



Western Australia

Wills Act 1970

Compare between:

[17 Oct 2003, 03-a0-04] and [26 Oct 2007, 03-b0-01]

Western Australia

Wills Act 1970

An Act to consolidate and amend the law relating to wills.

Part I — Preliminary

1. Short title

This Act may be cited as the *Wills Act 1970*¹.

2. Commencement

This Act shall come into operation on a date to be fixed by proclamation¹.

[3. *Omitted under the Reprints Act 1984 s. 7(4)(f).*]

4. Definitions

In this Act, unless the contrary intention appears —

“**country**” means any place or group of places having its own law of nationality, including the Commonwealth and its territories;

“**disposition**” includes a gift, devise, bequest or an appointment of property contained in a will; and

“**dispose of**” has a corresponding meaning;

“**internal law**” in relation to any country or place means the law that would apply in a case where no question of the law in force in any other country or place arose;

“**place**” means any territory including a State or Territory of the Commonwealth;

“**property**” includes real and personal property or any interest therein and any thing or chose in action;

“**will**” includes a codicil and any testamentary instrument.

5. Application of Act

This Act applies to the will of any person dying on or after the date of the coming into operation of this Act, whether the will was executed or made before, on or after that date but does not apply to the will of any person who died before that date.

Part II — Dispositions and appointments by will

6. Property disposable by will

A person may, by a will executed or made in manner required or permitted by this Act, dispose of all his property (whether acquired before or after making his will) to which at the time of his death he is entitled either at law or in equity and of all property that in exercise of a power of appointment he is entitled or able to dispose of by his will, and may also by his will appoint a guardian of his infant children.

7. Age of capacity to make will

Subject to the provisions of Part VI, a will made by a person under the age of 18 years is not valid.

Part III — Execution of wills

8. Execution generally

Subject to the provisions of Part VI and section 34, a will is not valid unless —

- (a) it is in writing;
- (b) it is signed by the testator or signed in his name by some other person in his presence and by his direction, in such place on the will so that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as his will;
- (c) the testator makes or acknowledges the signature in the presence of at least 2 witnesses present at the same time; and
- (d) the witnesses attest and subscribe the will in the presence of the testator but no publication or form of attestation is necessary.

[Section 8 amended by No. 69 of 1987 s. 4.]

9. Execution of will exercising a power of appointment

- (1) A will executed in the manner required by this Act is, so far as respects the execution and attestation thereof, a valid exercise of a power of appointment by will, notwithstanding it has been expressly required that a will made in exercise of such power should be executed or attested with some additional or other form of execution or attestation or solemnity.
- (2) For the purposes of subsection (1), a document that is a will by operation of Part X is deemed to be executed in the manner required by this Act.

[Section 9 amended by No. 69 of 1987 s. 5.]

10. Alterations after execution

- (1) Subject to subsection (2) and section 35, unless an alteration made to a will after its execution is made in accordance with the provisions of this Act governing the making of a will, the alteration has no effect except to invalidate words or meanings that it renders no longer apparent.
- (2) An alteration that is made in a will after the will has been made is validly made when the signature of the testator and subscription of witnesses to the signature of the testator to the alteration, or in the case of a will that was made under Part VI, the signature of the testator, are or is made —
 - (a) in the margin or in some other part of the will opposite or near the alteration; or
 - (b) at the foot or end of, or opposite to, a memorandum referring to the alteration and written in some part of the will.
- (3) In this section “**apparent**” means legible by the unaided eye or with the help of a magnifying lens but not otherwise.

[Section 10 amended by No. 69 of 1987 s. 6.]

Part IV — Witnesses to wills

11. Executor or creditor not incompetent witness

An executor of the will or a creditor of the estate to which the will relates is not on that account incompetent as a witness to prove the execution of the will or its validity or invalidity.

12. Beneficiary not incompetent witness

A person to whom a disposition is made by a will or the spouse or de facto partner of such person is not on that account incompetent as a witness to prove the execution of the will or its validity or invalidity.

[Section 12 amended by No. 28 of 2003 s. 210.]

[13. Repealed by No. 28 of 2003 s. 211(1)².]

Part V — Revocation of wills

14. Subsequent marriage

- (1) A will is revoked by the marriage of the testator except where —
 - (a) there is a declaration in the will that it is made in contemplation of the marriage; or
 - (b) the will is made in exercise of a power of appointment where the property thereby appointed would not in default of appointment pass to the testator's personal representatives as such.
- (2) A will expressed to be made in contemplation of the marriage of the testator is void if the marriage is not solemnised, unless the will provides to the contrary.

15. When will revoked

- (1) Subject to section 36, a will or a part of a will is revoked only by —
 - (a) marriage, subject to section 14;
 - (b) a later will executed in manner provided by this Act that expressly or impliedly revokes the earlier will;
 - (c) a writing declaring an intention to revoke it that is executed in the manner in which a will is required by this Act to be executed; or
 - (d) burning, tearing or otherwise destroying it by the testator or by some person in his presence and by his direction with the intention of revoking it.
- (2) For the purposes of subsection (1), a document that is a will by operation of Part X is deemed to be executed in the manner required by this Act.

