

**Version No. 015**

**Wills Act 1997**

**No. 88 of 1997**

Version incorporating amendments as at  
1 January 2010

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**The Parliament of Victoria enacts as follows:**

**PART 1—PRELIMINARY**

**1 Purpose**

The purpose of this Act is to re-state, with amendments, the law relating to wills in Victoria by making provision for—

- (a) the making, alteration, revocation and revival of wills, including—
  - (i) the capacity of minors to make wills; and
  - (ii) the effects of marriage and divorce of testators on wills made by them; and
- (b) the capacity of the Court to authorise the making or rectification of wills in certain circumstances; and
- (c) the construction of wills; and
- (d) other general matters in relation to wills; and
- (e) the repeal of the **Wills Act 1958** and the amendment of the **Administration and Probate Act 1958**.

**2 Commencement**

- (1) Section 1 and this section come into operation on the day on which this Act receives the Royal Assent.

- (2) Subject to subsection (3), the remaining provisions of this Act come into operation on a day or days to be proclaimed.
- (3) If a provision referred to in subsection (2) does not come into operation before 1 January 1999, it comes into operation on that day.

### 3 Definitions

- (1) In this Act—

*Court* means the Supreme Court;

S. 3(1) def. of *de facto spouse* repealed by No. 27/2001 s. 3(Sch. 1 item 14.1(a)).

\* \* \* \* \*

*disposition* includes the following—

- (a) any gift, devise or bequest of property under a will;
- (b) the creation by will of a power of appointment affecting property;
- (c) the exercise by will of a power of appointment affecting property;

*document* means any paper or material on which there is writing;

*domestic partner* of a deceased person means—

S. 3(1) def. of *domestic partner* inserted by No. 27/2001 s. 3(Sch. 1 item 14.1(b)), substituted by No. 12/2008 s. 73(1)(Sch. 1 item 66.1).

- (a) a person who was at the date of death in a registered relationship with the person; or
- (b) a person to whom the person was not married but with whom the deceased person was living at the date of death as a couple on a genuine domestic basis (irrespective of gender);

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*minor* means a person who is less than 18 years old;

*Registrar* has the same meaning as in the **Administration and Probate Act 1958**;

*spouse* of a deceased person means a person to whom the deceased person was married at the date of death;

S. 3(1) def. of *spouse* inserted by No. 27/2001 s. 3(Sch. 1 item 14.1(b)).

(1A) For the purposes of the definition of *domestic partner* in subsection (1)—

S. 3(1A) inserted by No. 27/2001 s. 3(Sch. 1 item 14.2), substituted by No. 12/2008 s. 73(1)(Sch. 1 item 66.2).

(a) *registered relationship* has the same meaning as in the **Relationships Act 2008**; and

(b) in determining whether persons who were not in a registered relationship were domestic partners of each other, all the circumstances of their relationship are to be taken into account, including any one or more of the matters referred to in section 35(2) of the **Relationships Act 2008** as may be relevant in a particular case.

(2) This Act applies to a codicil or other testamentary writing in the same manner as it applies to a will.

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

**Division 1—Will-making powers**

**4 What property may be disposed of by will?**

- (1) A person may, by will, dispose of—
- (a) any property to which the person is entitled at the time of his or her death, whether or not the entitlement of the person did or did not exist at the date of the making of the will; and
  - (b) any property to which the personal representative of that person becomes entitled, by virtue of the office of personal representative to that person, after the death of that person—

other than property of which the testator is trustee.

- (2) In this section *property* includes—
- (a) a contingent, executory or future interest in property—
    - (i) whether the person becomes entitled to the interest by way of the instrument which created the interest or otherwise; and
    - (ii) whether that person has or has not been ascertained as the person in whom the interest may become vested; and
  - (b) a right of entry or recovery of property or a right to call for the transfer of title of property.

**5 Minimum age for making a will**

A will made by a minor is not valid.

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## **6 Wills by minors who are married**

Despite section 5—

- (a) a minor may make a will in contemplation of marriage, and may alter or revoke such a will, but the will is of no effect if the marriage contemplated does not take place;
- (b) a minor who is married may make, alter or revoke a will;
- (c) a minor who has been married may revoke the whole or any part of a will made while the person was married or in contemplation of that marriage.

### **Division 2—Executing a will**

## **7 How should a will be executed?**

- (1) A will is not valid unless—
  - (a) it is in writing, and signed by the testator or by some other person, in the presence of, and at the direction of the testator; and
  - (b) the signature is made with the testator's intention of executing a will, whether or not the signature appears at the foot of the will; and
  - (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
  - (d) at least two of the witnesses attest and sign the will in the presence of the testator but not necessarily in the presence of each other.
- (2) A statement in a will that the will has been executed in accordance with this section is not necessary for the will to be valid.

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- (3) Where a testator purports to make an appointment by his or her will in the exercise of a power of appointment by will, the appointment is not valid unless the will is executed in accordance with this section.
  - (4) Where a power is conferred on a person to make an appointment by a will that is to be 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 section, but is not executed in that manner or with that solemnity.

