



Australian Capital Territory

# **Administration and Probate Act 1929 No 18**

**Republication No 8**

**Effective: 1 November 2002**

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Last amendment made by Act 2002 No 40

Authorised by the ACT Parliamentary Counsel

## About this republication

### The republished law

This is a republication of the *Administration and Probate Act 1929* (including any amendment made under the *Legislation Act 2001*, part 11.3 (Editorial changes)) as in force on 1 November 2002. It also includes any amendment, repeal or expiry affecting the republished law to 1 November 2002.

The legislation history and amendment history of the republished law are set out in endnotes 3 and 4.

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- authorised republications to which the *Legislation Act 2001* applies
- unauthorised republications.

The status of this republication appears on the bottom of each page.

### Editorial changes

The *Legislation Act 2001*, part 11.3 authorises the Parliamentary Counsel to make editorial amendments and other changes of a formal nature when preparing a law for republication. Editorial changes do not change the effect of the law, but have effect as if they had been made by an Act commencing on the republication date (see *Legislation Act 2001*, s 115 and s 117). The changes are made if the Parliamentary Counsel considers they are desirable to bring the law into line, or more closely into line, with current legislative drafting practice.

This republication does not include amendments made under part 11.3 (see endnote 1).

### Uncommenced provisions and amendments

If a provision of the republished law has not commenced or is affected by an uncommenced amendment, the symbol **U** appears immediately before the provision heading. The text of the uncommenced provision or amendment appears only in the last endnote.

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If a provision of the republished law is affected by a current modification, the symbol **M** appears immediately before the provision heading. The text of the modifying provision appears in the endnotes. For the legal status of modifications, see *Legislation Act 2001*, section 95.

### Penalties

The value of a penalty unit for an offence against this republished law at the republication date is—

- (a) if the person charged is an individual—\$100; or
- (b) if the person charged is a corporation—\$500.



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# Administration and Probate Act 1929

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Australian Capital Territory

# Administration and Probate Act 1929

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An Act relating to the administration of the estates of deceased persons

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## Part 1 Preliminary

### 1 Name of Act

This Act is the *Administration and Probate Act 1929*.

### 5 Interpretation for Act

(1) In this Act:

*Note* A definition applies except so far as the contrary intention appears (see *Legislation Act 2001*, s 155).

***administration*** includes all letters of administration of the real and personal estate of deceased persons whether with or without the will annexed and whether granted for general, special, or limited purposes, exemplification of letters of administration and any other formal evidence of the letters of administration purporting to be under the seal of a court of competent jurisdiction that is in the opinion of the Supreme Court sufficient.

***administrator*** includes any person to whom administration is granted.

***court*** means the Supreme Court.

***deceased person*** or ***the deceased*** means a person dying on or after 1 July 1929.

***deputy registrar*** means a Deputy Registrar of Probates under section 8.

***distribute*** means to pay, deliver, or divide the estate or property referred to, to or among the person or persons entitled under any intestacy or under any will.

***election*** means an election to administer the estate or a part of the estate of a deceased person.

***prescribed*** means prescribed by rules.

**probate** includes exemplification of probate or any other formal document, purporting to be under the seal of a court of competent jurisdiction, that, in the opinion of the Supreme Court, is deemed sufficient.

**public trustee**—see the *Public Trustee Act 1985*.

**purposes of administration** includes the payment in due course of administration of the debts, funeral and testamentary expenses duties and commission, and the costs, charges and expenses of the executor or administrator, and any costs that may be ordered to be paid out of the estate.

**registrar** means the Registrar of Probates under section 7.

**representation** means the probate of a will and administration.

**rules** mean rules of court made by the Supreme Court that apply to matters arising under this Act.

**seal of the court** means the seal referred to in section 7B.

**will** includes a codicil.

- (2) In this Act, a reference to a public trustee, in relation to a country, includes a reference to an officer of that country who is entitled under a law of that country to apply, if a deceased person has died intestate leaving no next of kin, to a court for an order that authorises the officer to administer the estate of the deceased person.

## **Part 2 Administration**

### **7 Registrar of Probates**

- (1) There shall be a Registrar of Probates.
- (2) The chief executive shall create and maintain an office in the public service the duties of which include exercising the functions of the registrar.
- (3) The registrar shall be the public servant for the time being performing the duties of the public service office referred to in subsection (2).

### **7A Deputy Registrars of Probates**

- (1) There may be 1 or more Deputy Registrars of Probates.
- (2) A deputy registrar may exercise any function of the registrar, subject to any direction of the registrar.
- (3) The chief executive shall create and maintain 1 or more offices in the public service the duties of which include exercising the functions of a deputy registrar.
- (4) A deputy registrar shall be any public servant for the time being performing the duties of a government service office referred to in subsection (3).

### **7B Registrar's seal and stamps**

- (1) The registrar shall have a seal and a stamp, for use under this Act, the respective designs of which shall be determined by the Minister.
- (2) A document that is required by this Act to be sealed with the seal of the Supreme Court may be stamped with the stamp referred to in subsection (1) and, when so stamped, has the same force and effect as if it had been sealed with the seal referred to in that subsection.

- (3) The registrar and any deputy registrar may have a stamp for affixing on documents a mark that is a facsimile of his or her signature.
- (4) Instead of signing a document, or a copy of or an extract from a document, for this Act, a person who exercises or who has exercised a function of the registrar or a deputy registrar may cause the document, copy or extract to be stamped with a facsimile of his or her signature, and the document, copy or extract shall then be deemed to have been signed by that person.

## **Part 3 Grant of representation**

### **Division 3.1 Jurisdiction of the Supreme Court**

#### **8C Supreme Court to make finding about domicile of deceased person**

On an application made under this Act—

- (a) for the grant of probate of the will, or administration of the estate, of a deceased person; or
- (b) to have probate of the will, administration of the estate, or an order to collect and administer the estate, of a deceased person granted by a court of competent jurisdiction in a State or other Territory sealed with the seal of the Supreme Court; or
- (c) by the public trustee for an order to collect and administer the estate of a deceased person;

the Supreme Court shall not grant the application or the registrar shall not issue the grant of probate or administration, seal the probate, administration or order of the court, or grant an order to the public trustee unless the court or the registrar has made a finding in relation to the domicile of the deceased person at the time of death.

#### **9 Probate or administration may be granted**

- (1) The Supreme Court shall have jurisdiction to grant probate of the will or administration of the estate of any deceased person leaving property, whether real or personal, within the ACT.
- (2) The Supreme Court shall have jurisdiction to grant probate of the will, or administration of the estate, of a deceased person who did not leave property, whether real or personal, within the ACT, if the court is satisfied that the grant of probate or administration is necessary.



## **9A Evidence of death**

- (1) Probate of the will, or administration of the estate, of a person may be granted by the Supreme Court if it is satisfied, by direct evidence or by evidence supporting a presumption of death, that the person is, or may be presumed to be, dead.
- (2) A grant of probate of the will, or administration of the estate, of a person made on direct evidence of the death of the person or on evidence supporting a presumption of the death of the person is valid notwithstanding that the person is, after the day the grant was made, found to have been alive on that day.

## **9B Grant on presumption of death**

- (1) If the Supreme Court makes a grant of probate of the will, or administration of the estate, of a person on evidence supporting a presumption of the death of the person—
  - (a) the grant shall be expressed to be made on presumption of the death of the person; and
  - (b) the estate of the person shall not be distributed without the leave of the court; and
  - (c) the court may, in the probate or administration or by an order made at any time, give leave to distribute the estate; and
  - (d) the court may, in giving leave to distribute the estate of the person, direct that the distribution shall not be made unless each person who is to take under the distribution gives an undertaking or security that he or she will, if the probate or administration is revoked—
    - (i) if the person has received property other than money under the order—restore the property or, at his or her option, pay an amount equal to the value of the property at the time he or she received the property to the person whose death was presumed or, if that person has

- subsequently died, to the administrator of the estate of that person; or
- (ii) if the person has received money under the order—pay an amount equal to the amount of the money received under the order to the person whose death was presumed or, if that person has subsequently died, to the administrator of the estate of that person; and
- (e) the court may direct the executor or the administrator to give, before the estate is distributed, the notices (including a notice specifying a date before which a caveat against the distribution of the estate may be lodged with the registrar) that the court considers appropriate.
- (2) If an executor or administrator of an estate has given the notices directed by the Supreme Court under subsection (1) (e), the executor or administrator—
- (a) may, subject to subsection (3), after the end of the period specified in the notices, distribute the estate among the persons entitled to it, having regard only to the claims of which the executor or administrator has notice at the time of the distribution; and
  - (b) is not liable, in relation to any part of the estate so distributed, to a person entitled to that part of whose claim he or she did not have notice at the time of the distribution.
- (3) If a caveat against the distribution of an estate has been lodged with the registrar in accordance with a notice under subsection (1) (e)—
- (a) the executor or administrator shall not distribute the estate among the persons entitled to it except under an order of the Supreme Court under subsection (4); and
  - (b) the executor or administrator, the person who lodged the caveat or a person interested in the distribution of the estate may make application to the court for an order under subsection (4).

- (4) The Supreme Court may, on application under subsection (3) (b), make an order authorising the executor or administrator of an estate to distribute the estate among the persons entitled to it notwithstanding the lodging of the caveat.
- (5) An order under subsection (4) may authorise the distribution of the estate subject to the conditions the Supreme Court considers appropriate.

## **10 Issue of probate by registrar**

- (1) Subject to this section, probate or administration may, on application to the registrar, supported by affidavits on which for the time being the Supreme Court would, in the opinion of the registrar, grant the probate or administration, be issued by the registrar as of course in the name and under the seal of the court, and every such probate or administration shall be deemed to have been granted by the court.
- (2) The registrar shall not, without an order of the Supreme Court, issue probate of the will, or administration of the estate, of a deceased person if—
  - (a) a caveat has been lodged; or
  - (b) it appears to the registrar to be doubtful whether the probate or administration should be granted.
- (3) Whenever the Supreme Court makes an order for the grant of probate or administration, the probate or administration shall be issued by the registrar in the name and under the seal of the court.

## **10A Sealing of probate and letters of administration**

The seal of the Supreme Court shall not be attached to any probate or letters of administration—

- (a) until all probate, stamp and other duties (if any), but not including estate duty, payable under any law in force in the ACT have been paid; and
- (b) except on an affidavit that notice of the intention to apply in that behalf has been published once in a newspaper published and circulating in the ACT 14 days before the making of the affidavit and that no caveat has been lodged.

**10B Grant to single executor reserving leave to others to apply**

The Supreme Court may, if it considers appropriate, grant probate to 1 or more of the executors named in a will reserving leave to the executor who has not renounced, or the executors who have not renounced, to come in and apply for a grant of probate at a future time.

**10C Grant of probate to public trustee**

If a deceased person has named, as an executor of his or her will—

- (a) the public trustee for the Australian Capital Territory; or
- (b) the public trustee of a State; or
- (c) the public trustee for the Northern Territory;

the Supreme Court may grant probate of the will to that public trustee.

**11 Practice about granting administration of real and personal estate**

Subject to this Act and the rules, the practice and procedure in relation to the granting of administration of the personal estate of an intestate shall be applicable so far as may be, to administration of real estate, and administration of both real and personal estate may be granted in and by the same letters.

## **12 Eligible administrators**

- (1) The Supreme Court may grant administration of an intestate estate to any of the following persons, subject to this section:
  - (a) the spouse of the intestate;
  - (b) 1 or more of the next of kin of the intestate;
  - (c) if the intestate is survived by 2 spouses—either spouse, or both spouses conjointly;
  - (d) a spouse or spouses of the intestate conjointly with 1 or more of the next of kin of the intestate;
  - (e) any other person (whether or not a creditor of the intestate) the court considers appropriate.
- (2) The Supreme Court shall only grant administration of an intestate estate to a person who is at least 18 years old.
- (3) The Supreme Court shall not grant administration of an intestate estate to a person referred to in subsection (1) (e) if there is any other person to whom administration may be granted under this section:
  - (a) who is fit to be trusted, in the opinion of the court; and
  - (b) who appears and prays for administration after being duly cited.
- (4) In this section:  
*spouse*, in relation to an intestate—see section 44.

## **13 Rights and duties of administrator**

A person to whom administration of the estate of a deceased person is granted—

- (a) has, subject to any limitations in the grant, the same rights and liabilities as the person would have if the person were the executor of the deceased; and
- (b) is accountable in the same way as the person would be accountable if the person were the executor of the deceased person.

*Note* This section was relocated from the *Imperial Acts (Substituted Provisions) Act 1986*, sch 2, pt 4 (for the effect of a relocation, see *Legislation Act 2001*, s 96). The 1986 Act substituted provisions for certain UK Acts that applied (or may have applied) in the ACT and repealed those Acts. The provisions of sch 2, pt 4 were substituted for 31 Edw. 3, St. 1, c 11 (1357) and 1 Jas. 2 c 17, s 6 (1685). The 1986 Act, s 4 (1) provided, in effect, that the rules of law about the interpretation of consolidating Acts apply to the interpretation of the provisions of a law set out in sch 2. These rules of law continue to apply to this section (see *Legislation Act 2001*, s 96 (3)).

#### **14 Administration bond to be given**

- (1) Subject to this section, a person to whom a grant of administration is made shall, before the issue of the administration, enter into, and file with the registrar, a bond with an insurance company as a surety for duly collecting, getting in and administering the real and personal estate of the deceased person.
- (2) The bond shall acknowledge that the person to whom the grant is made and the surety are bound to the registrar in a sum to be specified in the bond, being a sum equal to the value of the estate of the deceased person or such lesser sum as the Supreme Court, or if the value of the estate of the deceased person does not exceed \$2 000, as the registrar, directs.
- (3) If all or any part of the estate of the deceased person passes to—
  - (a) the person to whom administration is granted; or
  - (b) beneficiaries who are sui juris and consent in writing to the bond being dispensed with;

the registrar may, if he or she considers appropriate, dispense with the requirement of the bond in relation to the estate or that part of the estate, as the case requires.

- (4) Subsection (1) does not apply in relation to a grant of administration of the estate of a deceased person granted to—
- (a) the public trustee; or
  - (b) a person on behalf of the Crown; or
  - (c) a trustee company if the company is exempted by law from the obligation of having to enter into and file the bond referred to in that subsection; or
  - (d) a public trustee of a State or Territory of the Commonwealth.
- (5) In this section, a reference to an insurance company is a reference to a company that is carrying on insurance business within the meaning of the *Insurance (Deposits) Act 1932* (Cwlth) and maintains a deposit with the Commonwealth Treasurer in accordance with that Act.

## **17 Order may be made to assign bond**

The Supreme Court may, on being satisfied that the conditions of any administration bond have been broken, order the registrar to assign the bond to some person to be named in the order, and that person (or his or her executor or administrator) shall be entitled to sue on the bond in his or her own name as if it had been originally given to him or her, and shall be entitled to recover as trustee for all persons interested the full amount recoverable in relation to any breach of the conditions of the bond.

## **18 Order to assign bond in creditor's administration**

- (1) On being satisfied that there has been negligence or maladministration of the estate of which any person has obtained administration in the capacity of creditor, or that the condition of

any administration bond executed by any person who has obtained administration in that capacity has been broken in any substantial particular, the Supreme Court may, if it considers appropriate, order the registrar to assign the administration bond to the public trustee or to some person to be named in the order.

- (2) The public trustee or the person named in the order, is entitled to sue on the bond as if it had been originally given to him or her, and shall be entitled to recover, as trustee for all persons interested, the full amount recoverable in relation to any breach of the condition of the bond.
- (3) The Supreme Court may, if it considers appropriate, on making the order, remove the creditor from the position of administrator, and may grant a rule to the public trustee, or some persons to be named in the order, to administer the estate.

**18A Probate or administration may be revoked or further bond required**

- (1) At any time after probate of the will, or administration of the estate, of a deceased person has been granted, the Supreme Court may, on the motion of a person who is interested in the estate, revoke the probate or administration.
- (2) At any time after administration of the estate of a deceased person has been granted, the Supreme Court may, on the motion of a person who is interested in the estate, order the administrator of the estate to execute a bond, or an additional bond, of the amount, and within the time and with the sureties, that the court considers appropriate.
- (3) If an administrator fails to comply with the terms of an order made under subsection (2), the Supreme Court may remove the administrator and appoint another person to be an administrator of the estate in his or her place.
- (4) If the Supreme Court has removed an administrator of an estate under subsection (3) and appointed another person to be an



administrator of the estate in his or her place, any contract made before the date the administrator was so removed, in relation to which the administrator so removed was, in his or her capacity of administrator of the estate, a party shall, on and after that date, be read and construed, and may be enforced, as if references in the contract to the administrator so removed were references to the administrator so appointed in his or her place.

### **19 Application by surety for relief**

If, on motion by a surety to an administration bond, it appears to the Supreme Court that—

- (a) the estate is being wasted, or is in danger of being wasted; or
- (b) the surety is being in any way prejudiced, or in danger of being prejudiced, by the act or default of the person administering the estate;

the court may grant the relief it considers appropriate.

### **20 Renunciation or non-appearance by executor**

If—

- (a) any person renounces probate of the will of which he or she is appointed an executor; or
- (b) an executor appointed in a will survives the testator but dies without having taken probate; or
- (c) an executor named in a will is personally cited to take probate and does not appear to the citation;

the right of that person in relation to the executorship shall wholly cease, and the representation to the testator and the administration of the estate shall, without any further renunciation, go, devolve, and be committed in like way as if that person had not been appointed executor.

## **20A Renunciation etc by person appointed both executor and trustee of will**

- (1) If a person who is appointed by will both executor and trustee renounces probate or after being duly cited fails to apply for probate, the renunciation or failure shall be deemed to be a disclaimer of the trust contained in the will.
- (2) If there is any renunciation or failure or the person dies before probate is granted or instead of applying for probate authorises a trustee company to apply for administration with the will annexed and if administration with the will annexed is granted to a trustee company, the trustee company shall because of the grant and without any further appointment be deemed to be appointed trustee of the will in the place of the person appointed.
- (3) In this section:

*trustee company* means any company authorised by or under any law in force in the ACT to act as executor, administrator or trustee.

## **21 Administration to guardian of child sole executor**

- (1) If a child is sole executor, administration with the will annexed may be granted to—
  - (a) the guardian of the child; or
  - (b) any other person the court considers appropriate;until the child is 18 years old, with full or limited powers to act in the premises until probate has been granted to the executor or administration has been granted to some other person.
- (2) The person to whom that administration is granted shall have the same powers as an administrator under an administration granted during the minority of the child.

