



AUSTRALIAN CAPITAL TERRITORY

Wills (Amendment) Act 1991

No. 67 of 1991

An Act to amend the *Wills Act 1968* and for related purposes

[Notified in ACT Gazette S 120: 7 November 1991]

The Legislative Assembly for the Australian Capital Territory enacts as follows:

Short title

1. This Act may be cited as the *Wills (Amendment) Act 1991*.

Principal Act

2. In this Act, “Principal Act” means the *Wills Act 1968*.¹

Substitution

3. Section 8 of the Principal Act is repealed and the following sections are substituted:

Minors—testamentary capacity

“8. (1) Subject to this section and section 16, a will made by a minor is not valid.

“(2) A minor who is or has been married may make a valid will and may revoke a will, or a part of a will, which he or she has made.

“(3) A will made by a minor who may marry and which is made in contemplation of a marriage is, on the solemnisation of the marriage contemplated, valid.

“(4) Where the Supreme Court, on an application by a minor under section 8A, makes an order in accordance with that section enabling the minor to make a will in the specific terms of a proposed will attached to the application, the minor may make a valid will in those terms.

“(5) Where the Supreme Court, on an application by a minor under section 8B, makes an order in accordance with that section enabling the minor to revoke a will, or a part of a will, the minor may revoke the will, or the part of the will, in accordance with that order.

“(6) A minor who has made a will in accordance with an order of the Supreme Court under section 8A and who has not at any time been married may not revoke the will, or a part of the will, otherwise than in accordance with an order of the Supreme Court under section 8B.

“(7) This section has effect subject to section 9.

Supreme Court enabling will by minor

“8A. (1) A minor may apply to the Supreme Court for an order declaring that the minor is entitled to make a will in the terms of a proposed will attached to the application.

“(2) On an application made by a minor under subsection (1), the Supreme Court may, if it is satisfied that—

- (a) the minor understands the nature and effect of the proposed will;
- (b) the proposed will accurately reflects the intentions of the minor; and
- (c) it is reasonable in all the circumstances that the minor should be able to make the proposed will;

make an order declaring that the minor is entitled to make a valid will in the specific terms of the proposed will attached to the application.

Supreme Court enabling revocation of will by minor

“8B. (1) A minor who has made a valid will and has not at any time been married may apply to the Supreme Court for an order declaring that the minor is entitled to revoke the will, or a part of the will, by an instrument in the terms of a proposed instrument attached to the application.

“(2) On an application made by a minor under subsection (1), the Supreme Court may, if it is satisfied that—

- (a) the minor understands the nature and effect of the proposed instrument;
- (b) the proposed instrument accurately reflects the intentions of the minor; and
- (c) it is reasonable in all the circumstances that the minor should be able to revoke the will, or the part of the will, by the proposed instrument;

make an order declaring that the minor is entitled to revoke the will, or the part of the will, by executing an instrument in the specific terms of the proposed instrument attached to the application.”.

Will to be in writing and signed before 2 witnesses

4. Section 9 of the Principal Act is amended by inserting in paragraph (1) (c) “or acknowledged” after “is made”.

Appointments by will

5. Section 11 of the Principal Act is amended by omitting subsection (1) and substituting the following subsection:

“(1) Where a testator purports to make an appointment by his or her will in exercise of a power of appointment, the appointment is not valid unless the will is—

- (a) executed in accordance with this Part; or
- (b) pursuant to Part IIA, to be taken to have been properly made.”.

Insertion

6. After section 11 of the Principal Act the following section is inserted:

Validity of will etc. not executed with required formalities

“11A. (1) A document, or a part of a document, purporting to embody testamentary intentions of a deceased person shall, notwithstanding that it has not been executed in accordance with the formal requirements of this Act, constitute a will of the deceased person, an amendment of the will of the deceased person or a revocation of the will of the deceased person if the Supreme Court is satisfied that the deceased person intended the document or part of the document to constitute his or her will, an amendment of his or her will or the revocation of his or her will respectively.

“(2) In forming a view of whether a deceased person intended a document or a part of a document to constitute his or her will, an amendment of his or her will or a revocation of his or her will, the Supreme Court may, in addition to having regard to the document, have regard to—

- (a) any evidence relating to the manner of execution of the document; or
- (b) any evidence of the testamentary intentions of the deceased person, including evidence (whether admissible before the commencement of this section or not) of statements made by the deceased person.”.

