

WESTERN AUSTRALIA.

LAW REFORM (PROPERTY, PERPETUITIES, AND SUCCESSION).

11th Elizabeth II., No. LXXXIII.

No. 83 of 1962.

AN ACT to amend the law of property known as the rule against perpetuities, and to make provision for other matters relating to property and succession, and for incidental and other purposes.

[Assented to 6th December, 1962.]

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and the Legislative Assembly of Western Australia, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I.—PRELIMINARY.

1. This Act may be cited as the *Law Reform* Short title.
(Property, Perpetuities, and Succession) Act, 1962

**Division of
Act.**

2. This Act is divided into Parts as follows:—

PART I.—PRELIMINARY, ss. 1-4.

PART II.—PERPETUITIES, ss. 5-19.

PART III.—SUCCESSION, ss. 20-21.

PART IV.—MISCELLANEOUS, ss. 22-25.

Application.

3. (1) Except where otherwise expressly provided in this Act, this Act—

(a) insofar as it applies to wills, applies only to the wills of testators dying after the commencement of this Act, and

(b) insofar as it applies to instruments other than wills, applies only to instruments executed after the commencement of this Act.

(2) This Act binds the Crown.

**Interpre-
tation.**

4. In this Act, unless the context otherwise requires,—

“Court” means the Supreme Court of Western Australia or a judge thereof;

“decision of the Court” includes the decision of a court hearing an appeal from the Court;

“instrument” includes a will and also includes an instrument, testamentary or otherwise, exercising a power of appointment, whether general or special, even if the power were created before this Act comes into force; and does not include an Act of Parliament;

“limitation” includes any provision in an instrument whereby any property, or any interest in any property, or any right, power, authority or discretion in or over or in connection with any property, is or purports to be devised or bequeathed to, or created for, or given or granted or appointed to or conferred upon, or otherwise limited to, any person or purpose, and whether subject to a condition, precedent or subsequent, or not;

“property” includes any thing in action, and any interest in real or personal property;

“trust” and “trustee” have the same meaning as in the Trustees Act, 1962;

“will” includes a codicil.

PART II.—PERPETUITIES.

5. In determining whether any limitation is invalid as infringing the rule against perpetuities, the perpetuity period is, for the purposes of that rule, such period of years not exceeding eighty as may be specified in the instrument creating that limitation or, if no such period of years is specified, the period which is applicable under the rule at law.

The perpetuity period.

6. (1) This section applies whenever, in determining whether any limitation is invalid as infringing the rule against perpetuities, or in determining the right of any persons to put an end to a trust or accumulation, or generally in the management or administration of any trust, estate or fund, or for any purposes relating to the disposition, transmission or devolution of property, it becomes relevant to enquire whether any person is or at a relevant date was or will be capable of procreating or bearing a child.

Capacity to procreate or bear a child.

(2) Where this section applies, there is a presumption, rebuttable by sufficient evidence to the contrary tendered at the time at which the matter falls for decision (but not subsequently), that—

(a) a woman who has attained the age of fifty-five years is incapable of bearing a child; and

(b) a male or female who has not attained the age of twelve years is incapable of procreating or bearing a child.

(3) Where this section applies, medical evidence that a male or female of any age is or at a relevant date was or will be incapable of procreating or bearing a child is admissible in proceedings in order

to establish that incapacity, and the Court may accept any such evidence of a high degree of improbability of procreating or child-bearing as it thinks proper as establishing the incapacity.

(4) Any decision of the Court, in which any such presumption as is mentioned in subsection (2) of this section is applied or in which any such evidence as is mentioned in subsection (3) of this section is accepted, remains effective notwithstanding the subsequent birth of a child; but if a limitation, that is not itself invalid as infringing the rule against perpetuities, confers upon that child or his spouse, or upon his issue or the spouse of any of his issue, a right to any property, that right (including any right to follow or trace the property) is not affected by the decision of the Court.

"Wait and see" rule.

