

South Australia

# Wills Act 1936

An Act relating to wills.

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## Legislative history

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**The Parliament of South Australia enacts as follows:**

## **Part 1—Preliminary**

### **1—Short title**

This Act may be cited as the *Wills Act 1936*.

### **3—Interpretation and application of Act**

- (1) In this Act, unless the contrary intention appears—

*adult* means a person of or over the age of 18 years;

*the Court* means the Supreme Court of South Australia;

*minor* means a person under the age of 18 years;

*personal estate* includes leasehold estates and other chattels real and money, shares of Government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which, prior to the coming into operation of *The Intestate Real Estates Distribution Act 1867* devolved by law upon the executor or administrator and any share or interest in any such personal estate;

*real estate* includes messuages, lands, rents, and hereditaments, whether freehold or of any other tenure, and whether corporeal, incorporeal, or personal, and any estate, right or interest (other than a chattel interest) therein;

*the Registrar* means the Registrar of Probates or a deputy Registrar of Probates;

*will* includes testament, codicil, appointment by will or by writing in the nature of a will in exercise of a power and a disposition by will and testament or devise of the custody and tuition of any child by virtue of the Imperial Act passed in the twelfth year of the reign of King Charles the Second, Chapter 24, and any other testamentary disposition.

- (2) Except where this Act otherwise provides, this Act applies to every will made on or after 1 January, 1838. Every will re-executed or republished or revived by any codicil will, for the purposes of this Act, be taken to have been made at the time at which the will or codicil was so re-executed, republished or revived.
- (3) This Act does not extend to any estate *pur autre vie* of any person who died before 1 January, 1838.

## Part 2—The making, alteration, revocation, revival etc of wills

### Division 1—Property which may be disposed of by will

#### 4—All property may be disposed of by will

- (1) Every person may devise, bequeath or dispose of by his or her will, executed in the manner required by this Act, all real estate and all personal estate to which the person is entitled either at law or in equity at the time of his or her death and which if not so devised, bequeathed or disposed of would devolve upon the heir at law of the person or (if he or she became entitled by descent) of his or her ancestor or upon his or her executor or administrator.
- (2) The power given by this section extends to—
  - (a) any estate *pur autre vie* whether there is or is not any special occupant of the estate and whether the estate is freehold or of any other tenure and whether it is a corporeal or incorporeal hereditament;
  - (b) every contingent, executory or other future interest in any real or personal estate whether the testator is or is not ascertained as the person or one of the persons in whom that interest may become vested, and whether the testator is entitled to that interest under the instrument by which it was created or under any disposition of the interest by deed or will;
  - (c) every right of entry for condition broken and every other right of entry;
  - (d) any such estate, interest, right or other real or personal estate as mentioned in this section to which the testator is entitled at the time of his or her death, notwithstanding that he or she became so entitled subsequently to the execution of his or her will.

### Division 2—Testamentary capacity

#### 5—Will of minor

- (1) Subject to this Act, a minor cannot make, alter or revoke a will.
- (2) A minor who is or has been married may make, alter or revoke a will as if he or she were an adult.
- (3) A minor may make a will in contemplation of marriage (and may alter or revoke such a will) but the will is of no effect unless the contemplated marriage is solemnised.

#### 6—Will of minor pursuant to leave of Court

- (1) The Court may, on application by a minor, make an order authorising the minor to make or alter a will in specific terms approved by the Court, or to revoke a will.
- (2) An authorisation under this section may be granted on such conditions as the Court thinks fit.
- (3) Before making an order under this section, the Court must be satisfied that—
  - (a) the minor understands the nature and effect of the proposed will, alteration or revocation; and

- (b) the proposed will, alteration or revocation accurately reflects the intentions of the minor; and
  - (c) it is reasonable in all the circumstances that the order should be made.
- (4) A will or instrument altering or revoking a will made pursuant to an order under this section—
- (a) must be executed as required by law and one of the attesting witnesses must be the Registrar or the Public Trustee; and
  - (b) must be deposited for safe custody with the Registrar under section 13 of the *Administration and Probate Act 1919*.
- (5) The will may not be withdrawn from deposit with the Registrar by the minor unless the Court has made an order authorising the minor to revoke the will or the minor has attained the age of 18 years or is married.

### **7—Will of person lacking testamentary capacity pursuant to permission of court**

- (1) The Court may, on application by any person made with the permission of the Court, make an order authorising the making or alteration of a will in specific terms approved by the Court, or the revocation of a will, on behalf of a person who lacks testamentary capacity.
- (2) An authorisation under this section may be granted on such conditions as the Court thinks fit.
- (3) Before making an order under this section, the Court must be satisfied that—
- (a) the person lacks testamentary capacity; and
  - (b) the proposed will, alteration or revocation would accurately reflect the likely intentions of the person if he or she had testamentary capacity; and
  - (c) it is reasonable in all the circumstances that the order should be made.
- (4) In considering an application for an order under this section, the Court must take into account the following matters:
- (a) any evidence relating to the wishes of the person;
  - (b) the likelihood of the person acquiring or regaining testamentary capacity;
  - (c) the terms of any will previously made by the person;
  - (d) the interests of—
    - (i) the beneficiaries under any will previously made by the person;
    - (ii) any person who would be entitled to receive any part of the estate of the person if the person were to die intestate;
    - (iii) any person who would be entitled to claim the benefit of the *Inheritance (Family Provision) Act 1972* in relation to the estate of the person if the person were to die;
    - (iv) any other person who has cared for or provided emotional support to the person;

