

**LEGAL PROFESSION ADMISSION BOARD**

**SEPTEMBER 2013**

**SUCCESSION**

**Time: Three Hours** This paper consists of **five** questions.

Candidates are required to attempt any **four** questions.

No question is compulsory.

All questions are of equal value.

If a candidate answers more than the specified number of questions, only the first **four** questions attempted will be marked.

All questions may be answered in one examination booklet.

Each page of each answer must be numbered with the appropriate question number.

Candidates must indicate which questions they have answered on the front cover of the first examination booklet.

Candidates must write their answers clearly. Lack of legibility may lead to a delay in the candidate's results being given and could, in some circumstances, result in the candidate receiving a fail grade.

**This examination is worth 80% of the total marks in this subject.**

**Permitted Materials:** This is a closed book examination. No materials are permitted in the examination room.

Attached to this paper is a copy of Law Extension Committee materials (case list and statutory extracts, including the Succession Act 2006) and further extracts from the former Wills, Probate and Administration Act 1898, and the Probate and Administration Act 1898.

As some instances of cheating and of bringing unauthorised material into the examination room have come to the attention of the Admission Board, candidates are warned that such conduct will result in instant expulsion from the examination and may result in exclusion from all further examinations.

*This examination should not be relied on as a guide to the form or content of future examinations in this subject.*



**Question 1**

T, who was in a de facto relationship with A, separated from her in 1970. T and A had a daughter, Anne.

On 1 February 1980 T married B, with whom he had three children, B1, B2 and B3. B1 and B2 each had two children. B2 died on 5 March 2012 and B3 died in an accident on 15 July 2013.

In December 2009 T left B and in July 2011 entered into a relationship with C. T and C adopted a child, Christine, in December 2012.

T's only other relatives are a cousin, Charles, who has two children, Joseph and Josephine. Charles died on 20 July 2013.

T died intestate on 1 July 2013.

T left the following assets and liabilities:

House, occupied by B, who claims to be entitled to it	\$500,000
Furniture in the house occupied by B	\$30,000
Motor vehicle	\$30,000
Original painting by a well-known artist	\$40,000
Diamonds, which were purchased as an investment	\$100,000
Cash	\$20,000
Shares	\$80,000
Debts	\$50,000
Funeral and testamentary expenses	\$25,000

You may assume that the statutory legacy at all relevant times is \$425,000.

**Explain:**

- (a) How the estate should be distributed; and
- (b) How the estate would be distributed if T had died without any spouse or issue.

**(20 marks)**

**(Question 2 follows)**



## Question 2

(a) T made a will in 2000 leaving her estate to two cousins who are her only relatives. One of these is suffering a life threatening disease, and the other is aged 90 years.

In 2002 T suffered an accident which has left her physically and mentally handicapped, and as a result she may not have the capacity to make a new will.

T's cousins, both of whom have children, are afraid that they will predecease T, and they wish to apply to the court for an order authorising an alteration of T's will to provide for a gift over to their children in the event that they predecease T.

**Advise what they need to prove in an application for a court authorised alteration of T's will.**

**(7 marks)**

(b) T made the following will in 1985:

"I give my shares to my friend Harry, my jewellery to my niece Ariel, and the residue of my estate to my friend Fred. I appoint Ariel and Fred my executors."

**Explain how T's estate should be distributed and who is entitled to the grant of representation if T married Fred in 2005. Would your answer differ if T married Fred in 2010?**

**(7 marks)**

(c) **Explain the ways in which an informal will may be admitted to a grant of representation.**

**(6 marks)**

**(Question 3 follows)**



**Question 3**

(a) T's executor, X, published the notice of her intention to distribute T's estate. At the expiration of the time given by the notice, C telephoned X and stated that T was indebted to him in the amount of \$100,000. X disputed the claim. X did not hear anything further from C, and she subsequently distributed the whole of T's estate except for a sum of \$20,000. Now, several months later, C has commenced proceedings against X to recover the debt owed to him by the deceased.

**Advise X.**

**(7 marks)**

(b) Explain in each of the following situations, assuming that the testator has left property in New South Wales, whether or not a GRANT MAY BE MADE in New South Wales and if so what TYPE of grant should be made and to WHOM it should be made:

- (i) T's will appoints E as executor and disposes of the whole estate to A who predeceases T;
- (ii) The executor of X's will cannot be found;
- (iii) The executor of Y's will has taken the grant but 12 months after the grant has not done anything to administer the estate; and
- (iv) One of the two executors of Z's estate is a minor.

**(7 marks)**

(c) T appoints her lawyer and a friend as the executors of her will. The will makes a gift of \$100,000 to the lawyer and gives a sum of \$20,000 to T's friend which is in repayment of a loan.

The will is signed by T and witnessed by a partner in the lawyer's office and the friend.

The executors wish to take the gifts and apply for commission for their pains and trouble in administering the estate.

**Advise whether the gifts to the executors are valid and whether the executors are entitled to claim commission.**

**(6 marks)**

**(Question 4 follows)**



#### Question 4

T has recently divorced. He is now suffering from depression and lives alone.

T's friend, Max, who feels sorry for him, drops in to see T every day. As Max is a gardener and loves to cook, he looks after T's garden and frequently cooks for him.

T has only one son, Sam, who is unwell and after the divorce has continued to live with T's former wife.

T has two brothers, Allan and Barry. T has not seen Allan since Allan left the parental home 40 years ago when they were both teenagers. Barry, though a hard worker, has always been beset with bad luck and cannot support his family without frequent gifts of money from T.

T is wealthy and thrifty and wants to leave the whole of his estate to a charity which cares for people with depression.

**T seeks your advice as to whether any of his former wife, his son Sam, his friend Max, and his brother Allan could successfully make claims for provision out of his estate, and if so, whether there are any ways in which he can organise his affairs to protect his estate from the claims.**

**(20 marks)**

**(Question 5 follows)**



**Question 5**

(a) T made a will on 1 February 1990 which simply appointed an executor, made a specific gift of his home, and gave the following direction:

“I direct that my executor pay all of my debts out of my personal estate.”

Apart from the specific gift, T left other real and personal property.

T’s liabilities comprise unsecured debts, funeral, testamentary and administration expenses, and a mortgage debt on the home.

**Explain how the liabilities of the estate are to be paid.**

**(10 marks)**

(b) T’s will dated 2 February 2012 provides, inter alia:

- “1. I give my jewellery to my sisters, S1 and S2.
2. I give my shares to the issue of my brother.
3. I give the residue of my personal estate to my sisters, S1, S2 and S3.
4. I give the residue of my real estate to my brother.”

T’s sisters each have two children. His brother has three children, X, Y and Z, each of whom has two children.

T died on 1 August 2013.

T’s sister, S2, and Z predeceased him and his brother died on 10 August 2013.

**Explain who is entitled to the gifts in the will.**

**(10 marks)**

**END OF PAPER**



# **FORMER WILLS, PROBATE AND ADMINISTRATIVE**

## **ACT 1898**

### **Part 1 Wills**

#### **4 To what wills and estates this part shall not extend**

This part shall not extend to any will made before the passing of this Act, and every will re-executed or re-published or revived by any codicil shall, for the purposes of this part, be deemed to have been made at the time at which the same is so re-executed, re-published, or revived, and this part shall not extend to any estate pur autre vie of any person dying before the passing of this Act.

#### **6 Will of minor**

A will made by a minor is not valid, unless the minor is or has been married or section 6A or 6B applies.

##### **6A Will of minor pursuant to leave of the Court**

- (1) The Court may grant a minor leave to make a will the terms of which have been disclosed to the Court.
- (2) Leave may be granted subject to such conditions (if any) as the Court thinks fit.
- (3) A will made by a minor pursuant to leave granted under this section is valid.

##### **6B Will of minor in contemplation of a marriage**

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.

#### **7 Form and manner of execution of wills**

- (1) A will is not valid unless:
  - (a) it is in writing, and
  - (b) it is signed by the testator, and
  - (c) it appears, on the face of the will or otherwise, that the testator intended by the signature to give effect to the will, and
  - (d) the signature is made by the testator in the presence of 2 or more witnesses present at the same time or the signature is acknowledged by the testator in the presence of 2 or more witnesses present at the same time, and
  - (e) at least 2 of those witnesses attest and sign the will in the presence of the testator (but not necessarily in the presence of each other or of any other witness).
- (2) Without limiting paragraphs (d) and (e) of subsection (1), those paragraphs shall be taken to have been complied with if the following things happen in the following order:
  - (a) the signature of the testator is made or acknowledged by the testator in the presence of a witness (in this subsection called "the first witness"), and
  - (b) the first witness attests and signs the will in the presence of the testator, and
  - (c) the signature of the testator is acknowledged by the testator in the presence of one or more other witnesses and also of the first witness present at the same time, and
  - (d) the other witness, or at least one of the other witnesses, attests and signs the will in the presence of the testator (but not necessarily in the presence of the first witness or of any other witness).
- (3) No form of attestation by a witness is necessary.
- (4) In this section, a reference to the signing of a will by a testator includes a reference to the signing of the will by some other person who signs the will in the presence and by the direction of the testator.