7. (1) A limitation shall not be declared or treated as invalid, as infringing the rule against perpetuities, unless and until it is certain that the interest that it creates cannot vest within the perpetuity period or, if the limitation creates or confers a general power of appointment over or in connection with property, that the power cannot become exercisable within the perpetuity period, but if the power becomes exercisable within that period it is valid.

(2) Where a limitation creates a power exercisable over or in connection with any property, whether that power be a special power of appointment, or a power of advancement or of distribution under a discretionary trust, or any other power (not being a general power of appointment or a power that is exempted from the application of the rule against perpetuities by section twenty-nine of the Trustees Act, 1962), that limitation is valid, so far as the rule against perpetuities is concerned,—

- (a) if the power is exercisable only during the perpetuity period; or
- (b) if and to the extent that the power is exercised during the perpetuity period.

(3) Nothing in this section makes any person a life in being for the purpose of ascertaining the perpetuity period unless that person would have been reckoned a life in being for that purpose if this section had not been enacted.

8. (1) A trustee of any property, or any person interested under, or on the invalidity of, a limitation of property, may at any time apply to the Court for a declaration as to the validity, in respect of the rule against perpetuities, of a limitation of that property.

Power of Court to make declaration as to validity of limitations.

(2) The Court may, on an application under subsection (1) of this section, make a declaration, on the basis of facts existing and events that have occurred at the time the declaration is made, as to the validity or otherwise of the limitation in respect of which the application is made; but the Court shall not make a declaration in respect of any limitation the validity of which cannot be determined at the time at which the Court is asked to make the declaration.

9. (1) Where in an instrument the absolute vesting either of capital or income of property, or the ascertainment of a beneficiary or class of beneficiaries, is made to depend on the attainment by any person of an age exceeding twenty-one years, and the gift to that beneficiary or class or any member thereof, or any gift over, remainder, executory limitation or trust arising on the total or partial failure of the original gift, would, but for this section, be rendered invalid as infringing the rule against perpetuities, the instrument takes effect for the purposes of that gift, gift over, remainder, executory limitation or trust as if the absolute vesting or ascertainment had been made to depend on the person attaining the age of twenty-one years, and that age shall be substituted for the age stated in the instrument.

Invalid age contingencies. Cf. Law Reform (Miscellaneous Provisions) Act, 1941, s. 5.

(2) This section applies to any instrument other than a will executed after the twenty-fourth day of October, one thousand nine hundred and forty-two and to any testamentary appointment (whether made in exercise of a general or special power), devise or bequest contained in the will of a person dying after that date, whether the will was made before or after that date; but, in the case of an instrument executed, and the will of a person dying, after the commencement of this Act, this section applies only to the extent provided in section eleven of this Act.

(3) This section applies without prejudice to any provision whereby the absolute vesting either of capital or income of property, or the ascertainment of a beneficiary or class of beneficiaries, is also made to depend on the marriage of any person, or any other event which may occur before the age stated in the instrument is attained.

(4) Section five of the Law Reform (Miscellaneous Provisions) Act, 1941, is repealed.

**Class
gifts.**

10. (1) A limitation to a class of persons is not invalid as infringing the rule against perpetuities by reason of the failure of the limitation as to some only of the members of the class, but the limitation shall, in that case, be construed and take effect as a limitation only to those members of the class who attain a vested interest within the perpetuity period.

(2) This section applies only to the extent provided in section eleven of this Act.

**Order of
applying
rules.**

11. (1) The provisions of section nine of this Act shall not be applied—

- (a) unless and until it is certain that a limitation as worded is invalid as infringing the rule against perpetuities, and
- (b) unless either—
 - (i) the application of the provisions of that section would render the limitation valid, or

- (ii) the application of the provisions of that section, in conjunction with the provisions of section ten of this Act, would render the limitation valid.

(2) The provisions of section ten of this Act shall not be applied unless and until—

- (a) it is certain that a limitation as worded is invalid as infringing the rule against perpetuities, and
- (b) any invalid age contingency in that limitation has been reduced in accordance with the provisions of section nine of this Act as applied by subsection (1) of this section.