[Section 15 amended by No. 69 of 1987 s. 7.]

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16. How revoked will revived

- (1) Subject to section 37, a will or any part of a will that has been in any manner revoked is revived only by the re-execution thereof or by a later will executed in manner required by this Act and showing an intention to revive the will or part.
- (2) When a will that has been partly revoked and afterwards wholly revoked, is revived, the revival does not, unless the contrary intention appears by the will, extend to the part that was revoked before the revocation of the whole.

[Section 16 amended by No. 69 of 1987 s. 8.]

Part VI — Privileged wills

17. Persons entitled to make privileged wills

Any of the following persons irrespective of his age may make a valid will and may also validly revoke a will with or without making a new will: —

- (a) any person, whether as a member or not, serving with the armed forces of the Commonwealth or its allies while in actual military, naval or air service in connection with operations that are, or have been taking place, or are believed to be imminent in relation to a war declared or undeclared or other armed conflict in which members of such armed forces are, or have been or are likely to be engaged;
- (b) any mariner or seaman being at sea.

18. Making of a privileged will

A will made by a person to whom the provisions of section 17 apply need not be executed in the manner required by section 8 but may be made, without any formality, by any form of words, whether written or spoken, if it is clear that he thereby intended to dispose of his property after his death.

19. Revocation of privileged will

A person who has made a will at a time when the provisions of section 17 applied to him may, after those provisions cease to apply to him and while under the age of 18 years, revoke such will by any manner of revocation provided in this Act other than by the making of a later will.

Part VII — Rules as to formal validity of wills

20. Effect of this Part

The provisions of this Part take effect notwithstanding any other provisions of this Act.

21. General rule as to formal validity

A will shall be treated as properly executed if its execution conformed to the internal law in force in the place where it was executed, or in the place where, at the time of its execution or of the testator's death, he was domiciled or had his habitual residence, or in a country of which, at either of those times, he was a national.

22. Additional rules

Without prejudice to the provisions of section 21 the following wills shall be treated as properly executed: —

- (a) a will executed on board a vessel or aircraft of any description, if the execution of the will conformed to the internal law in force in the place with which, having regard to its registration, if any, and other relevant circumstances, the vessel or aircraft may be taken to have been most closely connected;
- (b) a will so far as it disposes of immovable property if its execution conformed to the internal law in force in the place where the property was situated;
- (c) a will so far as it revokes a will which under this Part would be treated as properly executed or revokes a provision which under this Part would be treated as comprised in a properly executed will, if the execution of the later will conformed to any law by reference to which the revoked will or provision would be so treated;

- (d) a will so far as it exercises a power of appointment if the execution of the will conformed to the law governing the essential validity of the power.

23. Ascertainment of system of internal law

- (1) Where under this Part the internal law in force in any country or place is to be applied in the case of a will, but there are in force in that country or place 2 or more systems of internal law relating to the formal validity of wills, the system to be applied shall be ascertained as follows: —
 - (a) if there is in force throughout the country or place a rule indicating which of those systems can properly be applied in the case in question, that rule shall be followed; or
 - (b) if there is no such rule, the system shall be that with which the testator was most closely connected at the relevant time and for this purpose the relevant time is the time of the testator's death where the matter is to be determined by reference to circumstances prevailing at his death and at the time of execution of the will in any other case.
- (2) In determining for the purpose of this Part whether or not the execution of a will conformed to a particular law, regard shall be had to the formal requirements of that law at the time of execution of the will, but this does not prevent account being taken of an alteration of law affecting wills executed at that time, if the alteration enables the will to be treated as properly executed.
- (3) Where a law in force outside this State falls, whether in pursuance of this Part or not, to be applied in relation to a will, any requirement of that law whereby special formalities are to be observed by testators answering a particular description or witnesses to the execution of a will are to possess certain qualifications, shall be treated, notwithstanding any rule of that law to the contrary, as a formal requirement only.

Part VIII — The construction of wills

24. Change of domicile

The construction of a will shall not be altered by reason of any change in the testator's domicile after the execution of the will.

25. Disposition not revoked by an alteration of the estate or interest of the testator

A transfer of or other act relating to any property comprised in a disposition, not being an act by which the will is revoked as provided in this Act, made or done after the making of the will, does not prevent the operation of the will with respect to any estate or interest in the property that the testator had power to dispose of by will at the time of his death.

26. General rules of construction

Unless the contrary intention appears by the will —

- (a) the will is to be construed, with reference to the property comprised in it, to speak and take effect as if it has been executed immediately before the death of the testator;
- (b) property that is the subject of a disposition that is void or fails to take effect is to be included in any residuary disposition contained in the will;
- (c) a general disposition of land or of the land in a particular area includes leasehold land whether or not the testator owns freehold land;
- (d) a general disposition of all the testator's property or of all his property of a particular kind includes property over which he had a general power of appointment exercisable by will and operates as an execution of the power;
- (e) a disposition of property without words of limitation whether to a person beneficially or as executor or trustee

is to be construed as passing the whole estate or interest of the testator therein.