- (e) any gift for a charitable or other purpose the person might reasonably be expected to give by a will;
  - (f) the likely size of the estate;
  - (g) any other matter that the Court considers to be relevant.
- (5) An order may be made under this section in relation to a minor.
- (6) The Court is not bound by rules of evidence in proceedings under this section.
- (7) The following persons are entitled to appear and be heard at proceedings under this section:
- (a) the person in relation to whom the order is proposed to be made;
  - (b) a legal practitioner representing the person or, with the permission of the Court, some other person representing the person;
  - (c) the person holding or acting in the office of Public Advocate under the *Guardianship and Administration Act 1993*;
  - (d) the person's administrator, if one has been appointed under the *Guardianship and Administration Act 1993*;
  - (e) the person's guardian, if one has been appointed under the *Guardianship and Administration Act 1993*;
  - (f) the person's manager, if one has been appointed under the *Aged and Infirm Persons' Property Act 1940*;
  - (g) the person's attorney, if one has been appointed under an enduring power of attorney;
  - (h) any other person who has, in the opinion of the Court, a proper interest in the matter.
- (8) In determining an application under this section, the Court may make such incidental orders relating to costs or other matters as it thinks fit.
- (9) A will or instrument altering or revoking a will made pursuant to an order under this section must be executed as follows:
- (a) it must be signed by the Registrar; and
  - (b) it must be sealed with the seal of the Court.
- (10) The will or instrument altering or revoking a will must be retained by the Registrar and will be taken to have been deposited with the Registrar under section 13 of the *Administration and Probate Act 1919*.
- (11) The will may not be withdrawn from deposit with the Registrar by or on behalf of the person on whose behalf it was made unless the Court has made an order under this section authorising the revocation of the will (in which case the Registrar must withdraw it on presentation of a copy of the order) or the person has acquired or regained testamentary capacity.
- (12) In this section—
- testamentary capacity** means the capacity to make a will<sup>1</sup>.

**Note—**

- 1 The cause of incapacity to make a will may arise from mental incapacity or from physical incapacity to communicate testamentary intentions.

**Division 3—Execution and attestation of wills****7A—Interpretation**

In this Division—

*domestic partner* means a person who is a domestic partner within the meaning of the *Family Relationships Act 1975*, whether declared as such under that Act or not;

*spouse*—a person is the spouse of another if they are legally married.

**8—Requirements as to writing and execution of will**

Subject to this Act, no will is valid unless it is in writing and executed in the following manner:

- (a) it must be signed by the testator or by some other person in the testator's presence and by the testator's direction; and
- (b) it must appear, on the face of the will or otherwise, that the testator intended by the signature to give effect to the will; and
- (c) the signature must be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
- (d) the witnesses must attest and sign the will (but no form of attestation is necessary); and
- (e) the signatures of the witnesses must be made or acknowledged in the presence of the testator (but not necessarily in the presence of each other).

**10—Exercise of power of appointment by will**

Where a person holds a power of appointment that is exercisable by will—

- (a) the provisions of this Act relating to the formalities with which the will must be executed apply in relation to the will notwithstanding that the power has been conferred on condition that a will made in exercise of the power should be executed with some other or lesser formality; and
- (b) the power may be exercised by a will executed in accordance with this Act notwithstanding that the power has been conferred on condition that a will made in exercise of the power should be executed with some other or additional formality.

**11—Will of person on active service**

Any person who is on active service as a member of a military, naval or air force of the Commonwealth may dispose of his or her real and personal property by nuncupative will.

**12—Validity of will**

- (1) A will is valid if executed in accordance with this Act, notwithstanding that the will is not otherwise published.

- (2) Subject to this Act, if the Court is satisfied that—
- (a) a document expresses testamentary intentions of a deceased person; and
  - (b) the deceased person intended the document to constitute his or her will,
- the document will be admitted to probate as a will of the deceased person even though it has not been executed with the formalities required by this Act.
- (3) If the Court is satisfied that a document that has not been executed with the formalities required by this Act expresses an intention by a deceased person to revoke a document that might otherwise have been admitted to probate as a will of the deceased person, that document is not to be admitted to probate as a will of the deceased person.
- (4) This section applies to a document whether it came into existence within or outside the State.
- (5) Rules of Court may authorise the Registrar to exercise the powers of the Court under this section.

### **13—Wills made out of the State to be admitted if made according to the law of the place where made etc**

Every will made out of the State before the commencement of the *Wills Act Amendment Act 1966* by a testator who has died or dies after 22 October, 1895 (whatever may be the domicile of the testator at the time of making the will or at the time of his or her death) will, as regards personal estate, be held to be well executed for the purpose of being admitted in the State to probate if it is made according to the forms required either by the law of the place where it was made, or by the law of the place where the testator was domiciled when it was made, or by the laws then in force in that part of Her Majesty's dominions that constituted his or her domicile of origin.

### **14—Wills made in the State to be admitted if made according to local usage**

Every will made within the State before the commencement of the *Wills Act Amendment Act 1966* by a testator who has died or dies after 22 October, 1895 (whatever may be the domicile of the testator at the time of making it or at the time of his or her death) will, as regards personal estate, be held to be well executed, and will be admitted in the State to probate if it is executed according to the forms required by the laws for the time being in force in the State.

