

Wills Bill

EXPLANATORY MEMORANDUM

PART 1—PRELIMINARY

- Clause 1 states the purpose of the Act.
- Clause 2 is the commencement provision. Sections 1 and 2 of the Act commence on the day on which the Act receives the Royal Assent. The remaining provisions of the Act come into operation on proclamation. If a provision of the Act does not come into operation before 1 January 1999, then the provision comes into operation on that day.
- Clause 3 is the definition section.

PART 2—THE MAKING, ALTERATION, REVOCATION AND REVIVAL OF WILLS

Division 1—Will-making powers

- Clause 4 specifies the property which a person may dispose of by will.
- Clause 5 provides that a will made by a minor (a person under the age of 18 years) is not valid.
- Clause 6 authorises a minor who is married or who is contemplating marriage to make a will, despite the prohibition in clause 5. A minor is able to make a will in contemplation of marriage and alter or revoke such a will, but the will is of no effect if the marriage contemplated does not take place. A minor who is married is able to make, alter or revoke a will. A minor who has been married is able to revoke a will made while the person was married or in contemplation of that marriage.

Division 2—Executing a will

- Clause 7 sets out the requirements for the valid execution of a will.

- Clause 8 provides that a will that is executed in accordance with this Act is validly executed even if a witness to the will did not know that it was a will.

Division 3—Dispensing with the requirements for execution

- Clause 9 sets out the circumstances in which the Supreme Court may dispense with the requirements for the execution or revocation of a will as specified by this Act. The Court is empowered to admit to probate as a will of a deceased person, a document that has not been executed as required by this Act if the Court is satisfied that the deceased person intended the document to be the person's will. The Court may also refuse to admit to probate a will which is purported to have been revoked by the testator.

Division 4—Witnessing a will

- Clause 10 prevents a person who is unable to see and attest that a testator has signed a document from witnessing a will.
- Clause 11 provides that a person who witnesses a will or the person's spouse at the time the will is witnessed, is not disqualified from taking a benefit under the will.

Division 5—Alteration, Revocation and Revival of Wills

- Clause 12 sets out the requirements for revoking a will.
- Clause 13 specifies the effect of marriage on a will. Subject to certain exceptions set out in the provision, a will is revoked by the marriage of the testator.
- Clause 14 specifies the effect of divorce on a will.
- Clause 15 sets out the requirements for validly altering a will.
- Clause 16 sets out the circumstances in which a will that has been revoked is revived.

Division 6—Wills to which foreign laws apply

- Clause 17 sets out the general rules for determining the validity of wills made outside the jurisdiction of Victoria.

Clause 18 sets out the process for ascertaining which system of law applies to a will where there is more than one system of internal law relating to the formal validity of a will operating in the place.

Clause 19 sets out the manner for constructing the law applying to wills where there may have been a later alteration to the relevant law.

PART 3 —WILLS MADE OR RECTIFIED UNDER COURT AUTHORISATION

Division 1—Court authorised wills by minors

Clause 20 provides that the Supreme Court may authorise a minor to make a will in specific terms approved by the Court or revoke a will, if the Court is satisfied that—

- the minor understands the nature and effect of the proposed will or revocation and the extent of the property disposed of by the will; and
- the proposed will or revocation accurately reflects the intention of the minor; and
- it is reasonable in all the circumstances that the Court should authorise the making or revocation of the will.

One of the witnesses to a Court authorised will for a minor is required to be the Registrar of Probates and the will is required to be deposited with the Registrar, although a failure to deposit a will with the Registrar does not affect the validity of the will.

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

Clause 21 empowers the Supreme Court to make an order authorising a will to be made in specific terms approved by the Court or for a will to be revoked on behalf of a person (including a minor) who does not have testamentary capacity. Any person can, with the leave of the Court, apply for an order seeking authorisation to make or revoke a will on behalf of a person lacking testamentary capacity. An order authorising the making or revocation of a will can not be made on behalf of a person who is deceased at the time the order is made.

- Clause 22 specifies the type of information the Court may have regard to in considering an application for an order authorising the making or revocation of a will on behalf of a person lacking testamentary capacity.
- Clause 23 enables the Court, in making an order authorising the making or revocation of a will for a person lacking testamentary capacity, to make any related orders or directions.
- Clause 24 provides that if a Court authorised will has been made for a person who later regains testamentary capacity, the person is able to revoke the will or deal with the will without an order from the Court.
- Clause 25 requires a Court authorised will for a person lacking testamentary capacity to be:
- signed by the Registrar of Probates and sealed with the seal of the Court for it to be valid;
 - deposited with the Registrar of Probates, although a failure to deposit a will with the Registrar of Probates does not affect the validity of a will.
- Clause 26 specifies the factors the Court must be satisfied of before granting leave to a person to apply for an order authorising the making or revocation of a will for a person lacking testamentary capacity.
- Clause 27 indicates the type of information the Court may take into account in considering an application for leave.
- Clause 28 specifies the type of information the Court may require an applicant for leave to provide in support of the application.
- Clause 29 specifies the persons who are entitled to appear and be heard at an application for leave hearing.
- Clause 30 deems a statutory will made according to the law of the place where the deceased was resident at the time of the execution of the will, to be a valid will of the deceased. A "statutory will" is defined to be a will executed under a statutory provision on behalf of a person who at the time of execution, lacked testamentary capacity.