**8 Must witnesses know that they are signing a will?**

A will which 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 requirements for execution**

**9 When may the Court dispense with requirements for execution or revocation?**

- (1) The Supreme Court may admit to probate as the will of a deceased person—
  - (a) a document which has not been executed in the manner in which a will is required to be executed by this Act; or
  - (b) a document, an alteration to which has not been executed in the manner in which an alteration to a will is required to be executed by this Act—

if the Court is satisfied that that person intended the document to be his or her will.

- 
- (2) The Supreme Court may refuse to admit a will to probate which the testator has purported to revoke by some writing, where the writing has not been executed in the manner in which a will is required to be executed by this Act, if the Court is satisfied that the testator intended to revoke the will by that writing.
- (3) In making a decision under subsection (1) or (2) the Court may have regard to—
- (a) any evidence relating to the manner in which the document was executed; and
  - (b) any evidence of the testamentary intentions of the testator, including evidence of statements made by the testator.
- (4) This section applies to a document whether it came into existence within or outside the State.
- (5) The Registrar may exercise the powers of the Court under this section—
- (a) where the Court has authorised the Registrar to exercise the Court's powers under this section; and
  - (b) where—
    - (i) all persons who would be affected by a decision under this section so consent; or
    - (ii) if consent is not given, the value of the estate does not exceed the limit set for the purposes of this section by the Court.
- (6) In this section *document* has the same meaning as in the **Interpretation of Legislation Act 1984**.

s. 10

**Division 4—Witnessing a will**

**10 What persons cannot act as witnesses to wills?**

A person who is unable to see and attest that a testator has signed a document, may not act as a witness to a will.

S. 11  
amended by  
No. 27/2001  
s. 3(Sch. 1  
item 14.3).

**11 Can an interested witness benefit from a disposition under a will?**

A person who witnesses a will or his or her spouse or domestic partner, 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**

**12 When and how can a will be revoked?**

S. 12(1)  
repealed by  
No. 43/1998  
s. 52(1).

\* \* \* \* \*

(2) Subject to—

S. 12(2)(a)  
repealed by  
No. 43/1998  
s. 52(2)(a).

\* \* \* \* \*

- (b) sections 13 and 14; and
- (c) any order made by the Court under this Act authorising the revocation of a will; and
- (d) any order made by the Court under this Act dispensing with the formal requirements for revoking a will—

the whole or any part of a will may not be revoked except—

S. 12(2)(da)  
inserted by  
No. 43/1998  
s. 52(2)(b).

- (da) by a later will; or

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- (e) by some writing, declaring an intention to revoke it, executed in the manner in which a will is required to be executed by this Act; or
  - (f) by the testator, or some person in his or her presence and by his or her direction, burning, tearing or otherwise destroying the will with the intention of revoking it; or
  - (g) by the testator, or by some person in his or her presence and at his or her direction, writing on the will or dealing with the will in such a manner that the Court is satisfied, from the state of the will, that the testator intended to revoke it.

**13 What is the effect of marriage on a will?**

- (1) A will is revoked by the marriage of the testator.
- (2) Despite subsection (1)—
  - (a) a disposition to the person to whom the testator is married at the time of his or her death; or
  - (b) an appointment as executor, trustee, advisory trustee or guardian of the person to whom the testator is married at the time of his or her death; or
  - (c) a power to exercise, by will, a power of appointment, when, if the testator did not exercise the power, the property so appointed would not pass to the executor or administrator or the State Trustees under section 19 of the **Administration and Probate Act 1958**—

is not revoked by the marriage of the testator.

(3) Despite subsection (1)—

- (a) a will made 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; and
- (b) a will which is expressed to be made in contemplation of marriage generally is not revoked by the marriage of the testator.

**14 What is the effect of divorce on a will?**

(1) The divorce of a testator revokes—

- (a) any disposition to the divorced spouse of the testator, made in a will in existence at the time of the divorce; and
- (b) the grant of a power of appointment by the will exercisable by or in favour of the spouse, other than a power of appointment exercisable by the spouse only in favour of persons who are the children of both the testator and the spouse; and
- (c) any appointment made by the will of the spouse as an executor, trustee, advisory trustee or guardian other than the appointment of the spouse as a trustee of property left by the will upon trust for beneficiaries that include the children of the spouse.

(2) This section does not apply to any disposition, appointment or grant, if it appears that the testator did not want the disposition, appointment or grant to be revoked upon the ending of the marriage.

(3) A will in which there is a disposition, appointment or grant to which subsection (1) applies takes effect as if the spouse had predeceased the testator.

(4) In this section—

*divorce* means the ending of a marriage by—

- (a) a decree of dissolution of the marriage becoming absolute under the Family Law Act 1975 of the Commonwealth; or
- (b) the granting of a decree of nullity in respect of the marriage by the Family Court of Australia; or
- (c) the dissolution or annulment of the marriage in accordance with the law of a place outside Australia, if that dissolution or annulment is recognised in Australia under the Family Law Act 1975 of the Commonwealth;

*divorced spouse* means the spouse of the testator by the marriage which was the subject of the divorce;

*spouse* includes a party to a purported or void marriage.