12. The widow or widower of a person who is a life in being for the purpose of the rule against perpetuities shall be deemed a life in being for the purpose of— **Unborn spouses.**

- (a) a limitation in favour of that widow or widower, and
- (b) a limitation in favour of a person who attains, or of a class the members of which attain, according to the limitation, a vested interest on or after the death of the survivor of that person and his spouse.

13. (1) A limitation, that itself complies with the rule against perpetuities, is not invalidated solely by reason of its being preceded by one or more invalid limitations, whether or not it expressly, or by implication, takes effect after, or subject to, or is dependent upon, those invalid limitations or any of them. **Dependent limitations.**

(2) Where a limitation is invalid as infringing the rule against perpetuities, any subsequent valid limitation is thereby accelerated.

Options.

14. (1) The rule against perpetuities does not apply to—

- (a) an option granted to a lessee in respect of the property demised, being an option exercisable only during the currency of the lease or within one year after the expiration thereof and enabling the lessee or the lessee for the time being to purchase the freehold or other superior interest in the demised property; or
- (b) an option to acquire an interest in land, not being an option to which paragraph (a) of this subsection refers.

(2) An option to which paragraph (b) of subsection (1) of this section refers, and which according to its terms is, or may be, exercisable at a date more than twenty-one years from the date of its grant, becomes void, on the expiry of twenty-one years from the date of its grant, as between the original parties to that grant and all persons claiming through them.

(3) Nothing in this section affects an option for renewal contained in a lease or a pre-emptive right to acquire an individual unit or individual units of accommodation in a building containing several units.

Application of the rule to possibilities of reverter, rights of entry and resulting trusts.

15. (1) The rule against perpetuities as amended by this Act applies—

- (a) to a possibility of reverter in land consequent upon a fee simple determinable; and so that, if the fee simple does not determine within the perpetuity period, it thereafter continues as a fee simple absolute;
- (b) to a right of entry for condition broken the exercise of which may determine a fee simple subject to a condition subsequent; and so that, if the right of entry is not exercised within the perpetuity period, the fee simple thereafter continues as a fee simple absolute; and

- (c) to an interest in property by way of resulting trust analogous to a possibility to a reverter in land; and so that, if the initial trust does not determine within the perpetuity period, the interest it creates thereafter continues as an absolute interest.

(2) The provisions of subsection (1) of this section apply as therein provided, whether the determinable or conditional estate or interest is charitable or not, except that the rule against perpetuities does not apply to a gift over from one charity to another.

16. For all purposes connected with the rule against perpetuities, a power of appointment under which there is a sole donee who is at all times free, without the concurrence of any other person, to appoint the whole of the property to himself is a general power, and every other power of appointment is a special power; but, notwithstanding the foregoing provisions of this section, an appointment made by will under a power that would, but for the fact that it was made exercisable only by will, have been a general power is to be treated as having been made under a general power for all purposes connected with the rule against perpetuities.

Powers of
appointment.

17. (1) The Act of the Parliament of Great Britain, 39 and 40 Geo. 3, c. 98 (known as the Accumulations Act 1800), ceases to apply in the State.

Accumula-
tions of
income.

(2) Where property is settled or disposed of in such manner that the income thereof may or shall be accumulated wholly or in part, the power or direction to accumulate that income is valid if the disposition of the accumulated income is, or may be, valid and not otherwise.

(3) Nothing in this section affects the right of any person or persons to terminate an accumulation that is for his or their benefit or any jurisdiction or power of the Court to maintain or advance out of accumulations or any powers of a trustee under Part V of the Trustees Act, 1962.

(4) For the avoidance of doubt, it is hereby declared that this section has effect only as provided by section three of this Act.

Rule in
Whitby v.
Mitchell
abolished.