#### **13 Gifts to interested witnesses**

- (1) If any beneficial gift is given or made by will to a person (in this section called "the interested witness") who attests the execution of the will or to the interested witness's spouse, the gift is void so far only as it concerns the interested witness or the interested witness's spouse or any person claiming under either of them, unless subsection (2) applies.
- (2) A beneficial gift given or made by will is not made void by this section if:
  - (a) at least 2 persons who attest the execution of the will are not persons to whom any such gift is so given or made or the spouses of any such persons, or
  - (b) all the persons who would benefit directly from the avoidance of the gift consent in writing to the distribution of the gift according to the will (all those persons having capacity at law to do so), or
  - (c) the Court is satisfied:

- (ii) that the gift was given or made freely and voluntarily by the testator.
- (3) Except in the case of a will to which subsection (2) (a) applies, the executor of an estate is not to distribute that part of the estate the subject of the gift before the expiration of one month after the date on which the executor notifies the interested witness or the interested witness's spouse (as the case may be) of the executor's intention to make the distribution, unless:
  - (a) all the persons to whom subsection (2) (b) applies have given the requisite consent, or
  - (b) the Court is satisfied as to the matters referred to in subsection (2) (c).
- (4) A consent referred to in subsection (2) (b) is not liable to duty under the *Stamp Duties Act 1920*.
- (5) In this section:
  - "executor" includes a person to whom letters of administration are granted with the will annexed.
  - "gift" includes a devise, legacy, estate, interest or appointment of or affecting any real or personal estate, but does not include a charge or direction for the payment of any debt.

## 15 Effect of marriage

- (1) Every will made by any person shall be revoked by the person's 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 the person's executor or administrator).
- (2) A will made after the commencement of the *Conveyancing (Amendment) Act 1930* and before the commencement of subsection (3) which is expressed to be made in contemplation of a marriage, shall not be revoked by the solemnisation of the marriage contemplated.
- (3) A will made after the commencement of this subsection in contemplation of a marriage, whether or not that contemplation is expressed in the will, is not revoked by the solemnisation of the marriage contemplated.
- (4) A will made after the commencement of subsection (3) which is expressed to be made in contemplation of marriage generally is not revoked by the solemnisation of a marriage of the testator.

## 15A Effect of termination of marriage

- (1) 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 a former spouse is revoked, and
  - (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 pursuant to subsection (1) (a), and an appointment shall not be taken to be omitted from a will pursuant to subsection (1) (b), if:
  - (a) the Court is satisfied by any evidence, including evidence (whether admissible before the commencement of this section or otherwise) 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 is 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 any application under the *Family Provision Act 1982*, or
  - (b) any direction, charge, trust or provision in the will of a testator for the payment of any amount in respect of a debt or liability (including any liability under a promise) of the testator to the former spouse of the testator or to the executor or administrator of the estate of the former spouse.
- (4) 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

"promise" includes any statement or representation of fact or intention.

- (5) 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 the marriage pursuant to the Family Law Act becomes final,
  - (b) on the making of a decree of nullity pursuant to the Family Law Act in respect of a 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.

### 17 Manner of revocation

- (1) A will shall not be revoked wholly or in part except as mentioned in section 15 or 15A or in this section.
- (2) A will may be revoked by another will.
- (3) A will may be revoked:
  - (a) by some writing declaring an intention to revoke the will and executed in the manner in which a will is required to be executed by section 7,
  - (b) if the will is in writing, by the burning, tearing or destruction otherwise of the will by the testator or by some person in the testator's presence and by the testator's direction, with the intention of revoking the will, or
  - (c) by some writing on the will, or by any dealing with the will, by the testator or by some person in the presence of the testator and by the testator's direction, if the Court is satisfied from the state of the will that the writing was made or the dealing was done with the intention of revoking the will.
- (4) A testator may revoke the testator's will as mentioned in subsection (3) notwithstanding that the testator is a minor.
- (5) This section applies to a revocation made after the commencement of the *Minors (Property and Contracts) Act 1970*.

### 18 Effect of alteration in a will

- (1) No obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration are not apparent, unless such alteration is executed in like manner as hereinbefore is required for the execution of a will, but the will, with such alteration as part thereof, shall be deemed 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 such alteration or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.
- (2) Subsection (1) applies to and in respect of an obliteration, interlineation or other alteration made in the will of a minor who may make a valid will under this Act in the same way as it applies to and in respect of an obliteration, interlineation or other alteration made in the will of a testator who is not a minor.

### 18A Certain documents to constitute wills etc

- (1) A document purporting to embody the testamentary intentions of a deceased person, even though it has not been executed in accordance with the formal requirements of this Act, constitutes a will of the deceased person, an amendment of such a will or the revocation of such a will if the Court is satisfied that the deceased person intended the document to constitute the person's will, an amendment of the person's will or the revocation of the person's will.
- (2) In forming its view, the Court may have regard (in addition to the document) to any other evidence relating to the manner of execution or testamentary intentions of the deceased person, including evidence (whether admissible before the commencement of this section or otherwise) of statements made by the deceased person.

### 19 Revival

- (1) No will or any part thereof which is in any manner revoked shall be revived otherwise than by:
  - (a) the re-execution thereof, or
  - (b) a codicil executed in the manner required by section 7 and showing an intention to revive the same.
- (3) Where a will which is partly revoked and afterwards wholly revoked is revived, the revival shall not extend to so much of the will as was revoked before the revocation of the whole of the will, unless an intention to the contrary is shown.

## 29 Gifts to children or other issue who leave issue living at the testator's death

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 such person dies intestate, leaving issue, and any such issue of such person is living at the time of the death of the testator, such devise or bequest shall not lapse but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will.

**Note:** See also *Conveyancing Act 1919*, sec 37.

### 29A Power of the Court to rectify will

- (1) If the Court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, it may order that the will be rectified so as to carry out the testator's intention.
- (2) An application for an order under this section shall not be made after the expiration of the period of 18 months after the death of the testator, except as provided by subsection (3).
- (3) The Court may grant leave to make an application for an order under this section after the expiration of the 18-month period if the Court is satisfied that sufficient cause is shown for the failure to make the application within that period.
- (4) Nothing in this section renders the executor of the estate of a testator liable for having distributed the assets, or any part of the assets, of that estate if the executor has complied with section 92.
- (5) Nothing in subsection (4) prevents a person who becomes a beneficiary in respect of assets of the estate of a testator by virtue of an order under this section from recovering the assets if the assets have, or any part of the assets has, been distributed.
- (6) In this section:  
"executor" includes a person to whom letters of administration are granted with the will annexed.

## PROBATE AND ADMINISTRATION ACT 1898

### Part 2 PROBATE AND ADMINISTRATION

#### 32G Interpretation

- (1) In this Part:  
"de facto relationship" has the same meaning as in the *Property (Relationships) Act 1984*.  
"de facto spouse", in relation to a person dying wholly or partly intestate, means someone who:
  - (a) was the sole partner in a de facto relationship with the person, and
  - (b) was not a partner in any other de facto relationship.
- (2) Except where the contrary intention appears, a reference in this Part to the spouse of an intestate includes a reference to a person who, at the time of death of the intestate, was the de facto spouse of the intestate.

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

- (1) Upon the grant of probate of the will or administration of the estate of any person dying after the passing of this Act, all real and personal estate which any such person dies seised or possessed of or entitled to in New South Wales, shall as from the death of such person pass to and become vested in the executor to whom probate has been granted or administrator for all the person's estate and interest therein in the manner following, that is to say:
  - (a) On testacy in the executor or administrator with the will annexed.
  - (b) On intestacy in the administrator.
  - (c) On partial intestacy in the executor or administrator with the will annexed.

#### 46C Administration of assets

- (2) Where the estate of a deceased person is solvent the deceased person's real and personal estate shall, subject to the provisions of any Act as to charges on property of the deceased and to the provisions, if any, contained in the deceased person's will, be applicable towards the discharge of the funeral, testamentary, and administrative expenses, debts, and liabilities, payable thereout in the order mentioned in Part 2 of the Third Schedule.

## 61 Property of deceased to vest in Public Trustee

From and after the decease of any person dying testate or intestate, and until probate, or administration, or an order to collect is granted in respect of the deceased person's estate, the real and personal estate of the deceased person shall be deemed to be vested in the NSW Trustee in the same manner and to the same effect as aforesaid in the case of the personal estate and effects vested in the Ordinary in England.

## Division 3 Probate and administration

### 63 To whom administration may be granted

The Court may grant administration of the estate of an intestate person to the following persons, not being minors, that is to say to:

- (a) the spouse of the deceased, or
- (b) one or more of the next of kin, or
- (c) the spouse conjointly with one or more of the next of kin,

or if there be no such person or no such person within the jurisdiction:

- (i) who is, of the opinion of the Court, fit to be so trusted, or
- (ii) who, upon being required in accordance with the rules, or as the Court may direct, to pray for administration, complies with the requirement or direction,

then to:

- (d) any person, whether a creditor or not of the deceased, that the Court thinks fit.