### **16—Will not void by incompetency of witness**

If any person who attests the execution of a will is at the time of the execution of the will or at any time afterwards incompetent to be admitted a witness to prove the execution of the will, the will is not on that account invalid.

### **17—Gifts to an attesting witness**

No will or testamentary provision in a will is void by reason only of the fact that the execution of the will is attested by a person, or the spouse or domestic partner of a person, who has or may acquire, in terms of the will or provision, any interest in property subject to the will or provision.



## 18—Creditor attesting to be admitted a witness

If by a will any real or personal estate is charged with a debt and a creditor whose debt is so charged or the spouse or domestic partner of any such creditor attests the execution of that will, that creditor notwithstanding the charge will be admitted a witness to prove the execution of that will or its validity or invalidity.

## 19—Executor to be admitted a witness

No person is on account of being an executor of a will incompetent to be admitted a witness to prove the execution of that will or its validity or invalidity.

## Division 4—Revocation of wills

### 19A—Interpretation

In this Division—

*partner*, in relation to a registered relationship, means either of the parties to the relationship;

*registered relationship* means a relationship that is registered under the *Relationships Register Act 2016*, and includes a corresponding law registered relationship under that Act.

### 20—Will to be revoked by certain events

- (1) Subject to this section, a will made by a person will be revoked by the person marrying or commencing a registered relationship (except a will made in exercise of a power of appointment when the real or personal estate thereby appointed would not in default of such appointment pass to the person's heir executor or administrator, or the person entitled as the person's next of kin under the Statute of Distributions).
- (2) A will made after the commencement of the *Wills Act Amendment Act 1969* which is expressed to be made in contemplation of marriage, is not revoked by the solemnisation of the marriage contemplated.
- (3) A will made after the commencement of the *Relationships Register Act 2016* which is expressed to be made in contemplation of the registration of a relationship under that Act, is not revoked by the commencement of the registered relationship contemplated.

### 20A—Effect on will of ending of a marriage or registered relationship

- (1) If, after making a will, the testator's marriage or registered relationship is ended, the following provisions apply:
  - (a) a disposition of a beneficial interest in property by the will in favour of the testator's former spouse or partner is revoked;
  - (b) an appointment by the will of the testator's former spouse or partner as executor, trustee or guardian is revoked;
  - (c) a grant by the will of a power of appointment exercisable by or in favour of the testator's former spouse or partner is revoked;
  - (d) the will is to have effect with respect to the revocation of such a disposition, appointment or grant of a power as if the former spouse or partner had died on the date the marriage or registered relationship ended.

- (2) This section does not affect—
- (a) a disposition or grant of a power in accordance with a contract between the testator and the former spouse or partner under which the testator is or was bound to dispose of property by will in a particular way; or
  - (b) a disposition, appointment or grant of a power if it appears from the terms of the will that the testator intended that the disposition, appointment or grant would have effect despite the ending of the marriage or registered relationship; or
  - (c) a disposition, appointment or grant of a power if the will is re-executed, or a codicil is made to the will, after the ending of the marriage or registered relationship and the will or codicil shows no intention of the testator to revoke the disposition, appointment or grant; or
  - (d) the right of a former spouse or partner to make a claim under the *Inheritance (Family Provision) Act 1972*.
- (3) For the purposes of this section—
- (a) a marriage is ended—
    - (i) when a decree of dissolution of a marriage becomes absolute under the Family Law Act;
    - (ii) on the making of a decree of nullity under the Family Law Act in respect of a purported marriage;
    - (iii) on the termination or annulment of a marriage or purported marriage in accordance with the law of a place outside Australia if the termination or annulment is recognised in Australia under the Family Law Act;
  - (ab) a registered relationship is ended when it is taken to end under the *Relationships Register Act 2016*;
  - (b) **disposition** of property by a will includes an appointment of property by will under a power of appointment conferred on the testator;
  - (c) **Family Law Act** means the *Family Law Act 1975* of the Commonwealth, as amended from time to time, or an Act of the Commonwealth enacted in substitution of that Act;
  - (d) **spouse** includes a party to a purported marriage.

## **21—No will to be revoked by presumption**

No will is revoked by any presumption of an intention on the ground of an alteration in circumstances.

## **22—In what cases wills may be revoked**

Subject to section 12(3), no will or codicil or any part of a will or codicil is revoked otherwise than—

- (a) by marriage or the ending of a marriage as provided by this Act; or
- (ab) by commencing or ending a registered relationship under the *Relationships Register Act 2016*; or

- (b) by another will or codicil executed in the manner required by this Act; or
- (c) by some writing declaring an intention to revoke the will or codicil or the part of the will or codicil and executed in the manner in which a will is required by this Act to be executed; or
- (d) by the burning, tearing or otherwise destroying the will or codicil or the part of the will or codicil by the testator or by some person in the testator's presence and by the testator's direction with the intention of revoking it.

### **23—Change of domicile not to invalidate will**

No will made by a testator who has died or dies after 22 October, 1895, will be held to be revoked, or to have become invalid, nor will the construction of the will be altered, by reason of any subsequent change of domicile of the person making the will.

## **Division 5—Alterations in wills**

### **24—No alteration in a will has any effect unless executed as a will**

No obliteration interlineation or other alteration made in any will after its execution is valid or has any effect except so far as the words or effect of the will before such alteration are not apparent unless the alteration is executed in the manner in which a will is required by this Act to be executed; but the will with the alteration as part of the will is to be taken to be duly executed if the signature of the testator and the subscription of the witnesses are made in the margin or on some other part of the will opposite or near to the alteration or at the foot or end of or opposite to a memorandum referring to the alteration and written at the end or some other part of the will.

