SOUTH AUSTRALIA

WILLS ACT, 1936

This Act is reprinted pursuant to the Acts Republication Act, 1967, and incorporates all amendments in force as at 18 February 1991.

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WILLS ACT, 1936

being

Wills Act, 1936, No. 2302 of 1936 [Assented to 5 November 1936][1]

as amended by

Wills Act Amendment Act, 1940, No. 11 of 1940 [Assented to 26 September 1940]
Wills Act Amendment Act, 1966, No. 27 of 1966 [Assented to 17 March 1966]
Wills Act Amendment Act, 1969, No. 13 of 1969 [Assented to 27 February 1969]
Wills Act Amendment Act, 1972, No. 10 of 1972 [Assented to 23 March 1972][2]
Wills Act Amendment Act, 1975, No. 55 of 1975 [Assented to 17 April 1975]
Wills Act Amendment Act (No. 2), 1975, No. 86 of 1975 [Assented to 20 November 1975][3]
Wills Act Amendment Act, 1980, No. 34 of 1980 [Assented to 17 April 1980][4]
Statute Law Revision Act (No. 2), 1990, No. 54 of 1990 [Assented to 22 November 1990][5]

Note: Asterisks indicate repeal or deletion of text. For further explanation see Appendix.

An Act to consolidate certain enactments relating to wills.

The Parliament of South Australia enacts as follows:

PART I

PRELIMINARY

Short title

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

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Interpretation and application of Act

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

"the Court" means the Supreme Court of South Australia:

"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:

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[1]Came into operation 1 June 1937: *Gaz.* 25 March 1937, p. 644.
[2]Came into operation 31 May 1973: *Gaz.* 31 May 1973, p. 2318
[3]Came into operation 29 January 1976: *Gaz.* 29 January 1976, p. 357.
[4]Came into operation 1 January 1980: s. 2.
[5]Came into operation (except Scheds. 2, 3 and 4) 22 November 1990: s. 2(1); Sched. 2 came into operation 1 August 1990: s. 2(2); Sched. 4 came into operation 24 December 1990: *Gaz.* 6 December 1990, p. 1685; Sched. 3 came into operation 18 February 1991: *Gaz.* 10 January 1991, p. 30.

"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 II

THE MAKING, ALTERATION, REVOCATION, REVIVAL, ETC., OF WILLS

Property which may be disposed of by Will

All property may be disposed of by will

4. (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.

Testamentary capacity

No will of person under 18 valid

5. (1) No will made by any person under the age of 18 years is valid.

(2) Subsection (1) does not apply to a will of a person who died before the date of the commencement of the *Wills Act Amendment Act, 1966*, but applies to a will of a person who dies after that date (whether the will was executed before or after that date) and sections 5, 6 and 6a of this Act, as in force immediately before the commencement of the *Wills Act Amendment Act, 1966*, continue to apply to a will of a person who died before the date of commencement of the *Wills Act Amendment Act, 1966*, as if that Act had not come into operation.

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Execution and attestation of wills

Requirements as to writing and execution of will

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

(a) it must be signed at the foot or end of the will by the testator or by some other person in the testator's presence and by the testator's direction;

(b) the signature must be made or acknowledged by the testator in the presence of two or more witnesses present at the same time;

and

(c) the witnesses must attest and subscribe the will in the presence of the testator, but no form of attestation is necessary.

When signature to a will to be deemed valid

9. (1) Every will, so far only as regards the position of the signature of the testator, or of the person signing for the testator as mentioned in the last preceding section, will be taken to be valid within the meaning of this Act, if the signature is so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it is apparent on the face of the will that the testator intended to give effect by his or her signature to the writing signed as his or her will.

(2) No such will is affected by the circumstance—

(a) that the signature does not follow, or is not immediately after the foot or end of the will;

(b) that a blank space intervenes between the concluding word of the will and the signature;

(c) that the signature is placed among the words of the *testamonium clause*, or of the clause of attestation, or follows or is after or under the clause of attestation either with or without a blank space intervening, or follows, or is after, or under, or beside the names, or one of the names of the subscribing witnesses;

(d) that the signature is on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will is written above the signature;

or

(e) that there appears to be sufficient space on or at the bottom of the preceding side or page, or other portion of the same paper on which the will is written, to contain the signature.