### 92 Distribution of assets after notice given by executor or administrator

- (1) The executor or administrator of the estate of a testator or an intestate may distribute the assets, or any part of the assets, of that estate among the persons entitled having regard to the claims of beneficiaries (including children conceived but not yet born at the date of the death of the testator or intestate), creditors and other persons in respect of the assets of the estate of which the executor or administrator has notice at the time of distribution if:
  - (a) the assets are distributed at least 6 months after the testator's or intestate's death, and
  - (b) the executor or administrator has given notice in the form approved under section 17 of the *Civil Procedure Act 2005* that the executor or administrator intends to distribute the assets in the estate after the expiration of a specified time, and
  - (c) the time specified in the notice is not less than 30 days after the notice is given, and
  - (d) the time specified in the notice has expired.
- (2) An executor or administrator who distributes the assets or any part of the assets of the estate of a testator or an intestate in accordance with subsection (1) is not liable in respect of those assets or that part of those assets to any person who has a claim in respect of those assets or that part unless the executor or administrator had notice of the claim at the time of the distribution or the distribution was not made in the circumstances described in subsection (2) (a) or (b) of section 28 (Protection of personal representatives who distribute as if will had not been rectified) of the *Succession Act 2006*.
- (3) In relation to a distribution of the assets of a testator or intestate dying after the commencement of the *Children (Equality of Status) Act 1976*, an executor or administrator referred to in subsection (2) shall be deemed to have notice of the claim of any person whose entitlement to the assets or to any part of them would have become apparent if the executor or administrator had applied for and obtained a certificate under section 50 of the *Births, Deaths and Marriages Registration Act 1995*.

### 92A Personal representatives may make maintenance distributions within 30 days

- (1) This section applies if a person (the "survivor"):
  - (a) survives a deceased person, and
  - (b) at the time of the deceased person's death, was wholly or substantially dependent on the deceased person, and
  - (c) will be entitled to part or all of the deceased person's estate if the person survives the deceased person for 30 days or, if that or another period for survival appears in the will, within the period appearing in the will (the "specified period").
- (2) The executor or administrator of the deceased person's estate may make a distribution that is an adequate amount for the proper maintenance, support or education of the survivor at any time after the death of the deceased person, including within 30 days, or the specified period, after the death of the deceased person.

- (3) The executor or administrator may make the distribution even though the executor or administrator knows, when the distribution is made, of a pending application, or an intended application, for an order under the *Family Provision Act 1982* in relation to the deceased person.
- (4) The executor or administrator is not liable for a distribution under subsection (2) that is made in good faith.
- (5) An amount distributed under subsection (2) to a survivor must be deducted from any share of the estate which the survivor becomes entitled to.
- (6) However, if the survivor does not survive the deceased person for 30 days, or the specified period, the distribution is to be treated as an administration expense.
- (7) An authorised deposit-taking institution does not incur any liability in relation to any transaction concerning an account of the deceased person kept with the institution or with some other financial institution that it is authorised to make by the executor or administrator of the deceased person for the purposes of a distribution under subsection (2).
- (8) Subsection (7) does not relieve an authorised deposit-taking institution from any liability or obligation it would have apart from that subsection.

### 93 Claims barred against executor or administrator in certain cases

- (1) When the executor or administrator of the estate of a testator or an intestate has published the notices referred to in section 92 (1) and a claim in respect of the assets of that estate is submitted to the executor or administrator, the executor or administrator may, if the executor or administrator disputes the claim, serve on the person by whom or on whose behalf the claim was submitted a notice calling on the person to take proceedings to enforce the person's claim within a period of 3 months from the date of service of the notice and to prosecute the person's claim.
- (2) If, after a notice has been served on a person in accordance with subsection (1) and the period of 3 months referred to in the notice has expired, that person does not satisfy the Court that the person is prosecuting the person's claim, the Court may, on an application in that behalf made by the executor or administrator:
  - (a) make an order barring the claim of that person as against the executor or administrator, subject to such conditions (if any) as it thinks just and equitable, or
  - (b) make such other order in respect of the application as it thinks just and equitable, having regard to the circumstances of the case.
- (3) Where:
  - (a) in its capacity as executor or administrator, a trustee company:
    - (i) disputes any claim upon an estate (whether the claimant claims to be a creditor or to have a beneficial interest in the estate), and
    - (ii) has served on the claimant a notice in accordance with subsection (1), and
  - (b) the claimant has not, within the period of 3 months referred to in the notice served in accordance with subsection (1), commenced proceedings to enforce the claim,

the trustee company may serve a further notice on the claimant that unless, within the period of 2 months from the date of service of that further notice, the trustee company is duly served with process of court issued in proceedings to enforce the claim, the trustee company will distribute the estate without regard to the claim.
- (4) If, within the period of 2 months referred to in a notice served on a claimant in accordance with subsection (3), a trustee company has not been duly served with process as referred to in that subsection, the claimant's claim shall thereupon be barred and become irrecoverable as against the trustee company and the trustee company may proceed to distribute the estate without regard to the claim.
- (5) A trustee company may, if it thinks fit, waive any objection which it might, by virtue of subsection (4), take to proceedings commenced by a claimant after the expiration of the period of 2 months referred to in a notice served on the claimant in accordance with subsection (3).
- (6) The powers conferred on a trustee company by subsections (3) and (4) are in addition to the powers exercisable under subsection (2).

## SCHEDULE 3

### Part 2 Order of application of assets where the estate is solvent

- 1) Assets undisposed of by will, subject to the retention thereof of a fund sufficient to meet any pecuniary legacies.

- 2) Assets not specifically disposed of by will but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet pecuniary legacies, so far as not provided for as aforesaid.
- 3) Assets specifically appropriated or disposed of by will (either by a specific or general description) for the payment of debts.
- 4) Assets charged with or disposed of by will (either by a specific or general description) subject to a charge for the payment of debts.
- 5) The fund, if any, retained to meet pecuniary legacies.
- 6) Assets specifically disposed of by will, rateably according to value.

# SUCCESSION CASE LIST

## 1. INTESTATE SUCCESSION

Casebook, ch 1  
Text, ch 3

*Adoption Act*, ss 95-97  
*Interpretation Act*, s 21C  
*Status of Children Act*, ss 5-8  
*Succession Act*, ch 4

*Thornton v Brunnsden* (1956) 56 SR (NSW) 265 (para. 1.35)

*Re Plaister* (1934) 34 SR (NSW) 547 (para. 1.45)

*Halbert v Mynar* [1981] NSWLR 659 (para. 1.55)

## 2. DEFINITION AND NATURE OF A WILL

Casebook, ch 2  
Text, ch 4, paras. 4.10-4.110, 4.160-4.370

*Succession Act*, s 6

*Synge v Synge* [1894] QB 466 (para. 2.10)  
*Birmingham v Renfrew* (1936) 57 CLR 666 (para. 2.25)

*Russell v Scott* (1936) 55 CLR 440 (para. 2.35)

*Palmer v Bank of New South Wales* (1975) 133 CLR 150 (para. 2.30)

*Bird v Perpetual Executors and Trustees Association of Australia* (1946) 73 CLR 140 (para. 2.45)

*McFadden v Public Trustee Association of Australia (Vic)* [1981] 1 NSWLR 15 (para. 2.50)

## 3. THE MENTAL ELEMENT

Casebook, ch 3  
Text, ch 5

### (1) Testamentary Capacity

#### (a) Age

*Succession Act*, ss 5, 16, 17 (cf former *Wills Probate and Administration Act*, ss 6, 6A, 6B)

#### (b) Sound mind, memory and understanding

*Succession Act*, ss 18-26

*Banks v Goodfellow* (1870) LR 5 QB 549 (para. 3.15)

*Timbury v Coffee* (1941) 66 CLR 277 (para. 3.25)

*Bull v Fulton* (1942) 66 CLR 295 (para. 3.20)  
*In the Estate of Bohrman* [1938] 1 All ER 271 (para. 3.35)

*Woodhead v Perpetual Trustee Co* (1987) 11 NSWLR 267 (para. 3.30)

*Re Fenwick & Re Charles* [2009] NSWSC 530 (para. 3.55)

### (2) Knowledge and approval

*Astridge v Bennet* [1970] 1 NSWLR 542 (para.

### (3) Fraud and undue influence

*Fulton v Andrew* (1875) LR 7 HL 448 (para. 3.65)

*Wingrove v Wingrove* (1886) 11 P and D 81 (para. 3.90)

*Hall v Hall* (1868) 1 P and D 481 (para. 3.85)

*Hindson v Weatherill* (1854) 43 ER 886 (para. 3.75)

*Wintle v Nye* [1959] 1 All ER 552 (para. 3.80)

### (4) Lack of testamentary intention

*In the Estate of Knibbs* [1962] 2 All ER 829 (para. 3.95)

*King's Proctor v Daines* (1830) 162 ER 1136 (para. 3.100)

*Nichols v Nichols* (1814) 161 ER 1113 (para. 3.105)

*In the Estate of Meyer* [1908] P 353 (para. 3.110)

## 4. FORMAL REQUIREMENTS

Casebook, ch 4  
Text, ch 6

### (1) Form and manner of execution of wills

*Succession Act*, ss 6, 7, 9 (cf former *Wills Probate and Administration Act*, ss 7, 12)

*In the Goods of Adams* (1872) 2 P and D 367 (para. 4.25)

*Re Male* [1934] VLR 318 (para. 4.30)

*Sweetland v Sweetland* (1865) 164 ER 1416 (para. 4.35)

*Willgoss v Ward* (1921) 22 SR (NSW) 61 (para. 4.55)

### (2) Gifts to interested witnesses

*Succession Act*, s 10 (cf former *Wills, Probate and Administration Act*, s 13)

*Re Bunting* [1974] 2 NZLR 219 (para. 4.60)

### (3) The judicial dispensing power

*Succession Act*, s 8 (cf former *Wills Probate and Administration Act*, s 18A)

*Re Application of Brown: Estate of Springfield* (1991) 23 NSWLR 535 (para. 4.75)

*In the Estate of Masters* (1994) 33 NSWLR 446 (para. 4.80)