## **22 Administration under power of attorney**

- (1) If a person entitled to probate or administration of a deceased estate is out of the jurisdiction, and has appointed a person within the jurisdiction under a power of attorney to exercise that entitlement, the Supreme Court may grant administration to the attorney on behalf of the entitled person on the terms the court considers appropriate.
- (2) The grant of administration under subsection (1) continues in force notwithstanding the death of the donor of the power of attorney, subject to the terms of the grant.

## **23 Administration pendente lite and receiver**

- (1) The Supreme Court may—
  - (a) pending any suit touching the validity of the will of any deceased person, or for obtaining recalling, or revoking any probate or any grant of administration; or
  - (b) during a contested right of administration;  
appoint an administrator of the personal estate and the same or any other person to be receiver of the real estate of any deceased person, with the full or limited powers, and with or without a bond or sureties, that the court considers appropriate.
- (2) The Supreme Court may make the orders for the remuneration of the administrator or receiver out of the personal and real estate of the deceased it considers right.

## **24 Power to appoint administrator**

The Supreme Court may, if a person dies—

- (a) intestate; or
- (b) leaving a will, but without having appointed an executor; or
- (c) leaving a will and having appointed an executor, who—

- (i) is not willing and competent to take probate; or
- (ii) is resident out of the ACT;

if it considers it necessary or convenient, appoint some person to be the administrator of the estate of the deceased or of any part of the estate, on giving the security (if any) that the court directs, and may limit the administration as the court considers appropriate.

## **25 Proceeding if executor neglects to prove will**

- (1) If the executor named in a will—
  - (a) neglects or refuses to prove the will or to renounce probate within 3 months from the death of the testator or from the time of the executor reaching 18 years old; or
  - (b) is unknown or cannot be found;

the Supreme Court may, on the application of—

- (c) any person interested in the estate; or
- (d) any creditor of the testator;

grant an order nisi calling on the executor to show cause why probate of the will should not be granted to the executor, or, in the alternative, why administration with the will annexed should not be granted to the applicant.

- (2) On affidavit of service or of sufficient reasons for non-service of the order if the executor does not appear, or on cause being shown, the Supreme Court may make the order for the administration of the estate and costs as appears just.

## **26 Issue of special letters of administration**

If, at the end of 6 months from the death of any person, the executor to whom probate has been granted or the administrator is then residing out of the jurisdiction, the Supreme Court may, on the application of any creditor, legatee, or next of kin, grant to the

creditor, legatee or next of kin so applying special letters of administration of the estate of the deceased person, nevertheless to cease on an order being made for the rescission of the grant of the special letters of administration as mentioned in section 29.

## **27 Special administrator to make certain affidavits**

The person applying for grant of special letters of administration shall, in addition to the oath usually taken by administrators, satisfy the Supreme Court by affidavit that the executor or administrator of the estate of the deceased person is resident out of the jurisdiction, and that—

- (a) the applicant is thereby delayed in recovering or obtaining payment of money or the possession of goods and chattels, or real estate, to which he or she is by law entitled; or
- (b) the estate is liable to loss or waste.

## **28 On return of original executor or administrator special administration to be rescinded**

- (1) On the return within the jurisdiction of the executor to whom probate has originally been granted, or the administrator, the executor or administrator may apply to the Supreme Court to rescind the special grant of administration.
- (2) The Supreme Court, on the hearing of the application, may make an order to rescind the special grant of administration on the terms and conditions as to security, costs, or otherwise as to the court appear reasonable, and the original probate or administration shall be and remain as valid and effectual as if the special grant of administration had not been made.

## **29 Accounting by special administrator**

On any order being made by the Supreme Court for the rescission of any grant of special administration the special administrator shall be bound duly to account to the original executor or administrator, and

to pay over any money received by him or her as special administrator that is undisposed of as the court may order.

**30 Liability of executor or administrator neglecting to apply for rescission of special administration**

If the executor or administrator neglects to apply for an order for the rescission of the special administration, he or she shall, notwithstanding that the special administration remains unrescinded, be liable to answer and make good all claims and demands against the estate of the deceased to the extent of the assets that have come to his or her hands or that might have come to his or her hands apart from his or her wilful neglect, or default, including the neglect mentioned in this section.

**31 Revocation of grants not to prejudice actions or suits**

If, while any legal proceeding is pending in any court by or against any executor or administrator lawfully acting as such, the grant of probate or administration is revoked or rescinded, that court may order that the proceeding be continued by or against the new personal representative in like way, as if the proceeding had been originally begun by or against the new representative, but subject to the conditions and variations (if any) as that court directs.

**32 Discharge or removal of executor or administrator**

- (1) Notwithstanding anything contained in any law in force in the ACT, if an executor or administrator to whom representation has been granted, or if an administrator who has been appointed under this section—
  - (a) remains out of the ACT for more than 2 years; or
  - (b) desires to be discharged from his or her office of executor or administrator; or
  - (c) after the grant or appointment, refuses, or is unfit, to act in the office, or is incapable of acting;

the Supreme Court may order the discharge or removal of that executor or administrator, and the appointment of some proper person or trustee company as administrator in place of the executor or administrator so discharged or removed, on the terms and conditions the court considers appropriate, and may make all necessary orders for vesting the estate in the new administrator, and as to accounts, and any order as to costs, the court considers appropriate.

- (2) Notice of the application may be served, if the Supreme Court considers it necessary, on the persons it directs.
- (3) An executor or administrator so removed or discharged shall, from the date of the order, cease to be liable for acts and things done after that date.
- (4) On the appointment of the new administrator the property and rights vested in, and the liabilities properly incurred in the due administration of the estate by, the executor or administrator so discharged or removed, shall become and be vested in, and transferred to, the new administrator, who shall, as administrator, have the same privileges, rights, powers, duties, discretions and liabilities, as if probate or administration had been granted to the new administrator originally.

### **32A Revocation of grant if person living at date of grant**

- (1) If the Supreme Court is satisfied that a person was living at the time when probate of his or her will, or administration of his or her estate, was granted by the court, the court—
  - (a) shall revoke the grant on the terms (if any) the court considers appropriate in relation to proceedings that have been begun by or against the executor or administrator or in relation to costs or any other matter; and
  - (b) may at any time, whether before or after the revocation of the grant, make the orders the court considers appropriate for the

protection of the estate, including an order for an injunction against the executor or administrator or another person and an order for the appointment of a receiver.

- (2) An application to the Supreme Court for the revocation, under subsection (1), of a grant of probate of the will, or administration of the estate, of a person may be made—
- (a) by the person; or
  - (b) if the person has died since the grant—by any person entitled to apply for a grant of probate of the will, or administration of the estate, of the person or by a person interested in the estate of the person.

### **32B Effect of revocation of grant**

- (1) If a grant of probate or administration has been revoked under this Act—
- (a) the executor or administrator to whom the grant was made shall account to the Supreme Court for the property that he or she has received, or that has vested in him or her, as the executor or administrator, and the court may make the orders it considers appropriate in relation to the disposal by the executor or administrator of so much of that property as remains in his or her hands; and
  - (b) the executor or administrator is not liable in relation to property that he or she has disposed of under the grant in good faith before the revocation of the grant if he or she complied with section 9B in relation to the disposing of that property; and
  - (c) the revocation of the grant does not, of its own force, invalidate a disposal of property made by, or to, the executor or administrator before the revocation of the grant; and



- (d) a person entitled to any property that has been distributed by the executor or administrator to whom the grant was made may apply to the court for an order under subsection (2); and
  - (e) an action does not lie against the registrar-general for loss suffered by any person in consequence of the registration of a dealing with land under the *Land Titles Act 1925*, being a dealing lawfully made by the executor or administrator before the revocation of the grant; and
  - (f) the court may make the vesting orders it considers appropriate.
- (2) If the Supreme Court, on application made under subsection (1) (d) in relation to property, is satisfied that the applicant is the person entitled to the property and that the respondent to the application is the appropriate person in relation to the property, the court may make an order directing the respondent—
- (a) if the respondent is in possession of the property—to return the property to the applicant or pay to the applicant the sum the court considers reasonable in the circumstances; or
  - (b) in any other case—to pay to the applicant the sum the court considers reasonable in the circumstances.
- (3) For this section, the ***appropriate person***, in relation to property distributed under a probate or administration that has been revoked, is—
- (a) if the person to whom the property was so distributed is alive—that person; or
  - (b) if the person to whom the property was so distributed is dead—the executor of the will or administrator of the will or estate of that person or a person who has benefited as a result of the property having been distributed to that person.
- (4) This section does not affect any entitlement of an executor or administrator to commission, or to any protection, indemnity, reimbursement or right under any other section of this Act.

## **Division 3.2 Caveats**

### **33 Caveat may be lodged**

- (1) Any person may lodge with the registrar a caveat against any application for representation at any time previous to the representation being granted.
- (2) The caveat shall include the name of the person lodging it, and an address in the ACT for the service of notices.

### **34 If caveat lodged court may grant order nisi**

If a caveat is lodged, the Supreme Court may, on motion on behalf of the person applying for representation supported by affidavits on which, if there had been no caveat, representation would have been granted, make an order nisi for the grant of representation to the person applying, and every such order shall name a time for showing cause against it, and the court may enlarge the order from time to time.

### **35 Service of order nisi**

Every such order nisi and every order enlarging it shall be served on the caveator by delivering a copy of the order at the address mentioned in the caveat.

### **36 Proceeding if caveator does not appear**

If, on the day named in the order nisi or on the day to which the order has been enlarged, the caveator does not appear, the order nisi may be made absolute on an affidavit of service, but, if the caveator appears, the hearing shall be conducted in the same way as nearly as may be as on a trial, and the order nisi may be made absolute or discharged with or without costs as may be just, and, if the Supreme Court so directs, the costs may be paid out of the estate.

### **37 Evidence on hearing of order nisi**

On the hearing of any order nisi, the parties shall be at liberty, subject to the rules, to verify their respective cases in whole or in part by affidavit, but so that the deponent in every affidavit shall, on the application of the opposite party, be subject to be cross-examined by or on behalf of the opposite party orally in open court, and after the cross-examination may be re-examined orally in open court by or on behalf of the party by whom the affidavit was filed.

### **37A Withdrawal and removal of caveat**

- (1) A caveat may, with the leave of the Supreme Court, be withdrawn at any time.
- (2) Leave to withdraw a caveat may be given subject to the conditions as to payment of costs or otherwise the Supreme Court considers appropriate.
- (3) A person applying for a grant of probate or administration may summon a person who has lodged a caveat against the grant to attend before the Supreme Court to show cause why the caveat should not be removed, and the court may, on proof that the caveator has been so summoned, make any order it considers appropriate.

### **38 Costs if caveat lodged by public trustee**

If a caveat is lodged by the public trustee, the Supreme Court may, if it considers appropriate, order costs to be paid to the public trustee out of the estate, whether the order nisi is discharged or not.

## **Division 3.3 Effect of grant of representation**

### **38A Estate to vest in public trustee until grant**

On the death of a person, the real and personal property of the deceased person vests in the public trustee in the same way, and to

the same extent, as the personal estate and effects of a deceased person formerly vested in the Ordinary in England.

**39 Real and personal estate to vest in executor or administrator**

On the grant of representation of the estate of any deceased person, all real and personal estate of which the person dies seised or possessed of, or entitled to, in the ACT, and that is unadministered at the date of the grant, shall pass to and become vested in the executor to whom probate has been granted or the administrator for all his or her estate and interest therein in the following way:

- (a) on testacy in the executor or administrator with the will annexed;
- (b) on intestacy in the administrator;
- (c) on partial intestacy in the executor or administrator with the will annexed.

**40 Real estate held in trust**

All real estate held by any person in trust or by way of mortgage, and vesting under section 39, shall vest in his or her executor or administrator, subject to the trusts and equities affecting the estate.

**41 Property of deceased to be assets**

- (1) The real, as well as the personal, estate of every deceased person shall be assets in the hands of his or her executor to whom probate has been granted, or his or her administrator, for the payment of all duties and fees, and for the payment of his or her debts in the ordinary course of administration.
- (2) The executor or administrator for purposes of administration, may, subject to sections 50 and 51, sell that real estate, or mortgage it with or without a power of sale, and convey it to a purchaser or

mortgagee in as full and effectual a way in law as the deceased person could have done in his or her lifetime.

#### **41A Property of deceased liable for debts**

- (1) The real and personal property of a person who dies on or after 1 January 1966, to the extent of his or her beneficial interest in it, and the real and personal property (if any) disposed of by the person's will (whether made before or after the commencement of this section) in exercise of a general power, are assets for the payment of the funeral, testamentary and administrative expenses, the debts and the liabilities of the person.
- (2) If a person—
  - (a) on whom a beneficial interest in any property referred to in subsection (1) devolves; or
  - (b) to whom such an interest is given; or
  - (c) in whom such an interest vests;

disposes of the interest or of a part of the interest in good faith before a proceeding is taken or process is sued out against him or her, the person is personally liable for the value of the interest or part so disposed of, but the interest or part is not liable to be taken in execution in the proceeding or under the process.

#### **41B Appointments by will under general power**

- (1) If a provision contained in the will of a person dying on or after 1 January 1966 operates as an appointment under a general power to appoint by will, the property, whether real or personal, that passes because of the provision vests in the executor or administrator as if the testator had been entitled to the property at his or her death, whether or not he or she was so entitled for an estate or interest determining on his or her death or for any other estate or interest.

- (2) If a provision contained in the will of a person who died on or after 1 January 1911 and before 1 January 1966, operated as an appointment under a general power to appoint by will, the property, whether real or personal, that passed because of the provision shall be deemed to have vested in the executor or administrator as if that property had been vested in the testator at the time of his or her death whether or not he or she was entitled to it for an estate or interest determining on his or her death or for any other estate or interest.
- (3) Subsection (2) does not affect—
- (a) a right or title that accrued before 1 January 1966 under a disposition by an appointee that, apart from that subsection, would be valid; or
  - (b) the operation of section 39.

#### **41C Administration of assets**

- (1) If the estate of a person who dies on or after 1 January 1966 is sufficient for the payment in full of all the expenses, debts and liabilities payable from the estate, the person's real and personal property is, subject to the provisions of the person's will (if any) and to any law in force in the ACT as to charges on property, applicable in the order set out in schedule 4, part 4.1 for the payment of the expenses, debts and liabilities payable from the estate.
- (2) If the estate of a person who dies on or after 1 January 1966 is insufficient for the payment in full of all the expenses, debts and liabilities payable from the estate, the person's real and personal property shall, subject to the *Bankruptcy Act 1966* (Cwlth), be administered in accordance with the rules set out in schedule 4, part 4.2.

#### **41D Application of income of settled residuary estate**

- (1) If a person who dies on or after 1 January 1966 leaves a will containing a residuary gift because of which real or personal property is settled by way of succession, this section applies to and in relation to the income derived from that property.
- (2) The income to which this section applies is not applicable in payment of—
  - (a) the funeral, testamentary or administrative expenses payable from the estate of the person; or
  - (b) the debts or liabilities of the person; or
  - (c) any interest that accrued on any such debts or liabilities before the death of the person; or
  - (d) any legacies bequeathed by the will of the person.
- (3) The income to which this section applies is applicable in payment of the interest (if any) that accrues—
  - (a) on the funeral, testamentary or administrative expenses payable from the estate of the person; or
  - (b) after the death of the person, on the debts or liabilities of the person; or
  - (c) on any legacies bequeathed by the will of the person;before payment, and the income is so applicable in priority to any other assets in the estate of the person.
- (4) Subject to subsection (3), the income to which this section applies is payable to the person for the time being entitled to the income from the settled property.
- (5) If, in the final adjustment of the estate of a deceased person among the persons entitled to share in the distribution of the estate—

- (a) property (other than property referred to in subsection (1)) is treated as if it had been used in the proper order in payment of the funeral, testamentary and administrative expenses, the debts and the liabilities of the estate or of any legacies bequeathed by the will of the deceased person although it was not in fact so used; and
- (b) income was earned by that property after the death of the person but before the property was so used or was deemed to have been so used;

that income shall, for this section, be deemed to be income to which this section applies.

- (6) This section—
  - (a) does not affect the rights of a creditor of the estate; and
  - (b) applies subject to the provisions of the will of the deceased person and of any law in force in the ACT in relation to charges on the property of a deceased person.

#### **42 Real estate to be held on trusts of will**

Subject to this part, the real estate of every such deceased person devising that estate by will shall be held by the executor to whom probate has been granted, or the administrator with the will annexed, according to the trusts and dispositions of the will.

#### **43 Rights of executor in relation to real estate**

The executor to whom probate has been granted shall have the same rights, and be subject to the same duties, in relation to the real estate of the testator, as executors had or were subject to in relation to personal assets under the law in force in New South Wales as in force immediately before 21 October 1929.



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## Division 4                      Position of executor of an executor

*Note* The provisions of this division were relocated from the *Imperial Acts (Substituted Provisions) Act 1986*, sch 2, pt 3 (for the effect of a relocation, see *Legislation Act 2001*, s 96). The 1986 Act substituted provisions for certain UK Acts that applied (or may have applied) in the ACT and repealed those Acts. The provisions of sch 2, pt 3 were substituted for 25 Edw. 3, St. 5, c 5 (1351). The 1986 Act, s 4 (1) provided, in effect, that the rules of law about the interpretation of consolidating Acts apply to the interpretation of the provisions of a law set out in sch 2. These rules of law continue to apply to this division (see *Legislation Act 2001*, s 96 (3)).

### 43A    Executor of executor

If—

- (a) probate of the will of a testator has been granted to a person (in this division called the ***original executor***) as the sole executor, or as 1 of the executors, of the will of the testator; and
- (b) the original executor was, immediately before his or her death, the sole, or the last surviving, executor of the will of the testator; and
- (c) probate of the will of the original executor is granted to the executor, or 1 of the executors, (in this division called the ***succeeding executor***) of the will of the original executor;

the succeeding executor becomes, on the grant of probate of the will of the original executor—

- (d) the executor of the will of the testator; and
- (e) the executor of the will of any other testator of whose will the testator was, immediately before his or her death, the executor under the application, or successive applications, of this section.

### **43B When ceases to represent deceased**

If, after a person has become the executor of the will of a testator under the application, or of successive applications, of section 43A, another person who was appointed an executor of the will of that testator is granted probate of that will, the firstmentioned person ceases, on the grant of that probate, to be the executor of the will of that testator.