27. Statutory substitutional gift

- (1) Unless the contrary intention appears by the will, where there is a disposition therein to a person who is a child or other issue of the testator, for an estate or interest not determinable at or before the death of that person and that person dies in the lifetime of the testator leaving a child or children who survive the testator, the disposition does not lapse but takes effect as a substitutional disposition to such of the children of that person who survive the testator and if more than one in equal shares.
- (2) This section applies whether the disposition referred to in subsection (1) is to a person as a named or designated person or as a member of a class.
- (3) This section does not apply to a disposition to a person as one of 2 or more joint tenants.

28. Charges on property to be paid primarily out of property charged

- (1) Where by his will a testator disposes of any property that at the time of his death is charged with the payment of money whether by way of mortgage, charge, lien (including a lien for unpaid purchase money) or otherwise and the testator has not by the will or by a deed or other document signified a contrary or other intention the property so charged is, as between the different persons claiming through the testator, primarily liable for payment of the money secured by the charge, and every part of such property according to its value shall bear a proportionate part of the charge on the whole.
- (2) Such contrary or other intention is not deemed to be signified —
 - (a) by a general direction for the payment of the debts, or of all the debts of the testator out of his personal estate, or

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out of his residuary real and personal estate, or out of his residuary real estate; or

- (b) by a charge of debts on any such estates, unless such intention is further signified by words expressly or by necessary implication referring to all or some part of the charge.
- (3) Nothing in this section affects the right of the person entitled to the charge to obtain payment or satisfaction thereof either out of the other assets of the testator's estate or otherwise.

Part IX — Illegitimacy³

[Heading inserted by No. 20 of 1971 s. 3.]

29. Application of Part IX

The provisions of this Part apply to the will of any person which is executed on or after the date of the coming into operation of the *Wills Act Amendment Act 1971*¹, but does not apply to the will of any person which was executed before that date and, notwithstanding any rule of law, a disposition made by a will executed before that date shall not be treated for the purposes of this Part as made on or after that date by reason only that a codicil to the will is executed on or after that date.

[Section 29 inserted by No. 20 of 1971 s. 3.]

30. Abolition of rule regarding illegitimates not in being

As respects any will to which this Part applies, any rule of law that a disposition in favour of illegitimate children not in being when the disposition takes effect is void as contrary to public policy is hereby abolished.

[Section 30 inserted by No. 20 of 1971 s. 3.]

31. Determination of relationships

- (1) Unless the contrary intention appears by the will, where for the purpose of determining who is entitled to an interest in any property that is the subject of a disposition (whether that disposition is effected under that will or under the provisions of section 27) it is necessary to determine any relationship, the relationship between a child and his or her parents shall be determined irrespective of whether the parents are or have been married to each other, and all other relationships, whether lineal or collateral, shall be construed accordingly.

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- (2) In any proceedings where a person relies on a matter of fact made relevant by the provisions of subsection (1) —
- (a) that fact shall not be taken to be proved unless it is established to the reasonable satisfaction of the Court; and
 - (b) where the parents are not, or have not been, married to each other, the relationship between a child and his or her parent, and all other lineal or collateral relationships, shall be recognised only —
 - (i) if parentage is admitted by or established against the parent in his or her lifetime; and
 - (ii) where the purpose for which the relationship is to be determined enures for the benefit of the parent, if parentage has been so admitted or established in the lifetime of the child.
- (3) Subsection (2)(b) does not apply to or in respect of a relationship established by the *Artificial Conception Act 1985*¹.
[Section 31 inserted by No. 20 of 1971 s. 3; amended by No. 14 of 1985 s. 8; No. 28 of 2003 s. 212.]

Part X — Informal wills

[Heading inserted by No. 69 of 1987 s. 9.]

32. Interpretation

[(1) repealed]

- (2) In sections 35, 36 and 37 “**will**” includes a document that is a will by operation of section 34.

[Section 32 inserted by No. 69 of 1987 s. 9; amended by No. 17 of 1989 s. 4.]

33. Application

This Part applies only to persons dying on or after the day on which the *Wills Amendment Act 1987*¹ comes into operation, but in respect of persons so dying extends to any document, writing or alteration executed or made before that day.

[Section 33 inserted by No. 69 of 1987 s. 9.]

34. Informal wills

A document purporting to embody the testamentary intentions of a deceased person is a will of that person, notwithstanding that it has not been executed in accordance with section 8, if the Supreme Court is satisfied that the deceased intended the document to constitute his will.

[Section 34 inserted by No. 69 of 1987 s. 9; amended by No. 17 of 1989 s. 5; No. 47 of 1997 s. 4.]

35. Informal alteration of will

Any alteration made to a will of a deceased person after the will was executed or made has effect, notwithstanding that the alteration has not been made in accordance with section 10, if the Supreme Court is satisfied that the deceased intended the will as so altered to constitute his will.

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[Section 35 inserted by No. 69 of 1987 s. 9; amended by No. 17 of 1989 s. 5; No. 47 of 1997 s. 4.]