## **15 Can a will be altered?**

- (1) An alteration to a will after it has been executed is not effective unless the alteration is executed in the manner in which the will is required to be executed under this Act.
- (2) Subsection (1) does not apply to an alteration to a will if the words or effect of the will are no longer apparent because of the alteration.
- (3) If a will is altered, it is sufficient compliance with the requirements for execution, if the signature of the testator and of the witnesses to the alteration are made—

- (a) in the margin, or on some other part of the will beside, near or otherwise relating to the alteration; or
- (b) as authentication of a memorandum referring to the alteration and written on the will.

**16 Can a revoked will be revived?**

- (1) A will or part of a will which has been revoked is revived by re-execution or by execution of a codicil which shows an intention to revive the will or part.
- (2) A revival of a will which was partly revoked and later revoked as to the balance only revives that part of the will most recently revoked.
- (3) Subsection (2) does not apply if a contrary intention appears in the document which revives the will.
- (4) A will which has been revoked and later revived, either wholly or partly, is to be taken to have been executed on the date on which the will is revived.

**Division 6—Wills to which foreign laws apply**

**17 General rule as to validity of a will executed in a foreign place**

- (1) A will is to be taken to be properly executed if its execution conforms to the internal law in force in the place—
  - (a) where it was executed; or
  - (b) which was the testator's domicile or habitual residence, either at the time the will was executed, or at the testator's death; or
  - (c) of which the testator was a national, either at the date of execution of the will, or at the testator's death.

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- (2) The following wills are also to be taken to be properly executed—
- (a) a will executed on board a vessel or aircraft, if the will has been executed in conformity with the internal law in force in the place with which the vessel or aircraft may be taken to have been most closely connected having regard to its registration and other relevant circumstances; or
  - (b) a will, so far as it disposes of immovable property if it has been executed in conformity with the internal law in force in the place where the property is situated; or
  - (c) a will, so far as it revokes a will or a provision of a will which has been executed in accordance with this Act, or which is taken to have been properly executed by this Act, if the later will has been executed in conformity with any law by which the earlier will or provision would be taken to have been validly executed; or
  - (d) a will, so far as it exercises a power of appointment, if the will has been executed in conformity with the law governing the validity of the power.
- (3) A will to which this section applies, so far as it exercises a power of appointment, is not to be taken to have been improperly executed because it has not been executed in accordance with the formalities required by the instrument creating the power.

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**18 Ascertainment of the system of law which applies to a will**

If, in the case of a will to which the internal law in force in a place is to be applied, there is more than one system of internal law in force in the place which relates to the formal validity of wills the system to be applied is determined as follows—

- (a) if there is a rule in force throughout the place which indicates which system applies to the will, that rule must be followed; or
- (b) if there is no rule, the system must be that with which the testator was most closely connected—
  - (i) at the time of his or her death, if the matter is to be determined by reference to circumstances prevailing at his or her death; or
  - (ii) in any other case, at the time of execution of the will.

**19 Construction of the law applying to wills**

- (1) In determining whether a will has been executed in conformity with a particular law, regard must be had to the formal requirements of that law at the time of execution, but account may be taken of a later alteration of the law affecting wills executed at that time, if the alteration enables the will to be treated as properly executed.
- (2) If a law in force outside Victoria is applied to a will, a requirement of that law that special formalities must be observed by testators of a particular description or that the witnesses to the execution of a will must have certain qualifications, is to be taken to be a formal requirement only, despite any rule of that law to the contrary.

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**PART 3—WILLS MADE OR RECTIFIED UNDER COURT  
AUTHORISATION**

**Division 1—Court authorised wills by minors**

**20 Wills by minors authorised by the Court**

- (1) Despite section 5, the Court may make an order under this section authorising a minor to make a will in specific terms or revoke a will.
- (2) An order under this section may be made on the application of the minor or a person on behalf of the minor.
- (3) In making an order under this section, the Court must approve the terms of the will.
- (4) The Court may impose any conditions on the authorisation that the Court thinks fit.
- (5) Before making an order under this section, the Court must be satisfied that—
  - (a) the minor understands the nature and effect of the proposed will or revocation and the extent of the property disposed of by it; and
  - (b) the proposed will or revocation accurately reflects the intentions of the minor; and
  - (c) it is reasonable in all the circumstances that the order should be made.
- (6) In addition to the requirements for the execution of a will specified in Part 2, one of the witnesses to the making of a will under this section must be the Registrar.
- (7) A will made under this section must be deposited with the Registrar under Part 1, Division 1A of the **Administration and Probate Act 1958**.

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- (8) Despite section 5C of the **Administration and Probate Act 1958**, any will which has been deposited with the Registrar under subsection (7), must not be withdrawn from deposit unless—
- (a) the Court has made an order under this section authorising the revocation of the will; or
  - (b) the testator has attained 18 years of age or marries.
- (9) A failure to comply with subsection (7) does not affect the validity of the will.

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

**21 Wills for persons who do not have testamentary capacity authorised by the Court**

- (1) The Court may make an order authorising a will to be made in specific terms approved by the Court or revoked on behalf of a person who does not have testamentary capacity.
- (2) Any person may make an application for an order under this section if the person has first obtained leave of the Court to make the application.
- (3) The Court may make an order under this section on behalf of a person who is a minor and who does not have testamentary capacity, but must not make an order under this section on behalf of a person who is deceased at the time the order is made.