## **Division 6—Revival of wills**

### **25—How revoked will is to be revived**

- (1) No will or codicil or any part of a will or codicil which has been in any manner revoked can be revived otherwise than by its re-execution or by a codicil executed in the manner required by this Act and showing an intention to revive the will or codicil or the part of the will or codicil.
- (2) When any will or codicil which has been partly revoked and afterwards wholly revoked is revived, the revival does not extend to so much of the will or codicil as was revoked before the revocation of the whole of it unless an intention to the contrary is shown.

## **Division 7—Rectification of wills**

### **25AA—Power of rectification**

- (1) If the Court is satisfied that a will does not accurately reflect the testamentary intentions of a deceased person, the Court may order that the will be rectified so as to give proper expression to those intentions.
- (2) An application for an order under this section must not, except with the consent of the Court, be made more than six months after the grant of probate or letters of administration.

- (3) Nothing in this section affects the operation of section 29 of the *Trustee Act 1936*.

## **Part 3—Validity of wills made outside the State**

### **25A—Interpretation and application**

- (1) In this Part—

*country* means any place or group of places having its own law of nationality (including the Commonwealth of Australia and its territories);

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

*place* means any territory (including a State or Territory of the Commonwealth of Australia).

- (2) Where under this Act the internal law in force in any country or place is to be applied in the case of a will, but there are in force in that country or place two or more systems of internal law relating to the formal validity of wills, the system to be applied must be ascertained as follows:
- (a) if there is in force throughout the country or place a rule indicating which of those systems can properly be applied in the case in question, that rule must be followed; or
  - (b) if there is no such rule, the system will be that with which the testator was most closely connected at the relevant time and for this purpose the relevant time is the time of the testator's death where the matter is to be determined by reference to circumstances prevailing at his or her death and the time of execution of the will in any other case.
- (3) In determining for the purposes of this Act whether or not the execution of a will conformed to a particular law, regard must be had to the formal requirements of that law at the time of execution, but this does not prevent account being taken of an alteration of law affecting wills executed at that time if the alteration enables the will to be treated as properly executed.
- (4) This Part does not apply to a will of a testator who died before the commencement of the *Wills Act Amendment Act 1966* and does apply to a will of a testator who dies after that commencement whether the will was executed before or after that commencement.
- (5) Where (whether in pursuance of this Act or not) a law in force outside the State falls to be applied in relation to a will, any requirement of that law whereby special formalities are to be observed by testators answering a particular description, or witnesses to the execution of a will are to possess certain qualifications, will be treated, notwithstanding any rule of that law to the contrary, as a formal requirement only.

## 25B—General rule as to formal validity

Notwithstanding any other provision of this Act, a will is to be treated as properly executed for all purposes if its execution conformed to the internal law in force in the place where it was executed, or in the place where, at the time of its execution or of the testator's death, he or she was domiciled or had his or her habitual residence, or in a country of which, at either of those times, he or she was a national.

## 25C—Additional rules

Without limiting the generality of section 25B, the following wills are to be treated as properly executed for the purpose of being admitted in the State to probate:

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

## 25D—Validity of statutory wills made outside the State

- (1) A statutory will made according to the law of the place where the deceased was resident at the time of execution will be regarded as a valid will of the deceased.
- (2) In this section—

*statutory will* means a will executed by virtue of a statutory provision on behalf of a person who, at the time of execution, lacked testamentary capacity.

## 25E—Part does not limit operation of international will provisions

This Part does not limit the operation of Part 3A.

## Part 3A—International wills

### 25F—Interpretation

In this Part—

*Australian legal practitioner* means a local legal practitioner or an interstate legal practitioner within the meaning of the *Legal Practitioners Act 1981*;

*Convention* means the *Convention providing a Uniform Law on the Form of an International Will 1973* signed in Washington D.C. on 26 October 1973;

*international will* means a will made in accordance with the requirements of the Annex to the Convention as set out in Schedule 1.

### **25G—Application of Convention**

The Annex to the Convention has the force of law in this jurisdiction.

**Note—**

The Annex to the Convention is set out in Schedule 1.

### **25H—Persons authorised to act in connection with international wills**

- (1) For the purposes of this Part, the following persons are authorised to act in connection with an international will:
  - (a) an Australian legal practitioner;
  - (b) a public notary of any Australian jurisdiction.
- (2) For the purposes of this Part, a reference in the Annex to the Convention to a person authorised to act in connection with international wills is a reference to—
  - (a) a person referred to in subsection (1) who is acting in Australia; or
  - (b) any other person who is acting as an authorised person under the law of a state (other than Australia) that is a party to the Convention.

**Note—**

This section gives effect to Articles II and III of the Convention.

### **25I—Witnesses to international wills**

The conditions requisite to acting as a witness to an international will are governed by the law of this jurisdiction.

### **25J—Application of Act to international wills**

To avoid doubt, the provisions of this Act that apply to wills extend to international wills.

## **Part 4—Construction of wills**

### **26—When a devise not to be rendered inoperative etc**

No conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate comprised in the will except an act by which the will is revoked as aforesaid prevents the operation of the will with respect to such estate or interest in that real or personal estate as the testator had power to dispose of by will at the time of his or her death.