18. The rule of law prohibiting the limitation, after a life interest to an unborn person, of an interest in land to the unborn child or other issue of an unborn person is hereby abolished, but without prejudice to any other rule relating to perpetuities.

Superannua-
tion funds,
etc.
Cf. W.A.
Companies
Act, s. 421.
Victoria,
Trustees
Act, s. 73 (1).

19. (1) The rule against perpetuities does not apply and shall be deemed never to have applied to—

- (a) a trust or fund established for the purpose of making provision by way of assistance, benefits, superannuation, allowances, gratuities or pensions for the employees of any employer or the widows, widowers, children, grandchildren, parents or dependants of any of those employees or for any persons duly selected or nominated for that purpose pursuant to the provisions of the trust or fund; and
- (b) a trust or fund established for the purpose of making provision by way of superannuation for persons (not being employees) engaged in any lawful profession, trade, occupation or calling or the widows, widowers, children, grandchildren, parents or dependants of any of those persons or for any persons duly selected or nominated for that purpose pursuant to the provisions of the trust or fund.

(2) In paragraph (a) of subsection (1) of this section, "employee" includes any director, officer, servant or person at any time in the employment—

- (a) of an employer, or
- (b) of an employer that is a subsidiary of an employer, or
- (c) of an employer that is allied to, or associated with, an employer, or

- (d) of an employer that is allied to, or associated with, a subsidiary of an employer, or
 - (e) of an employer having a subsidiary, or
 - (f) of an employer whose business is acquired by an employer,
- that establishes or contributes to a trust or fund such as is mentioned in that paragraph; and in this subsection "employer" includes a company.

PART III.—SUCCESSION.

20. (1) Notwithstanding anything in section eighteen of the Wills Act, 1837 (adopted in the State by 2 Vict., No. 1) or any other statutory provision or rule of law to the contrary, a will expressed to be made in contemplation of a marriage is not revoked by the solemnisation of the marriage contemplated.

Wills in contemplation of marriage. Of U.K. L.P.A., 1925, s. 177.

(2) Without limiting the provisions of subsection (1) of this section, a will expressed to be made in contemplation of marriage is, unless the testator expressly provides to the contrary, not valid in the event of the contemplated marriage not being solemnised.

(3) This section applies only to wills made after the commencement of this Act.

21. (1) Unless a contrary intention appears by the will, where any person is a child or other issue of the testator to whom (whether as a named or designated person or as a member of a class) any property is devised or bequeathed or appointed in terms that would enable that person to take the property for any estate or interest not determinable at or before the death of that person if that person survived the testator, and that person dies in the lifetime of the testator (whether before or after the testator makes the will) leaving any child or children living at the time of the death of the testator, the devise or bequest or appointment takes effect as if the will had contained a substitutional gift devising or bequeathing or appointing the property to such of the children of that person as are living at the time of the testator's death and if more than one in equal shares.

Statutory substitutional gift. Of N.Z. Wills Amendment Act, 1953, s. 3.

(2) Without limiting the manner in which a testator may show an intention to negative the operation of subsection (1) of this section, it is hereby declared that that subsection does not apply—

- (a) to a devise or bequest or appointment to any person that is in any way expressed to be conditional on the person being alive at or after the time of the death of the testator or any time or event which in the events that happen is subsequent to the time of the death of the testator; or
- (b) to a devise or bequest or appointment to a person that is in any way expressed to be conditional on the fulfilment by that person of any other contingency and that contingency has not been fulfilled before the time of the testator's death.

(3) This section does not apply to—

- (a) any specific legacy or specific appointment of any chattels; or
- (b) any devise or bequest or appointment to any person as one of two or more joint tenants.