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## 22 Hearing an application for an order

- (1) In considering an application for an order under section 21—
- (a) the Court may have regard to any information given to the Court in support of an application for leave under section 28; and
  - (b) the Court may inform itself of any other matter in any manner it sees fit; and
  - (c) the Court is not bound by the rules of evidence.
- (2) Nothing in subsection (1) prevents the application of Part 3.10 of the **Evidence Act 2008** to an application under section 21.

S. 22 amended by No. 69/2009 s. 54(Sch. Pt 1 item 66.1) (ILA s. 39B(1)).

S. 22(2) inserted by No. 69/2009 s. 54(Sch. Pt 1 item 66.1).

## 23 Powers of the Court in making an order

In making an order under section 21, the Court may make any necessary related orders or directions.

## 24 Revocation of a will made under an order under section 21

If a will has been made under an order under section 21 on behalf of a person who acquires or regains testamentary capacity after the making of the order, that person may revoke or deal with the will without an order under section 21.

## 25 Execution and storage of wills made under an order under section 21

- (1) A will which is made under an order under section 21 is not valid unless it is in writing, signed by the Registrar and sealed with the seal of the Court.

- (2) The revocation of a will which is made under an order under section 21 is not valid unless it is effected by a document which is signed by the Registrar and sealed with the seal of the Court.
- (3) Any will and any document to which this section applies must be deposited with the Registrar under Part 1, Division 1A of the **Administration and Probate Act 1958**.
- (4) Despite section 5C of the **Administration and Probate Act 1958**, any will and any document to which this section applies, which has been deposited with the Registrar, must not be withdrawn from the deposit unless—
  - (a) the Court has made an order under this section revoking the will; or
  - (b) the person on whose behalf the will has been made has acquired or regained testamentary capacity.
- (5) A failure to comply with subsection (3) does not affect the validity of the will.

**26 Matters of which Court must be satisfied before application for leave to make an application may be granted**

Before granting leave to apply for an order under section 21, the Court must be satisfied that—

- (a) the person on whose behalf the will is to be made or revoked does not have testamentary capacity; and
- (b) the proposed will or revocation reflects what the intentions of the person would be likely to be, or what the intentions of the person might reasonably be expected to be, if he or she had testamentary capacity; and

S. 26(b)  
substituted by  
No. 38/2007  
s. 3.

- (c) it is reasonable in all the circumstances for the Court, by order, to authorise the making of the will or the revocation of the will for the person.

## 27 Hearing an application for leave

- (1) In considering an application for leave to make an order under section 21—
- (a) in addition to any matter which the Court may take into account under section 28, the Court may inform itself in any manner it sees fit; and
- (b) the Court is not bound by the rules of evidence.

- (1A) Nothing in subsection (1) prevents the application of Part 3.10 of the **Evidence Act 2008** to an application under section 21.

S. 27(1A)  
inserted by  
No. 69/2009  
s. 54(Sch. Pt 1  
item 66.2).

- (2) If the Court is satisfied, on the evidence tendered under subsection (1) of the matters set out in section 26(a) to (c), the Court may determine that the application for leave to apply for an order under section 21 proceed as an application for such an order.

## 28 Information which the Court may require in support of an application for leave

In proceedings for the hearing of an application for leave to apply for an order under section 21, the applicant must, if so required by the Court, give—

- (a) a written statement of the general nature of the application and the reasons for making it;
- (b) a reasonable estimate, formed from any evidence available to the applicant, of the size and character of the estate of the person on whose behalf the will is to be made;

- (c) a draft of the proposed will for which the applicant is seeking the Court's approval;
- (d) any evidence available to the applicant of the wishes of the person;
- (e) any evidence available to the applicant of the likelihood of the person acquiring or regaining testamentary capacity;
- (f) any evidence available to the applicant of the terms of any will previously made by the person;
- (g) any evidence available to the applicant of the likelihood of an application being made under Part IV of the **Administration and Probate Act 1958** in respect of property of the person;
- (h) any evidence available to the applicant of the circumstances of any person for whom provision might reasonably be expected to be made under the will;
- (i) any evidence available to the applicant of any persons who might be entitled to claim on intestacy;
- (j) any evidence available to the applicant of any gift for a charitable or other purpose that the person might reasonably be expected to give or make by will;
- (k) any other evidence available to the applicant and which is relevant to the application.

**29 Persons who are entitled to appear at an application for leave**

Each of the following persons is entitled to appear and be heard in any proceedings for the hearing of an application for leave to apply for an order under section 21—

- (a) the person on whose behalf the will is to be made;
- (b) an Australian legal practitioner (within the meaning of the **Legal Profession Act 2004**) representing that person;
- (c) an attorney appointed by that person under an enduring power of attorney;
- (d) any guardian or administrator of the person within the meaning of the **Guardianship and Administration Act 1986**;
- (e) any other person who has, in the opinion of the Court, a genuine interest in the matter.

S. 29(b)  
amended by  
No. 18/2005  
s. 18(Sch. 1  
item 119).

S. 29(d)  
amended by  
No. 52/1998  
s. 311(Sch. 1  
item 108).

### 30 Recognition of statutory wills

- (1) 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 is deemed to be a valid will of the deceased.
- (2) In this section, *statutory will* means a will executed under a statutory provision on behalf of a person who, at the time of the execution, lacked testamentary capacity.