36. Informal revocation of will

A writing declaring an intention of a deceased person to revoke a will or part of a will has effect, notwithstanding that it has not been executed in accordance with section 15(1)(c), if the Supreme Court is satisfied that the deceased intended by the writing to revoke the will or part of the will, as the case may be.

[Section 36 inserted by No. 69 of 1987 s. 9; amended by No. 17 of 1989 s. 5; No. 47 of 1997 s. 4.]

37. Informal revival of will

A writing declaring an intention of a deceased person to revive a will or part of a will that has been revoked has effect, notwithstanding that it has not been revived in accordance with section 16(1), if the Supreme Court is satisfied that the deceased intended by the writing to revive the will or part of the will.

[Section 37 inserted by No. 69 of 1987 s. 9; amended by No. 17 of 1989 s. 5; No. 47 of 1997 s. 4.]

38. Modification of certain references to execution of will

For the purposes of sections 24, 26(a) and 29 a document that is a will by operation of this Part is executed, notwithstanding the absence of a signature to, or other form of execution of, the document.

[Section 38 inserted by No. 69 of 1987 s. 9.]

[Schedule omitted under the Reprints Act 1984 s. 7(4)(f).]

Notes

- ¹ This is a compilation of the *Wills Act 1970* and includes the amendments made by the other written laws referred to in the following table [1a](#).⁴ The table also contains information about any reprint.

Compilation table

Short title	Number and year	Assent	Commencement
<i>Wills Act 1970</i>	12 of 1970	29 Apr 1970	1 Jul 1970 (see s. 2 and <i>Gazette</i> 5 Jun 1970 p. 1521)
<i>Wills Act Amendment Act 1971</i>	20 of 1971	1 Dec 1971	21 Jan 1972 (see s. 2 and <i>Gazette</i> 21 Jan 1972 p. 71-2)
Reprint of the <i>Wills Act 1970</i> approved 28 Feb 1978 (includes amendments listed above)			
<i>Artificial Conception Act 1985</i> s. 8	14 of 1985	12 Apr 1985	1 Jul 1985 (see s. 2 and <i>Gazette</i> 28 Jun 1985 p. 2291)
<i>Wills Amendment Act 1987</i>	69 of 1987	22 Nov 1987	22 Nov 1987 (see s. 2)
<i>Wills Amendment Act 1989</i>	17 of 1989	1 Dec 1989	26 Jan 1990 (see s. 2 and <i>Gazette</i> 26 Jan 1990 p. 656)
Reprint of the <i>Wills Act 1970</i> as at 11 Sep 1996 (includes amendments listed above)			
<i>Wills Amendment Act 1997</i>	47 of 1997	10 Dec 1997	10 Dec 1997 (see s. 2)
<i>Acts Amendment (Equality of Status) Act 2003</i> Pt. 62 ²	28 of 2003	22 May 2003	1 Jul 2003 (see s. 2 and <i>Gazette</i> 30 Jun 2003 p. 2579)
Reprint 3: The <i>Wills Act 1970</i> as at 17 Oct 2003 (includes amendments listed above)			
Wills Amendment Act 2007 s. 1 and 2	27 of 2007	26 Oct 2007	26 Oct 2007

- ^{1a} [On the date as at which this compilation was prepared, provisions referred to in the following table had not come into operation and were therefore not included in this compilation. For the text of the provisions see the endnotes referred to in the table.](#)

Provisions that have not come into operation

<u>Short title</u>	<u>Number and year</u>	<u>Assent</u>	<u>Commencement</u>
Wills Amendment Act 2007 s. 3-24 ⁵	27 of 2007	26 Oct 2007	To be proclaimed (see s. 2)

- ² The *Acts Amendment (Equality of Status) Act 2003* s. 211(2) reads as follows:

“

- (2) The repeal effected by subsection (1) applies to and in respect of the will of any person dying on or after the date of the commencement of this section, whether the will was made or executed before, on or after that date but does not apply to the will of a person who died before that date.

”

3

Part IX of the *Wills Act 1970* is affected by the *Administration Act 1903* s. 47A.

4

Marginal notes in the *Wills Act 1970* referring to legislation of other jurisdictions have been omitted from this reprint.

5

On the date as at which this compilation was prepared, the *Wills Amendment Act 2007* s. 3-24 had not come into operation. They read as follows:

“

—

3. The Act amended

The amendments in this Act are to the *Wills Act 1970*.

4. Section 4 amended

Section 4 is amended as follows:

- (a) by inserting in the appropriate alphabetical position —

“

—

“marriage” has the meaning given to that term in the *Marriage Act 1961* of the Commonwealth;

”

- (b) in the definition of “will” by inserting after “instrument” —

“ or disposition ”.

5. Section 6 replaced

Section 6 is repealed and the following section is inserted instead —

“

—

6. Provision that may be made by will

A person may, by a will executed or made in a manner required or permitted by this Act —

- (a) dispose of property (whether acquired before or after the making of the will) to which at the time of the person’s death the person is entitled either at law or in equity;

(b) dispose of property that in exercise of a power of appointment the person is entitled or able to dispose of by will; and

(c) appoint a guardian of any infant child of the person.

