

1991

**AUSTRALIAN CAPITAL TERRITORY LEGISLATIVE ASSEMBLY**

**WILLS (AMENDMENT) BILL 1991**

**EXPLANATORY MEMORANDUM**

**Circulated by authority of the Attorney General**

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## WILLS (AMENDMENT) BILL 1991

### OUTLINE

The purpose of this Bill is to make a number of amendments to the *Wills Act 1968* as part of a general reform of the law relating to wills in the ACT.

The broad aims of the proposed amendments are:

- a) to eliminate unnecessary formality in the execution of wills;
- b) to provide courts with room for flexibility in individual circumstances;
- c) to ensure, so far as practicable, that a testator's intentions are put into effect; and
- d) to clarify and remove existing uncertainty in the Act.

Within these categories, the amendments cover a wide field.

### FINANCIAL IMPACT STATEMENT

The Bill will have no effect on government income or expenditure.

### NOTES ON CLAUSES

#### Clause 1: Short Title

This clause cites the short title of the Act.

#### Clause 2: Principal Act

The term 'Principal Act' refers to the *Wills Act 1968*.

### **Clause 3 : Substitution**

Clause 3 removes from the Principal Act the general prohibition contained in section 8 on persons under the age of eighteen (other than active military personnel) making valid wills, and inserts three new sections dealing with the topic:

. New section 8 describes the categories of minors who will be able to make, and then amend or revoke, a valid will. Apart from active military personnel (already dealt with in section 16 of the Principal Act), the relevant groups are those minors who are, or who have been, married; minors who make wills in contemplation of a marriage and that marriage is later solemnised; and minors who have complied with the court procedures detailed in new sections 8A and 8B.

. New section 8A deals with the procedure for enabling a minor, who is otherwise prevented from making a valid will, to make a valid will upon application to the court. The court may grant the application if it is satisfied about three matters - that the minor understands the nature and effect of the proposed will; that the proposed draft will is in accordance with the intentions of the minor; and thirdly, that it is reasonable in all the circumstances for the minor to make the proposed will.

. New section 8B is a complementary provision dealing with the procedure for application to the Supreme Court by a minor to revoke a will or part thereof. In a manner similar to new section 8A, the Court may grant the revocation application if it is satisfied that the minor understands the nature and effect of the proposed revocation instrument, that the instrument accurately reflects the intentions of the minor, and that it is reasonable in all the circumstances for the minor to make the proposed instrument.

### **Clause 4 : Will to be in writing and signed before two witnesses**

This clause amends section 9 of the Principal Act which deals with execution procedures. Paragraph (1)(c) of that section provides that the testator may only sign the will, or acknowledge the signing of the will by an

agent of the testator, in the presence of two witnesses. The amendment to the paragraph will provide for a third option - the testator may, in the presence of two witnesses, acknowledge his or her previously made signature to the will.

#### **Clause 5: Appointments by will**

This clause amends subsection 11(1) of the Principal Act to clarify that, where a will is executed outside the ACT, a power of appointment contained in the will is valid even though that will has not been executed in accordance with the main execution requirements set out in Part II of the Principal Act. (A power of appointment is a power conferred on a person under a will allowing the grantee of the power to appoint or select persons to take an interest in the grantor's property.)

#### **Clause 6: Insertion**

Clause 6 inserts new section 11A into the Principal Act. It deals with the validity of wills which have not been executed in accordance with the required formalities:

. New subsection 11A(1) gives the court the power to dispense with the need for compliance with the formal requirements for the execution of wills where it is satisfied that a deceased person intended a document, or a part of a document, to constitute his or her will, or an amendment to or revocation of a will.

. New subsection 11A(2) deals with the evidence a court may have regard to when reaching a conclusion as to the deceased person's intentions in relation to a particular document or writing. The evidence is of three kinds - the document itself; evidence which relates to the manner of execution of the document; and any evidence of the testamentary intentions of the deceased person, including evidence of statements made by him or her.