### (4) Incorporation by reference

*Allen v Maddock* (1858) 14 ER 757 (para. 4.70)

## 5. THE RECTIFICATION POWER

Casebook, ch 3, paras. 3.115-3.135  
Text, ch 5, paras. 5.80-5.100; ch 10, paras. 10.10, 10.140-10.180

*Succession Act*, ss 27-28 (cf former *Wills Probate and Administration Act*, s 29A), 32

*Mortenson v State of New South Wales* (NSWCA, unrep, 12.12.1991) (para. 3.130)  
*Estate of Gillespie* (NSWSC, unrep, 25.10.91) (para. 3.135)

## 6. REVOCATION

Casebook, ch 5  
 Text, ch 7

### (1) Involuntary revocation

#### (a) Marriage

*Succession Act*, s 12 (cf former *Wills Probate and Administration Act*, s 15)

*In the Goods of Russell* (1890) 15 PD 111 (para. 5.35)

*Lay v Burns Philp Trustee Co* (1986) 6 NSWLR 60 (para. 5.60)

*Re Natush* [1963] NZLR 173 (para. 5.70)

#### (b) Termination of marriage

*Succession Act*, s 13 (cf former *Wills Probate and Administration Act*, s 15A)

### (2) Voluntary revocation

*Succession Act*, s 11 (cf former *Wills, Probate and Administration Act*, s 17)

#### (a) By another will

*Succession Act*, s 11(1)(c) (cf former *Wills Probate and Administration Act*, s 17(2))

*In the Goods of Oswald* (1874) LR 3 P and D 162 (para. 5.80)

*In re Tait* [1957] VR 405 (para. 5.85)

*Re Mills* (1968) 88 WN (pt 2) (NSW) 74 (para. 5.90)

*Re Luck* [1977] WAR 148 (para. 5.95)

*Cadell v Wilcocks* [1898] P 21 (para. 5.100)

#### (b) By writing declaring an intention to revoke

*Succession Act*, s 11(1)(d) (cf former *Wills Probate and Administration Act*, s 17(3)(a))

*In the Goods of Fraser* (1869) LR 2 P and D 40 (para. 5.120)

#### (c) By destruction

*Succession Act*, s 11(1)(e) (cf former *Wills Probate and Administration Act*, s 17(3)(b))

*Cheese v Lovejoy* (1877) LR 2 P 251 (para. 5.130)

*Re Everest* [1975] 2 WLR 333 (para. 5.140)

*Doe v Perkes* (1820) 106 ER 740 (para. 5.135)

*In the Will of Boyd* (1959) 59 SR (NSW) 369 (para. 5.145)

*Guest v Webb* [1965] VR 427 (para. 5.150)

#### (d) By writing/dealing

*Succession Act*, s 11(1)(f) (cf former *Wills Probate and Administration Act*, s 17(3)(c))

#### (e) Dependent relative revocation

*Lippe v Hedderwick* (1922) 31 CLR 148 (para. 5.25)

*In the Estate of Southerden* [1925] P 177 (para. 5.165)

*Re Lindrea* [1953] VLR 168 (para. 5.175)

*In the Estate of Niven* (1921) 21 SR (NSW) 702 (para. 5.170)

*Re Jones* [1976] 1 Ch 200 (para. 5.180)

*Re Mills* (1968) 88 WN (pt 2) (NSW) 74 (para. 5.90)

## 7. ALTERATIONS

Casebook, ch 6  
 Text, ch 8

*Succession Act*, ss 8, 11(1)(f), 14 (cf former *Wills Probate and Administration Act*, ss 17(3)(c), 18, 18A)

*Goods of Sykes* (1873) 3 P and D 26 (para. 6.20)

*Williams v Ashton* (1860) 70 ER 685 (para. 6.25)

*Goods of Hall* (1871) LR 2 P and D 256 (para. 6.30)

*Goods of Itter* [1950] P 130 (para. 6.40)

*Ffinch v Combe* [1894] P 191 (para. 6.35)

## 8. REPUBLICANION AND REVIVAL OF WILLS

Casebook, ch 7  
 Text, ch 9

### (1) Republication

(Former *Wills Probate and Administration Act*, s 4)

*Re Smith* (1890) 45 Ch D 632 (para. 7.15)

*Fairweather v Fairweather* (1944) 69 CLR 121 (para. 7.20)

### (2) Revival

*Succession Act*, s 15 (cf former *Wills Probate and Administration Act*, s 19)

*Rogers v Goodenough* (1862) 164 ER 1028 (para. 7.45)

*In the Goods of Steele* (1862) 1 P and D 575 (para. 7.50)

*In the Estate of Horne* (1920) 20 SR (NSW) 531 (para. 7.55)

*In the Estate of Brian* [1974] 2 NSWLR 231 (para. 7.65)

## 9. JURISDICTION OF THE PROBATE COURT

Casebook, ch 8

Text, ch 14, paras. 14.10-14.60

*Probate and Administration Act*, ss 40, 40A, 40B, 40C, 40D, 41, 41A, 63, 74, 90

*In the Goods of Morton* (1864) 164 ER 1338 (para. 8.55)

*In re Carlton* [1924] VLR 237 (para. 8.50)

*In the Goods of Tamplin* [1897] P 39 (para. 8.60)

*New York Breweries v A-G* [1899] AC 62 (para. 8.70)

*Boyd v Leslie* [1964] VR 728 (para. 8.140)

## 10. ESTATES PENDING GRANTS OF REPRESENTATION

Casebook, ch 9

Text, ch 13

*Probate and Administration Act*, ss 44, 61

### (1) Position of NSW Trustee

*Andrews v Hogan* (1952) 86 CLR 223 (para. 9.20)

*Oxford Meat Co v McDonald* (1963) 63 SR (NSW) 423 (para. 9.25)

### (2) Executor de son tort

*Re Birch* (1951) 51 SR (NSW) 345 (para. 9.35)

*Cash v Nominal Defendant* (1969) 90 WN (pt 1) (NSW) 77 (para. 9.40)

*Will of Colless* (1941) 41 SR (NSW) 133 (para. 10.45)

## 11. GRANTS OF REPRESENTATION

Casebook, ch 10

Text, ch 14, paras. 14.70-14.330

*Bath v British and Malayan Trustees* (1969) 90 WN (pt 1) (NSW) 44 (para. 10.55)

*In the Will of Sands* (1944) 44 SR (NSW) 281 (para. 10.60)

*Bates v Messner* (1967) 67 SR (NSW) 187 (para. 10.75)

*Re Devoy* [1943] St R Qd 137 (para. 10.40)

*Re N* [1950] VLR 139 (para. 10.70)

*Bailey v Bailey* (1924) 34 CLR 558 (para. 10.85)

*Tyrrell v Painton* [1894] P 151 (para. 10.90)

## 12. SOME POWERS AND DUTIES OF A LEGAL PERSONAL REPRESENTATIVE

Casebook, ch 11

Text, ch 15, paras. 15.10-15.60, 15.90, 15.120, 15.220-15.240

### (1) Disposal of the body

*Williams and Williams* (1882) 20 Ch D 659 (para. 11.30)

### (2) Commencement and termination of the authority of a legal personal representative

*The Daily Pty Ltd v White* (1946) 63 WN (NSW) 262 (para. 11.50)

*Attenborough v Solomon* [1913] AC 76 (para. 11.60)

*Colyton Investments v McSorley* (1962) 107 CLR 177 (para. 11.75)

### (3) Executor's commission

*Probate and Administration Act*, ss 85-86

*In the Will of Wallace* (1934) 51 WN (NSW) 84 (para. 11.215)

*Dalrymple v Melville* (1932) 32 SR (NSW) 596 (para. 11.110)

*Sacks v Gridiger* (1991) 22 NSWLR 502 (para. 11.195)

*Re Murphy* [1928] St R Qd 1 (para. 11.200)

*In the Will of Sheppard* [1972] 2 NSWLR 714 (para. 11.220)

*Re Craig* (1952) 52 SR (NSW) 265 (para. 11.205)

*In the Will of Shannon* [1977] 1 NSWLR 210 (para. 11.225)

### (4) Special pleas and immunities of executors and administrators

*Probate and Administration Act*, ss 92, 92A, 93, 94

*Newton v Sherry* (1876) LR 1 CP 246 (para. 11.140)

*In the Will of Walker* (1943) 43 SR (NSW) 305 (para. 11.150)

*Re Owers: Public Trustee v Death* [1941] 1 Ch 389 (para. 11.155)

*Levy v Kum Chah* (1936) 56 CLR 159 (para. 11.135)

*Jervis v Wolfenstan* (1874) LR 18 Eq 18 (para. 11.160)

## 13. GIFTS BY WILL

Casebook, ch 13

Text, ch 11, paras. 11.10-11.200, 11.240-11.260, 11.390-11.400, 11-620-11.740

*Succession Act*, ss 30, 35, 39, 40, 41, 42 (cf former *Wills Probate and Administration Act*, ss 21, 29)

*Walford v Walford* [1912] AC 658 (para. 13.25)

*Re Clifford* [1912] 1 Ch 29 (para. 13.50)

*McBride v Hudson* (1961) 107 CLR 604 (para. 13.35)

*Re Rooke* [1933] 1 Ch 970 (para. 13.70)

*Re Collins' Will Trusts* [1971] 1 WLR 37 (para. 13.75)