### **43C Rights and liabilities of executor of executor**

While a person who has become the executor of the will of a testator under the application, or of successive applications, of section 43A, continues to be the executor of the will of the testator—

- (a) the person has the same rights in relation to the estate of that testator as the original executor, or the original executors, would have if living; and
- (b) the person is, to the extent to which the estate of the testator has come to his or her hands, answerable as if the person were the original executor, or 1 of the original executors of the will of the testator.

## Part 3A Intestacy

### Division 3A.1 Preliminary

#### 44 Interpretation for pt 3A

(1) In this part:

*eligible partner*, in relation to an intestate, means a person other than the intestate's legal spouse who—

- (a) whether or not of the same gender as the intestate, was living with the intestate immediately before the death of the intestate as a member of a couple on a genuine domestic basis; and
- (b) either—
  - (i) had lived with the intestate in that way for 2 or more years continuously before the death of the intestate; or
  - (ii) is the parent of a child of the intestate who was not 18 years old at the date of death of the intestate.

*intestate* means a person who dies on or after 1 July 1967 and either does not leave a will or leaves a will but does not dispose effectively, by the will, of the whole or part of his or her real or personal property.

*intestate estate*, in relation to an intestate, means—

- (a) for an intestate who leaves a will—the real and personal property of the intestate that is not effectively disposed of by the will; or
- (b) in any other case—the real and personal property of the intestate.

*legal spouse*, in relation to an intestate, means the husband or wife of the intestate immediately before the death of the intestate.

*personal chattels*, in relation to an intestate, means—

- (a) the articles of household or personal use or adornment, plated articles, china, glassware, pictures, prints, linen, jewellery, clothing, books, musical instruments or apparatus, scientific instruments or apparatus, wines, liquors, consumable stores and domestic animals of the intestate; and
- (b) the motor cars and accessories of the intestate;

but does not include—

- (c) any chattels of the intestate used exclusively for business purposes; or
- (d) money and securities for money of the intestate.

*personal representative*, in relation to an intestate, means the executor of the will, or the administrator of the estate, of the intestate, as the case requires.

*spouse*, in relation to an intestate, means—

- (a) the legal spouse of the intestate; or
  - (b) the eligible partner of the intestate.
- (2) For division 3A.2—
- (a) a husband and wife shall be regarded as 2 persons; and
  - (b) in ascertaining relationship it is immaterial whether the relationship is of the whole blood or the half-blood.

## **Division 3A.2 Distribution on intestacy**

### **45 Executor or administrator to hold property of intestate on trust for persons entitled**

The personal representative of an intestate holds, subject to his or her rights, powers and duties for the purposes of administration, the

intestate estate on trust for the persons entitled to it in accordance with this division.

#### **45A Distribution between legal spouse and eligible partner**

- (1) If an intestate is survived by both a legal spouse and an eligible partner, the entitlement to the spousal share of the intestate estate is to be determined as follows:
  - (a) if the eligible partner had lived as the eligible partner of the intestate continuously for a period of less than 5 years immediately before the intestate's death—the spousal share of the intestate estate shall be distributed equally between the eligible partner and the legal spouse;
  - (b) if the eligible partner had lived as the eligible partner of the intestate continuously for a period of 5 years or more immediately before the intestate's death—the eligible partner is exclusively entitled to the spousal share.

- (2) In this section:

*spousal share*, in relation to an intestate estate, means the share of the estate to which the spouse of the intestate is entitled under this division.

#### **46 Provisions relating to persons who at date of death of intestate are children**

- (1) If a person who is entitled, under this division, to the whole of, or a share in, an intestate estate is not, at the date of death of the intestate, 18 years old and is not married, the person is entitled to take the intestate estate, or the share in the intestate estate, beneficially, on reaching 18 or marrying before that age.
- (2) If a person to whom subsection (1) applies dies before reaching 18 years old and without having married, this division applies in relation to the intestate estate as if the person had died before the intestate.

- (3) This section does not affect the operation of any law in force in the ACT authorising expenditure for the maintenance, advancement or benefit of a person under 18 years old out of property held on trust for, or for the benefit of, the person and, if property forming part of the intestate estate is expended for the maintenance, advancement or benefit of the person and that person dies before reaching that age and without having married, the intestate estate shall, for this division, be deemed to have been reduced by the amount so expended.

**48 Estate by courtesy or right of dower not to arise**

An estate by courtesy or right of dower or an equivalent estate does not arise out of the real property as to which a person dies intestate.

**49 Distribution of intestate estate**

- (1) The person or persons entitled to take an interest in an intestate estate, and the interest in that estate that that person or those persons are entitled to take shall, subject to this division, be ascertained by reference to schedule 6 according to the facts and circumstances existing in relation to the intestate.
- (2) If an intestate is survived by his or her spouse, the intestate estate shall be taken, for schedule 6 and subsection (3), not to include any personal chattels of the intestate.
- (3) For schedule 6, the value of an intestate estate shall be ascertained by deducting from the gross value of that intestate estate an amount equal to such of the debts and liabilities of the estate, the funeral and testamentary expenses, the costs and expenses of administering the estate and the estate duties, probate duties and death duties payable in relation to the estate as are payable out of that intestate estate.
- (4) If an item of schedule 6 provides for the payment of a sum and interest on that sum out of an intestate estate and then provides for the payment of an additional sum equal to a particular proportion of the value of the balance of the intestate estate, the value of the

balance of the intestate estate shall be ascertained for that item by ascertaining the value of the intestate estate in the way provided by subsection (3) and deducting from that value the firstmentioned sum and the interest payable on that sum.

- (5) For schedule 6—
- (a) the brothers and sisters of an intestate; and
  - (b) the grandparents of an intestate; and
  - (c) the brothers and sisters of a parent of an intestate; and
  - (d) the issue of any of those brothers or sisters who predeceased the intestate;

are the next of kin of the intestate.

#### **49A Interest of spouse on intestacy in personal chattels**

If an intestate is survived by his or her spouse, the spouse is entitled to take, absolutely, any personal chattels of the intestate that are not effectively disposed of by the will (if any) of the intestate.

#### **49AA Immovable property if intestate domiciled elsewhere**

- (1) If—
- (a) an intestate was, at the time of death, domiciled in the ACT; and
  - (b) immovable property situated in a place outside the ACT forms part of the intestate estate; and
  - (c) the intestate is survived both by a spouse and by issue; and
  - (d) the spouse is, under a law of that place, entitled to part or all of that property, or to a sum of money calculated by reference to the value of part or all of that property;

the property or part of the property, or the sum of money, to which, under that law, the spouse is entitled, shall be taken to form part of the intestate estate for section 49 (3).

- (2) Subject to subsection (4), if—
- (a) an intestate was, at the time of death, domiciled outside the ACT; and
  - (b) the intestate is survived both by a spouse and by issue; and
  - (c) immovable property situated in the ACT forms part of the intestate estate; and
  - (d) the spouse is, under a law of a place outside the ACT, entitled to all or part of any other property (other than personal chattels) that forms part of the intestate estate, or to a sum of money calculated by reference to the value of all or part of that other property;

the property or part of the property, or the sum of money, to which, under that law, the spouse is entitled, shall be taken to form part of the intestate estate for section 49 (3).

- (3) If property or a sum of money is, under subsection (1) or (2), taken to form part of the intestate estate of an intestate, schedule 6, part 6.1, item 2 applies as if the references in that item to \$150 000 were references to the sum ascertained by deducting from \$150 000 an amount equal to the value of that property, or to that sum of money.
- (4) Subsection (2) does not apply in relation to an intestate estate if the spouse's share in that part of the estate that devolves in accordance with the law of the place where the intestate was domiciled would, under that law, be reduced by an amount calculated by reference to the value of part or all of the immovable property referred to in subsection (2) (c).



#### **49B How distribution to issue is made**

- (1) If an intestate is survived by issue who are entitled to the whole or a part of the intestate estate—
  - (a) if only 1 child of the intestate survives the intestate—that person is entitled to the whole, or that part, of the intestate estate; or
  - (b) if the intestate is survived by the issue of his or her child or 1 of his or her children but by no other issue—those issue are entitled to the whole, or that part, of the intestate estate through all degrees according to their stocks, and, if there are more than 1 issue, in equal shares; or
  - (c) in any other case—the whole or that part of the intestate estate shall be divided into a number of parts ascertained in accordance with subsection (2) and—
    - (i) any child of the intestate who survived the intestate is entitled to 1 of those parts; and
    - (ii) the issue of any child of the intestate who died before the intestate leaving issue who survived the intestate are entitled to 1 of those parts through all degrees, according to their stocks, and, if there are more than 1 issue, in equal shares.
- (2) The number of parts for subsection (1) (c) is a number equal to the sum of—
  - (a) a number equal to the number of children (if any) of the intestate who survived the intestate; and
  - (b) a number equal to the number of children (if any) of the intestate who died before the intestate leaving a child or remoter issue who survived the intestate.

#### **49BA Gifts made before death of intestate**

- (1) If—
- (a) an intestate has, within the period of 5 years immediately before death, given any money or property to or for the benefit of a person who is, under this division, entitled to a share in the intestate estate, or to or for the benefit of a spouse of such a person; and
  - (b) the intestate estate, or a part of the intestate estate, is divisible between that person, or the issue of that person, and another person or persons entitled under this division to a share in the intestate estate;

the money or property shall be taken to have been given in or towards satisfaction of the share that the person will become entitled to take, or would have become entitled to take if he or she had survived the intestate in the intestate estate or the part of the intestate estate unless—

- (c) the contrary intention appears from the circumstances of the particular case; or
  - (d) the value, as at the date of death of the intestate, ascertained in accordance with the requirements of the personal representative of the intestate, of all the money or property or of so much of the money or property in relation to which such a contrary intention did not appear, does not exceed \$10 000.
- (2) If, under subsection (1), any money or property is taken to have been given in or towards satisfaction of the share of a person referred to in subsection (1), the money or property shall be brought into account at a valuation, as at the date of death of the intestate, in accordance with the requirements of the personal representative of the intestate, in calculating the share that the person or the person's issue is, under this division, entitled to take in the intestate estate or a part of the intestate estate.

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- (3) This section does not apply in relation to money or property given to or for the benefit of—
- (a) a spouse of the intestate; or
  - (b) the spouse of a person referred to in subsection (1), if the spouse is a person who is, under this division, entitled to a share in the intestate estate.

- (4) In this section:

*given*, in relation to money or property, means money or property paid, transferred, assigned or settled (otherwise than for valuable consideration).

*legal spouse*, in relation to a person entitled to a share in an intestate estate, if the intestate has made a gift to which this section applies, means the husband or wife of the person at the time the gift was made.

*spouse*, in relation to a person entitled to a share in an intestate estate, if the intestate has made a gift to which this section applies, includes a person other than the entitled person's legal spouse who—

- (a) whether or not of the same gender as the entitled person, was living with that person on the date of the gift as a member of a couple on a genuine domestic basis; and
- (b) either—
  - (i) had lived with the entitled person in that way for 2 or more years continuously before the date of the gift; or
  - (ii) was the parent of a child of the entitled person who was under 18 years old on the date of the gift.

#### **49C How distribution to next of kin is made**

- (1) If, under this Act, the next of kin of an intestate are entitled to the intestate estate, the persons entitled to that intestate estate shall be ascertained as follows:
  - (a) the brothers and sisters of the intestate who survived the intestate, and the issue of a brother or sister of the intestate who died before the intestate, being issue who survived the intestate, are entitled to the intestate estate;
  - (b) if the intestate is not survived by any persons entitled to the intestate estate under paragraph (a) but is survived by 1 or more grandparents—the grandparent is entitled to the intestate estate or the grandparents are entitled to the intestate estate in equal shares;
  - (c) if the intestate is not survived by any persons entitled to the intestate estate under paragraph (a) or (b)—the uncles and aunts of the intestate who survived the intestate and the issue of such an uncle or aunt who died before the intestate, being issue who survived the intestate, are entitled to the intestate estate.
- (2) An intestate estate shall be divided among the brothers and sisters or the uncles and aunts of the intestate, and the issue of those brothers or sisters, or uncles or aunts, who died before the intestate, in the same way as the intestate estate would have been divided among those persons if the brothers and sisters or the uncles and aunts had been children of the intestate and the issue of a brother, sister, uncle or aunt who died before the intestate had been issue of a child of the intestate who died before the intestate.

#### **49CA How distribution to the Territory is made**

If, under this Act, the Territory is entitled to an intestate estate, the public trustee—

- (a) shall hold the intestate estate on trust for the Territory; and

- (b) at the end of 6 years from the date of death of the intestate—
- (i) in relation to so much of the estate as is not money—shall sell the estate and, after deducting from the proceeds of the sale all costs and charges lawfully due to the public trustee or any other person, pay the balance of the proceeds to the Territory; or
  - (ii) in relation to so much of the estate as is money—shall, after deducting all costs and charges lawfully due to the public trustee or any other person, pay the balance of the money to the Territory.

#### **49D Partial intestacies**

- (1) If the spouse of an intestate acquires a beneficial interest under the will of the intestate in the real or personal property of the intestate (other than in the personal chattels of the intestate), schedule 6 applies only to the extent it is expressed to apply under this section but the person or persons entitled to take an interest in the intestate estate, and the interest in that estate that that person or those persons are entitled to take, shall be ascertained in accordance with this section according to the facts and circumstances existing in relation to the intestate.
- (2) If an intestate is survived by his or her spouse but not by issue, the spouse is entitled to the whole of the intestate estate.
- (3) If the intestate is survived by his or her spouse and by issue—
  - (a) if the value of the beneficial interest that is acquired by the spouse under the will does not exceed \$150 000—schedule 6, part 6.1, item 2 applies as if the references to the sum of \$150 000 were read as references to the sum ascertained by deducting from \$150 000 the value of that beneficial interest; or
  - (b) if the value of the beneficial interest that is acquired by the spouse under the will exceeds \$150 000—

- (i) the spouse is entitled to be paid out of the intestate estate a sum equal to, if 1 child or the issue of 1 child of the intestate but no other issue of the intestate survives the intestate,  $\frac{1}{2}$  of the value of the intestate estate or, in any other case,  $\frac{1}{3}$  of the value of the intestate estate; and
  - (ii) the issue of the intestate are entitled to the balance of the intestate estate after payment to the spouse of the sum to which the spouse is entitled under subparagraph (i).
- (4) Section 49 (3) applies for subsection (3) in like way as it applies for schedule 6.
- (5) If a child of an intestate who is entitled to take an interest in the intestate estate also acquires an interest under the will of the intestate in the real or personal property of the intestate, the interest to which the child is entitled under the will shall be brought into account, at a valuation, as at the date of death of the intestate, in accordance with the requirements of the personal representative of the intestate, in calculating the interest that the child is entitled to take under this division in the intestate estate.
- (6) For this section, a beneficial interest in real or personal property acquired because of the exercise, by will, of a general power of appointment, shall be taken to be an interest acquired under that will.

#### **49E Presumptions of parentage**

For the application of this division and schedule 6 in relation to an intestate, a presumption of parentage arising under the *Birth (Equality of Status) Act 1988*, section 8 in relation to a person shall be taken to operate only if the presumption arose before the intestate died.

## Division 3A.3      Rights of spouses to intestate dwelling houses

### 49F    Definitions for div 3A.3

In this division:

*dwelling house* includes—

- (a) a garden or portion of ground attached to, and usually occupied with, a dwelling house, or otherwise required for the amenity or convenience of a dwelling house; and
- (b) a part of a building occupied as a separate dwelling.

*representation*, in relation to an intestate, means probate of the will, or administration (including administration with the will of the intestate annexed) of the estate, of the intestate.

### 49G    Claim by spouse to dwelling house

- (1) Subject to this division, if the intestate estate of an intestate who is survived by a spouse comprises or includes an interest in a dwelling house where the spouse was residing at the date of the intestate's death, the spouse may elect to have that interest appropriated under the *Trustee Act 1925*, section 46 in or towards the satisfaction of any interest of the spouse in the real and personal property of the intestate.
- (2) An election under this section may be exercised within a period of 1 year after the date representation in the estate of the intestate is granted by the Supreme Court or within any extended period the court allows.
- (3) If—
  - (a) probate of a will of the intestate has been revoked on the ground that the will was invalid; or

- (b) a question whether a person had an interest in the estate of the intestate, or a question as to the nature of an interest claimed in the estate of the intestate, had not been determined at the time when administration of the estate was granted or first granted; or
- (c) the Supreme Court, for any other reason affecting the administration or distribution of the estate, considers it proper to do so;

the court may extend the period specified in subsection (2).

- (4) An election by a spouse shall be given in writing—
  - (a) if the spouse is not a personal representative of the intestate—to the personal representative, or to each personal representative, of the intestate; or
  - (b) if the spouse is 1 of the personal representatives of the intestate—to the other personal representative, or to each other personal representative, of the intestate; or
  - (c) if the spouse is the sole personal representative of the intestate—to the registrar.
- (5) An election is not revocable except with the consent of the personal representative or of each personal representative of the intestate.
- (6) A spouse may require the personal representative of the intestate to have the interest in the dwelling house valued, and to inform the spouse of the result of that valuation, before deciding whether to exercise the right given by this division.

#### **49H Valuation**

For this division, the value of the interest of an intestate in a dwelling house is the amount determined by a qualified valuer engaged by the personal representatives of the intestate to be the market value of the interest.



#### **49J Right not exercisable for certain tenancies**

The right given by this division is not exercisable if the interest of the intestate in the dwelling house is a tenancy—

- (a) that will determine within a period of 2 years after the date of death of the intestate; or
- (b) that the landlord is, by notice given after the date of death of the intestate, entitled to determine before the end of that period.

#### **49K Right not exercisable in certain other cases**

If—

- (a) a dwelling house forms part of a building and an interest in the whole of the building is comprised in an intestate estate; or
- (b) a dwelling house is held with agricultural land and an interest in the agricultural land is comprised in an intestate estate; or
- (c) the whole or a part of a dwelling house was, at the date of an intestate's death, used as a hotel or boarding house; or
- (d) a part of a dwelling house was, at the date of an intestate's death, used for purposes other than domestic purposes;

the right given by this division to a spouse of the intestate in relation to the dwelling house is not exercisable by the spouse unless the Supreme Court so orders, being satisfied that the exercise of that right is not likely to—

- (e) diminish the value of the assets (other than the interest in the dwelling house) in the intestate estate; or
- (f) make those assets more difficult to dispose of.