### **27—A will to speak from the death of the testator**

Every will is to be construed with reference to the real estate and personal estate comprised in it to speak and take effect as if it had been executed immediately before the death of the testator unless a contrary intention appears by the will.

## **28—What a residuary devise includes**

Unless a contrary intention appears by the will, any real estate or interest in real estate comprised or intended to be comprised in any devise in a will, which devise fails or is void by reason of the death of the devisee in the lifetime of the testator or by reason of the devise being contrary to law or otherwise incapable of taking effect, will be included in the residuary devise (if any) contained in the will.

## **29—What estates a general devise includes**

A devise of the land of the testator or of the land of the testator in any place or in the occupation of any person mentioned in his or her will or otherwise described in a general manner, and any other general devise which would describe a leasehold estate if the testator had no freehold estate which could be described by it, is to be construed to include the leasehold estates of the testator or his or her leasehold estates or any of them to which such description extends, as the case may be, as well as freehold estates, unless a contrary intention appears by the will.

## **30—What property subject to a power of appointment a general gift includes**

- (1) A general devise of the real estate of the testator in any place or in the occupation of any person mentioned in the testator's will or otherwise described in a general manner is to be construed to include any real estate or any real estate to which the description extends (as the case may be) which the testator has power to appoint in any manner he or she may think proper and operates as an execution of that power unless a contrary intention appears by the will.
- (2) In like manner a bequest of the personal estate of the testator or any bequest of personal property described in a general manner is to be construed to include any personal estate or any personal estate to which the description extends (as the case may be) which the testator has power to appoint in any manner he or she may think proper and operates as an execution of that power unless a contrary intention appears by the will.

## **31—How a devise without words of limitation is to be construed**

Where any real estate is devised to any person without any words of limitation, that devise is to be construed to pass the whole estate or interest (whether the fee simple or any other estate or interest), which the testator had power to dispose of by will in that real estate unless a contrary intention appears by the will.

## **32—How the words "die without issue" or "die without leaving issue" are to be construed**

- (1) In any devise or bequest of real or personal estate the words "die without issue" or "die without leaving issue" or "have no issue" or any other words which may import either a want or failure of issue of any person in his or her lifetime or at the time of his or her death, or an indefinite failure of his or her issue are to be construed to mean a want or failure of issue in the lifetime or at the time of death of that person and not an indefinite failure of his or her issue unless a contrary intention appears by the will by reason of that person having a prior estate tail or of a preceding gift being without any implication arising from such words a limitation of an estate tail to that person or issue or otherwise.

- (2) This section does not extend to cases where the words mentioned in subsection (1) import if no issue described in a preceding gift is born or if there is no issue who lives to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

### **33—No devise to trustees or executors etc operates to pass a chattel interest**

Where any real estate is devised to any trustee or executor that devise is to be construed to pass the whole estate or interest (whether the fee simple or any other estate or interest), which the testator had power to dispose of by will in that real estate unless a definite term of years absolute or determinable or an estate of freehold is thereby given to him or her expressly or by implication.

### **34—Trustees under an unlimited devise etc to take the fee**

Where any real estate is devised to a trustee without any express limitation of the estate to be taken by the trustee and the beneficial interest in the real estate or in the surplus rents and profits of the real estate is not given to any person for life or that beneficial interest is given to any person for life but the purposes of the trust may continue beyond the life of that person, that devise is to be construed to vest in the trustee the whole legal estate (whether the fee simple or any other estate) which the testator had power to dispose of by will in that real estate and not an estate determinable when the purposes of the trust are satisfied.

### **35—Devises of estates tail do not lapse**

Where any person to whom any real estate is devised for an estate tail or an estate in quasi entail, dies in the lifetime of the testator leaving issue who would be heritable under the entail and any such issue are living at the time of the death of the testator, the devise does not lapse but takes effect as if the death of that person had happened immediately after the death of the testator unless a contrary intention appears by the will.

### **36—Gifts to children or other issue who leave issue living at the testator's death do not lapse**

Where any person being a child or other issue of the testator to whom any real or personal estate is devised or bequeathed for any estate or interest not determinable at or before the death of that person dies in the lifetime of the testator leaving issue and any such issue of that person is living at the time of the death of the testator, the devise or bequest does not lapse, but takes effect as if the death of that person had happened immediately after the death of the testator unless a contrary intention appears by the will.

### **37—Validity of certain wills**

Nothing in section 13, 14 or 23 invalidates any will or other testamentary instrument as regards personal estate which would have been valid if those sections had not been passed, except as that will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by those sections.



**38—References to valuations made or accepted for succession duty purposes etc to be construed, where appropriate, as references to valuations made by competent valuers**

Where a will refers expressly or by implication to a valuation made or accepted for the purpose of assessing succession duty or any other form of death duty, that reference is, if the valuation contemplated by the reference is not required under the law of this State or of any other place, to be construed as if it were a reference to a valuation made by a competent valuer.

## **Schedule 1—Annex to Convention providing a Uniform Law on the Form of an International Will 1973**

### ANNEX

#### **UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL 1973**

##### Article 1

- 1 A will shall be valid as regards form, irrespective particularly of the place where it is made, of the location of the assets and of the nationality, domicile or residence of the testator, if it is made in the form of an international will complying with the provisions set out in Articles 2 to 5 hereinafter.
- 2 The invalidity of the will as an international will shall not affect its formal validity as a will of another kind.

##### Article 2

This law shall not apply to the form of testamentary dispositions made by two or more persons in one instrument.