Alteration in will

7. Section 12 of the Principal Act is amended by inserting in paragraph (1) (b) “or acknowledged” after “is made”.

Insertion

8. After section 12 of the Principal Act the following sections are inserted:

Rectification

“12A. (1) If the court is satisfied that the probate copy of the will of a testator is so expressed that it fails to carry out his or her intentions, it may order that the will be rectified so as to carry out the testator’s intentions.

“(2) If the court is satisfied that circumstances or events existed or occurred before, at or after the execution by a testator of his or her last will, being circumstances or events—

- (a) that were not known to, or anticipated by, the testator;
- (b) the effects of which were not fully appreciated by the testator; or
- (c) that occurred at or after the death of the testator;

in consequence of which the provisions of the will applied according to their tenor would fail to accord with the probable intention of the testator had he or she known of, anticipated or fully appreciated the effects of those circumstances or events, the court may, if it is satisfied that it is desirable in all the circumstances to do so, order that the probate copy of the will be rectified so as to give effect to that probable intention.

“(3) Except with the leave of the court, an application to the court for an order for rectification shall not be made after the expiration of the period of 6 months commencing—

- (a) where the Public Trustee is administering the estate of the testator under section 87B or 87C of the *Administration and Probate Act 1929*—on the day on which notice was given under subsection 87B (3) or 87C (5), as the case requires, of that Act;
- (b) where an order has been granted under subsection 88 (1) or (3) of that Act in respect of the estate of the testator—on the day on which the order was granted; or
- (c) in any other case—on the day of the grant of probate of the will or letters of administration of the relevant estate with will annexed.

“(4) A personal representative of a deceased person may, within the period of 4 months commencing on the day referred to in paragraph 3 (a), (b) or (c) (whichever is applicable), by advertisement published in a daily newspaper circulating in the Territory, give notice of his or her intention to distribute all or part of the estate of the deceased person after the expiration of the period of 2 months commencing on the day on which the advertisement was so published and requiring any person wishing to make an application for an order for rectification to do so within that period of 2 months.

“(5) A personal representative of a deceased person is not liable for having distributed any part of the estate of the deceased person otherwise than in accordance with the provisions of the will of that deceased person as altered by an order for rectification where the distribution was made prior to the making of that order in accordance with the provisions of the will before it was so altered and, at the time of the distribution—

- (a) a period of 2 months had elapsed since an advertisement was published in accordance with subsection (4) and the personal representative had not received notice that an application had been made to the court for an order for rectification; or
- (b) the period of 6 months commencing on the day referred to in paragraph 3 (a), (b) or (c) (whichever is applicable) had expired and—
 - (i) the personal representative had not received notice that an application had been made to the court for an order for rectification, that the court had granted leave to apply for such an order or that an application had been made to the court for leave to apply for such an order; or
 - (ii) the court had granted leave to apply for an order for rectification but a period of 7 days had elapsed since the day on which that leave was granted without any application for such an order having been made.

“(6) Nothing in this section shall be taken to affect the right of a person, arising by reason of the making of an order for rectification, to recover any part of the estate of a deceased person that had been distributed before that order was made.

“(7) In this section, unless the contrary intention appears—

‘court’ means the Supreme Court;

‘order for rectification’ means an order inserting material in, or omitting material from, the probate copy of a will;

‘personal representative’, in relation to a deceased person, means the executor of the will of the deceased person or the administrator of the estate of the deceased person (including the Public Trustee when administering the estate of the deceased person under section 87B, 87C or 88 of the *Administration and Probate Act 1929*);

‘probate copy’, in relation to a will of a deceased person, includes the copy of the will—

- (a) annexed to letters of administration of the estate of the deceased person;
- (b) used in administering the estate of the deceased person under section 87B of the *Administration and Probate Act 1929*;
- (c) annexed to an election to administer the estate of the deceased person under section 87C of that Act; or
- (d) annexed to an order granted to collect and administer the estate of the deceased person under section 88 of that Act.

Extrinsic evidence

“12B. In proceedings to construe a will, evidence, including evidence of the testator’s dispositive intention, is admissible to the extent that the language used in the will renders the will, or any part of the will—

- (a) meaningless;
- (b) ambiguous or uncertain on the face of the will; or
- (c) ambiguous or uncertain in the light of the surrounding circumstances;

but evidence of a testator’s dispositive intention is not admissible to establish any of the circumstances referred to in paragraph (c).”.

Insertion

9. After section 14 of the Principal Act the following section is inserted:

Certain appointments and trusts not void

“14A. Where a testator, by his or her will—

- (a) confers on a person a power to appoint property; or
- (b) appoints a person to be trustee of any property with power to distribute the property as the trustee thinks fit;

the conferral of that power, or the creation of that trust, by the will shall not be void if the same power could have been conferred, or the same trust created, by an instrument *inter vivos*.”.