**49L Personal representative not to sell or dispose of interest without consent**

- (1) A personal representative of an intestate is not authorised to sell or otherwise dispose of the interest of the intestate in a dwelling house in which a spouse of the intestate was residing at the date of the intestate's death, during the period of 1 year after the date representation in the estate of the intestate is granted by the Supreme Court or, if that period is extended by the court, during that extended period without the written consent of the spouse, except in the course of administration owing to want of other assets or except with the approval of the court.
- (2) If on an application under section 49K made by a spouse or by the personal representatives of the intestate, the Supreme Court does not order that the right given by section 49G may be exercised by the spouse, the court may approve the disposal of the interest in the dwelling house within the period of 1 year referred to in subsection (1).
- (3) This section does not apply if the spouse of the intestate is the sole personal representative, or 1 of 2 or more personal representatives, of the intestate.
- (4) Nothing in this section shall be taken to affect the validity of a sale by the personal representatives of an intestate of any part of the estate of the intestate.

**49M Rule that trustee not to purchase trust property**

If a spouse of an intestate is the sole personal representative of the intestate or 1 of 2 or more personal representatives of the intestate, the spouse may, notwithstanding that he or she is a trustee, acquire under this division the interest of the intestate in the dwelling house in which the spouse was residing at the date of the intestate's death.

**49N If surviving spouse is under legal disability**

- (1) If a spouse of an intestate is a person of unsound mind, a requirement or consent under this division may be made or given on the spouse's behalf by his or her committee (if any) or, if there is no committee, by the Supreme Court.
- (2) A requirement or consent made or given under this division by a surviving spouse who is a child is as valid as it would be if he or she were at least 18 years old.

## Part 3B Simultaneous deaths

### 49P Devolution of property

- (1) Notwithstanding the *Conveyancing and Law of Property Act 1898*, section 119, if a deceased person (the **beneficiary**) who would, apart from his or her death, have been entitled, under a will or on an intestacy, to take an interest in the estate of another deceased person (the **benefactor**) died at the same time as the benefactor or in circumstances that give rise to uncertainty as to which of them survived the other, the property of the benefactor shall, subject to subsection (2), devolve as if the benefactor had survived the beneficiary and had died immediately after the beneficiary.
- (2) Property owned jointly and exclusively by 2 or more persons who died at the same time or in circumstances that give rise to uncertainty as to which of them survived the other or others, other than property so owned by them as trustees, shall devolve as if, at the time of their deaths, it had been owned by them as tenants in common in equal shares.

## Part 3C                      Functions of executors and administrators

### 50      Powers of executors and administrators to sell, mortgage or lease real estate

- (1) Subject to this section, an executor or an administrator may, without the consent of any person or the order of a court—
  - (a) sell or mortgage the real estate of the deceased person for purposes of administration; or
  - (b) sell the real estate of the deceased person as to which he or she died intestate, for purposes of distribution or division among the persons entitled; or
  - (c) lease the real estate of the deceased person in possession for any term not exceeding 3 years; or
  - (d) raise, on the security of the whole or any part of the intestate estate of the deceased person, any sum required by the executors or administrators for the purpose of paying to a spouse of the person the share, or a part of the share, of the spouse in the intestate estate of the person.
- (2) Any conditions may be imposed on the exercise of the power of sale, mortgage, lease or raising of any sum by an administrator, and either generally or for a particular sale, mortgage, lease or raising of any sum, by rules of court, or by the Supreme Court in the grant of administration (if any), or by other order.
- (3) A condition imposed, before 1 January 1966, on the exercise by an executor of a power given by this section shall not operate on or after that date.
- (4) The registrar shall write on letters of administration issued by him or her, and on any copy of the letters of administration, a certified copy

of any conditions imposed by the Supreme Court under subsection (2).

- (5) A purchaser, mortgagee, lessee or other person who for valuable consideration acquires an interest in the estate of the deceased person, or the registrar-general or other person registering title under any sale, mortgage or lease under this section, is not bound to inquire whether the powers mentioned in subsection (1) or any of them are being or have been exercised for the purposes specified in that subsection, and the receipt of the executor or administrator shall be a sufficient discharge, and shall exonerate the persons paying the money from any responsibility for the application of the money expressed to have been so received.
- (6) Some or 1 only of several executors or administrators shall be entitled to exercise those powers with the leave of the Supreme Court, and not otherwise, and the court may make any orders it considers appropriate for the purpose of carrying out any such sale, mortgage, lease or raising of any sum.
- (7) In this section:
- intestate*—see section 44.
- intestate estate*—see section 44.
- spouse*, in relation to an intestate—see section 44.

## **51 Supreme Court may make special order**

The Supreme Court may, if administration has been granted, on the application of the administrator, or for partial intestacy the executor or administrator with the will annexed, or of any person beneficially interested, and after the notice to the other parties and inquiry the court considers appropriate, order and direct the course of proceedings which shall be taken in regard to—

- (a) the time and method of sale of any real estate; and
- (b) the letting and management of any real estate until sale; and

- (c) the application for maintenance or advancement or otherwise of shares or income of shares of children; and
- (d) the expediency and mode of effecting a partition, if applied for; and generally in regard to the administration of the real estate for the greatest advantage of all persons interested.

### **51A Supreme Court may authorise postponement of realisation and carrying on of business**

- (1) The Supreme Court may, if it considers it beneficial so to do and subject to the conditions it considers appropriate to impose, authorise an executor or administrator—
  - (a) to postpone, for the period the court considers appropriate, the realisation of the real or personal estate of a deceased person, or any part of that estate; or
  - (b) to carry on, for the period or periods that the court from time to time considers appropriate, the business, trade or occupation of the deceased person, and for that purpose to use the estate or part of it.
- (2) An order under this section may be made either *ex parte* or on the notice the Supreme Court considers proper, and may be varied from time to time as the court considers appropriate.

### **52 Supreme Court may order partition in summary way**

- (1) If, on any such inquiry, the Supreme Court is satisfied that a partition of the real estate, or any part of it, will be advantageous to the parties interested, the court may appoint 1 or more arbitrators to effect the partition.
- (2) The report and final award of the arbitrators setting out particulars of the land allotted to each party interested shall, when signed by them and confirmed by the order of the Supreme Court, and registered in the office of the registrar-general, be effectual without

the necessity of any further conveyance to vest in each party the land allotted to the party, and an office copy of the award so signed, confirmed, and registered, shall for all purposes be equivalent to an indenture of conveyance to each party of the land allotted to the party.

- (3) For land subject to the provisions of the *Real Property Act 1900* (NSW) or the *Land Titles Act 1925*, each party shall be entitled to the issue of a certificate of title for the land allotted to the party.
- (4) If the allotment be made subject to the charge of any money payable to any other party interested for equalising the partition, the charge shall take effect according to the terms and conditions in regard to time and method and otherwise that are expressed in the award without the necessity of any further instrument being made or executed.
- (5) For land subject to the provisions of the *Real Property Act 1900* (NSW) or the *Land Titles Act 1925*, the certificate of title shall issue, subject to the charge, unless the charge is satisfied.

### **53 Personal representative not required to continue to act against own consent**

A personal representative shall not be required against his or her consent to continue the duty of a trustee by managing the property during an enforced suspension of sale, but shall be entitled, on that suspension being ordered, to relinquish his or her trust to the person the Supreme Court appoints.

### **54 In suits executor or administrator to represent real estate**

In all suits concerning the real estate of a deceased person, the executor to whom probate has been granted or administrator shall represent the real estate so long as it remains vested in the executor or administrator, and the persons interested, in the same way and to the same extent as, in suits concerning personal estate, the executor or administrator represents the estate and the persons interested.



**55 All debts to stand in equal degree**

- (1) In the administration of the estate of every person dying after 21 October 1929, all the creditors of every description of that person shall, notwithstanding anything to the contrary contained in any law, be treated as standing in equal degree and be paid accordingly out of the assets of the deceased person.
- (2) In the administration of the estate of any person dying before or after the commencement of this Act, in relation to which representation is granted under this Act, no debt or liability of that person shall be entitled to any priority or preference only because it is due to an executor or administrator of the estate.
- (3) This Act shall not prejudice or affect any mortgage, lien charge, or other security that any creditor may hold or be entitled to for payment of a debt.
- (4) Nothing in this Act shall affect the provisions of any law protecting life assurance or other policies against creditors.

**55A Interest on legacies**

- (1) Subject to subsection (2), if interest is payable on a legacy in accordance with the will under which the legacy is payable or in accordance with any enactment or rule of law, that interest shall, unless the will otherwise provides, or the Supreme Court otherwise orders, be payable at such rate as is determined by the Minister.
- (2) If an executor or administrator, in accordance with any power given to him or her by a will under which a legacy (other than an annuity) is payable, appropriates any property in or towards satisfaction of the legacy, the legatee shall be entitled to the income from the property so appropriated, and interest shall not be payable out of any other part of the estate on so much of the legacy as has been satisfied by the appropriation.

- (3) A determination under subsection (1) is a disallowable instrument.

*Note* A disallowable instrument must be notified, and presented to the Legislative Assembly, under the *Legislation Act 2001*.

## **56 Executor may sign acknowledgment instead of conveyance**

- (1) If any real estate not under the *Real Property Act 1900* (NSW) or the *Land Titles Act 1925* is devised to any person by a will duly proved under this Act, the executor of the will or the administrator with the will annexed may, as the executor or administrator, instead of executing a conveyance to that person, sign an acknowledgment, in the prescribed form, that the devisee is entitled to that real estate for the estate for which it is devised to him or her.
- (2) The acknowledgment may be registered under the law in force regulating the registration of deeds, and on registration of the acknowledgment the real estate shall vest in the devisee for the estate for which it is devised to him or her in the same way, and subject to the same trusts and liabilities, as if the executor or administrator had executed a conveyance of the acknowledgment.

## **57 Summary application for legacy etc**

If the executor or administrator, after written request, neglects or refuses to—

- (a) sign that acknowledgment; or
- (b) execute a conveyance of land devised to the devisee; or
- (c) pay or hand over to the person entitled any legacy or residuary bequest;

the devisee or person may apply to the Supreme Court, calling on the executor or administrator to show cause why he or she should not comply with the request, and the court may make any order in the matter it considers appropriate.

**58 Filing and passing accounts**

- (1) If a person to whom representation is granted is required to do so by the rules or by an order of the Supreme Court, the person—
  - (a) shall file an inventory of the estate of the deceased; and
  - (b) shall—
    - (i) file; or
    - (ii) file and pass;the person's accounts relating to the estate;  
within the time, and from time to time, and in the way that is prescribed or the Supreme Court orders.
- (2) Every such person shall be subject to any special order that the Supreme Court, on the motion of any person interested, makes as to the production and verification of his or her accounts.
- (3) The order of the Supreme Court allowing any account shall be prima facie evidence of its correctness, and shall, after the end of 3 years from the date of the order, operate as a release to the person filing it, excepting so far as it is shown by some person interested that an error or omission or fraudulent entry has been made in the account.

**58A Passing and allowance of accounts of executors and administrators**

The registrar in the name and under the seal of the Supreme Court may make any order or grant any certificate that the court may make or grant—

- (a) in and about the passing and allowance of the accounts of executors and administrators and the costs in connection therewith if no commission is applied for; or
- (b) in or in connection with the granting of further time to executors and administrators to file, to file and pass or to pass

their accounts if no objection is raised to the granting of the further time by a person interested or if no doubt or difficulty arises.

**59 If accounts not exhibited registrar to summon administrator before court, which may inflict penalty**

- (1) If any such executor or administrator neglects, for 1 month after the end of the period fixed, to file that inventory, or to file, to file and pass or to pass those accounts, the registrar shall cause the executor or administrator to be notified of the neglect.
- (2) If there is further neglect for a period of 1 month, the registrar shall cause the executor or administrator to be summoned before the Supreme Court to show cause why he or she should not be ordered to file the inventory or to file, to file and pass or to pass the accounts forthwith.
- (3) If the executor or administrator does not, within the prescribed time, or within any further time allowed by the Supreme Court, file the inventory or file, file and pass or pass the accounts, in the prescribed way, the executor or administrator shall be liable to attachment in accordance with the practice of the court.

**60 Proceedings under s 59 not to prejudice proceedings on bond**

Proceedings being taken under section 59 shall not prejudice the right to proceed against the executor or administrator for an account and administration, or prevent the Supreme Court from ordering the assignment of any bond to any person with a view to enforcing the penalty thereof.

**61 Supreme Court may make order about disposal of money in hands of executor etc**

- (1) The Supreme Court may make any order it considers appropriate in relation to the distribution or application of any money that the

executor or administrator has in hand, or as to the residue of the estate.

- (2) No final order for distribution shall be made except on notice to all the parties entitled.

### **62 Payments under revoked probates or administrations valid**

The executor or administrator who has acted under any revoked or rescinded probate or administration may keep and reimburse himself or herself, or shall be entitled to be reimbursed for, an amount equal to the amount of any payments made by him or her that the person to whom probate or administration is afterwards, or was originally, granted might have lawfully made.

### **63 Persons etc making payments on probate granted for estate of deceased person to be indemnified**

All persons making or permitting to be made any payment or transfer, bona fide, on any probate or administration or order granted in relation to the estate of any deceased person under this Act shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of the probate or administration or order not then known to those persons.

### **64 Distribution of assets**

- (1) If an executor or administrator has given such or the like notices as, in the opinion of the Supreme Court in which the executor or administrator is sought to be charged, would have been given by the court in an administration suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, the executor or administrator may, at the end of the time named in the notices, or the last of the notices, for sending in those claims, distribute the assets of the testator or intestate, or any part of the assets, among the persons entitled, having regard to the claims of which the executor or administrator has then notice.

- (2) An executor or administrator shall not distribute the assets of the testator or intestate, or any part of them, unless he or she has—
- (a) applied under the *Births, Deaths and Marriages Registration Act 1997* for a search of the register for information about the parents or any children—
    - (i) of the deceased; or
    - (ii) of any other person known by the executor or administrator to be relevant to the distribution of the assets; and
  - (b) taken into account any relevant information, documents or certified copies of, or extracts from, documents obtained from the registrar-general as a result of the search.
- (3) If an executor or administrator has complied with subsection (2), he or she shall not be liable for the assets or any part of the assets so distributed to any person of whose claim he or she has not had notice at the time of the distribution.

## **65 Claims barred against executor or administrator in certain cases**

- (1) If an executor or administrator has given notices under section 64 and a claim against the estate is sent to him or her, the executor or administrator may serve a notice on the claimant calling the claimant to take proceedings to enforce the claim within a period of 6 months, and to duly prosecute the claim.
- (2) If, after that period of 6 months has ended, that person does not satisfy the Supreme Court that he or she is duly prosecuting the claim, the court may, on application by the executor or administrator, make an order barring the claim against the executor or administrator, subject to any conditions that appear just, or make any other order the court considers appropriate.

**66 Distribution of estate by executors and administrators**

- (1) If an executor or administrator liable as such, under any lease or agreement for a lease granted or assigned to, or made and entered into with, the testator or intestate whose estate is being administered, to the rents, covenants, or agreements contained in the lease or agreement has—
- (a) satisfied all liabilities under the lease, or agreement for a lease, as have accrued due and been claimed up to the assignment mentioned in paragraph (c); and
  - (b) set apart a sufficient sum to answer any future claim that may be made in relation to any fixed and ascertained sum, covenanted or agreed by the lessee, to be laid out on the property demised, or agreed to be demised, although the period for laying out the sum may not have arrived; and
  - (c) assigned the lease, or agreement for a lease, to a purchaser, or to a legatee, devisee, or other person entitled to call for a conveyance of it;

the executor or administrator may distribute the estate of the testator or intestate remaining in his or her hands among the parties entitled respectively, without appropriating any part or any further part of it to meet any future liability under the lease or agreement.

- (2) An executor or administrator so distributing the estate shall not, after having made or executed that assignment, and having, if necessary, set apart that sufficient fund, be personally liable in relation to any subsequent claim under any such lease, or agreement for a lease.
- (3) In this section:

*assignment* includes an acknowledgment within the meaning of section 56.

*lease* includes an underlease.

**67 Right to follow assets**

Nothing in section 64, 65 or 66 shall prejudice the right of any creditor or claimant or lessor, or those claiming under any lessor, to follow the assets or estate, or any part of the assets or estate, into the hands of the persons, or any of them, among whom they may have been distributed, or who may have received them.

**68 Executors may compound etc**

An executor or administrator may—

- (a) pay any debts or claims on any evidence that he or she considers sufficient; or
- (b) accept any composition, or any security, real or personal, for any debts due to the deceased; or
- (c) allow any time for the payment of any such debts as he or she considers appropriate; or
- (d) compromise, compound, or submit to arbitration, all debts, accounts, claims, and things whatsoever relating to the estate of the deceased; and
- (e) for any of the purposes mentioned in this section, enter into, give, and execute any agreements, instruments of composition, releases, and other things he or she considers expedient, without being responsible for any loss occasioned thereby.

**69 Every executor etc to be deemed resident in ACT**

- (1) Every executor or administrator—
  - (a) named in any probate or letters of administration granted by any court of competent jurisdiction in any part of a Commonwealth country and making application under this Act for the sealing of the probate or administration; or
  - (b) appointed under this Act;



shall be deemed to be resident in the ACT.

- (2) If an executor or administrator is not actually resident in the ACT, he or she shall lodge with the registrar for filing an address for service within 20km of the registrar's office before the issue or sealing of any probate or administration.
- (3) Any document served on an executor or administrator referred to in subsection (2) at the address referred to in that subsection is to be taken to have been served personally on the executor or administrator.

## **70 Executors etc may be allowed commission**

- (1) Subject to subsection (2), the Supreme Court or the registrar may allow out of the assets of any deceased person to his or her executor, administrator or trustee, in passing his or her accounts, the commission or percentage for his or her services that is just.
- (2) A commission or percentage allowed by the registrar under subsection (1) must not exceed 5% (plus any GST payable in relation to the commission or percentage).
- (3) No such allowance shall be made to any executor, administrator or trustee who neglects or omits, without a special order of the Supreme Court, to pass his or her accounts under any general or special rule or order of the court.