##### Article 3

- 1 The will shall be made in writing.
- 2 It need not be written by the testator himself.
- 3 It may be written in any language, by hand or by any other means.

##### Article 4

- 1 The testator shall declare in the presence of two witnesses and of a person authorized to act in connection with international wills that the document is his will and that he knows the contents thereof.
- 2 The testator need not inform the witnesses, or the authorized person, of the contents of the will.

##### Article 5

- 1 In the presence of the witnesses and of the authorized person, the testator shall sign the will or, if he has previously signed it, shall acknowledge his signature.
- 2 When the testator is unable to sign, he shall indicate the reason therefor to the authorized person who shall make note of this on the will. Moreover, the testator may be authorized by the law under which the authorized person was designated to direct another person to sign on his behalf.
- 3 The witnesses and the authorized person shall there and then attest the will by signing in the presence of the testator.

##### Article 6

- 1 The signatures shall be placed at the end of the will.

- 2 If the will consists of several sheets, each sheet shall be signed by the testator or, if he is unable to sign, by the person signing on his behalf or, if there is no such person, by the authorized person. In addition, each sheet shall be numbered.

#### Article 7

- 1 The date of the will shall be the date of its signature by the authorized person.  
2 This date shall be noted at the end of the will by the authorized person.

#### Article 8

In the absence of any mandatory rule pertaining to the safekeeping of the will, the authorized person shall ask the testator whether he wishes to make a declaration concerning the safekeeping of his will. If so and at the express request of the testator the place where he intends to have his will kept shall be mentioned in the certificate provided for in Article 9.

#### Article 9

The authorized person shall attach to the will a certificate in the form prescribed in Article 10 establishing that the obligations of this law have been complied with.

#### Article 10

The certificate drawn up by the authorized person shall be in the following form or in a substantially similar form:

#### CERTIFICATE

(Convention of October 26, 1973)

- 1 I, .....(name, address and capacity), a person authorized to act in connection with international wills
- 2 Certify that on .....(date) at .....(place)
- 3 (testator) .....(name, address, date and place of birth) in my presence and that of the witnesses
- 4(a) .....(name, address, date and place of birth)
- (b) ..... (name, address, date and place of birth)
- has declared that the attached document is his will and that he knows the contents thereof.
- 5 I furthermore certify that:
- 6(a) in my presence and in that of the witnesses
- (1) the testator has signed the will or has acknowledged his signature previously affixed.
- \* (2) following a declaration of the testator stating that he was unable to sign his will for the following reason  
.....
- I have mentioned this declaration on the will  
\*—the signature has been affixed by  
.....(name, address)

- 7(b) the witnesses and I have signed the will;
- 8\*(c) each page of the will has been signed by  
.....and numbered;
- 9(d) I have satisfied myself as to the identity of the testator and of the witnesses as designated above;
- 10(e) the witnesses met the conditions requisite to act as such according to the law under which I am acting;
- 11\*(f) the testator has requested me to include the following statement concerning the safekeeping of his will:.....
- 12 PLACE
- 13 DATE
- 14 SIGNATURE and, if necessary, SEAL

Article 11

The authorized person shall keep a copy of the certificate and deliver another to the testator.

Article 12

In the absence of evidence to the contrary, the certificate of the authorized person shall be conclusive of the formal validity of the instrument as a will under this Law.

Article 13

The absence or irregularity of a certificate shall not affect the formal validity of a will under this Law.

Article 14

The international will shall be subject to the ordinary rules of revocation of wills.

Article 15

In interpreting and applying the provisions of this law, regard shall be had to its international origin and to the need for uniformity in its interpretation.

\_\_\_\_\_  
\*To be completed if appropriate

## Legislative history

### Notes

- Please note—References in the legislation to other legislation or instruments or to titles of bodies or offices are not automatically updated as part of the program for the revision and publication of legislation and therefore may be obsolete.
- Earlier versions of this Act (historical versions) are listed at the end of the legislative history.
- For further information relating to the Act and subordinate legislation made under the Act see the Index of South Australian Statutes or [www.legislation.sa.gov.au](http://www.legislation.sa.gov.au).

### Legislation repealed by principal Act

The *Wills Act 1936* repealed the following:

*An Act for adopting a certain Act of Parliament intituled "An Act for the Amendment of the Laws with respect to Wills" in the administration of Justice in South Australia in like manner as other laws in England are applied therein (No. 16 of 1842)*

*An Act for the amendment of the laws with respect to wills (The Imperial Act 7 Will. 4 and 1 Vict., c. 26)*

*Wills Amendment Act 1862*

*An Act to amend the law with respect to wills (No. 620 of 1895)*

*Wills (Naval and Military Services) Amendment Act 1915*

### Principal Act and amendments

New entries appear in bold.