### Division 3—Court authorised rectification of wills

#### 31 Can a will be rectified?

- (1) The Court may make an order to rectify a will to carry out the intentions of the testator, if the Court is satisfied that the will does not carry out the testator's intentions because—
  - (a) a clerical error was made; or
  - (b) the will does not give effect to the testator's instructions.

s. 31

- (2) A person who wishes to make an application for an order under subsection (1) must apply to the Court within 6 months from the date of the grant of probate.
- (3) The Court may extend the period of time for making an application if the Court thinks this is necessary, even if the original period of time has expired, but not if the final distribution of the estate has been made.
- (4) If the personal representative makes a distribution to a beneficiary, the personal representative is not liable if—
  - (a) the distribution is made—
    - (i) to a person who is, at the date of the deceased's death, the spouse of the deceased; or
    - (ii) to the domestic partner or a child of the deceased—

and is made—

      - (iii) in good faith; and
      - (iv) for the purpose of providing for the maintenance, support or education of the person to whom it is made; or
  - (b) the distribution has been made—
    - (i) when the personal representative has not been aware of any application under this section or any application under Part IV of the **Administration and Probate Act 1958** having been made; and
    - (ii) at least 6 months after the grant of probate.

S. 31(4)(a)(ii)  
amended by  
No. 27/2001  
s. 3(Sch. 1  
item 14.4).

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**32 Order to be attached to will**

The Court must direct that a certified copy of an order under section 31 must be attached to the grant of probate or letters of administration with the will annexed (as the case requires) of the will to which the order relates, and the Court must retain the probate or letters of administration until the copy of the order is attached.

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**S. 32**  
amended by  
**No. 43/1998**  
s. 53.

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**PART 4—CONSTRUCTION OF WILLS**

**Division 1—General rules about the construction of wills**

**33 What interest in property does a will operate to dispose of?**

If—

- (a) a testator has made a will disposing of property; and
- (b) after the making of the will and before his or her death, the testator disposes of an interest in that property—

the will operates to dispose of any remaining interest the testator has in that property.

**34 When does a will take effect?**

- (1) A will takes effect, with respect to the property disposed of by the will, as if it had been executed immediately before the death of the testator.
- (2) Subsection (1) does not apply if a contrary intention appears (whether in the will or elsewhere).

**35 What is the effect of a failure of a disposition?**

- (1) If any disposition of property is ineffective, the will takes effect as if the property were part of the residuary estate of the testator.
- (2) Subsection (1) does not apply if a contrary intention appears (whether in the will or elsewhere).
- (3) In this section *disposition of property* does not include the exercise of a power of appointment.

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**36 When is evidence admissible to clarify a will?**

- (1) In any proceedings to construe a will, if the language used in a will renders the will or any part of the will—
  - (a) meaningless; or
  - (b) uncertain or ambiguous on the face of the will; or
  - (c) uncertain or ambiguous in the light of surrounding circumstances—

evidence may be admitted to assist in the interpretation of that language.

- (2) Evidence which may be admitted under subsection (1)(c) does not include evidence of the testator's intention.
- (3) Nothing in this section prevents the admission of evidence which would otherwise be admissible at law in any proceedings to construe a will.

S. 36(3)  
inserted by  
No. 43/1998  
s. 54.

**37 What is the effect of a change in the testator's domicile?**

The construction of a will is not altered by a change in the testator's domicile after he or she has executed the will.

**38 Income on contingent and future dispositions**

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.

**39 Beneficiaries must survive testator by 30 days**

- (1) If a disposition is made to a person who dies within 30 days after the death of the testator, the will is to take effect as if the person had died before the testator.

- (2) Subsection (1) does not apply if a contrary intention appears in the will.
- (3) A general requirement or condition that a beneficiary survive the testator is not a contrary intention for the purpose of this section.
- (4) If the personal representative makes a distribution under the will to a person who is—
  - (a) the spouse of the testator at the date of the testator's death; or
  - (b) the domestic partner or a child of the testator—

S. 39(4)(b)  
amended by  
No. 27/2001  
s. 3(Sch. 1  
item 14.4).

within 30 days after the death of the testator, the personal representative is not liable if the distribution is made—

- (c) in good faith; and
- (d) for the purpose of providing for the maintenance, support or education of the person to whom it is made—

whether or not an application has been made under Part IV of the **Administration and Probate Act 1958** or under section 31 of this Act.

- (5) Any distribution made to a person under subsection (4) must be deducted from the share of the estate to which the person is entitled under the will, or, if the person does not survive the testator by 30 days, must be treated as an administration expense.

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**Division 2—Construction of particular provisions in wills**

**40 What does a general disposition of land include?**

- (1) A general disposition of land or of the land in a particular area includes leasehold land whether or not the testator owns freehold land.
- (2) Subsection (1) does not apply if a contrary intention appears (whether in the will or elsewhere).