### Clause 7 : Alteration in will

This clause amends section 12 of the Principal Act which deals with alterations made in a will after the execution of the will. Paragraph (1)(b) of that section provides such alterations are not valid or effectual unless (among other things) the alteration is signed by the testator, or by another person at the direction of the testator who then acknowledges that signature, in the presence of two witnesses. The amendment to the paragraph will provide for a third exception - the testator may, in the presence of two witnesses, acknowledge his or her previously made signature to the alteration.

### Clause 8 : Insertion

Clause 8 inserts new sections 12A and 12B into the Principal Act. They deal, respectively, with the rectification of wills and with the admissibility of extrinsic evidence to construe a will:

New subsection 12A(1) enables a court to order that certain material be inserted into, or omitted from, a deceased's will in circumstances where that will is so expressed that it would otherwise fail to carry out the testator's intentions.

New subsection 12A(2) provides that a court may also order the will to be rectified where the provisions of the will, if applied according to their tenor, would fail to accord with the probable intention of the testator. However, before making such an order, the court will need to be satisfied that there were - prior to, at, or after the time of execution of the will by the testator - circumstances or events which lead to that failure. The circumstances or events are matters which the testator had no knowledge of, or did not anticipate, or which the testator, while knowing of, or anticipating, them, did not appreciate their effect on the provisions of his or her will. They may also be circumstances or events which occurred at the time of, or after, the testator's death. An order by the court under this subsection may only be made if the court is satisfied that it is desirable in all the circumstances to do so.

New subsection 12A(3) provides that an application by a person for rectification of the will under either of the previous subsections is to be made within six months of certain events taking place. Most commonly, the application is to be made within six months of the day on which probate of the will is granted.

New subsection 12A(4) permits the executor of the deceased's will or the administrator of the deceased's estate to require potential applicants to apply for an order for rectification within two months of the executor or administrator advertising such requirement in a local daily newspaper, provided that the advertisement is published within four months from the date of the events described in subsection (3). The provision gives greater scope for the deceased's personal representative to expedite the distribution of the deceased's estate.

New subsection 12A(5) deals with the liability of the personal representative of the deceased arising from the distribution of estate property against the background of subsections (3) and (4). The subsection relieves the personal representative from liability where he or she has distributed property in accordance with the will following the expiration of the time periods noted in subsections (3) and (4), and has not received notice that an application for rectification has been made.

New subsection 12A(6) makes it clear that a person retains the right, following the making of an order for rectification, to recover any part of the deceased's estate which had been distributed prior to the making of the order in satisfaction of his or her entitlement under the rectified will.

New subsection 12A(7) contains the definition of certain words and phrases used in the section.

New section 12B deals with the circumstances under which a broad range of evidence, outside the words used in the will, may be admitted by the court when it is construing a will. Those circumstances are when the language used in the will renders the will, in whole or in part;

- meaningless;
- ambiguous or uncertain on the face of the will; or
- ambiguous or uncertain in the light of the surrounding circumstances.

The section makes it clear, however, that evidence of a testator's dispositive intention is not admissible to establish the surrounding circumstances referred to above.

#### **Clause 9: Insertion**

Clause 9 inserts new section 14A into the Principal Act. It provides that the conferral of a power to appoint, or the creation of a trust to distribute property, which is created by a will, is not to be void as being a delegation of the testator's power to make a will if the same power or trust would be valid if it were created by the deceased person while he or she were still alive.

#### **Clause 10: Substitution**

Clause 10 removes from the Principal Act the prohibition contained in section 15 on a witness to a will (or the spouse to that witness) also being a beneficiary under that will. New section 15 provides instead that a will, or testamentary provision thereof, is not void by reason only of the fact that a witness, or a spouse of that witness, is also a beneficiary under the will.

#### **Clause 11: Revocation of will by testator's marriage**

This clause amends section 20 of the Principal Act, dealing with the revocation of a testator's will when he or she marries, in two parts. The first part inserts a new cross-reference in subsection 20(1) to new subsection 20(3), which is inserted by the second part. The subsection provides an additional exception to the rule contained in subsection 20(1) that where a person marries after having made a will, the will is revoked by the marriage unless the will was expressed to be made in contemplation of that marriage. An exception is already contained in subsection 20(2).