Year	No	Title	Assent	Commencement
1936	2302	<i>Wills Act 1936</i>	5.11.1936	1.6.1937 ( <i>Gazette 25.3.1937 p644</i> )
1940	11	<i>Wills Act Amendment Act 1940</i>	26.9.1940	26.9.1940
1966	27	<i>Wills Act Amendment Act 1966</i>	17.3.1966	17.3.1966
1969	13	<i>Wills Act Amendment Act 1969</i>	27.2.1969	27.2.1969
1972	10	<i>Wills Act Amendment Act 1972</i>	23.3.1972	31.5.1973 ( <i>Gazette 31.5.1973 p2318</i> )
1975	55	<i>Wills Act Amendment Act 1975</i>	17.4.1975	17.4.1975
1975	86	<i>Wills Act Amendment Act (No. 2) 1975</i>	20.11.1975	29.1.1976 ( <i>Gazette 29.1.1976 p357</i> )
1980	34	<i>Wills Act Amendment Act 1980</i>	17.4.1980	1.1.1980: s 2
1990	54	<i>Statute Law Revision Act (No. 2) 1990</i>	22.11.1990	Sch 3—18.2.1991 ( <i>Gazette 10.1.1991 p30</i> )
1994	9	<i>Wills (Miscellaneous) Amendment Act 1994</i>	21.4.1994	1.7.1994 ( <i>Gazette 2.6.1994 p1522</i> )
1996	36	<i>Wills (Wills for Persons Lacking Testamentary Capacity) Amendment Act 1996</i>	2.5.1996	10.6.1996 ( <i>Gazette 23.5.1996 p2534</i> )

## Wills Act 1936—1.8.2017

### Legislative history

1996	39	<i>Wills (Effect of Termination of Marriage) Amendment Act 1996</i>	6.6.1996	5.8.1996 ( <i>Gazette</i> 27.6.1996 p3104)
1998	59	<i>Statutes Amendment (Attorney-General's Portfolio) Act 1998</i>	3.9.1998	Pt 13 (s 22)—13.12.1998 ( <i>Gazette</i> 3.12.1998 p1676)
2000	57	<i>Statutes Amendment and Repeal (Attorney-General's Portfolio) Act 2000</i>	20.7.2000	Pt 15 (ss 30 & 31)—14.8.2000 ( <i>Gazette</i> 10.8.2000 p444)
2003	44	<i>Statute Law Revision Act 2003</i>	23.10.2003	Sch 1—24.11.2003 ( <i>Gazette</i> 13.11.2003 p4048)
2006	17	<i>Statutes Amendment (New Rules of Civil Procedure) Act 2006</i>	6.7.2006	Pt 80 (s 257)—4.9.2006 ( <i>Gazette</i> 17.8.2006 p2831)
2006	43	<i>Statutes Amendment (Domestic Partners) Act 2006</i>	14.12.2006	Pt 93 (ss 223—225)—1.6.2007 ( <i>Gazette</i> 26.4.2007 p1352)
2012	46	<i>Wills (International Wills) Amendment Act 2012</i>	22.11.2012	22.11.2014 (s 7(5) <i>Acts Interpretation Act 1915</i> )
2013	12	<i>Advance Care Directives Act 2013</i>	18.4.2013	Sch 1 (cl 31)—1.7.2014 ( <i>Gazette</i> 6.2.2014 p546)
<b>2016</b>	<b>67</b>	<b><i>Relationships Register Act 2016</i></b>	<b>15.12.2016</b>	<b>Sch 1 (cll 20—23)—1.8.2017 (<i>Gazette</i> 1.8.2017 p3038)</b>

### Provisions amended since 3 February 1976

- Legislative history prior to 3 February 1976 appears in marginal notes and footnotes included in the consolidation of this Act contained in Volume 11 of The Public General Acts of South Australia 1837-1975 at page 564.

New entries appear in bold.

Entries that relate to provisions that have been deleted appear in italics.

Provision	How varied	Commencement
Long title	amended by 44/2003 s 3(1) (Sch 1)	24.11.2003
Pt 1		
s 1	substituted by 54/1990 s 3(1) (Sch 3)	18.2.1991
s 2	<i>deleted by 54/1990 s 3(1) (Sch 3)</i>	<i>18.2.1991</i>
s 3	amended by 54/1990 s 3(1) (Sch 3)	18.2.1991
adult	inserted by 9/1994 s 3(a)	1.7.1994
minor	inserted by 9/1994 s 3(b)	1.7.1994
Pt 2		
Pt 2 Div 1	heading preceding s 4 deleted and Div 1 heading inserted by 44/2003 s 3(1) (Sch 1)	24.11.2003
s 4	amended by 54/1990 s 3(1) (Sch 3)	18.2.1991
Pt 2 Div 2	heading preceding s 5 deleted and Div 2 heading inserted by 44/2003 s 3(1) (Sch 1)	24.11.2003
s 5	amended by 54/1990 s 3(1) (Sch 3)	18.2.1991
	substituted by 9/1994 s 4	1.7.1994
s 6	inserted by 9/1994 s 4	1.7.1994
s 7	inserted by 36/1996 s 3	10.6.1996