**41 What does a general disposition of property include?**

- (1) A general disposition of—
  - (a) all or the residue of the testator's property; or
  - (b) all or the residue of his or her property of a particular description—includes any property over which he or she has a general power of appointment exercisable by will and operates as an exercise of the power.
- (2) Subsection (1) does not apply if a contrary intention appears (whether in the will or elsewhere).

**42 What is the effect of a disposition of real property without words of limitation?**

- (1) 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 to that person.
- (2) Subsection (1) does not apply if a contrary intention appears (whether in the will or elsewhere).

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**43 How are dispositions to issue to operate?**

- (1) A disposition to a person's issue, without limitation as to remoteness, must be distributed to that person's issue in the same manner as if that person had died intestate and as if that person had died leaving only issue surviving.
- (2) Subsection (1) does not apply if a contrary intention appears in the will.

**44 How are requirements to survive with issue construed?**

- (1) If there is a disposition to a person in a will which is expressed to fail if there is either—
  - (a) a want or a failure of issue of that person either in his or her lifetime or at his or her death; or
  - (b) an indefinite failure of issue of that person—

those words must be construed to mean a want or failure of issue in the person's lifetime or at the person's death and not an indefinite failure of his or her issue.
- (2) Subsection (1) does not apply if a contrary intention appears in the will.
- (3) For the purposes of avoiding doubt, subsection (2) does not affect the operation of the rule against perpetuities.

**45 Dispositions not to fail because issue have died before the testator**

- (1) If a person makes a disposition to any of his or her issue, where—
  - (a) the disposition is not a disposition to which section 43 applies; and
  - (b) one or more of the issue do not survive the testator for thirty days; and

(c) the interest in the property is not determinable at or before the death of the issue—

the issue of the deceased issue who survive the testator for 30 days take the deceased issue's share of the disposition in place of the deceased issue in the same manner as if the testator had died intestate and as if the testator had died leaving only issue surviving.

- (2) Subsection (1) applies to dispositions to issue either as individuals or as members of a class.
- (3) Subsection (1) does not apply if a contrary intention appears in the will, but a general requirement or condition that a beneficiary survive the testator or attain a specified age does not indicate a contrary intention for the purposes of this section.
- (4) If an original beneficiary under a will—
- (a) is issue of the testator; and
  - (b) did not survive the testator by 30 days; and
  - (c) did not fulfil a contingency required by the will—

S. 45(4)(c)  
amended by  
No. 43/1998  
s. 55.

subsection (1) does not operate to entitle issue of that beneficiary to a disposition under the will.

#### **46 Construction of residuary dispositions**

- (1) A disposition of the whole or of the residue of the estate of a testator which refers only to the real estate of the testator or only to the personal estate of the testator is to be construed to include both the real and personal estate of the testator.
- (2) Subsection (1) does not apply if a contrary intention appears in the will.

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- (3) If any part of—
- (a) a residuary disposition which is in fractional parts; or
  - (b) a disposition of the whole of the estate which is in fractional parts—
- fails, the part that fails passes to the part which does not fail and, if there is more than one part which does not fail, to all those parts proportionately.
- (4) Subsection (3) does not apply if a contrary intention appears in the will.

**47 Dispositions to unincorporated associations of persons**

- (1) A disposition—
- (a) to an unincorporated association of persons, which is not a charity; or
  - (b) to or upon trust for the aims, objects or purposes of an unincorporated association of persons, which is not a charity; or
  - (c) to or upon trust for the present and future members of an unincorporated association of persons, which is not a charity—
- has effect as a disposition in augmentation of the general funds of the association.
- (2) Property which is or which is to be taken to be a disposition in augmentation of the general funds of an unincorporated association must be—
- (a) paid into the general fund of the association; or
  - (b) transferred to the association; or
  - (c) sold or otherwise disposed of on behalf of the association and the proceeds paid into the general fund of the association.

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- (3) If—
- (a) the personal representative pays money to an association under a disposition, the receipt of—
    - (i) the Treasurer; or
    - (ii) a like officer, if the officer is not so named—of the association is an absolute discharge for that payment; or
  - (b) the personal representative transfers property to an association under a disposition, the transfer of that property to a person or persons designated in writing by any two persons holding the offices of President, Chairman, Treasurer or Secretary or like officers, if those officers are not so named, is an absolute discharge to the personal representative for the transfer of that property.
- (4) Subsection (3) does not apply if a contrary intention appears in the will.
- (5) It is not an objection to the validity of a disposition to an unincorporated association of persons that—
- (a) a list of persons who were members of the association at the time the testator died cannot be compiled; or
  - (b) that the members of the association have no power to divide assets of the association beneficially among themselves.

**48 Can a person, by will, delegate the power to dispose of property?**

A power or a 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 made by the testator, by instrument during his or her lifetime.

S. 49  
amended by  
No. 43/1998  
s. 56 (ILA  
s. 39B(1)).

**49 What is the effect of referring to a valuation in a will?**

(1) If—

- (a) there is an express or implied requirement in a will that a valuation be made or accepted for any purpose; and
- (b) the will does not provide a method of calculating the valuation or the method of calculating the valuation is not provided for by the law of Victoria or of another jurisdiction—

the reference to the valuation in the will is to be construed as if it were a reference to a valuation of the property as at the testator's death made by a competent valuer.