*Re Plowright* [1971] VR 128 (para. 13.40)

*Permanent Trustee Co of New South Wales v Royal Prince Alfred Hospital* (1944) 45 SR (NSW) 339 (para. 13.55)

*In re Buckley's Trusts* (1883) 22 Ch D 583 (para. 13.45)

Class gifts and class closing rules

*Re Bleckly* [1951] 1 All ER 1064 (see pp.1068-9) (para. 13.85)

**14. ADMINISTRATION OF SOLVENT ESTATES**(1) The statutory order of application of assets

Casebook, ch 16, paras 16.05, 16.20, 16.30, 16.50-16.55, 16.65, 16.80-16.85

Text, ch 15, paras 15.130, 15.170-15.210

*Probate and Administration Act*, s 46C(2); sch 3, pt 2

*Re Tong* [1931] 1 Ch 202 (para. 16.30)

*Re John* [1933] 1 Ch 370 (para. 16.80)

*Re Sloan* [1943] VLR 63 (para. 16.85)

*Permanent Trustee Co of New South Wales v Temple* [1957] SR (NSW) 301 (para. 16.55)

*Perpetual Trustee Co v Walker* (1941) 41 SR (NSW) 174 (para. 16.50)

*Ebert v Healy* (1969) 89 WN (pt 1) (NSW) 479 (para. 16.65)

*Re McCallum* (1907) 7 SR (NSW) 523 (para. 14.40)

(2) Locke King's Act

Casebook, ch 15

Text, ch 15, para. 15.160

*Conveyancing Act 1919* (NSW), s 145

*Re Neeld* [1962] 1 Ch 643 (para. 15.20)

*Re Beinstein* [1925] 1 Ch 12 (para.15.35)

*Re Fegan* [1928] 1 Ch 45 (para. 15.25)

*McPhie v Mackay* [1975] 2 NSWLR 369 (para. 15.30)

*Perpetual Trustee Co v Killick* (1951) 51 SR (NSW) 36 (para. 15.45)

*Re Baron Kensington* [1902] 1 Ch 203 (para. 15.50)

*Re Fison's Will Trusts* [1950] 1 Ch 395 (para. 15.55)

(3) Payment of legacies

Casebook, ch 16, paras 16.105

Text, ch 15, para 15.170, at pp 301-302

(4) Protected assets

Casebook, ch 14, para 14.05

Text, ch 15, para 15.140

*Life Insurance Act 1995* (Cth), ss 204-205

**15. FAMILY PROVISION**

Casebook, ch 12

Text, ch 12

*Interpretation Act*, s 21C

*Succession Act*, Ch 3 (cf former *Family Provision Act*)

*Roy v Sturgeon* (1986) 11 NSWLR 454 (para. 12.20)

*Simonis v Perpetual Trustee Co Ltd* (1987) 21 NSWLR 677 (para 12.25)

*Ball v Newey* (1988) 13 NSWLR 489 (para. 12.35)

*Benney v Jones* (1991) 23 NSWLR 559 (para.12.40)

*Petrohilos v Hunter* (1991) 25 NSWLR 343 (para. 12.45)

*Vanvalen v Neaves* [2005] NSWSC 593 (para 12.50)

*Ye v Fung* [2006] NSWSC 243 (para 12.55)

*Fung v Ye* [2007] NSWCA 115 (para 12.60)

*Singer v Berghouse (No 2)* (1994) 181 CLR 201 (para. 12.65)

*Bosch v Perpetual Trustee Co* [1938] AC 463 (para. 12.70)

*Permanent Trustee Co v Fraser* (1995) 36 NSWLR 24 (para. 12.75)

*Vigolo v Bostin* (2005) 221 CLR 191 (para 12.80)

*Re Fulop* (1987) 8 NSWLR 679 (para. 12.85)

*Churton v Christian* (1988) 13 NSWLR 241 (para. 12.90)

*Dijkhuijs v Barclay* (1988) 13 NSWLR 639 (para. 12.95)

*Palmer v Dolman* [2005] NSWCA 361 (para 12.100)

*Re Buckland* [1966] VR 404 (para. 12.105)

*King v White* [1992] 2 VR 417 (para. 12.110)

*Gorton v Parks* (1989) 17 NSWLR 1 (para. 12.115)

*Wade v Harding* (1987) 11 NSWLR 551 (para. 12.130)

*Cetojevic v Cetojevic* [2007] NSWCA 33 (para 12.135)

*Luciano v Rosenblum* (1985) 2 NSWLR 65 (para. 12.125)

## Conveyancing Act 1919 (NSW)

### Part 12 Debts charged on property of deceased

#### 145 Charges on property of deceased to be paid primarily out of the property charged

- (1) Where a person dies after the commencement of the *Conveyancing (Amendment) Act 1930* possessed of or entitled to, or, under a general power of appointment by his or her will disposes of:
  - (a) property, which at the time of his or her death is charged with the payment of money, whether by way of legal mortgage, equitable charge, or otherwise (including a lien for unpaid purchase money), or
  - (b) land in respect of which there is owing at the time of his or her death any money under a contract of purchase whether from the Crown or not,
 and the deceased has not by will, deed, or other document signified a contrary or other intention, the property so charged shall, as between the different persons claiming through the deceased, be primarily liable for the payment of the charge; and every part of the property, according to its value, shall bear a proportionate part of the charge on the whole thereof.
- (2) Such contrary or other intention shall not be deemed to be signified:
  - (a) by a general direction for the payment of debts or of all the debts of the testator out of the testator's personal estate or the testator's residuary real and personal estate, or the testator's residuary real estate, or
  - (b) by a charge of debts upon any such estate,
 unless such intention is further signified by words expressly or by necessary implication referring to all or some part of the charge.
- (3) Nothing in this section affects the right of a person entitled to the charge to obtain payment or satisfaction thereof either out of the other assets of the deceased or otherwise.

## Adoption Act 2000 (NSW)

### 95 General effect of adoption orders

(cf AC Act s 35 (1) and (4))

- (1) An adoption order made by the Court gives sole parental responsibility for a child to the person or persons named in the order (***the adoptive parent or adoptive parents***).
- (2) For the purposes of the law of New South Wales, if an adoption order is made:
  - (a) the adopted child has the same rights in relation to the adoptive parent, or adoptive parents, as a child born to the adoptive parent or adoptive parents,
  - (b) the adoptive parent or adoptive parents have the same parental responsibility as the parent or parents of a child born to the adoptive parent or adoptive parents,
  - (c) the adopted child is regarded in law as the child of the adoptive parent or adoptive parents and the adoptive parent or adoptive parents are regarded in law as the parents of the adopted child,
  - (d) the adopted child ceases to be regarded in law as the child of the birth parents and the birth parents cease to be regarded in law as the parents of the adopted child.

**Note.** For example, for the purposes of a distribution on intestacy, an adopted child is regarded as a child of the adoptive parent or parents and the child's family relationships are determined accordingly. See section 109 of the *Succession Act 2006*.

- (3) Despite subsection (1), an adopted child does not cease to be regarded in law as the child of a birth parent or adoptive parent, and the birth parent or adoptive parent does not cease to be regarded in law as the parent of the child, if an adoption order is made in relation to a step parent with whom the birth parent or adoptive parent is living.
- (4) For the purposes of any law of New South Wales relating to a sexual offence (being a law for which the relationship between persons is relevant), any relationship that would have existed if an adoption order or discharge order had not been made continues to exist for the purposes of that law in addition to any relationship that exists under this section by virtue of the order.

### 96 Effect of adoption order on parental responsibility and previous adoption

(cf AC Act s 35 (1) (d) and (e))

- (1) On the making of an adoption order:
- the existing parental responsibility for the adopted child (including the Minister's parental responsibility under the *Children and Young Persons (Care and Protection) Act 1998*) ceases to have effect;
  - any previous adoption of the child (whether effected under the law of New South Wales or otherwise) ceases to have effect.
- (2) This section does not apply in relation to an agreement or instrument (not being a disposition of property) made or executed before 7 February 1967.

**Note.** 7 February 1967 was the date of commencement of the *Adoption of Children Act 1965*.

## 97 Effect of orders as regards property

(cf AC Act ss 35 (2) and (3) and 36)

- Section 95 does not have effect so as to deprive an adopted child of any vested or contingent property right acquired by the child before the making of the adoption order.
- (Repealed)

## Status of Children Act 1996 (NSW)

### Part 2 Status of children and dispositions of property

#### 5 All children are of equal status

- For the purposes of any law of the State by or under which the relationship between any person and the person's father and mother (or either of them) arises, that relationship and any other relationship (whether of consanguinity or affinity) between the person and another person is to be determined regardless of whether the person's parents are or have been married to each other.
- This section is subject to sections 6 and 7.

#### 6 Construction of dispositions of property made on or after 1 July 1977

- This section applies to the following dispositions only:
  - dispositions made inter vivos on or after 1 July 1977 (being the date on which the *Children (Equality of Status) Act 1976* commenced),
  - dispositions made by will or codicil executed before, on or after 1 July 1977 by a person who dies after that date.
- Unless a contrary intention appears, in any disposition to which this section applies:
  - a reference (however expressed) to the child or children of a person includes a reference to an exnuptial child of whom that person is a parent, and
  - a reference (however expressed) to any person or persons related to another person (other than as a parent or child) includes a reference to anyone who is so related in fact regardless that the person related in fact, or some other person through whom the relationship is traced, is or was an exnuptial child.
- The use of any of the following words (or of any word or words having the same or a similar meaning) does not of itself indicate a contrary intention for the purposes of subsection (2):
  - the words "legitimate" or "lawful" when used with reference to the child or children of a person or persons related to another person in some other way,
  - the words "married", "husband" or "wife" when used with reference to the parent or parents of a person.
- Without limiting any other provision of this Act, any rule of law that a disposition in favour of an exnuptial child not conceived or born when the disposition takes effect is void as being contrary to public policy is abolished in respect of any disposition to which this section applies.