The further exception provides that where a will contains a gift (ie. a devise or bequest) or an administrative appointment (ie. an appointment of property or a conferral of a power of appointment) in favour of a person, and that gift or appointment is expressed to be in contemplation of the marriage of the testator to that person, two consequences will follow. Firstly, that gift or appointment is not revoked by the subsequent solemnisation of the marriage contemplated. Secondly, the remaining provisions of the will are not revoked by that subsequent marriage unless a contrary intention appears from the will itself or from extrinsic evidence admitted in accordance with new section 12B of the Principal Act.

### **Clause 12 : Insertion**

Clause 12 inserts new section 20A into the Principal Act. The section, dealing with the effect that a termination of marriage has on a testator's will, consists of five subsections:

. New subsection 20A(1) provides that upon the termination of the testator's marriage, any beneficial gift in favour of, or power of appointment conferred upon, the testator's former spouse is revoked. Property which would, but for that revocation, have passed to the testator's former spouse, passes instead as if the spouse had predeceased the testator. The subsection further provides that where the former spouse of the testator has been appointed as an executor, trustee or guardian under the testator's will, the appointment is to be taken to be omitted from the will upon the termination of the marriage.

. New subsection 20A(2) provides for exceptions to the revocation of gifts or powers of appointment and to the omission of appointments contained in subsection 20A(1). The first is where the court is satisfied that at the time of the termination of the marriage, the testator did not intend to revoke the gift, power of appointment or appointment. The second provides that where a will containing the gift, power of appointment or appointment is republished following the termination of the marriage, they are not to be revoked where the

instrument of republication evidences no intention of the testator to revoke them.

New subsection 20A(3) makes it clear that new section 20A is not to affect, firstly, any right of the former spouse of the testator to make a claim under the Family Provision Act 1969 and, secondly, any provision in the will providing for the repayment of a debt of liability of the testator to the former spouse, or to the executor of the will or administrator of the estate of the former spouse.

New subsection 20A(4) provides for the interpretation of when the termination of the marriage is, or is to be taken, to occur for the purposes of new section 20A.

New subsection 20A(5) contains the definition of the phrases 'Family Law Act' and 'former spouse' which are used in the section.

#### **Clause 13 : Revocation of will**

Clause 13 amends a cross-reference contained in section 21 of the Principal Act to take account of the insertion into the Principal Act of new section 20A. Section 21 deals generally with the revocation of wills.

[The clause also makes an amendment to section 21 to take into account the court-supervised revocation of wills made by certain minors. That procedure is provided for in new section 8B, inserted by clause 3 of this Bill.]

#### **Clause 14 : Insertion**

Clause 14 inserts new section 30A into the Principal Act. It provides that where gifts in a will of real or personal property, not taking effect immediately, generate income, that income goes with the gift, except so far as that income or any part of it is otherwise disposed of by the will.

### **Clause 15 : Substitution**

Clause 15 repeals section 31 of the Principal Act and inserts new section 31 dealing with the fate of gifts in a will to a child, or other issue, of the testator who predecease the testator.

The effect of section 31 of the Principal Act is that a gift to a child or remoter lineal descendant (together generally referred to as 'issue') of the testator will not lapse by reason of the beneficiary predeceasing the testator, if that beneficiary leaves a child or other issue who survives the testator. This is brought about by deeming the original beneficiary to have survived the testator. The intention of that provision is to prevent an intestacy in respect of the gift to the original beneficiary, although its effect is to put the gift into the estate of the original beneficiary. As a consequence, the gift is more likely to pass to someone with whom the testator is not acquainted.

New section 31 provides that a gift (ie. a devise or a bequest or an appointment of property) which is saved from lapsing by the present provision, goes in equal shares to the issue of the deceased child or other issue of the testator, rather than into the estate of that deceased child or other issue. The new section consists of five subsections:

. New subsection 31(1) states the general rule that where a testator, by will, leaves property to a person who is the testator's child or other issue, and that person dies while the testator is still alive but leaves one or more issue who in turn survive the testator by thirty days, then that property goes to those surviving issue. The division of the property when there are more than one surviving issue is dealt with in the following subsection. This default mechanism is subject to a contrary intention appearing in the will (touched on further in new subsection 31(4)) or from extrinsic evidence admitted pursuant to new section 12B.