S. 49(2)  
inserted by  
No. 43/1998  
s. 56.

- (2) Subsection (1) does not apply if a contrary intention appears in the will.

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**PART 5—GENERAL**

**50 Who may see a will?**

A person who has possession and control of a will, a revoked will or a purported will of a deceased person must allow the following persons to inspect and make copies of the will (at their own expense)—

- (a) any person named or referred to in the will, whether as beneficiary or not;
- (b) any person named or referred to in any earlier will as a beneficiary;
- (c) any spouse of the testator at the date of the testator's death;
- (d) any domestic partner of the testator;
- (e) any parent, guardian or children of the deceased person;
- (f) any person who would be entitled to a share of the estate if the deceased person had died intestate;
- (g) any parent or guardian of a minor referred to in the will or who would be entitled to a share of the estate of the testator if the testator had died intestate;
- (h) any creditor or other person who has a claim at law or in equity against the estate of the deceased person and who produces evidence of that claim.

S. 50(d)  
amended by  
No. 27/2001  
s. 3(Sch. 1  
item 14.4).

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**PART 6—TRANSITIONAL AND CONSEQUENTIAL PROVISIONS**

**51 Repeal of Wills Act 1958**

The **Wills Act 1958** is repealed.

**52 Transitional provisions**

S. 52(1)  
amended by  
No. 43/1998  
s. 57(1).

(1) This Act, other than sections 4, 8, 9, 10, 12, 31, 33, 34, 35, 37, 38, 40, 41, 42, 47, 48 and 49 applies only to wills made on or after the commencement of this section.

S. 52(2)  
amended by  
No. 43/1998  
s. 57(2).

(2) The **Wills Act 1958**, as in force immediately before the commencement of this section, continues to apply to wills made before the commencement of this section, in so far as those wills do not come under the operation of subsection (3) or (5) or under the operation of the sections specified in subsection (4).

(3) Section 14 applies to a will made before the commencement of this section, if the granting of the decree absolute of the dissolution of the marriage or the annulment of the marriage has taken place after the commencement of this section.

(4) Sections 4, 8, 9, 10, 31, 33, 34, 35, 37, 38, 40, 41, 42, 47, 48 and 49 apply to wills whether or not they are executed before, on or after the commencement of this section, where the testator dies on or after that commencement.

S. 52(5)  
inserted by  
No. 43/1998  
s. 57(3).

(5) Section 12 applies to the revocation, after the commencement of this section, of a will, whether made before, on or after that commencement.

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**52A Transitional provision—Wills Amendment Act 2007**

Section 26, as amended by the **Wills Amendment Act 2007**, applies to an application for leave to apply for an order under section 21 made before the commencement of section 3 of the **Wills Amendment Act 2007** that has not been determined before that commencement.

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S. 52A  
inserted by  
No. 38/2007  
s. 4.

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**PART 7—AMENDMENT OF THE ADMINISTRATION AND  
PROBATE ACT**

**53 Principal Act**

In this Part the **Administration and Probate Act 1958** is called the Principal Act.

**54 Amendment of reference**

In section 19 of the Principal Act, for "State Trust" **substitute** "State Trustees".

**55 New section 91 inserted**

For section 91 of the Principal Act **substitute**—

**"91 Power of the Court to make maintenance order**

- (1) Despite anything in this Act to the contrary, the Court may 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.
- (2) The Court must not make an order under subsection (1) in favour of a person unless—
  - (a) that person has applied for the order; or
  - (b) another person has applied for the order on behalf of that person.
- (3) The Court must not make an order under subsection (1) in favour of a person unless the Court is of the opinion that the distribution of the estate of the deceased person effected by—
  - (a) his or her will (if any); or
  - (b) the operation of the provisions of Part I, Division 6; or

- 
- (c) both the will and the operation of the provisions—  
does not make adequate provision for the proper maintenance and support of the person.
- (4) The Court in determining—
- (a) whether or not the deceased had responsibility to make provision for a person; and
  - (b) whether or not the distribution of the estate of the deceased person as effected by—
    - (i) the deceased's will; or
    - (ii) the operation of the provisions of Part I, Division 6; or
    - (iii) both the will and the operation of the provisions—  
makes adequate provision for the proper maintenance and support of the person; and
  - (c) the amount of provision (if any) which the Court may order for the person; and
  - (d) any other matter related to an application for an order under subsection (1)—  
must have regard to—
    - (e) 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;
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- (f) any obligations or responsibilities of the deceased person to the applicant, any other applicant and the beneficiaries of the estate;
  - (g) the size and nature of the estate of the deceased person and any charges and liabilities to which the estate is subject;
  - (h) 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 for the foreseeable future;
  - (i) any physical, mental or intellectual disability of any applicant or any beneficiary of the estate;
  - (j) the age of the applicant;
  - (k) any contribution (not for adequate consideration) of the applicant to building up the estate or to the welfare of the deceased or the family of the deceased;
  - (l) any benefits previously given by the deceased person to any applicant or to any beneficiary;
  - (m) whether the applicant was being maintained by the deceased person before that person's death either wholly or partly and, where the Court considers it relevant, the extent to which and the basis upon which the deceased had assumed that responsibility;
  - (n) the liability of any other person to maintain the applicant;
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- (o) the character and conduct of the applicant or any other person;
- (p) any other matter the Court considers relevant."