s 7(1)	amended by 17/2006 s 257(1)	4.9.2006
s 7(7)	amended by 17/2006 s 257(2)	4.9.2006
	amended by 12/2013 Sch 1 cl 31	1.7.2014
Pt 2 Div 3	heading preceding s 8 deleted and Div 3 heading inserted by 44/2003 s 3(1) (Sch 1)	24.11.2003
s 7A	inserted by 43/2006 s 223	1.6.2007
s 8	amended by 54/1990 s 3(1) (Sch 3)	18.2.1991
	substituted by 9/1994 s 5	1.7.1994
s 9	<i>amended by 54/1990 s 3(1) (Sch 3)</i>	<i>18.2.1991</i>
	<i>deleted by 9/1994 s 6</i>	<i>1.7.1994</i>
s 11	amended by 54/1990 s 3(1) (Sch 3)	18.2.1991
s 12		
s 12(2)	amended by 54/1990 s 3(1) (Sch 3)	18.2.1991
	substituted by 9/1994 s 7	1.7.1994
	substituted by 59/1998 s 22	13.12.1998
	substituted by 57/2000 s 30	14.8.2000
s 12(3)	inserted by 9/1994 s 7	1.7.1994
	substituted by 59/1998 s 22	13.12.1998
	substituted by 57/2000 s 30	14.8.2000
s 12(4) and (5)	inserted by 9/1994 s 7	1.7.1994
ss 13 and 14	amended by 54/1990 s 3(1) (Sch 3)	18.2.1991
s 15	<i>deleted by 54/1990 s 3(1) (Sch 3)</i>	<i>18.2.1991</i>
s 16	amended by 54/1990 s 3(1) (Sch 3)	18.2.1991
s 17	s 17(1) amended and redesignated as s 17 by 54/1990 s 3(1) (Sch 3)	18.2.1991
	amended by 43/2006 s 224	1.6.2007
s 18	amended by 54/1990 s 3(1) (Sch 3)	18.2.1991
	amended by 43/2006 s 225	1.6.2007
s 19	amended by 54/1990 s 3(1) (Sch 3)	18.2.1991
Pt 2 Div 4	heading preceding s 20 deleted and Div 4 heading inserted by 44/2003 s 3(1) (Sch 1)	24.11.2003
<b>s 19A</b>	<b>inserted by 67/2016 Sch 1 cl 20</b>	<b>1.8.2017</b>
s 20	amended by 54/1990 s 3(1) (Sch 3)	18.2.1991
s 20(1)	<b>amended by 67/2016 Sch 1 cl 21(1), (2)</b>	<b>1.8.2017</b>
s 20(3)	<b>inserted by 67/2016 Sch 1 cl 21(3)</b>	<b>1.8.2017</b>
s 20A	inserted by 39/1996 s 3	5.8.1996
s 20A(1)	<b>amended by 67/2016 Sch 1 cl 22(1)—(2)</b>	<b>1.8.2017</b>
s 20A(2)	<b>amended by 67/2016 Sch 1 cl 22(4)—(7)</b>	<b>1.8.2017</b>
s 20A(3)	<b>amended by 67/2016 Sch 1 cl 22(8), (9)</b>	<b>1.8.2017</b>
s 21	amended by 54/1990 s 3(1) (Sch 3)	18.2.1991
s 22	amended by 54/1990 s 3(1) (Sch 3)	18.2.1991
	amended by 39/1996 s 4	5.8.1996
	amended by 57/2000 s 31	14.8.2000
	<b>amended by 67/2016 Sch 1 cl 23(1), (2)</b>	<b>1.8.2017</b>

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s 23	amended by 54/1990 s 3(1) (Sch 3)	18.2.1991
Pt 2 Div 5	heading preceding s 24 deleted and Div 5 heading inserted by 44/2003 s 3(1) (Sch 1)	24.11.2003
s 24	amended by 54/1990 s 3(1) (Sch 3)	18.2.1991
Pt 2 Div 6	heading preceding s 25 deleted and Div 6 heading inserted by 44/2003 s 3(1) (Sch 1)	24.11.2003
s 25	amended by 54/1990 s 3(1) (Sch 3)	18.2.1991
Pt 2 Div 7	heading preceding s 25AA inserted by 9/1994 s 8	1.7.1994
	heading preceding s 25AA deleted and Div 7 heading inserted by 44/2003 s 3(1) (Sch 1)	24.11.2003
s 25AA	inserted by 9/1994 s 8	1.7.1994
Pt 3	heading substituted by 36/1996 s 4	10.6.1996
s 25A		
s 25A(2)—(5)	amended by 54/1990 s 3(1) (Sch 3)	18.2.1991
s 25B	amended by 54/1990 s 3(1) (Sch 3)	18.2.1991
s 25C	s 25C(1) amended and redesignated as s 25C by 54/1990 s 3(1) (Sch 3)	18.2.1991
s 25D	inserted by 36/1996 s 5	10.6.1996
s 25E	inserted by 46/2012 s 4	22.11.2014
Pt 3A	inserted by 46/2012 s 5	22.11.2014
Pt 4		
ss 26—37	amended by 54/1990 s 3(1) (Sch 3)	18.2.1991
s 38	s 39 inserted by 34/1980 s 3	1.1.1980
	s 39 amended and redesignated as s 38 by 54/1990 s 3(1) (Sch 3)	18.2.1991
Sch 1	inserted by 46/2012 s 6	22.11.2014

## **Transitional etc provisions associated with Act or amendments**

### ***Wills (Miscellaneous) Amendment Act 1994***

#### **9—Application of amendments to formality requirements**

The amendments made to section 8 of the principal Act by section 5 of this Act and the repeal of section 9 of the principal Act by section 6 of this Act have effect in relation to wills whether made before, on or after the commencement of this Act.

### ***Wills (Effect of Termination of Marriage) Amendment Act 1996***

#### **5—Application**

The amendments made to the principal Act by this Act apply in relation to a will of a person dying after the commencement of this Act whether the will was made or the marriage terminated before or after the commencement.

## **Historical versions**

Reprint No 1—1.7.1994

Reprint No 2—10.6.1996



Reprint No 3—5.8.1996  
Reprint No 4—13.12.1998  
Reprint No 5—14.8.2000  
Reprint No 6—24.11.2003  
4.9.2006  
1.6.2007  
1.7.2014  
22.11.2014