Substitution

10. Section 15 of the Principal Act is repealed and the following section substituted:

Will attested by beneficiary or spouse of beneficiary

“15. No will or testamentary provision of a will shall be void by reason only of the execution of the will having been attested by a person, or the spouse of a person, who has or may acquire, under the will or provision, any interest in property subject to the will.”

Revocation of will by testator’s marriage

11. Section 20 of the Principal Act is amended—

- (a) by omitting from subsection (1) “the next succeeding sub-section” and substituting “subsections (2) and (3)”;
- (b) by adding at the end the following subsection:

“(3) Where a will contains a devise or bequest to, an appointment of property in favour of, or a conferral of a power of appointment on, a person, being a devise, bequest, appointment or conferral expressed to be in contemplation of the marriage of the testator to that person—

- (a) the devise, bequest, appointment or conferral is not revoked by the marriage; and
- (b) the remaining provisions of the will are not revoked by the marriage unless a contrary intention appears from the will or from evidence admitted pursuant to section 12B.”

Insertion

12. After section 20 of the Principal Act the following section is inserted:

Effect of termination of marriage

“20A. (1) Subject to subsection (2), if, after a testator has made a will, the testator’s marriage is terminated—

- (a) any beneficial gift (including any devise, legacy, estate, interest or appointment of or affecting any real or personal estate, but not including any charge or direction for the payment of any debt) in favour of the former spouse of the testator and any power of appointment conferred on the former spouse is revoked;

- (b) any appointment under the will of the former spouse of the testator as executor, trustee or guardian shall be taken to be omitted from the will; and
- (c) any property which would, but for this subsection, have passed to the former spouse of the testator pursuant to a beneficial gift referred to in paragraph (a) shall pass as if the former spouse had predeceased the testator, but no class of beneficiaries under the will shall close earlier than it would have closed if the beneficial gift had not been revoked.

“(2) A beneficial gift or power of appointment is not revoked by paragraph (1) (a), and an appointment shall not be taken to be omitted from a will pursuant to paragraph (1) (b), if—

- (a) the Supreme Court is satisfied by any evidence, including evidence (whether admissible before the commencement of this section or not) of statements made by the testator, that the testator did not, at the time of termination of the marriage, intend to revoke the gift, power of appointment or appointment; or
- (b) the gift, power of appointment or appointment is contained in a will which was republished after the termination of the marriage by a will or codicil which evidences no intention of the testator to revoke the gift, power of appointment or appointment.

“(3) Nothing in this section affects—

- (a) any right of the former spouse of a testator to make an application under the *Family Provision Act 1969*; or
- (b) any direction, charge, trust or provision in the will of a testator for the payment of an amount in respect of a debt or liability of the testator to the former spouse of the testator or to the executor of the will, or administrator of the estate, of the former spouse.

“(4) For the purposes of this section, the termination of a marriage occurs, or shall be taken to occur—

- (a) when a decree of dissolution of marriage under the Family Law Act becomes absolute;
- (b) on the making of a decree of nullity under the Family Law Act in respect of a purported marriage which is void; or
- (c) on the annulment of the marriage in accordance with the law of a place outside Australia if the annulment is recognised in Australia pursuant to the Family Law Act.

“(5) In this section—

‘Family Law Act’ means the *Family Law Act 1975* of the Commonwealth;

‘former spouse’, in relation to a testator, means the person who, immediately before the termination of the testator’s marriage, was the testator’s spouse, or, in the case of a purported marriage of the testator which is void, was the other party to the purported marriage.”.

Revocation of will

13. Section 21 of the Principal Act is amended by omitting “the last preceding section” and substituting “sections 8B, 20 and 20A”.

Insertion

14. After section 30 of the Principal Act the following section is inserted:

Intermediate income on future and contingent bequests and devises

“30A. A contingent, future or deferred bequest or devise of property, whether specific or residuary, carries the intermediate income of that property except so far as that income or any part of it is otherwise disposed of by the will.”.