**56 Powers of Court—Amendment of section 94**

At the end of section 94 of the Principal Act  
**insert—**

"; and

- (c) accept any evidence of the deceased person's reasons for making the dispositions in his or her will (if any) and for not making proper provision for the applicant, whether or not the evidence is in writing."

**57 Repeal of section 95**

Section 95 of the Principal Act is **repealed**.

**58 Amendment of section 96—powers to refuse applications**

In section 96 of the Principal Act, subsection (1) is **repealed**.

**59 Amendment of section 97—contents of order**

- (1) In section 97(1) of the Principal Act, for "widow widower or child" **substitute** "person".
- (2) In section 97(5) of the Principal Act, for "widow widower or child" **substitute** "person".
- (3) For section 97(6) of the Principal Act **substitute—**  
"(6) Subject to subsection (7), the Court may make any order as to the costs of an application under section 91 that is, in the Court's opinion, just.

s. 60

(7) If the Court is satisfied that an application for an order under section 91 has been made frivolously, vexatiously or with no reasonable prospect of success, the Court may order the costs of the application to be made against the applicant."

S. 60  
substituted by  
No. 43/1998  
s. 58.

## **60 Insertion of new Part IVA**

After Part IV of the Principal Act **insert**—

### **"PART IVA—TRANSITIONAL**

#### **99AA Transitional provision—Wills Act 1997**

Despite the amendment of this Act by Part 7 of the **Wills Act 1997**, Part IV of this Act, as in force immediately before the commencement of Part 7 of the **Wills Act 1997**, continues to apply to the estate of a person who has died before that commencement.

#### **99AB Further transitional provision—Wills Act 1997**

Despite the amendment of this Act by section 61 of the **Wills Act 1997**, Part V of this Act, as in force immediately before the commencement of that section, continues to apply to wills made before the commencement of Part 2 of the **Wills Act 1997**."

S. 61  
inserted by  
No. 43/1998  
s. 58.

## **61 Repeal of Part V**

Part V of the Principal Act is **repealed**.

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## ENDNOTES

### 1. General Information

*Minister's second reading speech—*

*Legislative Assembly: 9 October 1997*

*Legislative Council: 12 November 1997*

The long title for the Bill for this Act was "to re-state with amendments the law relating to wills in Victoria, to repeal the **Wills Act 1958** and to amend the **Administration and Probate Act 1958**."

The **Wills Act 1997** was assented to on 2 December 1997 and came into operation as follows:

Sections 1 and 2 on 2 December 1997: section 2(1); rest of Act on 20 July 1998: Government Gazette 16 July 1998 page 1924.

## 2. Table of Amendments

This Version incorporates amendments made to the **Wills Act 1997** by Acts and subordinate instruments.

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### **Miscellaneous Acts (Omnibus No. 1) Act 1998, No. 43/1998**

*Assent Date:* 26.5.98  
*Commencement Date:* Ss 52–57 on 26.5.98: s. 2(1); s. 58 on 20.7.98: s. 2(5)  
*Current State:* This information relates only to the provision/s amending the **Wills Act 1997**

### **Tribunals and Licensing Authorities (Miscellaneous Amendments) Act 1998, No. 52/1998**

*Assent Date:* 2.6.98  
*Commencement Date:* S. 311(Sch. 1 item 108) on 1.7.98: Government Gazette 18.6.98 p. 1512  
*Current State:* This information relates only to the provision/s amending the **Wills Act 1997**

### **Statute Law Amendment (Relationships) Act 2001, No. 27/2001**

*Assent Date:* 12.6.01  
*Commencement Date:* S. 3(Sch. 1 item 14) on 28.6.01: Government Gazette 28.6.01 p. 1428  
*Current State:* This information relates only to the provision/s amending the **Wills Act 1997**

### **Legal Profession (Consequential Amendments) Act 2005, No. 18/2005**

*Assent Date:* 24.5.05  
*Commencement Date:* S. 18(Sch. 1 item 119) on 12.12.05: Government Gazette 1.12.05 p. 2781  
*Current State:* This information relates only to the provision/s amending the **Wills Act 1997**

### **Wills Amendment Act 2007, No. 38/2007**

*Assent Date:* 14.8.07  
*Commencement Date:* Ss 3, 4 on 15.8.07: s. 2  
*Current State:* This information relates only to the provision/s amending the **Wills Act 1997**

### **Relationships Act 2008, No. 12/2008**

*Assent Date:* 15.4.08  
*Commencement Date:* S. 73(1)(Sch. 1 item 66) on 1.12.08: s. 2(2)  
*Current State:* This information relates only to the provision/s amending the **Wills Act 1997**

### **Statute Law Amendment (Evidence Consequential Provisions) Act 2009, No. 69/2009**

*Assent Date:* 24.11.09  
*Commencement Date:* S. 54(Sch. Pt 1 item 66) on 1.1.10: s. 2(2)  
*Current State:* This information relates only to the provision/s amending the **Wills Act 1997**

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### 3. Explanatory Details

No entries at date of publication.