”.

6. Section 7 amended

Section 7 is amended by deleting “the provisions of Part VI,” and inserting instead —

“ section 17. ”.

7. Section 8 amended

Section 8 is amended as follows:

(a) by deleting “the provisions of Part VI and section 34.” and inserting instead —

“ sections 17 and 20 and Parts X and XI. ”;

(b) in paragraph (b) by deleting “his” in each place where it occurs and inserting instead —

“ the testator’s ”.

8. Section 9 amended

(1) Section 9(1) is repealed and the following subsection is inserted instead —

“

—

(1) If a power is conferred on a person to make an appointment by a will which power 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 a manner required or permitted by this Act, but is not executed in that particular manner or with that particular solemnity.

”.

(2) Section 9(2) is amended by deleting “this Act.” and inserting instead —

“ section 8. ”.

9. Section 10 replaced

Section 10 is repealed and the following section is inserted instead —

“

10. Alterations after execution

- (1) In subsection (3) —
“**apparent**” means legible by the unaided eye or with the help of a magnifying lens but not otherwise.
- (2) Subject to Part X, an alteration to a will after it has been executed is not effective unless the alteration is executed in a manner in which a will is required or permitted to be executed by this Act.
- (3) Subsection (2) does not apply to an alteration to a will made by, or at the direction of, the testator if the words or effect of the will are no longer apparent because of the alteration.
- (4) If a will is altered, it is sufficient compliance with the requirements for execution if the signatures of the testator and of the witnesses to the alteration, or in the case of a will referred to in section 17 the signature of the testator, are or is 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.

”

10. Section 11 inserted

After section 10 the following section is inserted in Part III —

“

11. Situation in which a person cannot be a witness

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

”

11. Part IV repealed

Part IV is repealed.

12. Section 14 amended

- (1) Section 14(1)(a) is amended by deleting “there is a declaration in the will that”.
- (2) Section 14(2) is amended by deleting “expressed to be”.
- (3) After section 14(2) the following subsections are inserted —

- “
—
- (3) For the purposes of this section, a will is made in contemplation of a marriage if—
 - (a) it is expressed to be made in contemplation of the marriage; or
 - (b) there is other evidence establishing that the will was made in contemplation of the marriage.
 - (4) Subsection (3)(b) applies to the will of a person dying on or after the day on which section 12 of the *Wills Amendment Act 2007* comes into operation, whether the will was executed or made before, on or after that day, and the will of a person who died before that day is to be construed as if that section had not come into operation.

”
—

13. Section 14A inserted

After section 14 the following section is inserted—

“
—

14A. Ending of marriage

- (1) In this section—
 - “**Family Court of Australia**” means the Family Court of Australia created by the Family Law Act;
 - “**Family Law Act**” means the *Family Law Act 1975* of the Commonwealth.
- (2) A will is revoked by the ending of the testator’s marriage except where—
 - (a) a contrary intention appears in the will; or
 - (b) there is other evidence establishing such an intention.
- (3) For the purposes of subsection (2), a marriage ends—
 - (a) when a divorce order terminating the marriage takes effect under the Family Law Act;
 - (b) on the granting of a decree of nullity in respect of the marriage by the Family Court of Australia or the Family Court of Western Australia; or
 - (c) on the dissolution or annulment of the marriage in accordance with the law of a place outside Australia, but only if that dissolution or annulment is recognised in Australia under the Family Law Act.
- (4) Subsection (2)—

- (a) applies where a marriage ends on or after the day on which section 13 of the *Wills Amendment Act 2007* comes into operation, whether the will was executed or made before, on or after that day; and
- (b) does not apply where a marriage ends before that day.

”

14. Section 15 replaced

Section 15 is repealed and the following section is inserted instead —

“

15. When will revoked

Without limiting sections 14(1) and 14A(2), the whole or any part of a will may be revoked only —

- (a) by a later will, including a document that is a will by operation of Part X;
- (b) subject to Part X, by some writing declaring an intention to revoke it, executed in the manner in which a will is required or permitted to be executed by this Act; or
- (c) by the testator, or some person in the testator’s presence and by the testator’s direction, burning, tearing or otherwise destroying it to give effect to the intention of the testator of revoking it.

”

15. Section 16 amended

(1) Section 16(1) is repealed and the following subsection is inserted instead —

“

(1) Subject to Part X, a will or any part of a will that has been revoked is revived only by the re-execution of that will or by execution of a later will, including a document that is a will by operation of Part X, showing an intention to revive that will or part.

”

(2) Section 16(2) is amended by deleting “revoked,” and inserting instead —

“ revoked ”.