#### 7 Construction of dispositions of property made before 1 July 1977

- The following dispositions are to be construed as if the *Children (Equality of Status) Act 1976* and this Act had not been enacted:
  - dispositions made inter vivos before 1 July 1977,
  - dispositions made by will or codicil executed by a person who died before 1 July 1977.
- If any such disposition contains a special power of appointment, nothing in this Act:

- (b) causes the exercise of the power to be construed so as to include any person who is a member of that class.

## 8 Rights of exnuptial children and their relatives on intestacy

- (1) This section applies to rights under the intestacy of persons dying on or after 1 July 1977.
- (2) If any relative of an exnuptial child (including a parent of the child) dies intestate in respect of all or any of the child's real or personal property, the child (or any of the child's issue if the child is dead) is entitled to take any interest in that property that the child (or the child's issue) would have been entitled to take if the child's parents had been married to each other when the child was born.
- (3) If an exnuptial child dies intestate in respect of all or any of the child's real or personal property, any relative of the child (including a parent of the child) is entitled to take any interest in that property that the relative would have been entitled to take if the parents of the child had been married to each other when the child was born.
- (4) Nothing in this section affects the generality of section 5. However, this section does not (despite section 5) apply to any child who is an adopted person under an adoption order made or continued in force under the *Adoption of Children Act 1965* or under an adoption recognised in the State under Part 5 of that Act.

## Interpretation Act 1987 (NSW)

### 21C References to de facto partners and de facto relationships

#### (1) Meaning of “de facto partner”

For the purposes of any Act or instrument, a person is the **de facto partner** of another person (whether of the same sex or a different sex) if:

- (a) the person is in a registered relationship or interstate registered relationship with the other person within the meaning of the *Relationships Register Act 2010*, or
- (b) the person is in a de facto relationship with the other person.

#### (2) Meaning of “de facto relationship”

For the purposes of any Act or instrument, a person is in a **de facto relationship** with another person if:

- (a) they have a relationship as a couple living together, and
- (b) they are not married to one another or related by family.

A de facto relationship can exist even if one of the persons is legally married to someone else or in a registered relationship or interstate registered relationship with someone else.

#### (3) Determination of “relationship as a couple”

In determining whether 2 persons have a relationship as a couple for the purposes of subsection (2), all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case:

- (a) the duration of the relationship,
- (b) the nature and extent of their common residence,
- (c) whether a sexual relationship exists,
- (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them,
- (e) the ownership, use and acquisition of property,
- (f) the degree of mutual commitment to a shared life,
- (g) the care and support of children,
- (h) the performance of household duties,
- (i) the reputation and public aspects of the relationship.

No particular finding in relation to any of those matters is necessary in determining whether 2 persons have a relationship as a couple.

#### (4) Meaning of “related by family”

For the purposes of subsection (2), 2 persons are **related by family** if:

- (a) one is the child (including an adopted child) of the other, or
- (b) one is another descendant of the other (even if the relationship between them is traced through an adoptive parent), or
- (c) they have a parent in common (including an adoptive parent of either or both of them).

- (a) even if an adoption has been declared void or is of no effect, and
- (b) to adoptions under the law of any place (whether in or out of Australia) relating to the adoption of children.

## **Relationships Register Act 2010**

### **Part 2 Registration of relationships**

#### **4 Definitions**

- (1) In this Act:

**adult** means a person of or above the age of 18 years.

**corresponding law** means a law of another State or a Territory providing for the registration of or recognition of relationships that is prescribed by the regulations.

**interstate registered relationship**—see section 16.

**Register** means the Register established under the *Births, Deaths and Marriages Registration Act 1995*.

**registered relationship** means a relationship that is registered under this Act.

**Registrar** means the Registrar of Births, Deaths and Marriages within the meaning of the *Births, Deaths and Marriages Registration Act 1995*.

- (2) Notes included in this Act do not form part of this Act.

#### **5 Eligibility for registration**

- (1) Two adults who are in a relationship as a couple, regardless of their sex, may apply to the Registrar for registration of their relationship.
- (2) A relationship cannot be registered unless at least one of the adults resides in New South Wales.
- (3) A relationship cannot be registered if:
- (a) either adult is married, or
  - (b) either adult is registered under this Act or a corresponding law as being in a registered relationship or an interstate registered relationship, or
  - (c) either adult is in a relationship as a couple with another person, or
  - (d) the adults are related by family.
- (4) Two adults are **related by family** if:
- (a) one is the child (including an adopted child) of the other, or
  - (b) one is another descendant of the other (even if the relationship between them is traced through an adoptive parent), or
  - (c) they have a parent in common (including an adoptive parent of either or both of them).
- (5) Subsection (4) applies:
- (a) even if an adoption has been declared void or is of no effect, and
  - (b) to adoptions under the law of any place (whether in or out of Australia) relating to the adoption of children.

#### **6 Applications for registration**

An application for registration of a relationship is to be made in the form approved by the Registrar and must be accompanied by the following:

- (a) a statutory declaration by each person in the relationship stating the following:
- (i) that the person wishes to register the relationship,
  - (ii) that the person is in a relationship as a couple with the other person,
  - (iii) that the person is not married,
  - (iv) that the person is not registered under this Act or a corresponding law as being in a registered relationship or an interstate registered relationship,
  - (v) that the person is not in a relationship as a couple with a person other than the other applicant,
  - (vi) that the person does or does not reside in New South Wales,
  - (vii) that the person is not related to the other applicant by family,
- (b) evidence of the identity and age of each person in the relationship,
- (c) the fee prescribed by the regulations,

- (d) any other documents and information prescribed by the regulations.

## Part 3 End of registration of relationships

### 10 Revocation of registration by events

The registration of a registered relationship is revoked in the following circumstances:

- (a) on the death of a person in the relationship,
- (b) on the marriage of a person in the relationship.

### 11 Applications for revocation of registration by parties

- (1) One or both persons in a registered relationship may apply to the Registrar to revoke the registration of the relationship.
- (2) The application is to be in the form approved by the Registrar and to be accompanied by the following:
  - (a) a statutory declaration by at least one of the persons stating that the person wishes to revoke the registration,
  - (b) if only one person makes the application, proof of service of notice of the application on the other person and particulars of that notice,
  - (c) the fee prescribed by the regulations,
  - (d) any other documents and information prescribed by the regulations.
- (3) The Registrar may dispense with the obligation to give notice of the application to the other person, or approve alternative means of giving notice, if the Registrar is satisfied that it is not reasonably practicable to give notice of the application in the manner required by or under this Act.

## Part 4 Miscellaneous

### 16 Recognition of interstate registered relationships

The regulations may declare that a class of relationships registered or recognised under a corresponding law are interstate registered relationships for the purposes of this Act.

## Succession Act 2006

## CHAPTER 1 – PRELIMINARY

### 3 Definitions

- (1) In this Act:

**administration** of the estate of a deceased person is defined in section 55.

**administrator** has the same meaning as it has in the *Probate and Administration Act 1898*.

**close personal relationship** is defined in subsection (3).

**costs**, in relation to proceedings under this Act, means costs payable in or in relation to the proceedings, and includes fees, disbursements, expenses and remuneration.

**Court** means:

- (a) the Supreme Court, in relation to any matter (including a matter referred to in paragraph (b)), or
- (b) the District Court, in relation to a matter under Chapter 3 for which it has jurisdiction under section 134 of the *District Court Act 1973*.

**deceased person** includes any person in respect of whose estate administration has been granted.

**deceased transferee** means a deceased transferee referred to in section 81 or 82.

**disposition** includes the following:

- (a) any gift, devise or bequest of property under a will,
- (b) the creation by will of a power of appointment affecting property,
- (c) the exercise by will of a power of appointment affecting property.

**document**:

- (a) except as provided by paragraph (b)—has the same meaning that it is given by section 21 of the *Interpretation Act 1987*, and
- (b) in Chapter 2 (other than section 8)—means any paper or material on which there is writing.

**domestic relationship** has the same meaning as it has in the *Property (Relationships) Act 1976*.

**eligible person** means a person who may make an application for a family provision order under section 57.

**family provision order** means an order made by the Court under Chapter 3 in relation to the notional estate of a deceased person to provide from that estate for the maintenance, education or advancement in life of an eligible person.

**intestate** is defined in section 102.

**legal representative** of an estate is defined in section 55 (2).

**notional estate** of a deceased person means property designated by a notional estate order as notional estate of the deceased person.

**notional estate order** means an order made by the Court under Chapter 3 designating property specified in the order as notional estate of a deceased person.

**personal representative** means the executor or administrator of the estate of a deceased person.

**property** includes any valuable benefit.

**Registrar** means a person who is:

- (a) appointed in accordance with section 120 of the *Supreme Court Act 1970*, and
- (b) nominated by the Principal Registrar of the Court for the purposes of this Act.