Division 3—Court authorised rectification of wills

- Clause 31 empowers the Supreme Court to make an order to rectify a will to carry out the intentions of a testator, if the Court is satisfied that the will does not carry out the testator's intentions because a clerical error was made or because the will does not give effect to the testator's instructions. An application for the rectification of a will is required to be made within 6 months from the date of the grant of probate.
- Clause 32 requires the Court to direct that a certified copy of a rectification order be attached to a will to which it relates.

PART 4—CONSTRUCTION OF WILLS

Division 1—General rules about construction of wills

- Clause 33 specifies the interest in property that may be disposed of by a will.
- Clause 34 provides that, subject to a contrary intention, a will takes effect, as if it had been executed immediately before the death of the testator.
- Clause 35 provides that, subject to a contrary intention, if any disposition of property is ineffective, the will takes effect as if the property were part of the residuary estate of the testator.
- Clause 36 specifies the circumstances in which extrinsic evidence is admissible to clarify a will.
- Clause 37 provides that the construction of a will is not altered by a change in the testator's domicile after the execution of his or her will.
- Clause 38 provides that a contingent, future or deferred disposition of property, whether specific or residuary, includes any intermediate income of the property which has not been disposed of by the will.
- Clause 39 requires a beneficiary to survive a testator by 30 days before receiving a benefit under the testator's will, subject to a contrary intention appearing in the will.

Division 2—Construction of particular provisions in wills

- Clause 40 provides that a general disposition of land or of the land in a particular area includes leasehold land whether or not the testator owns freehold land.
- Clause 41 specifies what property is included in a general disposition of property by the testator.
- Clause 42 provides that, subject to a contrary intention, a disposition of real property to a person without words of limitation is to be construed as passing the whole estate or interest of the testator in that property.
- Clause 43 specifies how a disposition to a person's issue is to operate.
- Clause 44 specifies the manner of construing a disposition which contains a requirement that the disposition will fail if the beneficiary dies without issue.
- Clause 45 specifies the course of a disposition to issue who predecease the testator but leave issue surviving the testator.
- Clause 46 specifies how a residuary disposition is to be construed.
- Clause 47 specifies the operation of dispositions to unincorporated associations.
- Clause 48 provides that a power or trust to dispose of property created by will is not void, on the ground that it is a delegation of the testator's power to make a will, if the same power or trust would be valid if created by the testator during his or her lifetime.
- Clause 49 specifies how a reference, whether express or implied, to a valuation in a will is to be construed.
- Clause 50 specifies the persons who may see the will of a deceased person.

PART 6—TRANSITIONAL AND CONSEQUENTIAL PROVISIONS

- Clause 51 provides that the **Wills Act 1958** is repealed.
- Clause 52 specifies transitional provisions for the Bill.

PART 7—AMENDMENT OF THE ADMINISTRATION AND PROBATE ACT

- Clause 53 specifies that for the purposes of this Part, the **Administration and Probate Act 1958** is the Principal Act.
- Clause 54 amends section 19 of the Principal Act to correct a reference to State Trustees.
- Clause 55 inserts a new section 91 into the Principal Act which empowers the Court to order that provision be made out of the estate of a deceased person for the proper maintenance and support of a person for whom the deceased had responsibility to make provision.

In considering whether provision should be made out of the estate of a deceased and the quantum of any such provision, the Court is required to have regard to a list of factors specified in clause 55(4), including—

- any family or other relationship between the deceased person and the applicant, including the nature of the relationship and where relevant, the length of the relationship;
 - any obligations or responsibilities of the deceased person to the applicant, any other applicant and the beneficiaries of the estate;
 - the size and nature of the estate of the deceased person;
 - the financial resources (including earning capacity) and the financial needs of the applicant, of any other applicant and of any beneficiary of the estate at the time of the hearing and in the foreseeable future; and
 - any benefits previously given by the deceased to any applicant or any beneficiary.
- Clause 56 amends section 94 of the Principal Act to enable the Court at the hearing of a testator's family maintenance application to accept any evidence of the deceased person's reasons for making the dispositions in his or her will and for not making proper provision for the applicant.

- Clause 57 repeals a redundant provision of the Principal Act.
- Clause 58 amends section 96 of the Principal Act to repeal a redundant sub-section.
- Clause 59 amends section 97 of the Principal Act to specify the powers of the Court in relation to the costs of a testator's family maintenance application.
- Clause 60 substitutes a new Part V into the Principal Act which is a transitional provision. It provides that the amendment to Part IV of the Principal Act made by the **Wills Act 1997** does not apply to a testator's family maintenance application made before the commencement of the amendments.