(3) The enumeration of the above circumstances does not restrict the generality of subsection (1); but, subject to this Act, no signature under this Act is operative to give effect to any disposition or direction which is underneath or which follows it, nor does it give effect to any disposition or direction inserted after the signature was made.

Exercise of power of appointment by will

10. 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.

Will of person on active service

11. 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.

Validity of will

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

(2) A document purporting to embody the testamentary intentions of a deceased person will, notwithstanding that it has not been executed with the formalities required by this Act, be taken to be a will of the deceased person if the Supreme Court, upon application for admission of the document to probate as the last will of the deceased, is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his or her will.

Wills made out of the State to be admitted if made according to the law of the place where made, etc.

13. 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.

Wills made in the State to be admitted if made according to local usage

14. 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.

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Will not void by incompetency of witness

16. 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.

Gifts to an attesting witness

17. 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 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.

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Creditor attesting to be admitted a witness

18. If by a will any real or personal estate is charged with a debt and a creditor whose debt is so charged or the wife or husband 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.

Executor to be admitted a witness

19. 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.

Revocation of wills

Will to be revoked by marriage

20. (1) Subject to subsection (2), every will made by a man or woman is revoked by his or her marriage (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 his or her heir executor or administrator, or the person entitled as his or her 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.

No will to be revoked by presumption

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

In what case wills may be revoked

22. No will or codicil or any part of a will or codicil is revoked otherwise than—

(a) by marriage as provided by this Act;

(b) by another will or codicil executed in the manner required by this Act;

(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.

Change of domicile not to invalidate will

23. 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.

Alterations in wills

No alteration in a will has any effect unless executed as a will

24. 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.

Revival of wills

How revoked will is to be revived

25. (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 afterward 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.

PART III

FORMAL VALIDITY OF WILLS

Interpretation and application

25a. (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.

General rule as to formal validity

25b. 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.

Additional rules

25c. 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.

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PART IV

CONSTRUCTION OF WILLS

When a devise not to be rendered inoperative, etc.

26. 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.

A will to speak from the death of the testator

27. 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.

What a residuary devise includes

28. 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.

What estates a general devise includes

29. 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.

What property subject to a power of appointment a general gift includes

30. (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.

How a devise without words of limitation is to be construed

31. 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.

How the words "die without issue" or "die without leaving issue" are to be construed

32. (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.

No devise to trustees or executors, etc., operates to pass a chattel interest

33. 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.

Trustees under an unlimited devise, etc., to take the fee

34. 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.

Devises of estates tail do not lapse

35. 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.

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

36. 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.

Validity of certain wills

37. 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.

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

38. 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.

APPENDIX

Legislative History

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.

Section 1:	substituted by 54, 1990, s. 3(1) (3rd Sched.)
Section 2:	repealed by 54, 1990, s. 3(1) (3rd Sched.)
Sections 3 - 9:	amended by 54, 1990, s. 3(1) (3rd Sched.)
Section 11:	amended by 54, 1990, s. 3(1) (3rd Sched.)
Section 12(2):	amended by 54, 1990, s. 3(1) (3rd Sched.)
Sections 13 and 14:	amended by 54, 1990, s. 3(1) (3rd Sched.)
Section 15:	repealed by 54, 1990, s. 3(1) (3rd Sched.)
Section 16:	amended by 54, 1990, s. 3(1) (3rd Sched.)
Section 17(1):	amended and redesignated as s. 17 by 54, 1990, s. 3(1) (3rd Sched.)
Sections 18 - 25:	amended by 54, 1990, s. 3(1) (3rd Sched.)
Section 25a(2) - (5):	amended by 54, 1990, s. 3(1) (3rd Sched.)
Section 25b:	amended by 54, 1990, s. 3(1) (3rd Sched.)
Section 25c(1):	amended and redesignated as s. 25c by 54, 1990, s. 3(1) (3rd Sched.)
Sections 26 - 37:	amended by 54, 1990, s. 3(1) (3rd Sched.)
Section 39:	inserted by 34, 1980, s. 3; amended and redesignated as s. 38 by 54, 1990, s. 3(1) (3rd Sched.)