## **71 Limits of professional charges for obtaining probate etc**

- (1) Subject to this section, if the gross value of an estate does not exceed \$20 000, the costs to be allowed out of the estate to a solicitor for professional services rendered in connection with the obtaining of a grant of probate or administration shall, if no contention has arisen, be in accordance with the following scale:

item	where the gross value of the estate is—	the costs shall be—
		\$

## Section 71

item	where the gross value of the estate is—	the costs shall be—
1	not more than \$1 000	60
2	more than \$1 000 but not more than \$2 000	80
3	more than \$2 000 but not more than \$4 000	100
4	more than \$4 000 but not more than \$6 000	120
5	more than \$6 000 but not more than \$8 000	140
6	more than \$8 000 but not more than \$10 000	160
7	more than \$10 000 but not more than \$12 000	180
8	more than \$12 000 but not more than \$14 000	200
9	more than \$14 000 but not more than \$16 000	220
10	more than \$16 000 but not more than \$18 000	240
11	more than \$18 000 but not more than \$20 000	260

(2) Subject to this section, if the gross value of the estate exceeds \$20 000, the costs to be allowed out of the estate to a solicitor for professional services rendered in connection with the obtaining of a grant of probate or administration are—

- (a) \$260 plus an additional \$10 for each complete \$2 000 by which the gross value of the estate exceeds \$20 000; or
- (b) \$2 000;

whichever is less.

(3) The following are not included in the amounts mentioned in subsections (1) and (2) and must be allowed and paid out of the estate:

- (a) necessary disbursements;
- (b) GST payable for the supply of the services;

- (c) the charges for preparing and passing the statement for duty or the payment of duty.
- (4) If the net value of the estate exceeds \$4 000, a solicitor may deliver a bill of costs to the executor or administrator and cause it to be submitted for taxation and the amount of the bill when so taxed and no more shall be allowed and paid out of the estate.
- (5) If the net value of the estate does not exceed \$4 000, the Supreme Court may, if the work has been of exceptional length or difficulty, grant leave to the solicitor to submit his or her bill of costs for taxation, and the amount of the bill when so taxed and no more shall be allowed and paid out of the estate.
- (6) An application for leave under subsection (5) shall be supported by an affidavit setting out the exceptional circumstances on which the applicant relies.
- (7) If a bill of costs is taxed under subsection (4) or (5) and the amount of the bill (exclusive of the costs of submitting it for taxation and of amounts referred to in subsection (3)) does not, after taxation, exceed the amount that would otherwise have been payable under subsection (1), the costs of submitting the bill for taxation shall be paid by the solicitor.

### **73 Bill to be taxed by taxing officer**

A taxing officer of the Supreme Court shall tax and settle all bills of costs submitted for taxation under section 71.

### **74 Taxing rules to apply**

The rules of the court for the time being in force relating to the taxation of bills of costs shall, so far as practicable, apply to bills of costs so taxed and settled by a taxing officer.

## Part 3D

### Liability of certain persons in relation to deceased estates

*Note* The provisions of this part were relocated from the *Imperial Acts (Substituted Provisions) Act 1986*, sch 2 (for the effect of a relocation, see *Legislation Act 2001*, s 96). The 1986 Act substituted provisions for certain UK Acts that applied (or may have applied) in the ACT and repealed those Acts. The 1986 Act, s 4 (1) provided, in effect, that the rules of law about the interpretation of consolidating Acts apply to the interpretation of the provisions of a law set out in schedule 2. These rules of law continue to apply to this part (see *Legislation Act 2001*, s 96 (3)).

#### 74A Fraudulently obtaining or keeping property

A person—

(a) who—

- (i) by obtaining, receiving or holding any real or personal property forming part of the estate of a deceased person; or
- (ii) by effecting the release of a debt or liability due to the estate of a deceased person;

defrauds any creditor of the estate of the deceased person; or

(b) who, without full valuable consideration—

- (i) obtains, receives or holds any real or personal property forming part of the estate of a deceased person; or
- (ii) effects the release of a debt or liability due to the estate of a deceased person;

is liable and chargeable as an executor in his or her own wrong to the extent of the real and personal property forming part of the estate of the deceased person that the person receives, or that comes into his or her hands, less—

- (c) the amount of any debt incurred for valuable consideration and without fraud that was due to the person from the deceased person at the time of his or her death; and

the amount of any payment made by the person that might have been properly made by the personal representative of the deceased person.

*Note* The provisions of this section were substituted for 43 Eliz. 1 c 8 (1601).

#### **74B Persons liable for waste of deceased estate**

If a person (the *relevant person*) has, as the personal representative of a deceased person or as the executor in his or her own wrong of the will of a deceased person, wasted or converted to his or her own use any part of the estate of the deceased person, then, on the death of the relevant person, the personal representative of the relevant person is, to the extent of the available assets of the relevant person, liable and chargeable in relation to that waste or conversion in the same way as the relevant person would have been if the relevant person has not died.

*Note* The provisions of this section were substituted for 30 Chas. 2 c 7 (1678) and 4 Will. and Mary c 24, s 12 (1692).

## Part 4 Small estates

### 75 Application to registrar for probate or administration

If a person dies leaving property not exceeding \$100 000 in value, application for representation may be made direct to the registrar.

### 76 Duties of registrar

- (1) The registrar shall, on being satisfied about—
  - (a) the identity of the applicant;
  - (b) the right of the applicant to administer the estate of the deceased; and
  - (c) the value of the estate;give the applicant all necessary information for the purpose of enabling him or her to fill up advertisements, affidavits, and documents necessary for obtaining representation.
- (2) The registrar may—
  - (a) swear the applicant and every deponent; and
  - (b) attest the execution of the administration bond.

### 77 Issue of probate or administration in name of Supreme Court

- (1) The registrar shall, on being satisfied—
  - (a) with the sufficiency of the evidence in support of the application; and
  - (b) that the estate does not exceed \$100 000 in value; and
  - (c) that no caveat has been entered against the application; and
  - (d) that no will has been deposited with the registrar;

cause probate or letters of administration to be issued and delivered to the applicant on demand.

- (2) Probate or administration under this section shall be issued in the name and under the seal of the Supreme Court.

**78 Matters about which registrar not satisfied**

If the registrar is not satisfied about the matters mentioned in section 77, the registrar shall state, to the applicant, the matters in relation to which he or she is not satisfied.

**79 Obligation of registrar**

In no case shall the registrar be under any obligation because of this part to deal with any application that the registrar may consider proper to be dealt with by the Supreme Court, or to be placed in the hands of a legal practitioner.

## Part 5 Recognition of foreign grants

### 80 Reseal of grant made in certain countries

(1) If a court of competent jurisdiction in a State or Territory or in a Commonwealth country has, whether before or after the commencement of this section, granted probate of a will, administration of an estate or an order to collect and administer an estate, the person who is—

- (a) for a probate of a will—
  - (i) the executor to whom the probate was granted; or
  - (ii) a person authorised by that executor, under a power of attorney, to make the application; or
  - (iii) the executor, by representation, of the will; or
- (b) for administration of an estate—
  - (i) the administrator to whom the administration was granted; or
  - (ii) the person authorised by that administrator, under a power of attorney, to make the application; or
- (c) for an order to collect and administer an estate—a public trustee in the country or part of a country to whom the order was granted;

may, on producing the probate, administration or order to the registrar and depositing a copy of it with the registrar, apply to the registrar to have it sealed with the seal of the Supreme Court, and the registrar may seal it accordingly.

(2) The registrar shall not, without an order of the Supreme Court, seal a probate or administration under this section if a caveat against the



sealing of the probate or administration has been lodged with the registrar.

- (3) The registrar may, at any time, refer an application under this section to the Supreme Court and, if an application is so referred, the probate, administration or order to collect and administer an estate to which the application relates shall not be sealed except in accordance with an order of the court.
- (4) If a probate or administration is sealed under subsection (1)—
  - (a) the probate or administration has the same force, effect and operation as if it had been originally granted by the Supreme Court; and
  - (b) the person who made the application under subsection (1) shall perform the same duties and be subject to the same liabilities as if the probate or administration had been originally granted by the court and he or she was the person to whom the probate or administration had been so granted.
- (5) If an order to collect and administer an estate is sealed under subsection (1), the person who made application for the sealing of the order has the same duties and is subject to the same liabilities as if he or she was the public trustee and the order was an order to collect and administer the estate granted to the public trustee under section 88.
- (6) The Supreme Court may, before or after sealing a probate, administration or order to collect and administer an estate under subsection (1), require the applicant to give security for the proper administration of the estate to which it relates.
- (7) In this section, a reference to an order to collect and administer an estate includes a reference to an exemplification of such an order.

**81 Caveat**

Any person may lodge with the registrar a caveat against the sealing of any such probate or administration, and any such caveat shall have the same effect, and shall be dealt with in the same way, as if it were a caveat against the granting of probate or administration.

**82 Seal not to be attached until duty is paid etc**

- (1) The seal of the Supreme Court shall not be attached to any such probate or administration until all such probate, stamp, and any other duties (excluding estate duty) have been paid as would have been payable if the probate or administration had been originally granted by the court.
- (2) Subject to subsection (3), the administration shall not be so sealed until such bond has been entered into as would have been required if the administration had been originally granted by the Supreme Court.
- (3) The seal of the Supreme Court shall not be attached to any such probate or administration except on an affidavit that notice of the intention to apply in that behalf has been published once in a newspaper published and circulating in the ACT 14 days before the making of the affidavit, and that no caveat has been lodged in relation to the probate or administration.

**83 Inclusion of orders to collect and Scotch confirmation**

A reference in this part to probate or administration includes a reference to—

- (a) an order to a curator or other person to collect and administer an estate; and
- (b) a confirmation of the executor or another person granted in a sheriff court in Scotland.

## Part 6 Public trustee

### 87B Estates to the value of \$10 000 or less

- (1) If the public trustee is satisfied—
  - (a) that the net value of the estate of a deceased person does not exceed \$20 000; and
  - (b) that application has not been made for a grant of probate of the will, or administration of the estate, of the deceased person;

the public trustee may administer the estate of the deceased person, and for that purpose may call in the estate of the deceased person, sell and convert into money the part of that estate that does not consist of money, pay any debts and liabilities of or relating to the deceased person, being debts and liabilities of which he or she has notice, and deal with the balance (if any) of that estate as if probate of the will or administration of the estate of the deceased person had been granted to him or her by the Supreme Court.

- (2) If the public trustee administers the estate of a deceased person under subsection (1) and a balance remains after he or she has dealt with the estate in accordance with that subsection, the public trustee shall deal with the balance of the estate in the following way:
  - (a) if the public trustee is of the opinion that the person died testate—as if probate of the last will of the person had been granted to him or her by the Supreme Court;
  - (b) in any other case—as if administration of the estate had been granted to him or her by the Supreme Court.
- (3) The public trustee shall not administer an estate under subsection (1) unless notice of intention to do so has been given by advertisement or otherwise, in the way and form the public trustee considers appropriate.

- (4) If the public trustee is in, or comes into, possession of a will of a deceased person whose estate is being administered or has been administered under subsection (1), the public trustee shall deposit the will with the registrar.

### **87C Election to administer estate**

- (1) The public trustee may file in the office of the registrar an election, signed by the public trustee, to administer the estate of a deceased person if—
- (a) the person left property in the ACT; and
  - (b) the gross value of that property does not, in the opinion of the public trustee, exceed \$100 000; and
  - (c) probate of the will, or administration of the estate, of the person has not been granted by the Supreme Court to any person; and
  - (d) the public trustee is entitled under section 88 to apply for an order to collect and administer the estate of the person.
- (2) An election under subsection (1) in relation to the estate of a deceased person shall contain—
- (a) particulars of the name of the deceased person; and
  - (b) the particulars of the place of residence, and the occupation, of the deceased person at the time of death that are known to the public trustee; and
  - (c) the particulars of the date of death, and the property forming part of the estate, of the deceased person that are known to the public trustee.
- (3) If, in the opinion of the public trustee, a deceased person died testate, an election shall have the will of the person annexed to it and shall state that the will was, in the opinion of the public trustee, duly executed by the person.

- (4) If the public trustee has filed an election, the estate of the person vests in the public trustee, and the public trustee has the powers and duties that he or she would have had if the Supreme Court had, under section 88, granted to the public trustee an order to collect and administer the estate of the person.
- (5) The public trustee shall publish notice of each election filed under this section in a newspaper published and circulating in the ACT, and publication of a notice accordingly in relation to an estate is conclusive evidence that the public trustee is entitled to administer the estate of the deceased person.
- (6) If, after the public trustee has filed an election—
- (a) if the will of the deceased person was annexed to the election—a later will; or
  - (b) in any other case—a will;
- of the deceased person comes into the possession of the public trustee, the public trustee shall, forthwith, file in the office of the registrar a notice, signed by the public trustee, containing particulars of that will.
- (7) If the public trustee files a notice under subsection (6), the election shall be deemed to have been revoked and the public trustee ceases to have the powers and duties given by this section in relation to the estate.
- (8) If, after the public trustee has filed an election in relation to the estate of a deceased person, the gross value of the estate is found to exceed \$100 000, the public trustee shall, forthwith, file in the office of the registrar a notice, signed by the public trustee, certifying that the value of the estate exceeds that amount.
- (9) If the public trustee files a notice under subsection (8), the election shall be deemed to have been revoked and the public trustee ceases to have the powers and duties given by this section in relation to the estate.

- (10) The filing of a notice under subsection (6) or (8) in relation to the estate of a deceased person does not prevent the public trustee from applying, under section 88, for an order to collect and administer that estate.
- (11) If the public trustee has filed a notice under subsection (6) or (8) in relation to the estate of a deceased person, the provisions of section 32B apply as if the filing of an election under this section was the grant of probate of the will, or administration of the estate, of the deceased person and the filing of the notice was the revocation of that grant.

### **88 Orders to public trustee to collect and administer**

- (1) The Supreme Court may, on the application of the public trustee, grant to the public trustee an order to collect and administer the estate of any deceased person leaving real or personal estate within the jurisdiction in any of the following cases:
- (a) if the deceased leaves no executor, spouse or next of kin, resident within the jurisdiction, willing and capable of acting in execution of his or her will or administration of his or her estate;
  - (b) if the executors named renounce probate of the will of the deceased, and all the persons primarily entitled to administration by writing filed with the registrar decline to apply for administration;
  - (c) if probate or administration is not applied for within 3 months after the death of the deceased;
  - (d) if, after the end of 30 days from the death there is no reasonable probability of application being made within that period of 3 months;
  - (e) if the estate or any part of the estate is liable to waste and the executor, any spouse or the next of kin—

- (i) is absent from the locality of the estate; or
  - (ii) is not known; or
  - (iii) has not been found; or
  - (iv) requests the public trustee in writing to apply for the order;
- (f) if the estate, or any part of it, is—
- (i) of a perishable nature; or
  - (ii) in danger of being lost or destroyed;
- (g) if great expense may be incurred because of delay;
- (h) if by the will of the deceased the curator of estates of deceased persons or the public trustee is appointed to act.
- (2) The Supreme Court may in any case require the public trustee to—
- (a) give the notices; or
  - (b) cite the person; or
  - (c) produce the evidence;
- it considers appropriate before granting the order applied for, or may make a temporary order for collection and protection only or limited to a part of the estate or otherwise.
- (3) The registrar may, on the application of the public trustee, supported by affidavits on which the Supreme Court would, in the opinion of the registrar, grant to the public trustee an order to collect and administer the estate of a deceased person, grant such an order as of course in the name and under the seal of the court, and the order shall be deemed to have been made by the court.
- (4) In any application under subsection (3) the registrar may make any requirement which the Supreme Court could, under subsection (2), make on an application to the court, and may make a temporary or limited order of the kind referred to in subsection (2).

- (5) The registrar shall not grant an order to the public trustee to collect and administer the estate of a deceased person in any case in which it appears to him or her to be doubtful whether the order ought to be granted.
- (6) In this section:
- spouse*, in relation to a deceased person, has the same meaning as it has in part 3A in relation to an intestate.

### **89 Effect of order**

- (1) If an order to collect and administer the estate of any deceased person is granted, the public trustee shall have the same powers, rights, and obligations in relation to the estate, except as otherwise expressly provided, as the public trustee would have had if administration had been granted to him or her, and the estate of the deceased shall vest in the public trustee.
- (2) If the Supreme Court grants an order to collect and administer the estate of a deceased person after having been satisfied that the deceased made a valid will that had not been revoked before death—
- (a) a copy of that will shall be annexed to the order; and
- (b) the public trustee has, subject to this part, the same rights and duties in relation to the estate of the person as the public trustee would have if administration with the will annexed of the estate of the deceased person had been granted to the public trustee.
- (3) All laws for the time being in force in relation to the administration of the estates of deceased persons shall apply to the administration of estates by the public trustee.



**90 Grant of probate or administration notwithstanding appointment of public trustee**

- (1) Notwithstanding that—
  - (a) the public trustee is administering the estate of a deceased person under section 87B; or
  - (b) the public trustee has filed an election to administer the estate of a deceased person under section 87C; or
  - (c) the public trustee has been granted an order to collect and administer the estate of a deceased person under section 88;the Supreme Court may grant probate of the will, or administration of the estate, of the deceased person to an appropriate person on the conditions it considers appropriate.
- (2) No application for any such grant shall be made until 7 days after written notice of the intention to apply for the grant has been left at the office of the public trustee.

**91 Cessation of rights and liabilities of public trustee**

- (1) Immediately on the grant of any such probate or administration, all the interest, powers, rights, and duties of the public trustee (except rights given by this section) in regard to the estate of the deceased person whose estate is affected by the grant, and all liabilities of the public trustee under any contract or agreement entered into in relation to the estate, or any part of the estate, shall cease.
- (2) The part of the estate of the deceased left unadministered by the public trustee, and all rights and obligations of the public trustee in relation to it, shall vest in the executor or administrator obtaining the probate or administration.
- (3) Nothing in this section shall interfere with the allowance and payment of—
  - (a) all money due for the commission of the public trustee; and

- (b) the necessary outlay, disbursements, costs, charges, and expenses in relation to the estate, including all costs in relation to appearing on the application for the probate or administration.
- (4) Nothing in this section shall relieve the public trustee from any liability in relation to the management of the estate up to the time of granting the probate or administration.

