

Western Australia

## **Wills Act 1970**

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## Wills Act 1970

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### CONTENTS

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|  |   |   |
|--|---|---|
| <b>Part I — Preliminary</b>                            |   |   |
| 1.   | Short title   | 2 |
| 2.   | Commencement  | 2 |
| 4.   | Definitions   | 2 |
| 5.   | Application of Act                                  | 2 |
| <b>Part II — Dispositions and appointments by will</b> |   |   |
| 6.   | Property disposable by will                         | 3 |
| 7.   | Age of capacity to make will                        | 3 |
| <b>Part III — Execution of wills</b>                   |   |   |
| 8.   | Execution generally                                 | 4 |
| 9.   | Execution of will exercising a power of appointment | 4 |
| 10.  | Alterations after execution                         | 5 |
| <b>Part IV — Witnesses to wills</b>                    |   |   |
| 11.  | Executor or creditor not incompetent witness        | 6 |
| 12.  | Beneficiary not incompetent witness                 | 6 |
| <b>Part V — Revocation of wills</b>                    |   |   |
| 14.  | Subsequent marriage                                 | 7 |
| 15.  | When will revoked                                   | 7 |
| 16.  | How revoked will revived                            | 8 |
| <b>Part VI — Privileged wills</b>                      |   |   |
| 17.  | Persons entitled to make privileged wills           | 9 |

Contents

---

|  |  |    |
|--|--|----|
| 18.  | Making of a privileged will  | 9  |
| 19.  | Revocation of privileged will  | 9  |
| <b>Part VII — Rules as to formal validity of wills</b> |  |    |
| 20.  | Effect of this Part  | 10 |
| 21.  | General rule as to formal validity   | 10 |
| 22.  | Additional rules   | 10 |
| 23.  | Ascertainment of system of internal law  | 11 |
| <b>Part VIII — The construction of wills</b>           |  |    |
| 24.  | Change of domicile   | 12 |
| 25.  | Disposition not revoked by an alteration of the estate or interest of the testator | 12 |
| 26.  | General rules of construction  | 12 |
| 27.  | Statutory substitutional gift  | 13 |
| 28.  | Charges on property to be paid primarily out of property charged                   | 13 |
| <b>Part IX — Illegitimacy<sup>3</sup></b>              |  |    |
| 29.  | Application of Part IX   | 15 |
| 30.  | Abolition of rule regarding illegitimates not in being                             | 15 |
| 31.  | Determination of relationships   | 15 |
| <b>Part X — Informal wills</b>                         |  |    |
| 32.  | Interpretation   | 17 |
| 33.  | Application  | 17 |
| 34.  | Informal wills   | 17 |
| 35.  | Informal alteration of will  | 17 |
| 36.  | Informal revocation of will  | 18 |
| 37.  | Informal revival of will   | 18 |
| 38.  | Modification of certain references to execution of will                            | 18 |
| <b>Notes</b>   |  |    |
|  | Compilation table  | 19 |

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*<sup>1</sup>.

**2. Commencement**

This Act shall come into operation on a date to be fixed by proclamation<sup>1</sup>.

[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)<sup>2</sup>.]*

## **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.]*

**s. 16**

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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

**s. 28**

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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.

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## Part IX — Illegitimacy<sup>3</sup>

*[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*<sup>1</sup>, 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.

**s. 31**

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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*<sup>1</sup>.  
*[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*<sup>1</sup> 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.

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

**s. 36**

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**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**

<sup>1</sup> 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 <sup>4</sup>. 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) |
| <b>Reprint of the <i>Wills Act 1970</i> approved 28 Feb 1978</b> (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)  |
| <b>Reprint of the <i>Wills Act 1970</i> as at 11 Sep 1996</b> (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 <sup>2</sup>                             | 28 of 2003      | 22 May 2003 | 1 Jul 2003 (see s. 2 and <i>Gazette</i> 30 Jun 2003 p. 2579)  |
| <b>Reprint 3: The <i>Wills Act 1970</i> as at 17 Oct 2003</b> (includes amendments listed above)    |                 |             |   |

<sup>2</sup> 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.

”.

<sup>3</sup> Part IX of the *Wills Act 1970* is affected by the *Administration Act 1903* s. 47A.

<sup>4</sup> Marginal notes in the *Wills Act 1970* referring to legislation of other jurisdictions have been omitted from this reprint.