(4) In this section—

“appointment” means an appointment made by will in exercise of a general power of appointment; and also means an appointment made by will in exercise of a special power of appointment if every child in whose favour this section would operate is an object of the power; and the terms “appointed” and “appointing” have corresponding meanings;

“chattels” does not include money or securities for money;

“child,”—

- (a) in relation to a testator, means any child (whether legitimate or illegitimate) of the testator;

(b) in relation to any person to whom any property is devised or bequeathed or appointed as mentioned in this section, means a legitimate child of that person; and also, in relation to any woman, includes any illegitimate child of that woman;

“issue,” in relation to a testator, means any issue (whether legitimate or illegitimate in any generation) of the testator;

(5) For the purposes of this section, an illegitimate relationship between a father and his child shall not be recognised unless there is proof that the paternity of the father has been admitted by or established against the father while both the father and child were living.

(6) This section applies only to wills made after the commencement of this Act.

(7) For the purposes of the law of Western Australia, section thirty-three of the Wills Act, 1837 (adopted in the State by 2 Vict., No. 1) does not apply to any will made after the commencement of this Act, except in relation to a specific legacy or a specific appointment of any chattels.

(8) For the purposes of this section, every will that is re-executed or confirmed or revived by any codicil shall be deemed to have been made at the time when it was first made, and not at the time when it was re-executed or confirmed or revived.

PART IV.—MISCELLANEOUS.

22. (1) A contingent or future specific or residuary devise or bequest of property, and a specific or residuary devise or bequest of property upon trust for a person whose interest is contingent or executory, carries the intermediate income of that property from the death of the testator, except so far as the income or any part thereof may be otherwise expressly disposed of.

Intermediate
income of
executory or
contingent
gifts.
Cr. N.Z.
P.L.A.,
1952, s. 35.
N.S.W. Conv.
Act, s. 36B.
U.K. L.P.A.
1925, s. 175.

(2) Where, under an instrument other than a will, property stands limited to a person for a contingent or future interest, or stands limited to trustees upon trust for a person whose interest is contingent or executory, that interest carries the intermediate income of that property from the time when the instrument comes into operation, except so far as the income or any part thereof may be otherwise expressly disposed of.

(3) In determining whether any devise or bequest or other limitation of property carries the intermediate income of that property any uncertainty whether the devise or bequest or limitation will ultimately prove void for perpetuity shall be disregarded.

(4) Subsection (1) of this section applies only in relation to wills made after the commencement of this Act.

Recovery of
payments
made under
mistake of
law.
Cf. N.Z.
Judicature
Act, 1908
(amended
1958), s. 94A.

23. (1) Subject to the provisions of this section, where relief in respect of any payment that has been made under mistake is sought in any court, whether in an action or other proceeding or by way of defence, set off, counterclaim or otherwise, and that relief could be granted if the mistake were wholly one of fact, that relief shall not be denied by reason only that the mistake is one of law whether or not it is in any degree also one of fact.

(2) Nothing in this section enables relief to be given in respect of any payment made at a time when the law requires or allows, or is commonly understood to require or allow, the payment to be made or enforced, by reason only that the law is subsequently changed or shown not to have been as it was commonly understood to be at the time of the payment.

Payments
made under
mistake of
law or fact
not always
recoverable.
1914, s. 94B.

24. (1) Relief, whether under section twenty-three of this Act or in equity or otherwise, in respect of any payment made under mistake, whether of law or fact, shall be denied wholly or in part if

the person from whom relief is sought received the payment in good faith and has so altered his position in reliance on the validity of the payment that in the opinion of the Court, having regard to all possible implications in respect of the parties (other than the plaintiff or claimant) to the payment and of other persons acquiring rights or interests through them, it is inequitable to grant relief, or to grant relief in full.

(2) Where the Court makes an order for the repayment of any money paid under a mistake, the Court may in that order direct that the repayment shall be by periodic payments or by instalments, and may fix the amount or rate thereof, and may from time to time vary, suspend or discharge the order for cause shown, as the Court thinks fit.

25. (1) A restriction upon anticipation or alienation attached to the enjoyment of any property by a woman that could not have been attached to the enjoyment of that property by a man is of no effect.

Abolition of
restraint
upon
anticipation.

(2) For the avoidance of doubt, it is hereby declared that this section has effect only as provided by section three of this Act.