**92 Order to public trustee to collect and administer in special circumstances**

- (1) If it is made to appear to the Supreme Court that there is reasonable ground to suppose that any person has died, either in or out of the jurisdiction of the court, intestate, leaving property within the jurisdiction, the court may order and empower the public trustee to collect and administer the estate, both real and personal, of that person.
- (2) The order shall be valid until revoked, and shall empower the public trustee to—
  - (a) collect, manage, and administer the personal estate of the supposed deceased person; and
  - (b) enter on and receive the rents and profits and otherwise manage the real estate; and
  - (c) pay and discharge the debts and liabilities of that person;in like way as if he or she were certainly dead and the public trustee had obtained an order to collect and administer the estate of the person under section 88.
- (3) The public trustee shall not proceed to any distribution of the assets without an order of the Supreme Court specially authorising the public trustee to make the distribution.

**93 Notice of order to be published**

Within 1 month after any order to collect and administer has been granted, the public trustee shall, unless the Supreme Court otherwise orders, cause notice of the fact that the order has been granted to be published twice in some newspaper circulating in or near to the ACT.

**95 Supreme Court orders against public trustee**

- (1) This section applies if—
  - (a) the public trustee has the responsibility of collecting and administering a deceased estate; and
  - (b) the public trustee or the curator of estates of deceased persons has—
    - (i) neglected or refused to do any act in relation to the administration of the estate; or
    - (ii) acted, or threatened to act, in breach of his or her duty in relation to the administration of the estate.
- (2) If this section applies, a person interested in an estate referred to in subsection (1) may apply to the Supreme Court on affidavit—
  - (a) for an order calling on the public trustee to show cause before the court, within 2 days after the date of service of the order, why the public trustee should act, or fail to act, in the way complained of; or
  - (b) for an interim injunction.
- (3) On application under subsection (2), the Supreme Court may grant an order or interim injunction subject to any conditions about giving security for costs the court considers appropriate.

**96 Applications how heard**

- (1) On the hearing of any such complaint the Supreme Court may receive proof of the matters in relation to the complaint orally or by affidavit, and may make any order that the circumstances of the case require, and about payment of costs—
  - (a) by the complainant; or
  - (b) by the public trustee; or
  - (c) from the estate administered by the public trustee;as, in its discretion, seems just.
- (2) Any orders shall have the same effect and be enforceable by the same process as if made by the Supreme Court in a suit between the parties to the complaint.

**97 Public trustee to act as Supreme Court directs**

If an order to collect and administer is made under this part, the Supreme Court may, on the application of the public trustee or any person interested in the estate, make any orders about the collection, sale, investment, and disposal of the estate, that the court considers appropriate.

**97A Public trustee may obtain directions of Supreme Court**

- (1) The public trustee may, *ex parte*, take the opinion or obtain the direction of the Supreme Court on any question, whether of law or of fact, arising under this part, or in the course of his or her duties.
- (2) Any question shall be submitted to the Supreme Court in the way and at the time it directs, and shall be accompanied by any statement of facts, documents and other information it requires and the public trustee shall, if the court so desires, attend on it at the time and place it appoints.

- (3) The Supreme Court may, before giving its opinion or direction, require the attendance of, or communication with, any person interested in the estate to which the question relates, but no person shall have a right to be heard unless the court otherwise directs.
- (4) The Supreme Court shall give its opinion or direction to the public trustee, and the public trustee shall act in accordance with its opinion or direction and shall, on the request of any person interested in the estate, communicate to the person the effect of the opinion or direction.

### **98 Mode of proceeding under this Act**

- (1) If the estate of any deceased person is administered by the public trustee under this part—
  - (a) all disputes and matters about the collection, management, or administration of the estate; and
  - (b) all claims and demands on the estate;shall, subject to subsection (2), be decided by the Supreme Court.
- (2) If it appears to be not desirable that the matter in question should be so decided, the Supreme Court may direct such proceedings to be instituted as appear proper for the due decision of the matter.

### **101 Accounts to be kept etc**

The public trustee shall—

- (a) make an inventory or list of all the estates of the persons that the public trustee has been ordered to collect and administer and keep it in his or her office; and
- (c) keep all letters received, and copies of all letters written by the public trustee, and all deeds, papers, and writings of and relating to those estates.

**102 Receipt of public trustee sufficient discharge**

The written receipt of the public trustee for any money payable to the public trustee under this part shall be a sufficient discharge for the money to the person paying it, and the person shall not afterwards be liable for any misapplication of the money.

## Part 8 Procedure

### 121 Method of taking evidence

- (1) Subject to the rules, the witnesses, and, if necessary, the parties in all matters if their attendance can be had, shall be examined orally in open court.
- (2) By leave of the Supreme Court in every case the parties may verify their respective cases in whole or in part by affidavit.
- (3) The deponent in every affidavit shall be subject to be cross-examined by or on behalf of the opposite party orally in open court, and on that cross-examination may be re-examined orally in open court by or on behalf of the party using the affidavit.

### 124 Order to produce instrument purporting to be testamentary

- (1) The Supreme Court may, whether any suit or other proceeding is or is not pending in the court in relation to any probate or administration, order any person to produce and bring into the registry any paper or writing, being or purporting to be testamentary, or otherwise material to the matter before the court, that is shown to be in the possession or under the control of that person.
- (2) If it is not shown that the paper or writing is in the possession or under the control of that person, but it appears that there are reasonable grounds for believing that the person has the knowledge of the paper or writing, the Supreme Court may direct him or her to attend for the purpose of being examined in open court or on interrogatories in relation to the paper or writing.
- (3) Any person directed so to attend shall be bound to answer the questions or interrogatories, and (if so ordered) to produce and bring in the paper or writing, and shall be subject to the like process of

contempt for default in not attending or in not answering those questions or interrogatories, or not bringing in that paper or writing, that the person would have been subject to in case he or she had been a party to a suit in the Supreme Court and had made that default.

- (4) The costs of the motion, petition, or other proceeding shall be in the discretion of the Supreme Court.



## Part 9                      Miscellaneous

### 125 Registrar to keep record of probates etc

- (1) The registrar shall cause entries to be made in a book to be kept for that purpose of—
  - (a) all grants of probate and administration; and
  - (b) all elections and orders to collect; and
  - (c) the filing, passing, and allowance of the accounts of all executors and administrators; and
  - (d) any special order extending the time for passing those accounts.
- (2) The book referred to in subsection (1) shall set out—
  - (a) the dates of the grants, elections and orders; and
  - (b) the names of the testators or intestates; and
  - (c) the place and time of death; and
  - (d) the names and description of the executors or administrators; and
  - (e) the sworn value of the estates; and
  - (f) the dates of the filing, passing, allowance of, and special orders in relation to, the accounts.

### 125A Proved wills and other documents to be held by Supreme Court

An original will—

- (a) that is brought into the Supreme Court; or
- (b) probate of which is granted under this Act; or

- (c) a copy of which is annexed to administration granted under this Act; or
- (d) that is deposited with the registrar under section 87B; or
- (e) a copy of which is annexed to an election filed under section 87C; or
- (f) a copy of which is annexed to an order to collect and administer an estate granted under section 88;

and any other documents the Supreme Court directs shall be deposited and preserved at the office of the court and may, subject to the rules, be inspected there.

### **125B Official certificate or copy of grants and wills obtainable**

A person may, on payment of the fee (if any) determined under the *Supreme Court Act 1933*, section 37 (1), obtain from the registrar—

- (a) a certificate or exemplification of a grant of probate or administration; or
- (b) a copy of—
  - (i) the whole or a part of a will; or
  - (ii) any other document the Supreme Court approves.

### **126 Costs**

In all matters under this Act the question of costs and how they shall be paid shall be in the discretion of the Supreme Court.

### **127 Person fraudulently disposing of will liable for damages**

If a person suffers damage as a result of the stealing of a will or a part of a will, or as a result of the fraudulent destroying, cancelling, obliterating or concealing of a will or a part of a will, the person may recover damages in relation to the damage by action in a court

of competent jurisdiction from the person who stole, destroyed, cancelled, obliterated or concealed the will or part.

**128 Application of amendments made by Administration and Probate (Amendment) Act 1996**

The following provisions as amended or inserted by the *Administration and Probate (Amendment) Act 1996* (and any other consequential amendments made by that Act, schedule) apply only in relation to the distribution of the estates of people who die on or after 1 May 1996:

- (a) section 12;
- (b) section 22;
- (c) part 3A heading;
- (d) division 3A.1 heading;
- (e) section 44;
- (f) division 3A.2 heading;
- (g) section 45A;
- (h) section 49BA;
- (i) paragraphs 49D (3) (a) and (b);
- (j) division 3A.3 heading;
- (k) parts 3B and 3C headings;
- (l) section 65;
- (m) section 69;
- (n) section 95;
- (o) schedule 6.

## **Schedule 4**

(see s 41C)

### **Part 4.1                      Order of application of assets if estate solvent**

- 1 Assets undisposed of by will, subject to the retention out of those assets of a fund sufficient to meet any pecuniary legacies.
- 2 Assets not specifically disposed of by will but included (either by a specific or general description) in a residuary gift, subject to the retention out of those assets of a fund sufficient to meet any pecuniary legacies that are not provided for out of the assets undisposed of by will.
- 3 Assets specifically appropriated or disposed of by will (either by a specific or general description) for the payment of debts.
- 4 Assets charged with, or disposed of by will (either by a specific or general description) subject to a charge for, the payment of debts.
- 5 The fund (if any) kept to meet pecuniary legacies.
- 6 Assets specifically disposed of by will, rateably according to value.

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## **Part 4.2**                      **Rules about payment of debts and liabilities if estate insolvent**

- 1 The funeral, testamentary and administration expenses have priority.
- 2 Subject to rule 1, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to the valuation of annuities and future and contingent liabilities, respectively, and as to the priorities of debts and liabilities as are in force at the death of the deceased person under the law of bankruptcy in relation to the assets of persons adjudged bankrupt.
- 3 In the application of those rules, the date of the death of the deceased person shall be substituted for the date of the sequestration order.

## **Schedule 6      Distribution of intestate estate on intestacy**

(See s 49)

### **Part 6.1      Distribution of estate if intestate survived by spouse**

<b>item</b>	<b>circumstances</b>	<b>How intestate estate of intestate is to be distributed</b>
1	if the intestate is not survived by issue	The spouse is entitled to the whole of the intestate estate.
2	if the intestate is survived by issue	<ol style="list-style-type: none"><li>1 If the value of the intestate estate does not exceed \$150 000, the spouse is entitled to the whole of the intestate estate.</li><li>2 If the value of the intestate estate exceeds \$150 000, the spouse is entitled to be paid out of the intestate estate—<ol style="list-style-type: none"><li>(a) \$150 000; and</li><li>(b) interest on that sum, calculated at the rate of 8% per annum from the date of the death of the intestate to the date that sum is paid or appropriated to the spouse (inclusive); and</li></ol></li></ol>

<b>item</b>	<b>circumstances</b>	<b>How intestate estate of intestate is to be distributed</b>
		<p>(c) an additional sum equal to—</p> <ul style="list-style-type: none"><li>(i) if 1 child or the issue of 1 child of the intestate survives the intestate but no other issue of the intestate survives the intestate—<math>\frac{1}{2}</math> of the value of the balance of the intestate estate; or</li><li>(ii) in any other case—<math>\frac{1}{3}</math> of the value of the balance of the intestate estate.</li></ul> <p>3 The issue of the intestate are entitled to the balance (if any) of the intestate estate after payment to the spouse of the sum or sums to which the spouse is entitled under this item.</p>

## **Part 6.2**

### **Distribution of estate if intestate not survived by spouse**

<b>item</b>	<b>circumstances</b>	<b>How intestate estate of intestate is to be distributed</b>
1	if the intestate is survived by issue	the issue are entitled to the whole of the intestate estate.
2	if the intestate is not survived by issue but is survived by a parent or both parents	the parent is entitled to the whole of the intestate estate or, if both parents survive the intestate, the parents are entitled to the whole of the intestate estate in equal shares.
3	if the intestate is not survived by issue or by a parent but is survived by next of kin	the next of kin are entitled to the intestate estate in accordance with section 49C.
4	if the intestate is not survived by issue, by a parent or by next of kin	the Territory is entitled to the intestate estate.



## Endnotes

### 1 About the endnotes

Amending and modifying laws are annotated in the legislation history and the amendment history. Current modifications are not included in the republished law but are set out in the endnotes.

Not all editorial amendments made under the *Legislation Act 2001*, part 11.3 are annotated in the amendment history. Full details of any amendments can be obtained from the Parliamentary Counsel's Office.

Uncommenced amending laws and expiries are listed in the legislation history and the amendment history. These details are underlined. Uncommenced provisions and amendments are not included in the republished law but are set out in the last endnote.

If all the provisions of the law have been renumbered, a table of renumbered provisions gives details of previous and current numbering.

The endnotes also include a table of earlier republications.

If the republished law includes penalties, current information about penalty unit values appears on the republication inside front cover.

### 2 Abbreviation key

am = amended	ord = ordinance
amdt = amendment	orig = original
ch = chapter	p = page
cl = clause	par = paragraph
def = definition	pres = present
dict = dictionary	prev = previous
disallowed = disallowed by the Legislative Assembly	(prev...) = previously
div = division	prov = provision
exp = expires/expired	pt = part
Gaz = Gazette	r = rule/subrule
hdg = heading	reg = regulation/subregulation
IA = Interpretation Act 1967	renum = renumbered
ins = inserted/added	reloc = relocated
LA = Legislation Act 2001	R[X] = Republication No
LR = legislation register	RI = reissue
LRA = Legislation (Republication) Act 1996	s = section/subsection
mod = modified / modification	sch = schedule
No = number	sdiv = subdivision
num = numbered	sub = substituted
o = order	SL = Subordinate Law
om = omitted/repealed	<u>underlining</u> = whole or part not commenced or to be expired

## Endnotes

3 Legislation history

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### 3 Legislation history

This Act was originally a Commonwealth ordinance—the *Administration and Probate Ordinance 1929* No 18 (Cwlth).

The *Australian Capital Territory (Self-Government) Act 1988* (Cwlth), s 34 (4) converted most former Commonwealth ordinances in force in the ACT into ACT enactments. This allowed the ACT Legislative Assembly to amend and repeal the laws. This Act was converted into an ACT enactment on 1 July 1992 under the *Australian Capital Territory (Self-Government) Act 1988* (Cwlth), s 34 (7).

As with most ordinances in force in the ACT, the name was changed from *Ordinance* to *Act* by the *Self-Government (Citation of Laws) Act 1989* No 21, s 5 on its conversion to an ACT enactment on 1 July 1992.

Before 11 May 1989, ordinances commenced on their notification day unless otherwise stated (see *Seat of Government (Administration) Act 1910* (Cwlth), s 12).

After 11 May 1989 and before 10 November 1999, Acts commenced on their notification day unless otherwise stated (see *Australian Capital Territory (Self-Government) Act 1988* (Cwlth) s 25).

#### Legislation before becoming Territory enactment

##### **Administration and Probate Act 1929 No 18**

notified 10 October 1929

commenced 21 October 1929

as amended by

##### **Administration and Probate Ordinance 1930 No 11**

notified 25 July 1930

commenced 25 July 1930

##### **Administration and Probate Ordinance 1932 No 13**

notified 28 April 1932

commenced 28 April 1932

##### **Administration and Probate Ordinance 1933 No 9**

notified 4 May 1933

commenced 4 May 1933

##### **Administration and Probate Ordinance 1934 No 2**

notified 8 February 1934

commenced 8 February 1934

**Administration and Probate Ordinance (No 2) 1934 No 6**

notified 22 March 1934  
commenced 22 March 1934

**Administration and Probate Ordinance 1937 No 3**

notified 18 March 1937  
commenced 18 March 1937

**Administration and Probate Ordinance (No 2) 1937 No 13**

notified 19 August 1937  
commenced 19 August 1937

**Ordinances Revision Ordinance 1937 No 27 sch 2**

notified 23 December 1937  
commenced 23 December 1937

**Ordinances Revision Ordinance 1938 No 35 sch 2**

notified 15 December 1938  
commenced 15 December 1938

**Administration and Probate Ordinance 1943 No 7**

notified 13 May 1943  
commenced 13 May 1943

**Trustee Companies Ordinance 1947 No 15**

notified 18 December 1947  
commenced 18 December 1947

**Administration and Probate Ordinance 1950 No 16**

notified 21 December 1950  
commenced 21 December 1950

**Administration and Probate Ordinance 1953 No 5**

notified 27 February 1953  
commenced 27 February 1953

**Administration and Probate Ordinance (No 2) 1954 No 2**

notified 7 January 1954  
commenced 7 January 1954

**Administration and Probate Ordinance 1960 No 6**

notified 9 September 1960  
commenced 12 September 1960

## Endnotes

3 Legislation history

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**Administration and Probate Ordinance 1965 No 20**

notified 21 December 1965  
commenced 1 January 1966

**Administration and Probate Ordinance 1967 No 9 (as am by Ord 1967 No 23)**

notified 18 May 1967  
s 1, s 2, s 7, s 10 and s 12 commenced 18 May 1967  
remainder commenced 1 July 1967

**Administration and Probate Ordinance 1969 No 16**

notified 14 August 1969  
commenced 1 September 1969 (Cwlth Gaz 1969)

**Administration and Probate Ordinance 1970 No 25**

notified 2 July 1970  
commenced 20 July 1970 (Cwlth Gaz 1970)

**Administration and Probate Ordinance 1974 No 27 (as am by Ord 1974 No 43)**

notified 13 August 1974  
commenced 13 August 1974

**Administration and Probate Ordinance (No 2) 1974 No 43 (as am by Ord 1974 No 47 sch 3)**

notified 18 October 1974  
commenced 18 October 1974

**Ordinances Revision (Age of Majority) Ordinance 1974 No 47 sch 1**

notified 24 October 1974  
commenced 1 November 1974

**Administration and Probate (Amendment) Ordinance 1976 No 53**

notified 27 October 1976  
commenced 1 November 1976

**Administration and Probate (Amendment) Ordinance 1980 No 8**

notified 26 March 1980  
commenced 1 April 1980 (Cwlth Gaz 1980 No S66)

**Administration and Probate (Amendment) Ordinance 1984 No 67**

notified 5 December 1984  
commenced 5 December 1984

**Public Trustee (Miscellaneous Amendments) Ordinance 1985 No 9**

notified 8 March 1985

commenced 28 October 1985 (Cwlth Gaz 1985 No G42)