. New subsection 31(2) provides for the division of that property in the case of two or more issue of the deceased original beneficiary (ie. the testator's child or other issue) surviving the testator by thirty days. In that event, the number of shares into which the property may be divided is equivalent to the number of the nearest issue of the original

beneficiary who survive the testator by the thirty days, or who, while not surviving for that period, themselves leave issue who survive the testator by thirty days. Provision is then made for the distribution of the shares in the property amongst the nearest issue and the surviving issue of the nearest issue who, whilst surviving the testator, did not survive the testator by thirty days. Paragraph (e) of the subsection provides that where there are two or more surviving issue of a nearest issue, those surviving issue take one share in equal shares.

. New subsection 31(3) provides that where a share is distributed in accordance with paragraph (e) of new subsection 31(2), the class of surviving issue of the nearest issue of the original beneficiary is to be composed, with one exception, of the children of that nearest issue of the original beneficiary. The exception applies where a child in that class, who is also a parent, survives the testator, but not by thirty days. In that case, that child's issue take that child's share in equal shares.

. New subsection 31(4) provides for two matters which are not to be considered to be an expression of a contrary intention as would oust the operation of the rule contained in the section. They are statements made in a will to the effect that the original beneficiary must survive the testator, or attain a specified age, before being entitled to take under that will.

. New subsection 31(5) provides for a specific instance where the section is not to apply - that is, where the original beneficiary has not fulfilled some contingency (apart from the two contingencies noted in new subsection 31(4)) which were required by the will to be fulfilled before that beneficiary could have taken.

### **Clause 16: Insertion**

Clause 16 inserts new sections 31B and 31C into the Principal Act. New section 31B deals with distribution to issue and new section 31C deals further with the position of beneficiaries who do not survive the testator.

New section 31B replaces the common law rule applicable to the distribution of gifts to a person's issue that, in the absence of a contrary

intention, the gift is to be distributed to all the issue, however remote, in equal shares. For example, if a gift is made to the issue of A, and A has three children, each of whom have two children themselves at the date of the testator's death, the number of issue is nine and they will each therefore take a one ninth share. In effect, the children's interests will be diluted according to the total number of grandchildren.

The new section provides that, except where the testator intends otherwise, gifts to his or her issue are to be distributed in equal shares among the testator's immediate issue, and by representation among more remote surviving issue. It consists of three subsections:

. New subsection 31B(1) provides that where a testator leaves property to his or her issue, he or she is presumed to have intended the property to be distributed in equal shares between only those issue of the testator who are his or her nearest issue and who survive the testator by thirty days. A contrary intention which appears from the will, or from extrinsic evidence admitted pursuant to new section 12B, will displace the presumption. The presumed intention is also subject to new subsection 31B(2).

. New subsection 31B(2) deals with the case where a nearest issue of the testator does not survive the testator by thirty days, but who in turn leaves issue who survive the testator by thirty days. In that event, the testator shall be presumed to have intended that those surviving issue of the nearest issue take the nearest issue's share in equal shares

. New subsection 31B(3) provides that the above new subsection (2) operates only in respect of the surviving child or children of the deceased nearest issue, with an exception in the case where that survivor is a parent who does not survive the testator by thirty days. In that event, the testator shall be presumed to have intended that the issue of that survivor take the survivor's share in equal shares.

New section 31C provides in subsection (1) that in the absence of a contrary intention on the part of the testator, a gift in favour of any person is to lapse if the beneficiary does not survive the testator by thirty days. New

subsection (2) goes on to provide that a statement in the will to the effect that a beneficiary must survive the testator is not to be taken as an expression of a contrary intention for the purposes of the section.

**Clause 17: Application**

This clause provides for the timing of the application of each of the amendments effected by the clauses of this Bill.