Substitution

15. Section 31 of the Principal Act is repealed and the following section substituted:

Gifts to issue

“31. (1) Where—

- (a) a testator by will devises or bequeaths property to, or appoints property in favour of, a person (in this section referred to as ‘the original beneficiary’) (whether individually or as a member of a class) who is a child or other issue of the testator for an estate or interest not determinable before or upon the death of the original beneficiary;
- (b) the original beneficiary dies in the lifetime of the testator and is survived by issue; and

- (c) any such issue survive the testator for a period of 30 days (in this section referred to as ‘the specified period’);

then, unless a contrary intention appears from the will or from evidence admitted pursuant to section 12B, the will has force and effect as if the devise or bequest were to, or the appointment were in favour of, any issue of the original beneficiary who survive the testator for the specified period, to be distributed—

- (d) where only 1 issue of the original beneficiary survives for that period—to that issue; or
- (e) where 2 or more issue of the original beneficiary survive for that period—in accordance with subsection (2).

“(2) Where 2 or more issue of an original beneficiary survive the testator for the specified period, the property the subject of the devise, bequest or appointment shall be divided into a number of equal shares equivalent to the total number of the nearest issue of the original beneficiary who—

- (a) survive the testator for the specified period; or
- (b) die before the end of that period leaving issue (in this subsection referred to as ‘surviving issue’) who survive the testator for the specified period;

and those equal shares shall be distributed as follows:

- (c) each of the nearest issue of the original beneficiary who survives the testator for the specified period is entitled to 1 share;
- (d) any sole surviving issue of a nearest issue who fails to survive the testator for the specified period is entitled to 1 share;
- (e) where there are 2 or more surviving issue of a nearest issue who fails to survive the testator for the specified period—those surviving issue are entitled, in equal shares, to 1 share.

“(3) Notwithstanding subsection (2), where a share is distributed in accordance with paragraph (2) (e), no surviving issue remoter than children of the nearest issue of the original beneficiary shall form part of the class of surviving issue entitled to take, unless a parent, who would have taken had he or she survived the testator for the specified period, dies before the end of that period, and then any remoter issue is or are entitled to take, if more than 1 in equal shares, the share which that parent would have taken.

“(4) A general requirement or condition in a will that an original beneficiary survive the testator or attain a specified age shall not be taken to be an expression of a contrary intention for the purposes of this section.

“(5) This section does not apply where an original beneficiary has not fulfilled a contingency required by the will as a condition of attaining the vested estate or interest, being a contingency other than surviving the testator or attaining a specified age.”.

Insertion

16. After section 31A of the Principal Act the following sections are inserted:

Distribution to issue

“31B. (1) Where a testator by will devises or bequeaths property to, or appoints property in favour of, his or her issue then, unless a contrary intention appears from the will or from evidence admitted pursuant to section 12B, the testator is presumed to have intended that, subject to subsection (2), the devise, bequest or appointment is to be distributed in equal shares between only those issue of the testator who—

- (a) are his or her nearest issue; and
- (b) survive the testator for a period of 30 days (in this section referred to as ‘the specified period’).

“(2) If a person who is one of the nearest issue of the testator dies before the end of the specified period, leaving issue who survive the testator for the specified period (in this section referred to as ‘surviving issue’), the testator shall be presumed to have intended that any surviving issue of that deceased nearest issue take, if more than 1 in equal shares, the share in the testator’s estate which that deceased nearest issue would have taken had he or she survived the testator for the specified period.

“(3) Subsection (2) does not operate to entitle any surviving issue remoter than the children of any deceased nearest issue to take unless the death of a parent who would have taken as surviving issue occurred before the end of the specified period, and then the testator shall be presumed to have intended that the remoter issue take, if more than 1 in equal shares, the share which that parent would have taken.

Beneficiary not surviving testator

“31C. (1) Subject to section 31, where—

- (a) a testator by will devises or bequeaths property to, appoints property in favour of, or confers the power to appoint property on, any person; and
- (b) that person does not survive the testator by 30 days;

then unless the contrary intention appears from the will, or from evidence admitted pursuant to section 12B, that person shall be deemed to have predeceased the testator and the devise, bequest, appointment or power shall lapse.

“(2) A general requirement or condition in a will that a beneficiary survive the testator shall not be taken to be an expression of a contrary intention for the purposes of this section.”.

Application

17. (1) The amendments effected by sections 4, 5, 6, 7, 8, 9, 10, 11 and 14 apply only in relation to wills taking effect after the commencement of this Act.

(2) The amendment effected by section 12 applies only in relation to the will and estate of a testator where a marriage of the testator is terminated after the commencement of this Act.

(3) The amendments effected by sections 15 and 16 apply only in relation to wills made or republished after the commencement of this Act.

NOTE

- 1. Ordinance No. 11, 1968 as amended by No. 65, 1977; No. 46, 1978; No. 46, 1983; Nos. 16 and 21, 1989.

[Presentation speech made in Assembly on 19 September 1991]