**Administrative Arrangements (Consequential Amendments)****Ordinance 1988 No 17 sch 2**

notified 22 April 1988

commenced 2 April 1988

**Administration and Probate (Amendment) Ordinance 1988 No 34**

notified 6 July 1988

commenced 6 July 1988

**Administration and Probate (Amendment) Ordinance 1989 No 17**

notified 22 March 1989

commenced 22 March 1989

**Administration and Probate (Amendment) Ordinance (No 2) 1989  
No 19**

notified 22 March 1989

commenced 24 March 1989 (Cwlth Gaz 1989 No S101)

**Self-Government (Consequential Amendments) Ordinance 1989****No 38 pt 2 div 1, sch 1**

notified 10 May 1989 (Cwlth Gaz 1989 No S160)

s 1, s 2 commenced 10 May 1989 (s 2 (1))

pt 2 div 1, sch 1 commenced 11 May 1989 (s 2 (2) and see Cwlth Gaz 1989 No S164)

**Legislation after becoming Territory enactment****Administration and Probate (Amendment) Act 1991 No 20**

notified 10 May 1991 (Gaz 1991 No S36)

commenced 10 May 1991

**Administration and Probate (Amendment) Act (No 2) 1991 No 69**

notified 7 November 1991 (Gaz 1991 No S120)

commenced 7 November 1991

## Endnotes

3 Legislation history

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**Registrar-General (Consequential Provisions) Act 1993 No 64 sch 1**

notified 6 September 1993 (Gaz 1993 No S172)  
s 1, s 2 commenced 6 September 1993 (s 2 (1))  
sch 1 commenced 1 October 1993 (s 2 (2) and see Gaz 1993 No S207)

**Supreme Court (Amendment) Act (No 2) 1993 No 91 sch 3**

notified 17 December 1993 (Gaz 1993 No S258)  
commenced 17 December 1993 (s 2)

**Statutory Offices (Miscellaneous Provisions) Act 1994 No 97 sch pt 1**

notified 15 December 1994 (Gaz 1994 No S280)  
s 1, s 2 commenced 15 December 1994 (s 2 (1))  
sch pt 1 commenced 15 December 1994 (s 2 (2) and Gaz 1994  
No S293)

**Land Titles (Consequential Amendments) Act 1995 No 54 sch pt 1**

notified 20 December 1995 (Gaz 1995 No S313)  
commenced 20 June 1996 (s 2, see Land Titles (Amendment) Act 1995  
s 2 (3) and LA s 79)

**Administration and Probate (Amendment) Act 1996 No 15**

notified 1 May 1996 (Gaz 1996 No S71)  
commenced 1 May 1996 (s 2)

**Legal Practitioners (Consequential Amendments) Act 1997 No 96  
sch 1**

notified 1 December 1997 (Gaz 1997 No S380)  
s 1, s 2 commenced 1 December 1997 (s 2 (1))  
sch 1 commenced 1 June 1998 (s 2 (2))

**Birth (Equality of Status) (Amendment) Act 1998 No 42**

notified 14 October 1998 (Gaz 1998 No 41)  
ss 1-3 commenced 14 October 1998 (s 2 (1))  
remainder commenced 14 April 1999 (s 2 (3))

**Law Reform (Miscellaneous Provisions) Act 1999 No 66 sch 3**

notified 10 November 1999 (Gaz 1999 No 45)  
commenced 10 November 1999 (s 2)

**Statute Law Amendment Act 2000 No 80 sch 3**

notified 21 December 2000 (Gaz 2000 No S69)  
commenced 21 December 2000 (s 2 (1))

**Legislation (Consequential Amendments) Act 2001 No 44 pt 3**

notified 26 July 2001 (Gaz 2001 No 30)  
 s 1, s 2 commenced 26 July 2001 (IA s 10B)  
 pt 3 commenced 12 September 2001 (s 2 and see Gaz 2001 No S65)

**Statute Law Amendment Act 2001 (No 2) 2001 No 56 pt 3.1**

notified 5 September 2001 (Gaz 2001 No S65)  
 commenced 5 September 2001 (s 2 (1))

**Justice and Community Safety Legislation Amendment Act 2002 No 27 pt 2**

notified LR 9 September 2002  
 s 1, s 2 commenced 9 September 2002 (LA s 75)  
 pt 2 commenced 10 September 2002 (s 2)

**Civil Law (Wrongs) Act 2002 No 40 div 3.2.1**

notified LR 10 October 2002  
 s 1, s 2 commenced 10 October 2002 (LA s 75 (1))  
 div 3.2.1 commenced 1 November 2002 (s 2 (2) and CN2002-13)

**4 Amendment history****Commencement**

s 2 om 2001 No 44 amdt 1.22

**Repeal**

s 3 am 1930 No 11 s 2  
 om 1999 No 66 sch 3

**Parts**

s 4 am 1953 No 5 s 2  
 sub 1965 No 20 s 3  
 am 1967 No 9 s 3; 1969 No 16 s 3; 1970 No 25 s 4  
 om 1976 No 53 s 3

**Interpretation for Act**

s 5 am 1965 No 20 s 4; 1967 No 9 s 4; 1999 No 66 sch 3  
 def **acting curator** ins 1965 No 20 s 4  
 om 1985 No 9 sch 1  
 def **acting deputy curator** ins 1965 No 20 s 4  
 om 1985 No 9 sch 1  
 def **acting deputy registrar** ins 1965 No 20 s 4  
 am 1985 No 9 sch 1; 1988 No 34 s 3  
 om 1994 No 97 sch pt 1

## Endnotes

### 4 Amendment history

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- def **acting registrar** ins 1965 No 20 s 4  
am 1985 No 9 sch 1  
om 1994 No 97 sch pt 1
- def **administration** am 1937 No 13 s 3
- def **administrator** am 1937 No 13 s 3
- def **city area** om 1985 No 9 sch 1
- def **Commonwealth country** ins 1965 No 20 s 4  
om 1969 No 16 s 4
- def **court** ins 1996 No 15 sch
- def **deceased person** or **the deceased** am 1930 No 11 s 3;  
1985 No 9 sch 1  
sub 1965 No 20 s 4
- def **deputy curator** ins 1965 No 20 s 4  
om 1985 No 9 sch 1
- def **deputy registrar** ins 1965 No 20 s 4  
am 1985 No 9 sch 1; 1988 No 34 s 3  
sub 1994 No 97 sch pt 1
- def **distribute** ins 1937 No 13 s 3
- def **election** ins 1965 No 20 s 4
- def **judge** ins 1937 No 13 s 3  
om 1984 No 67 sch
- def **justice** om 1937 No 13 s 3
- def **portion of His Majesty's Dominions** ins 1934 No 6 s 2  
om 1965 No 20 s 4
- def **probate** ins 1932 No 13 s 2
- def **public trustee** ins 1985 No 9 s 4
- def **registrar** ins 1994 No 97 sch pt 1
- def **rules** am 1930 No 11 s 3  
sub 1999 No 66 sch 3
- def **seal of the court** ins 1996 No 15 sch
- def **the court** sub 1937 No 13 s 3; 1965 No 20 s 4  
om 1996 No 15 sch
- def **the curator** sub 1965 No 20 s 4  
om 1985 No 9 sch 1
- def **the registrar** sub 1965 No 20 s 4  
am 1985 No 9 sch 1; 1988 No 34 s 3  
om 1994 No 97 sch pt 1
- def **the registrar of titles** sub 1965 No 20 s 4  
am 1985 No 9 sch 1  
om 1993 No 64 sch 1
- def **the seal of the court** ins 1934 No 2 s 2  
sub 1965 No 20 s 4  
am 1985 No 9 sch 1  
om 1996 No 15 sch
- def **will** ins 1965 No 20 s 4

#### Administration

s 6 om 1985 No 9 sch 1



**Registrar of Probates**

s 7 am 1930 No 11 s 4  
sub 1965 No 20 s 5  
am 1988 No 17 sch 2; 1988 No 34 s 4  
sub 1994 No 97 sch pt 1

**Deputy Registrars of Probates**

s 7A ins 1965 No 20 s 5  
am 1988 No 34 s 5  
sub 1994 No 97 sch pt 1

**Registrar's seal and stamps**

s 7B ins 1965 No 20 s 5  
am 1988 No 17 sch 2; 1988 No 34 s 6; 1994 No 97 sch pt 1

**Powers and duties of deputies**

s 8 sub 1930 No 11 s 5  
sub 1965 No 20 s 5  
om 1985 No 9 sch 1

**Powers of acting curator, deputy curator, etc**

s 8A ins 1965 No 20 s 5  
om 1985 No 9 sch 1

**Seal and stamp of the curator**

s 8B ins 1965 No 20 s 5  
om 1985 No 9 sch 1

**Jurisdiction of Supreme Court**

div 3.1 hdg (prev pt 3 div 1 hdg) renum R6 LA

**Preliminary**

pt 3 div 3A hdg ins 1967 No 9 s 5  
om 1996 No 15 s 7

**Rights of spouses to intestate dwelling-houses**

pt 3 div 3B hdg ins 1967 No 9 s 5  
om 1996 No 15 s 12

**Simultaneous deaths**

pt 3 div 3C hdg ins 1984 No 67 s 12  
om 1996 No 15 s 13

**Supreme Court to make finding about domicile of deceased person**

s 8C ins 1970 No 25 s 5  
am 1984 No 67 s 4; 1985 No 9 sch 1; 1996 No 15 sch; 1999  
No 66 sch 3

**Probate or administration may be granted**

s 9 am 1965 No 20 s 6

## Endnotes

### 4 Amendment history

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#### **Evidence of death**

s 9A ins 1965 No 20 s 7

#### **Grant on presumption of death**

s 9B ins 1965 No 20 s 7  
am 1969 No 16 s 5; 1996 No 15 sch

#### **Issue of probate by registrar**

s 10 am 1965 No 20 s 8; 1984 No 67 s 5; 1996 No 15 sch; pars  
renum R6 LA

#### **Sealing of probate and letters of administration**

s 10A ins 1930 No 11 s 6  
am 1965 No 20 s 9; 1996 No 15 sch

#### **Grant to single executor reserving leave to others to apply**

s 10B ins 1965 No 20 s 10  
am 1996 No 15 sch

#### **Grant of probate to public trustee**

s 10C ins 1965 No 20 s 10  
sub 1985 No 9 s 5

#### **Eligible administrators**

s 12 am 1974 No 47 sch 1  
sub 1996 No 15 s 5

#### **Rights and duties of administrator**

s 13 am 1937 No 3 s 2  
om 1947 No 15 s 2  
ins 1999 No 66 sch 3  
am 2001 No 44 amdt 1.23, amdt 1.24

#### **Administration bond to be given**

s 14 sub 1965 No 20 s 11; 1969 No 16 s 6  
am 1984 No 67 sch; 1985 No 9 sch 1; 1996 No 15 sch

#### **Amount of penalty on administration bond**

s 15 am 1930 No 11 s 7; 1937 No 13 sch; 1965 No 20 s 12; 1967  
No 9 sch  
om 1969 No 16 s 6

#### **Powers of registrar as to sureties, penalty, etc**

s 16 am 1965 No 20 s 13; 1967 No 9 sch  
om 1969 No 16 s 6

#### **Order may be made to assign bond**

s 17 am 1930 No 11 s 8; 1937 No 13 sch; 1984 No 67 sch; 1996  
No 15 sch

**Order to assign bond in creditor's administration**

s 18 am 1930 No 11 s 9; 1937 No 13 sch; 1984 No 67 sch; 1985  
No 9 s 6, sch 1; 1996 No 15 sch

**Probate or administration may be revoked or further bond required**

s 18A ins 1965 No 20 s 14  
am 1984 No 67 sch; 1996 No 15 sch

**Renunciation or non-appearance by executor**

s 20 am 1996 No 15 sch

**Renunciation etc by person appointed both executor and trustee of will**

s 20A ins 1930 No 11 s 10  
am 1996 No 15 sch

**Administration to guardian of child sole executor**

s 21 am 1974 No 47 sch 1; 1996 No 15 sch; 1999 No 66 sch 3

**Administration under power of attorney**

s 22 am 1965 No 20 s 15  
sub 1996 No 15 s 6

**Power to appoint administrator**

s 24 am 1996 No 15 sch

**Proceeding if executor neglects to prove will**

s 25 am 1937 No 13 s 4; 1974 No 47 sch 1; 1996 No 15 sch

**Issue of special letters of administration**

s 26 am 1996 No 15 sch

**Special administrator to make certain affidavits**

s 27 am 1996 No 15 sch

**On return of original executor or administrator special administration to be rescinded**

s 28 am 1930 No 11 s 11; 1937 No 13 sch; 1984 No 67 sch

**Accounting by special administrator**

s 29 am 1996 No 15 sch

**Liability of executor or administrator neglecting to apply for rescission of special administration**

s 30 am 1996 No 15 sch

**Revocation of grants not to prejudice actions or suits**

s 31 am 1930 No 11 s 12; 1996 No 15 sch

**Discharge or removal of executor or administrator**

s 32 am 1930 No 11 s 13; 1937 No 13 sch; 1984 No 67 sch; 1996  
No 15 sch; pars renum R6 LA

## Endnotes

### 4 Amendment history

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#### **Revocation of grant if person living at date of grant**

s 32A ins 1965 No 20 s 16  
am 1996 No 15 sch

#### **Effect of revocation of grant**

s 32B ins 1965 No 20 s 16  
am 1969 No 16 s 7; 1993 No 64 sch 1; 1995 No 54 sch pt 1;  
1996 No 15 sch; pars renum R6 LA

#### **Caveats**

div 3.2 hdg (prev pt 3 div 2 hdg) renum R6 LA

#### **Caveat may be lodged**

s 33 am 1996 No 15 sch

#### **Service of order nisi**

s 35 am 1996 No 15 sch

#### **Withdrawal and removal of caveat**

s 37A ins 1965 No 20 s 17

#### **Costs if caveat lodged by public trustee**

s 38 am 1985 No 9 s 7; 1996 No 15 sch

#### **Effect of grant of representation**

div 3.3 hdg (prev pt 3 div 3 hdg) renum R6 LA

#### **Estate to vest in public trustee until grant**

s 38A ins 1965 No 20 s 18  
am 1985 No 9 s 8

#### **Real and personal estate to vest in executor or administrator**

s 39 am 1965 No 20 s 19; 1996 No 15 sch

#### **Real estate held in trust**

s 40 am 1965 No 20 s 20; 1996 No 15 sch

#### **Property of deceased to be assets**

s 41 am 1934 No 6 s 3; 1996 No 15 sch

#### **Property of deceased liable for debts**

s 41A ins 1965 No 20 s 21  
am 1996 No 15 sch

#### **Appointments by will under general power**

s 41B ins 1965 No 20 s 21  
am 1996 No 15 sch

#### **Administration of assets**

s 41C ins 1965 No 20 s 21  
am 1996 No 15 sch

**Application of income of settled residuary estate**

s 41D ins 1965 No 20 s 21  
am 1996 No 15 sch

**Real estate to be held on trusts of will**

s 42 am 1996 No 15 sch

**Rights of executor in relation to real estate**

s 43 am 1996 No 15 sch

**Position of executor of an executor**

div 3.4 hdg (prev pt 3 div 4 hdg) ins 1999 No 66 sch 3  
renum R6 LA

div 3.4 note ins 1999 No 66 sch 3  
am 2001 No 44 amdt 1.25, amdt 1.26

**Executor of executor**

s 43A ins 1999 No 66 sch 3

**When ceases to represent deceased**

s 43B ins 1999 No 66 sch 3

**Rights and liabilities of executor of executor**

s 43C ins 1999 No 66 sch 3

**Intestacy**

pt 3A hdg ins 1996 No 15 s 7

**Preliminary**

div 3A.1 hdg (prev pt 3A div 1 hdg) ins 1996 No 15 s 7  
renum R6 LA

**Interpretation for pt 3A**

s 44 sub 1967 No 9 s 5  
am 1996 No 15 s 8, sch

**Distribution on intestacy**

div 3A.2 hdg (prev pt 3A div 2 hdg) ins 1996 No 15 s 9  
renum R6 LA

**Executor or administrator to hold property of intestate on trust for persons entitled**

s 45 am 1954 No 2 s 2; 1965 No 20 s 22  
sub 1967 No 9 s 5  
am 1996 No 15 sch

**Distribution between legal spouse and eligible partner**

s 45A ins 1996 No 15 s 10

**Provisions relating to persons who at date of death of intestate are children**

s 46 sub 1967 No 9 s 5  
am 1974 No 47 sch 1; 1996 No 15 sch

## Endnotes

4 Amendment history

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### **Presumption of survivorship not to apply**

s 47 sub 1967 No 9 s 5  
om 1984 No 67 s 6

### **Estate by courtesy or right of dower not to arise**

s 48 sub 1967 No 9 s 5

### **Distribution of intestate estate**

s 49 am 1930 No 11 s 14; 1937 No 13 sch  
sub 1967 No 9 s 5  
am 1984 No 67 s 7; 1996 No 15 sch; R5 (LR s 15 (1) (j))

### **Interest of spouse on intestacy in personal chattels**

s 49A ins 1967 No 9 s 5  
am 1996 No 15 sch

### **Immovable property if intestate domiciled elsewhere**

s 49AA ins 1984 No 67 s 8  
am 1996 No 15 sch

### **How distribution to issue is made**

s 49B ins 1967 No 9 s 5  
am 1984 No 67 s 9; 1996 No 15 sch

### **Gifts made before death of intestate**

s 49BA ins 1984 No 67 s 10  
am 1996 No 15 s 11

### **How distribution to next of kin is made**

s 49C ins 1967 No 9 s 5  
am 1996 No 15 sch

### **How distribution to the Territory is made**

s 49CA ins 1989 No 17 s 3  
am 1989 No 38 s 3

### **Partial intestacies**

s 49D ins 1967 No 9 s 5  
am 1984 No 67 s 11; 1996 No 15 sch; ss renum R6 LA

### **Presumptions of parentage**

s 49E ins 1967 No 9 s 5  
sub 1989 No 19 s 4  
am 1998 No 42 s 12

### **Rights of spouses to intestate dwelling houses**

div 3A.3 hdg (prev pt 3A div 3 hdg) ins 1996 No 15 s 12  
renum R6 LA

### **Definitions for div 3A.3**

s 49F ins 1967 No 9 s 5  
am 1996 No 15 sch

**Claim by spouse to dwelling house**

s 49G ins 1967 No 9 s 5  
am 1996 No 15 sch; 2001 No 56 amdt 3.1

**Valuation**

s 49H ins 1967 No 9 s 5

**Right not exercisable for certain tenancies**

s 49J ins 1967 No 9 s 5  
am 1996 No 15 sch

**Right not exercisable in certain other cases**

s 49K ins 1967 No 9 s 5  
am 1996 No 15 sch

**Personal representative not to sell or dispose of interest without consent**

s 49L ins 1967 No 9 s 5  
am 1996 No 15 sch

**Rule that trustee not to purchase trust property**

s 49M ins 1967 No 9 s 5  
am 1996 No 15 sch

**If surviving spouse is under legal disability**

s 49N ins 1967 No 9 s 5  
am 1974 No 47 sch 1; 1996 No 15 sch

**Simultaneous deaths**

pt 3B hdg ins 1996 No 15 s 13

**Devolution of property**

s 49P ins 1984 No 67 s 12  
am 1996 No 15 sch

**Functions of Executors and Administrators**

pt 3C hdg (prev div 4 pt 3 hdg) sub 1996 No 15 s 14

**Powers of executors and administrators to sell, mortgage or lease real estate**

s 50 am 1965 No 20 s 23; 1967 No 9 s 6; 1993 No 64 sch 1; 1996  
No 15 sch; ss renum R6 LA