(3) After section 16(2) the following subsection is inserted —

- “
—
- (3) A will that has been revoked and later revived, either wholly or partly, is taken to have been executed on the day on which the will is revived.
- ”
—

16. Sections 17, 18 and 19 replaced by section 17

Sections 17, 18 and 19 are repealed and the following section is inserted instead —

“
—

17. Saving for wills and revocations made under former provisions

- (1) The repeal of sections 17, 18 and 19 of this Act by section 16 of the *Wills Amendment Act 2007* (“the repeal”) does not affect —
- (a) a will made under section 18 before the repeal; or
(b) the revocation of such a will under section 19 before the repeal.
- (2) A will referred to in subsection (1)(a), or part of such a will, that was not revoked before the repeal has effect as if the repeal had not occurred, but may only be revoked after the repeal in accordance with section 15.
- ”
—

17. Sections 20, 21, 22 and 23 replaced by sections 20 and 21

Sections 20, 21, 22 and 23 are repealed and the following sections are inserted instead —

“
—

20. General rules as to formal validity

- (1) A will is taken to be properly executed if its execution conforms to the internal law in force in the place —
- (a) where it was executed;
(b) that 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.
- (2) The following wills are also 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;

- (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;
- (c) a will, so far as it revokes a will or a provision of a will that has been executed in accordance with this Act, or that 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;
- (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 essential validity of the power.

21. Ascertainment of system of internal law

- (1) If the internal law in force in a place is to be applied to a will, but there is more than one system of internal law in force in the place that 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 that indicates which system of internal law applies to the will, that rule must be followed;
 - (b) if there is no rule, the system of internal law is that with which the testator was most closely connected either —
 - (i) at the time of the testator's death, if the matter is to be determined by reference to circumstances prevailing at the testator's death; or
 - (ii) in any other case, at the time of execution of the will.
- (2) In determining whether a will has been executed in conformity with a particular internal 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.
- (3) If a law in force outside this State 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.

”.

18. Section 25 replaced

Section 25 is repealed and the following section is inserted instead —

“

25. Disposition of interest in property after making of will

If —

(a) a testator has made a will disposing of property; and

(b) after the making of the will and before the testator’s 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.

”.

19. Section 26 amended

(1) Section 26 is amended as follows:

(a) by inserting before “Unless the contrary” the subsection designation “(1)”;

(b) in paragraph (b), by inserting after “of a disposition” —

“

, other than the exercise of a power of appointment,

”.

(c) in paragraph (d) —

(i) by deleting “his” and inserting instead —

“ the testator’s ”; and

(ii) by deleting “he” and inserting instead —

“ the testator ”;

(d) at the end of paragraph (e), by deleting the full stop and inserting a semicolon instead;

(e) after paragraph (e), by inserting the following paragraphs —

“

(f) a disposition of the residue of the estate of a testator, or of the whole of the estate of a testator, that refers only to —

(i) the real estate of the testator; or

(ii) the personal estate of the testator,
is to be construed to include both the real and personal
estate of the testator;

(g) if any part of a disposition in fractional parts of the whole
or of the residue of the estate of a testator fails, the part
that fails accrues to the part that does not fail, and, if
there is more than one part that does not fail, to all those
parts proportionately.

”

(2) At the end of section 26 the following subsection is inserted —

“

(2) Subsection (1)(f) and (g) apply to the will of a person dying on or
after the day on which section 19(1)(e) of the *Wills Amendment
Act 2007* comes into operation, whether the will was executed or
made before, on or after that day, and the will of a person who
died before that day is to be construed as if section 19(1)(e) of that
Act had not come into operation.

”

20. Section 27 amended

Section 27(1) is repealed and the following subsection is inserted
instead —

“

(1) Unless the contrary intention appears by the will, where —

- (a) there is a disposition in a will to a person who is a child
or other issue of the testator, for an estate or interest not
determinable at or before the death of that person; and
- (b) that person dies in the lifetime of the testator leaving a
child or children who survive the testator,

the disposition does not lapse but takes effect as a substitutional
disposition to such of the children of that person as survive the
testator and if more than one in equal shares.

”

21. Section 28 amended

Section 28 is amended as follows:

(a) in subsection (1) —

(i) by deleting “his will” and inserting instead —
“ will ”; and

(ii) by deleting “his death” and inserting instead —

“ the testator’s death ”;
(b) in subsection (2)(a) by deleting “his” in each place where it occurs and inserting instead —
“ the testator’s ”.

22. Section 28A inserted

After section 28 the following section is inserted in Part VIII —

28A. Use of extrinsic evidence to clarify a will

- (1) In proceedings to construe a will, evidence, including evidence of the testator’s intention, is admissible to the extent that the language used in, or other content of, the will renders the will or any part of the will —
- (a) meaningless;
 - (b) ambiguous on the face of the will; or
 - (c) ambiguous in the light of the surrounding circumstances.
- (2) Evidence of a testator’s intention is not admissible to establish any of the circumstances referred to in subsection (1)(c).
- (3) Nothing in this section prevents evidence that is otherwise admissible at law from being admissible in proceedings to construe a will.
- (4) This section applies to the will of any person dying on or after the day on which section 22 of the *Wills Amendment Act 2007* comes into operation, whether the will was made or executed before, on or after that day, but does not apply to the will of a person who died before that day.

