testator.

**What a  
residuary  
devise  
includes.**

**25.** Where a devise of real property in a will fails by reason of the death of the devisee in the lifetime of the testator or by reason of the devise being contrary to law or otherwise incapable of taking effect, the real property shall, unless a contrary intention appears in the will, be taken to be included in the residuary devise (if any) contained in the will.

**26.—(1.) Unless a contrary intention appears in the will—****(a) a devise in the will—**

- (i) of all the land of the testator;
- (ii) of the land of the testator at a particular place or in the occupation of a particular person; or
- (iii) of the land of the testator described in the will in some other general manner; or

**(b) any other general devise in the will that would be apt to describe leasehold property of the testator if the testator does not have any real property that the devise is apt to describe,**

What a general devise or bequest includes.

shall be construed as if the leasehold estates of the testator, or the leasehold estates of the testator that the devise is apt to describe, as the case may be, as well as freehold estates, were land of the testator.

**(2.) Unless the contrary intention appears in the will, where a testator has power to appoint, by will, any real property in such manner as he thinks fit, a general devise of the real property of the testator or of the real property of the testator at a particular place, in the occupation of a particular person or otherwise described in a general manner, in the will of the testator—**

- (a) shall be construed as including the real property over which the testator had that power of appointment, or so much of that real property as the description is apt to describe, as the case may be; and**
- (b) operates as the appointment of that real property or so much of that real property as the description is apt to describe, as the case may be, in pursuance of that power.**

**(3.) Unless the contrary intention appears in the will, where a testator has power to appoint, by will, any personal property in such manner as he thinks fit, a bequest of the personal property of the testator, or of any class of personal property of the testator described in a general manner, in the will of the testator—**

- (a) shall be construed as including the personal property over which the testator had that power of appointment, or so much of that personal property as is included in that class, as the case may be; and**
- (b) operates as the appointment of that personal property or so much of that personal property as is included in the class of personal property so described, as the case may be, in pursuance of that power.**

**27. Where real property is devised to a person without words of limitation, the devise shall, unless a contrary intention appears in the will, be construed as passing the fee simple or other the whole estate or interest in the real property that the testator has power to dispose of by will.**

How a devise without words of limitation shall be construed.



How the words "die without issue" or "die without leaving issue" or "have no issue" shall be construed.

**28.**—(1.) In a devise or bequest of real property or personal property in a will, the words "die without issue", "die without leaving issue" or "have no issue", or any other words that may import either a want or failure of a person's issue in his lifetime or at the time of his death or an indefinite failure of a person's issue shall be construed as referring to a want or failure of issue in the lifetime or at the time of death of that person and not an indefinite failure of the issue of that person, unless a contrary intention appears in the will by reason of that person having a prior estate tail, or by reason of a preceding gift being, without any implication arising from any such words, a limitation of an estate tail to that person or issue, or for any other reason.

(2.) The last preceding sub-section does not apply where, in a will, words referred to in that sub-section refer to no issue described in a preceding gift being born, or no issue living to attain the age or otherwise to answer the description, required for obtaining a vested estate by a preceding gift to that issue.

Devises to trustees or executors.

**29.** Where real property is devised to a trustee or executor, the devise shall be construed as passing the fee simple or other the whole estate or interest that the testator had power to dispose of by will in the real property, unless a definite term of years (whether or not provision is made for determining the estate before the expiration of that term) or an estate of freehold is given to him expressly or by implication.

Trustees under an unlimited devise, etc., to take the fee.

**30.** Where real property is devised to a trustee without an express limitation of the estate to be taken by the trustee and the beneficial interest in the real property, or in the surplus rents and profits of the real property—

(a) is not given to any person for life; or

(b) is given to some person for life but the purposes of the trust may continue beyond the life of that person,

the devise shall be construed as vesting the real property in the trustee in fee simple or as vesting the legal estate in the real property which the testator had power to dispose of by will, as the case may be, and not as vesting an estate determinable when the purposes of the trust are satisfied.

Gifts to children or other issue not to lapse.

**31.** Where—

(a) a testator has, in his will, devised or bequeathed real property or personal property to a person (whether individually or as a member of a class) who is a child or other issue of the testator for an estate or interest not determinable before or upon the death of the person;

(b) the person died in the lifetime of the testator and was survived by issue of the person; and

(c) any of the issue of the person are living at the time of the death of the testator,

then, unless a contrary intention appears in the will, the devise or bequest does not lapse but takes effect as if the death of the person had occurred immediately after the death of the testator.

**32.—**(1.) Subject to the next succeeding sub-section, a person may deposit his will in the office of the Registrar. Wills may be deposited with Registrar.

(2.) The Registrar may refuse to allow a will to be deposited under the last preceding sub-section unless—

- (a) the will is enclosed in a sealed envelope or cover; and
- (b) the envelope or cover has written on it—
  - (i) the full name, occupation (if any) and address of the testator, or some other means of readily identifying the testator; and
  - (ii) the full name, occupation and address of the executor, or of each executor, named in the will.

(3.) The Registrar shall cause a will deposited under sub-section (1.) of this section to be kept safely at that office until it is dealt with in accordance with the succeeding provisions of this section.

(4.) Where a person whose will is deposited in the office of the Registrar under sub-section (1.) of this section requests the Registrar to do so, the Registrar shall cause the will to be delivered to that person.

(5.) Where the Registrar is satisfied that a person whose will is deposited in the office of the Registrar under sub-section (1.) of this section is dead, the Registrar shall—

- (a) cause the will to be delivered to the executor or one of the executors named on the envelope or cover in which the will is sealed or, if such an executor cannot be found or refuses to accept the will, to such person (if any) as a Judge of the Supreme Court directs; or
- (b) with the permission of a Judge of the Supreme Court, cause the will to be destroyed.

**33.—**(1.) The Registrar shall keep an index of wills deposited in his office under the last preceding section.

Register of wills deposited with the Registrar.

(2.) Where such a will is delivered to a person or destroyed in pursuance of sub-section (4.) or (5.) of the last preceding section, the Registrar shall enter in the index particulars of the date on which, and the person to whom, the will was delivered or the date on which the will was destroyed, as the case may be.

**34.** A person may search in the index kept by the Registrar under the last preceding section. Searches.