**will** includes a codicil and any other testamentary disposition.

**Note.** The *Interpretation Act 1987* contains definitions of some terms and expressions used in this Act. See, for example, the definitions of **minor**, **land** and **property** in section 21 of that Act.

- (2) A reference in this Act to a child or issue of any person includes a child or issue who is born after the person's death after a period of gestation in the uterus that commenced before the person's death and survives the person for at least 30 days after birth.
- (3) For the purposes of this Act, a **close personal relationship** is a close personal relationship (other than a marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care.
- (4) For the purposes of subsection (3), a close personal relationship is taken not to exist between two persons where one of them provides the other with domestic support and personal care:
  - (a) or fee and reward, or
  - (b) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation).
- (5) Notes included in this Act do not form part of this Act.

**Note.** References in headings to sections of this Act to "WPA" are references to the *Wills, Probate and Administration Act 1898* as in force before it was amended by this Act. References in headings to sections of this Act to "FPA" are references to the *Family Provision Act 1982* as in force immediately before it was repealed by the *Succession Amendment (Family Provision) Act 2008*.

## CHAPTER 2 – WILLS

### Division 1 Making a will

#### 5 Minimum age for making a will

(cf WPA 6 and 6B)

- (1) A will made by a minor is not valid.
- (2) Despite subsection (1):
  - (a) 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 if the marriage contemplated does not take place, and
  - (b) a minor who is married may make, alter or revoke a will, and
  - (c) a minor who has been married may revoke the whole or any part of a will made while the minor was married or in contemplation of that marriage.
- (3) Subsection (1) does not apply to a will made by an order under section 16 (Court may authorise minor to make, alter or revoke a will).

### Division 2 Executing a will

(cf WPA 7 and 9)

- (1) A will is not valid unless:
  - (a) it is in writing and signed by the testator or by some other person in the presence and at the direction of the testator, and
  - (b) the signature is made or acknowledged by the testator in the presence of 2 or more witnesses present at the same time, and
  - (c) at least 2 of those witnesses attest and sign the will in the presence of the testator (but not necessarily in the presence of each other).
- (2) The signature of the testator or of the other person signing in the presence and at the direction of the testator must be made with the intention of executing the will, but it is not essential that the signature be at the foot of the will.
- (3) It is not essential for a will to have an attestation clause.
- (4) If a testator purports to make an appointment by his or her will in the exercise of a power of appointment by will, the appointment is not valid unless the will is executed in accordance with this section.
- (5) If a power is conferred on a person to make an appointment by a will that is to be executed in some particular way or with some particular solemnity, the person may exercise the power by a will that is executed in accordance with this section, but is not executed in the particular way or with the particular solemnity.
- (6) This section does not apply to a will made by an order under section 18 (Court may authorise a will to be made, altered or revoked for a person without testamentary capacity).

### **Division 3 Dispensing with requirements for execution, alteration or revocation of a will**

#### **8 When may the Court dispense with the requirements for execution, alteration or revocation of wills?**

(cf WPA 18A)

- (1) This section applies to a document, or part of a document, that:
  - (a) purports to state the testamentary intentions of a deceased person, and
  - (b) has not been executed in accordance with this Part.
- (2) The document, or part of the document, forms:
  - (a) the deceased person's will—if the Court is satisfied that the person intended it to form his or her will, or
  - (b) an alteration to the deceased person's will—if the Court is satisfied that the person intended it to form an alteration to his or her will, or
  - (c) a full or partial revocation of the deceased person's will—if the Court is satisfied that the person intended it to be a full or partial revocation of his or her will.
- (3) In making a decision under subsection (2), the Court may, in addition to the document or part, have regard to:
  - (a) any evidence relating to the manner in which the document or part was executed, and
  - (b) any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person.
- (4) Subsection (3) does not limit the matters that the Court may have regard to in making a decision under subsection (2).
- (5) This section applies to a document whether it came into existence within or outside the State.

### **Division 4 Witnessing a will**

#### **9 Persons who cannot act as witnesses to wills**

(cf WPA 12)

A person who is unable to see and attest that a testator has signed a document may not act as a witness to a will.

#### **10 Can an interested witness benefit from a disposition under a will?**

(cf WPA 13)

- (1) This section applies if a beneficial disposition is given or made by will to a person (the *interested witness*) who attests the execution of the will.

- (2) The beneficial disposition is void to the extent that it concerns the interested witness or a person claiming under the interested witness.
- (3) A beneficial disposition is not void under subsection (2) if:
- (a) at least 2 of the people who attested the execution of the will are not interested witnesses, or
  - (b) all the persons who would benefit directly from the avoidance of the disposition consent in writing to the distribution of the disposition under the will and have the capacity to give that consent, or
  - (c) the Court is satisfied that the testator knew and approved of the disposition and it was given or made freely and voluntarily by the testator.

**Note.** Consent under section 10 (3) (b) is not liable to duty. See section 65 (12A) of the *Duties Act 1997*.

- (4) In this section:

**beneficial disposition** does not include a charge or direction for the payment of:

- (a) a debt, or
- (b) reasonable remuneration to an executor, administrator, legal practitioner or other person acting in relation to the administration of the testator's estate.

## Division 5 Revocation, alteration and revival of a will

### 11 When and how can a will be revoked?

(cf WPA 16 and 17)

- (1) The whole or any part of a will may be revoked but only:
- (a) if the revocation (whether by a will or other means) is authorised by an order under section 16 or 18, or
  - (b) by the operation of section 12 or 13, or
  - (c) by a later will, or
  - (d) by some writing declaring an intention to revoke it, executed in the manner in which a will is required to be executed by this Act, or
  - (e) by the testator, or by some person in his or her presence and by his or her direction, burning, tearing or otherwise destroying the will with the intention of revoking it, or
  - (f) by the testator, or by some person in his or her presence and at his or her direction, writing on the will or dealing with the will in such a manner that the Court is satisfied from the state of the will that the testator intended to revoke it.
- (2) No will or part of a will may be revoked by any presumption of an intention on the ground of an alteration in circumstances.

### 12 Effect of marriage on a will

(cf WPA 15)

- (1) A will is revoked by the marriage of a testator.
- (2) Despite subsection (1), the following are not revoked by the marriage of the testator:
- (a) a disposition to the person to whom the testator is married at the time of his or her death,
  - (b) an appointment as executor, trustee, advisory trustee or guardian of the person to whom the testator is married at the time of his or her death,
  - (c) a will made in the exercise of a power of appointment if the property in relation to which the appointment is exercised would not pass to the executor, administrator or NSW Trustee and Guardian if the power of appointment was not exercised.
- (3) A will made in contemplation of a particular marriage, whether or not that contemplation is expressed in the will, is not revoked by the solemnisation of the marriage concerned.
- (4) A will that is expressed to be made in contemplation of marriage generally is not revoked by the solemnisation of a marriage of the testator.

### 13 What is the effect of divorce or an annulment on a will?

(cf WPA 15A)

- (1) The divorce of a testator or annulment of his or her marriage revokes:
- (a) a beneficial disposition to the testator's former spouse made by a will in existence at the time of the divorce or annulment, and
  - (b) an appointment of the testator's former spouse as an executor, trustee, advisory trustee or guardian

- (c) a grant made by the will of a power of appointment exercisable by, or in favour of, the testator's former spouse.
- (2) Subsection (1) does not apply if a contrary intention appears in the will.
- (3) The divorce of a testator or the annulment of his or her marriage does not revoke:
- the appointment of the testator's former spouse as trustee of property left by the will on trust for beneficiaries that include the former spouse's children, or
  - the grant of a power of appointment exercisable by the testator's former spouse exclusively in favour of the children of whom both the testator and the former spouse are the parents.
- (4) If a disposition, appointment or grant is revoked by this section, the will takes effect in respect of the revocation as if the testator's former spouse had died before the testator.
- (5) Nothing in this section affects:
- any right of the former spouse of a testator to make any application under Chapter 3 of this Act, or
  - any direction, charge, trust or provision in the will of a testator for the payment of any amount in respect of a debt or liability (including any liability under a promise) of the testator to the former spouse of the testator or to the executor or the administrator of the estate of the former spouse.
- (6) In this section:

**annulment**, in relation to a testator, means:

- the annulment of the testator's marriage by the Family Court of Australia, or
- the annulment of the testator's marriage under a law of a place outside Australia, if the annulment is recognised in Australia under the *Family Law Act 1975* of the Commonwealth.

**divorce** means the ending of a marriage by:

- a divorce order in relation to the marriage taking effect under the *Family Law Act 1975* of the Commonwealth, or
- a decree of nullity in respect of the marriage by the Family Court of Australia, or
- the dissolution of the marriage in accordance with the law of a place outside Australia, if the dissolution is recognised in Australia under the *Family Law Act 1975* of the Commonwealth.

**spouse** includes a party to a purported or void marriage.

**testator's former spouse** means the person who was the testator's spouse immediately before the testator's marriage was ended by divorce or annulment.

## 14 How a will may be altered

(cf WPA 18)

- (1) An alteration to a will after it has been executed is not effective unless the alteration:
- is executed in the manner in which a will is required to be executed under this Part, or
  - is made by a minor by the authority of an order of the Court under section 16 and is executed in accordance with, and satisfies the requirements for such a will set out in, section 16 (5), or
  - is made for and on behalf of a person who does not have testamentary capacity by the authority of an order under section 18 and satisfies the requirements for such a will set out in section 23.
- (2) Subsection (1) does not apply to an alteration to a will made by or at the direction of the testator, or signed by the Registrar under section 23, if the words or effect of the will are no longer apparent because of the alteration.
- (3) If a will is altered, it is sufficient compliance with the requirements for execution if the signatures of the testator and of the witnesses to the alteration are made:
- in the margin, or on some other part of the will beside, near or otherwise relating to the alteration, or
  - as authentication of a memorandum referring to the alteration and written on the will.