23. Sections 32, 33, 34, 35, 36 and 37 replaced by sections 32 and 33

Sections 32, 33, 34, 35, 36 and 37 are repealed and the following sections are inserted instead —

32. Court may dispense with formal requirements

- (1) In this section and section 33 —
- “document” means any record of information including —
- (a) anything on which there is writing;

- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
 - (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or
 - (d) a map, plan, drawing or photograph,
and includes any part of a document within the meaning given by this subsection.
- (2) A document purporting to embody the testamentary intentions of a deceased person, even though it has not been executed in the manner required by this Act, constitutes —
 - (a) a will of the person;
 - (b) an alteration to a will of the person;
 - (c) the revocation of a will of the person; or
 - (d) the revival of a will or part of a will of the person,
if the Supreme Court is satisfied that the person intended the document to constitute the person's will, an alteration to the person's will, the revocation of the person's will or the revival of a will or part of a will of the person, as the case may be.
- (3) In forming its view, the Supreme Court may have regard (in addition to the document) to any evidence relating to the manner of execution or testamentary intentions of the person, including evidence (whether admissible before the commencement of this section or otherwise) of statements made by the person.
- (4) This section applies to a document whether it came into existence within or outside the State.

33. Application of section 32

- (1) Section 32 applies only to persons dying on or after the day on which section 23 of the *Wills Amendment Act 2007* comes into operation, but in respect of persons so dying extends to any document that came into existence before that day.
- (2) For persons dying before the day referred to in subsection (1), this Part has effect as if section 23 of the *Wills Amendment Act 2007* had not come into operation.

”

24. Parts XI and XII inserted

After section 38 the following Parts are inserted —

“

Part XI — Wills of persons who lack testamentary capacity

Division 1 — Jurisdiction of Supreme Court to authorise the making, alteration and revocation of wills

39. Interpretation

(1) In this Part —

“**Court**” means the Supreme Court;

“**person concerned**” has the meaning given by section 40(1);

“**Principal Registrar**” means the person for the time being holding or acting in the office designated under the *Supreme Court Act 1935* as the “Principal Registrar of the Supreme Court”.

(2) For the purposes of sections 6, 9(1), 10(2) and 15(b), a will or instrument signed in accordance with section 40(4) is to be taken to be executed by the person concerned in a manner permitted by this Act.

40. Jurisdiction of Court to make, alter or revoke will

(1) The Court may, on application made by any person, make an order authorising —

(a) the making or alteration of a will in specific terms approved by the Court; or

(b) the revocation of the whole or any part of a will, on behalf of a person who lacks testamentary capacity (the “**person concerned**”).

(2) The Court is not to make an order under subsection (1) unless, at the time when the order is made, the person concerned —

(a) is living; and

(b) has reached the age of 18 years.

(3) An order under subsection (1) may authorise —

(a) the making or alteration of a will that deals with the whole, or with only part, of the property of the person concerned; or

(b) the alteration of only part of the person’s will.

(4) A will or instrument authorised under subsection (1) must be signed by the Principal Registrar and sealed with the seal of the Court.

41. Content of application under section 40

- (1) In an application under section 40, the applicant must furnish the following to the Court, except to the extent that the Court otherwise allows —
- (a) a written statement of the nature of the application and the reasons for it;
 - (b) an estimate of the nature and value of the assets of the person concerned and of the nature and amount of the person's liabilities, so far as that information is known to the applicant;
 - (c) a suggested draft of the proposed will or alteration or of the instrument of revocation;
 - (d) any evidence available to the applicant as to the wishes of the person concerned;
 - (e) evidence as to the likelihood of the person concerned having testamentary capacity at a later time;
 - (f) any will, or a copy of any will, of the person concerned in the possession of the applicant, or details known to the applicant of the contents of any will of the person concerned, and evidence that the applicant has made reasonable enquiry to locate such wills, or details of the contents of such wills, as may have been made by the person concerned;
 - (g) evidence that the applicant has made reasonable enquiry concerning the interests of any person who would be entitled to receive any part of the estate of the person concerned either under a previous will or if the person were to die intestate, and any evidence of those interests so far as they are known to the applicant;
 - (h) evidence that the applicant has made reasonable enquiry concerning the likelihood of an application being made under the *Inheritance (Family and Dependants Provision) Act 1972*, and evidence of any facts known to the applicant indicating such a likelihood;
 - (i) evidence that the applicant has made reasonable enquiry concerning the circumstances of any person for whom the person concerned might reasonably be expected to make provision under a will, and any evidence of those circumstances so far as they are known to the applicant;
 - (j) a reference to any gift to a body, whether charitable or not, or for a charitable purpose, that the person concerned might reasonably be expected to make by will;

(k) evidence of any other facts that the applicant considers to be relevant to the application.

(2) In subsection (1) —

“previous will”, in paragraph (g), means a will made before a will furnished to the Court, or details of which are furnished to the Court, in accordance with paragraph (f);

“will”, in paragraphs (f) and (g), includes a document that is a will by operation of Part X.