**Supreme Court may make special order**

s 51 am 1930 No 11 s 15; 1937 No 13 sch; 1965 No 20 s 24; 1984  
No 67 sch

**Supreme Court may authorise postponement of realisation and carrying on of business**

s 51A ins 1934 No 6 s 4  
am 1996 No 15 sch

**Supreme Court may order partition in summary way**

s 52 am 1930 No 11 s 16; 1937 No 13 sch; 1984 No 67 sch; 1993  
No 64 sch 1; 1995 No 54 sch pt 1; 1996 No 15 sch

## Endnotes

4 Amendment history

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**Personal representative not required to continue to act against own consent**

s 53 am 1930 No 11 s 17; 1937 No 13 sch; 1984 No 67 sch; 1996 No 15 sch

**In suits executor or administrator to represent real estate**

s 54 am 1996 No 15 sch

**All debts to stand in equal degree**

s 55 am 1996 No 15 sch

**Interest on legacies**

s 55A ins 1991 No 69 s 3  
am 2001 No 44 amdt 1.27, amdt 1.28

**Executor may sign acknowledgment instead of conveyance**

s 56 am 1993 No 64 sch 1; 1995 No 54 sch pt 1; 1996 No 15 sch

**Summary application for legacy etc**

s 57 am 1930 No 11 s 18; 1937 No 13 sch; 1984 No 67 sch; 1996 No 15 sch

**Filing and passing accounts**

s 58 am 1930 No 11 s 19; 1965 No 20 s 25; 1984 No 67 s 13; 1989 No 19 s 5; 1996 No 15 sch

**Passing and allowance of accounts of executors and administrators**

s 58A ins 1930 No 11 s 20  
am 1933 No 9 s 2; 1965 No 20 s 26

**If accounts not exhibited registrar to summon administrator before court, which may inflict penalty**

s 59 am 1965 No 20 s 27; 1996 No 15 sch

**Proceedings under s 59 not to prejudice proceedings on bond**

s 60 am 1996 No 15 sch

**Supreme Court may make order about disposal of money in hands of executor etc**

s 61 am 1930 No 11 s 21; 1937 No 13 s 5, sch; 1984 No 67 sch; 1996 No 15 sch

**Payments under revoked probates or administrations valid**

s 62 am 1930 No 11 s 22; 1965 No 20 s 28; 1996 No 15 sch

**Distribution of assets**

s 64 am 1937 No 13 sch; 1989 No 19 s 6; 1993 No 64 sch 1; 1999 No 66 sch 3; ss renum R6 LA

**Claims barred against executor or administrator in certain cases**

s 65 am 1930 No 11 s 23; 1937 No 13 sch; 1984 No 67 sch; 1996 No 15 sch



**Distribution of estate by executors and administrators**

s 66 am 1930 No 11 s 24; 1996 No 15 sch

**Right to follow assets**

s 67 am 1996 No 15 sch

**Executors may compound etc**

s 68 am 1965 No 20 s 29; 1996 No 15 sch

**Every executor etc to be deemed resident in ACT**

s 69 am 1965 No 20 s 30; 1996 No 15 sch

**Commission, charges and costs**

pt 3 div 5 hdg om 1996 No 15 s 15

**Executors etc may be allowed commission**

s 70 am 1930 No 11 s 25; 1932 No 13 s 3; 1937 No 13 sch; 1967  
No 9 sch; 1984 No 67 s 14, sch; 1996 No 15 sch; ss  
renum R6 LA; 2002 No 27 s 4

**Limits of professional charges for obtaining probate etc**

s 71 am 1930 No 11 s 26; 1937 No 13 sch  
sub 1950 No 16 s 2  
am 1965 No 20 s 31; 1967 No 9 s 7, sch; 1976 No 53 s 4; 1984  
No 67 sch; 1996 No 15 sch; ss renum R6 LA; 2002 No 27 s 5

**Additional charge where necessary to employ agent**

s 72 am 1950 No 16 s 3  
om 1965 No 20 s 32

**Bill to be taxed by taxing officer**

s 73 sub 1950 No 16 s 4  
am 1996 No 15 sch

**Taxing rules to apply**

s 74 am 1950 No 16 s 5

**Liability of certain persons in relation to deceased estates**

pt 3D hdg ins 1999 No 66 sch 3  
pt 3D note ins 1999 No 66 sch 3  
am 2001 No 44 amdt 1.29, amdt 1.30

**Fraudulently obtaining or keeping property**

s 74A ins 1999 No 66 sch 3

**Persons liable for waste of deceased estate**

s 74B ins 1999 No 66 sch 3

**Application to registrar for probate or administration**

s 75 am 1965 No 20 s 33; 1967 No 9 sch; 1974 No 43 sch; 1991  
No 20 s 3

## Endnotes

4 Amendment history

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### **Duties of registrar**

s 76 am 1974 No 27 s 2; 1996 No 15 sch

### **Issue of probate or administration in name of Supreme Court**

s 77 am 1930 No 11 s 27; 1965 No 20 s 34; 1967 No 9 sch; 1974 No 43 sch; 1991 No 20 s 4

### **Matters about which registrar not satisfied**

s 78 am 1996 No 15 sch

### **Obligation of registrar**

s 79 am 1965 No 20 s 35; 1996 No 15 sch; 1997 No 96 sch 1

### **Reseal of grant made in certain countries**

s 80 sub 1965 No 20 s 36  
am 1969 No 16 s 8; 1985 No 9 sch 1; 1996 No 15 sch;  
ss renum R6 LA

### **Caveat**

s 81 am 1965 No 20 s 37

### **Seal not to be attached until duty is paid etc**

s 82 am 1930 No 11 s 28; 1965 No 20 s 38; 1996 No 15 sch

### **Inclusion of orders to collect and Scotch confirmation**

s 83 sub 1965 No 20 s 39

### **Special provisions with respect to death duty payable under state law**

pt 5A hdg ins 1970 No 25 s 6  
om 1999 No 66 sch 3

### **Interpretation**

s 83A ins 1970 No 25 s 6  
om 1999 No 66 sch 3

### **Death duty etc payable under law of a State to constitute a debt payable out of Territory assets**

s 83B ins 1970 No 25 s 6  
am 1985 No 9 sch 1; 1996 No 15 sch  
om 1999 No 66 sch 3

### **Public trustee**

pt 6 hdg sub 1965 No 20 s 40; 1985 No 9 s 9

### **Curator to give security**

s 84 sub 1965 No 20 s 41  
om 1985 No 9 sch 1

### **Successors to have power of administration de bonis non**

s 85 om 1985 No 9 sch 1

**Proceedings by and against curator**

s 86 am 1965 No 20 s 42  
om 1985 No 9 sch 1

**As to fees and commission**

s 87 sub 1960 No 6 s 3  
am 1967 No 9 sch; 1974 No 43 s 2  
om 1985 No 9 sch 1

**Appointment of agents**

s 87A ins 1937 No 13 s 6  
om 1985 No 9 sch 1

**Estates to the value of \$10 000 or less**

s 87B ins 1965 No 20 s 43  
am 1967 No 9 sch; 1969 No 16 s 9; 1974 No 43 sch; 1985 No 9  
sch 1; 1991 No 20 s 5; 1996 No 15 sch

**Election to administer estate**

s 87C ins 1965 No 20 s 43  
am 1967 No 9 sch; 1969 No 16 s 10; 1974 No 43 sch; 1985  
No 9 sch 1; 1991 No 20 s 6; 1996 No 15 sch

**Orders to public trustee to collect and administer**

s 88 am 1937 No 13 s 7; 1943 No 7 s 4; 1985 No 9 s 10, sch 1; 1996  
No 15 sch

**Effect of order**

s 89 am 1937 No 13 s 8; 1965 No 20 s 44; 1985 No 9 sch 1; 1996  
No 15 sch; ss renum R6 LA

**Grant of probate or administration notwithstanding appointment of public trustee**

s 90 am 1937 No 13 s 9; 1965 No 20 s 45; 1985 No 9 s 11, sch 1;  
1999 No 66 sch 3

**Cessation of rights and liabilities of public trustee**

s 91 am 1985 No 9 s 12, sch 1; 1996 No 15 sch

**Order to public trustee to collect and administer in special circumstances**

s 92 am 1932 No 13 s 4; 1937 No 13 s 10, sch; 1984 No 67 sch;  
1985 No 9 s 13, sch 1; 1996 No 15 sch

**Notice of order to be published**

s 93 am 1932 No 13 s 5; 1937 No 13 s 11, sch; 1984 No 67 sch;  
1985 No 9 sch 1

**Like notices to next of kin**

s 94 am 1932 No 13 s 6  
sub 1937 No 13 s 12  
am 1965 No 20 s 46  
om 1985 No 9 sch 1

## Endnotes

4 Amendment history

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### **Payment to curator in a State or Territory**

s 94A ins 1937 No 13 s 12  
sub 1965 No 20 s 47  
om 1985 No 9 sch 1

### **Curator may receive payment of estate situated in another State or Territory**

s 94B ins 1937 No 13 s 12  
sub 1965 No 20 s 47  
om 1985 No 9 sch 1

### **Supreme Court orders against public trustee**

s 95 am 1930 No 11 s 29; 1937 No 13 s 13, sch; 1984 No 67 sch;  
1985 No 9 s 14, sch 1  
sub 1996 No 15 sch

### **Applications how heard**

s 96 am 1930 No 11 s 30; 1937 No 13 s 14, sch; 1984 No 67 sch;  
1985 No 9 sch 1

### **Public trustee to act as Supreme Court directs**

s 97 am 1930 No 11 s 31; 1937 No 13 s 15, sch; 1984 No 67 sch;  
1985 No 9 s 15, sch 1

### **Public trustee may obtain directions of Supreme Court**

s 97A ins 1937 No 13 s 16  
am 1984 No 67 sch; 1985 No 9 s 16, sch 1; 1996 No 15 sch

### **Mode of proceeding under this Act**

s 98 am 1930 No 11 s 32; 1937 No 13 sch; 1984 No 67 sch; 1985  
No 9 sch 1

### **Payment of debts**

s 99 am 1937 No 13 s 17  
om 1985 No 9 sch 1

### **Payment to relatives etc in petty cases**

s 100 am 1930 No 11 s 33; 1937 No 13 sch  
om 1965 No 20 s 48

### **Accounts to be kept etc**

s 101 am 1937 No 13 s 18; 1965 No 20 s 49; 1985 No 9 sch 1; 1996  
No 15 sch

### **Receipt of public trustee sufficient discharge**

s 102 am 1985 No 9 s 17, sch 1; 1996 No 15 sch

### **Accounts to be audited by auditor-general**

s 103 am 1937 No 13 s 19  
sub 1969 No 16 s 11  
om 1985 No 9 sch 1

**The curator to invest moneys after expiration of 6 months**

s 104 am 1933 No 9 s 3; 1937 No 13 s 20, sch; 1943 No 7 s 5; 1984  
No 67 sch  
om 1985 No 9 sch 1

**Curator not liable for acts done in the performance of his duties**

s 105 om 1985 No 9 sch 1

**Proceeds of property of third person to be handed over to him**

s 106 om 1985 No 9 sch 1

**Conveyance of escheated lands and disposal of proceeds of sale**

s 107 am 1965 No 20 s 50; 1985 No 9 sch 1  
om 1989 No 17 s 4

**Unclaimed moneys**

s 108 am 1930 No 11 s 34  
sub 1965 No 20 s 51; 1969 No 16 s 12  
om 1985 No 9 sch 1

**Parties entitled may apply subsequently**

s 109 am 1930 No 11 s 35; 1937 No 13 sch  
sub 1965 No 20 s 51  
om 1969 No 16 s 12

**Testator's family maintenance**

pt 7 hdg sub 1953 No 5 s 3; 1954 No 2 s 3  
om 1969 No 16 s 13

**Where no adequate provision made by deceased person, court may make orders, etc**

s 110 om 1953 No 5 s 4  
ins 1954 No 2 s 3  
am 1967 No 9 s 8  
om 1969 No 16 s 13

**Court may make order for widow's or children's maintenance**

s 111 am 1930 No 11 s 36; 1937 No 13 sch; 1953 No 5 s 5  
sub 1954 No 2 s 3  
am 1967 No 9 s 9  
om 1969 No 16 s 13

**Application by summons in chambers**

s 112 om 1930 No 11 s 37  
ins 1954 No 2 s 3  
om 1969 No 16 s 13

**Service of notice of application**

s 113 am 1930 No 11 s 38; 1937 No 13 sch  
sub 1954 No 2 s 3  
om 1969 No 16 s 13

## Endnotes

### 4 Amendment history

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#### **Powers of court**

s 114 am 1930 No 11 s 39; 1937 No 13 sch; 1953 No 5 s 6  
sub 1954 No 2 s 3  
om 1969 No 16 s 13

#### **Court to consider net estate and widow's or children's means**

s 115 am 1930 No 11 s 40; 1937 No 13 sch; 1953 No 5 s 7  
sub 1954 No 2 s 3  
om 1969 No 16 s 13

#### **Cases in which court may refuse application**

s 116 am 1930 No 11 s 41; 1937 No 13 sch  
sub 1954 No 2 s 3  
om 1969 No 16 s 13

#### **Contents of order**

s 117 am 1938 No 35 sch 2; 1953 No 5 s 8  
sub 1954 No 2 s 3  
om 1969 No 16 s 13

#### **Adjustment of duty**

s 118 om 1954 No 2 s 3

#### **Time within which application to be made**

s 119 sub 1953 No 5 s 9  
om 1954 No 2 s 3

#### **Practice**

s 120 om 1930 No 11 s 42

#### **Method of taking evidence**

s 121 am 2002 No 40 amdt 3.2

#### **Trial of question of fact by jury**

s 122 om 1965 No 20 s 52

#### **Question to be stated**

s 123 om 1965 No 20 s 52

#### **Order to produce instrument purporting to be testamentary**

s 124 am 1930 No 11 s 43; 1937 No 13 sch; 1984 No 67 sch; 1996  
No 15 sch

#### **Registrar to keep record of probates etc**

s 125 am 1965 No 20 s 53; paragraphs renum R6 LA

#### **Proved wills and other documents to be held by Supreme Court**

s 125A ins 1965 No 20 s 54  
am 1984 No 67 sch; 1996 No 15 sch

**Official certificate or copy of grants and wills obtainable**

s 125B ins 1965 No 20 s 54  
am 1980 No 8 s 4; 1984 No 67 sch; 1993 No 91 sch 3

**Costs**

s 126 am 1965 No 20 s 55

**Person fraudulently disposing of will liable for damages**

s 127 sub 1965 No 20 s 56

**Application of amendments made by Administration and Probate (Amendment) Act 1996**

s 128 om 1937 No 13 s 21  
ins 2000 No 80 amdt 3.1

**Rules**

s 129 am 1930 No 11 s 44; 1937 No 13 sch; 1937 No 27 sch 2; 1984  
No 67 sch  
om 1999 No 66 sch 3

**Seal of the court**

s 129A ins 1934 No 2 s 3  
om 1965 No 20 s 57

**Fees**

hdg pt 10 om 1980 No 8 s 5  
s 130 am 1930 No 11 s 45; 1974 No 43 s 3  
om 1980 No 8 s 5

**Schedules**

schedules hdg om 1999 No 66 sch 3

**Schedule 1**

sch 1 hdg om 1999 No 66 sch 3  
sch 1 sub 1930 No 11 s 46  
am 1938 No 35 sch 2  
om 1999 No 66 sch 3

**Schedule 2**

sch 2 om 1960 No 6 s 4

**Fees**

sch 3 sub 1960 No 6 s 4  
sub 1967 No 9 s 10; 1974 No 27 s 3  
om 1980 No 8 s 6

**Schedule 4**

sch 4 ins 1965 No 20 s 58

**Order of application of assets if estate solvent**

pt 4.1 hdg (prev pt 1 hdg) renum R6 LA

## Endnotes

### 5 Earlier republications

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#### **Rules about payment of debts and liabilities if estate insolvent**

pt 4.2 hdg (prev pt 2 hdg) renum R6 LA

#### **Commonwealth countries**

sch 5 ins 1965 No 20 s 58  
om 1969 No 16 s 14

#### **Distribution of intestate estate on intestacy**

sch 6 ins 1967 No 9 s 11  
am 1984 No 67 s 15; 1989 No 17 s 5; 1989 No 38 sch 1; 1996  
No 15 s 16

#### **Distribution of estate if intestate survived by spouse**

pt 6.1 hdg (prev sch 6 pt 1 hdg) renum R6 LA

#### **Distribution of estate if intestate not survived by spouse**

pt 6.2 hdg (prev sch 6 pt 2 hdg) renum R6 LA

## 5 Earlier republications

Some earlier republications were not numbered. The number in column 1 refers to the publication order.

Since 12 September 2001 every authorised republication has been published in electronic pdf format on the ACT legislation register. A selection of authorised republications have also been published in printed format. These republications are marked with an asterisk (\*) in column 1. Except for the footer, electronic and printed versions of an authorised republication are identical.

<b>Republication No</b>	<b>Amendments to</b>	<b>Republication date</b>
1	Act 1991 No 20	31 August 1991
2	Act 1993 No 91	31 January 1994
3	Act 1994 No 97	31 January 1995
4	Act 1996 No 15	30 November 1996
5	Act 1998 No 42	31 August 1999
6	Act 2001 No 56	9 May 2002
7	Act 2002 No 27	10 September 2002



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