42. Certain criteria to be applied by Court

(1) In exercising its powers under section 40 the Court must refuse an application if it is not satisfied that —

(a) the person concerned is incapable of making a valid will or of altering or revoking the person’s will, as the case may be;

(b) the suggested will, alteration or revocation, or that will, alteration or revocation as revised under section 43(1)(b), is one which could be made by the person concerned if the person were not lacking testamentary capacity;

(c) the applicant is an appropriate person to make the application; and

(d) adequate steps have been taken to allow all persons with a legitimate interest in the application, including persons who have reason to expect any benefit from the estate of the person concerned, to be represented in the proceedings.

(2) Subsection (1) does not prevent the Court from refusing an application for any other reason.

43. Further powers of Court

(1) In proceedings under section 40 the Court may —

(a) give directions, including directions about the attendance of any person as a witness and, if it thinks fit, the attendance of the person concerned;

(b) revise the terms of the suggested draft of the proposed will, alteration or revocation furnished to the Court under section 41(1)(c);

(c) inform itself as to any matter in any manner it thinks fit; and

(d) make any order it thinks fit as to the costs of and incidental to the proceedings.

- (2) The Court is not bound by the rules of evidence in proceedings under section 40.
- 44. Deposit of wills made under this Part with Principal Registrar**
- (1) After a will or instrument has been signed by the Principal Registrar under section 40(4) —
- (a) it must be deposited in the office of the Principal Registrar; and
 - (b) the fee prescribed under section 171(1)(c) of the *Supreme Court Act 1935* must be paid by the person who made the relevant application under section 40.
- (2) A will or instrument deposited in the office of the Principal Registrar under subsection (1) must be in a sealed envelope that has written on it —
- (a) the name and address of the person concerned, as they appear in the will or instrument;
 - (b) the name and address of any executor as they appear in the will or instrument; and
 - (c) the date of the will or instrument.
- (3) If the Court has made an order authorising the revocation of a will deposited under subsection (1), the Principal Registrar must release the will to the person who made the relevant application under section 40.
- (4) If the person concerned has acquired or regained testamentary capacity to the satisfaction of the Court, the Principal Registrar must release to that person a will deposited under subsection (1).
- 45. Court may allow access to will**
- (1) A person may, with the leave of the Court and in accordance with the terms of the leave, request the Principal Registrar to provide the person with a copy of a will deposited in the office of the Principal Registrar under section 44, and the Principal Registrar must comply with a request so made.
- (2) The Court may, on the application of any person, grant leave to the person for the purposes of subsection (1) on such terms as it thinks fit, but only if —
- (a) the Court is satisfied that adequate steps have been taken to allow all persons with a legitimate interest in the application to be represented in the proceedings; and
 - (b) it appears to the Court to be necessary or desirable for the proper carrying out of the provisions of the will that leave be granted.

46. Alteration or revocation of will authorised under this Part

(1) This section applies if —

- (a) a will has been made on behalf of a person under this Part; and
- (b) the person acquires or regains testamentary capacity.

(2) The will —

- (a) may be altered by the person in accordance with section 10 or by a document that has effect under Part X;
- (b) may be revoked in whole or in part by the person in accordance with section 15 or by a document that has effect under Part X; and
- (c) is subject to revocation under section 14(1) or 14A(2), as if it were a will executed in accordance with section 8.

47. Protection of privacy of persons to whom applications relate

(1) In proceedings under section 40, the Court may do any or all of the following, either on its own initiative or on the application of a party to the proceedings —

- (a) order that the whole or any part of the proceedings be heard in closed court;
- (b) order that only persons or classes of persons specified by the Court may be present during the whole or any part of the proceedings;
- (c) make an order prohibiting the publication of a report of —
 - (i) the whole or any part of the proceedings; or
 - (ii) any information derived from or relating to the proceedings,including any order made by the Court.

(2) Instead of making an order described in subsection (1)(c), the Court may make such an order but with exceptions allowing the publication, in the manner or to the persons specified in the order, of particulars or information, or particulars or information of a kind, so specified.

Division 2 — Wills of persons who lack testamentary capacity made under the law of another place

48. Recognition of wills

(1) In this section —

“statutory will” means a will executed by virtue of a statutory provision on behalf of a person who, at the time of execution, lacked testamentary capacity, and includes an alteration to and a revocation of a statutory or other will.

(2) A statutory will made according to the law of the place where the deceased was resident at the time of execution is to be regarded as a valid will of the deceased or a valid alteration or revocation of a will, as the case may be, for the purposes of the law of this State.

(3) The application of subsection (2) extends to a statutory will made before the commencement of section 24 of the *Wills Amendment Act 2007*.

Part XII — Rectification of wills by Supreme Court

49. Definition

In this Part —

“Court” means the Supreme Court.

50. Court may rectify a will

(1) The Court may make an order rectifying a will to carry out the intentions of a deceased 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.

(2) Any application for an order under this section must be made within 6 months after the death of the testator.

(3) The Court may extend the period of time for making an application, even if the original period has expired, but not if the final distribution of the estate has been made.

(4) A certified copy of an order under this section must be attached to the original will and to the probated copy of the will.

(5) Subject to subsection (2), the power conferred by subsection (1) extends to the will of a person who died before the commencement of section 24 of the *Wills Amendment Act 2007*.

”
”
—