**Note.** Section 21 of the *Interpretation Act 1987* defines **sign** to include making a mark.

## 15 How a revoked will may be revived

(cf WPA 19)

- A will or part of a will that has been revoked is revived by re-execution or by execution of a will showing an intention to revive the will or part.
- A revival of a will that was partly revoked and later revoked as to the balance only revives that part of the will

- (3) Subsection (2) does not apply if a contrary intention appears in the reviving will.
- (4) A will that has been revoked and is later wholly or partly revived is taken to have been executed on the day on which the will is revived.

## **Division 1 Wills by minors**

### **16 Court may authorise minor to make, alter or revoke a will**

(cf WPA 6A)

- (1) The Court may make an order authorising a minor:
  - (a) to make or alter a will in the specific terms approved by the Court, or
  - (b) to revoke a will or part of a will.
- (2) An order under this section may be made on the application of a minor or by a person on behalf of the minor.
- (3) The Court may impose such conditions on the authorisation as the Court thinks fit.
- (4) 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 or alteration or revocation of the will or part of the will and the extent of the property disposed of by it, and
  - (b) the proposed will or alteration or revocation of the will or part of the will accurately reflects the intentions of the minor, and
  - (c) it is reasonable in all the circumstances that the order should be made.
- (5) A will is not validly made, altered or revoked, in whole or in part, as authorised by an order under this section unless:
  - (a) in the case of the making or alteration of a will (in whole or in part)—the will or alteration is executed in accordance with the requirements of Part 2.1, and
  - (b) in the case of a revocation of a will (in whole or in part):
    - (i) if made by a will—the will is executed in accordance with the requirements of Part 2.1, and
    - (ii) if made by other means—is made in accordance with the requirements of the order, and
  - (c) in addition to the requirements of Part 2.1, one of the witnesses to the making or alteration of the will under this section is the Registrar, and
  - (d) the conditions of the authorisation (if any) are complied with.
- (6) A will that is authorised to be made, altered or revoked in part by an order under this section must be deposited with the Registrar under Part 2.5.
- (7) A failure to comply with subsection (6) does not affect the validity of the will.

## **Division 2 Court authorised wills for persons who do not have testamentary capacity**

### **18 Court may authorise a will to be made, altered or revoked for a person without testamentary capacity**

- (1) The Court may, on application by any person, make an order authorising:
  - (a) a will to be made or altered, in specific terms approved by the Court, on behalf of a person who lacks testamentary capacity, or
  - (b) a will or part of a will to be revoked on behalf of a person who lacks testamentary capacity.

**Note.** A person may only make an application for an order if the person has obtained the leave of the Court—see section 19.

- (2) An order under this section may authorise:
  - (a) the making or alteration of a will that deals with the whole or part of the property of the person who lacks testamentary capacity, or
  - (b) the alteration of part only of the will of the person.
- (3) The Court is not to make an order under this section unless the person in respect of whom the application is made is alive when the order is made.
- (4) The Court may make an order under this section on behalf of a person who is a minor and who lacks testamentary capacity.
- (5) In making an order, the Court may give any necessary related orders or directions.

**Note.** The power of the Court to make orders includes a power to make orders on such terms and conditions as the

directions under sections 61 and 62 of that Act.

- (6) A will that is authorised to be made or altered by an order under this section must be deposited with the Registrar under Part 2.5.
- (7) A failure to comply with subsection (6) does not affect the validity of the will.

### **Division 3 Rectification of wills by Court**

#### **27 Court may rectify a will**

(cf WPA 29A)

- (1) The Court may make an order to rectify a will to carry out the intentions of the testator, if the Court is satisfied the will does not carry out the testator's intentions because:
  - (a) a clerical error was made, or
  - (b) the will does not give effect to the testator's instructions.
- (2) A person who wishes to make an application for an order under this section must apply to the Court within 12 months after the date of the death of the testator.
- (3) However, the Court may, at any time, extend the period of time for making an application specified in subsection (2) if:
  - (a) the Court considers it necessary, and
  - (b) the final distribution of the estate has not been made.

#### **28 Protection of personal representatives who distribute as if will had not been rectified**

(cf WPA 29A)

- (1) This section applies if:
  - (a) a will is rectified under section 27, and
  - (b) a personal representative made a distribution to a beneficiary as if the will had not been rectified.
- (2) A personal representative is not liable if:
  - (a) the distribution was made under section 92A (Personal representatives may make maintenance distributions within 30 days) of the *Probate and Administration Act 1898*, or
  - (b) the distribution was made at least 6 months after the date of the death of the testator and at the time of making the distribution the personal representative was not aware of an application in respect of the estate having been made under section 27 or under Chapter 3,

and the personal representative has complied with the requirements of section 92 (Distribution of assets after notice given by executor or administrator) of the *Probate and Administration Act 1898*.

### **Division 1 General rules about construction of wills**

#### **30 When a will takes effect**

(cf WPA 21)

- (1) A will takes effect, with respect to the property disposed of by the will, as if it had been executed immediately before the death of the testator.
- (2) This section does not apply if a contrary intention appears in the will.

#### **31 Effect of failure of a disposition**

(cf WPA 22)

- (1) If, and to the extent that, a disposition of property under a will is ineffective wholly or in part, the will takes effect as if the property or undisposed part of the property were part of the residuary estate of the testator.
- (2) This section does not apply if a contrary intention appears in the will.
- (3) In this section:  
**disposition of property** does not include the exercise of a power of appointment.

#### **32 Use of extrinsic evidence to construe wills**

- (1) In proceedings to construe a will, evidence (including evidence of the testator's intention) is admissible to assist in the interpretation of the language used in the will if the language makes the will or any part of the

- (a) meaningless, or
  - (b) ambiguous on the face of the will, or
  - (c) ambiguous in the light of the surrounding circumstances.
- (2) Despite subsection (1), evidence of the testator's intention is not admissible to establish the circumstances mentioned in subsection (1) (c).
- (3) Despite subsection (2), nothing in this section prevents evidence that is otherwise admissible at law from being admissible in proceedings to construe a will.

### 33 Effect of a change in testator's domicile

(cf WPA 32F)

The construction of a will is not altered because of a change in the testator's domicile after executing the will.

### 34 Income on contingent, future or deferred dispositions

A contingent, future or deferred disposition of property, whether specific or residuary, includes any intermediate income of the property that has not been disposed of by will.

### 35 Beneficiaries must survive testator by 30 days

- (1) If a disposition of property is made to a person who dies within 30 days after the testator's death, or, if that or another period for survival appears in the will, within the period appearing in the will, the will is to take effect as if the person had died immediately before the testator.
- (2) This section does not apply if a contrary intention appears in the will.
- (3) A general requirement or condition that a beneficiary survive the testator does not indicate a contrary intention for the purposes of this section.

## Division 2 Construction of particular provisions in wills

### 39 How dispositions to issue operate

A disposition to a person's issue, without limitation as to remoteness, must be distributed to that person's issue in the same way as the person's estate would be distributed if that person had died intestate leaving only issue surviving.

### 40 How are requirements to survive with issue construed?

(cf WPA 25)

- (1) If a disposition to a person is expressed to fail if there is:
  - (a) a want or failure of issue of that person either in his or her lifetime or at his or her death, or
  - (b) an indefinite failure of issue of that person,

the words used are to be construed to mean a want or failure of issue in the person's lifetime or at the person's death and not an indefinite failure of his or her issue.

- (2) This section does not apply if a contrary intention appears in the will, except where the result would be to cause a failure of the disposition.

### 41 Dispositions not to fail because issue have died before testator

(cf WPA 29)

- (1) This section applies if:
  - (a) a testator makes a disposition of property to a person, whether as an individual or as a member of a class, who is issue of the testator (***the original beneficiary***), and
  - (b) under the will, the interest of the original beneficiary in the property does not come to an end on or before the original beneficiary's death, and
  - (c) the disposition is not a disposition of property to the testator's issue, without limitation as to remoteness, and
  - (d) the original beneficiary does not survive the testator for 30 days or, if that or another period for survival appears in the will, for the period appearing in the will.
- (2) The issue of the original beneficiary who survive the testator for 30 days or, if that or another period for survival appears in the will, for the period appearing in the will, take the original beneficiary's share of the property in place of the original beneficiary as if the original beneficiary had died intestate leaving only issue surviving.

- (4) (Repealed)
- (5) A gift to persons as joint tenants on its own indicates a contrary intention for the purposes of s 42(1).

## 42 Construction of residuary dispositions

- (1) A disposition of all, or the residue, of the estate of a testator that refers only to the real estate of the testator or only to the personal estate of the testator, is to be construed to include both the real and personal estate of the testator.
- (2) If a part of a disposition in fractional parts of all, or the residue, of the testator's estate fails, the part that fails passes to the part that does not fail, and, if there is more than one part that does not fail, to all those parts proportionally.
- (3) This section does not apply if a contrary intention appears in the will.

## CHAPTER 3 – FAMILY PROVISION

### Part 3.2 Family provision orders

#### Division 1 Applications for family provision orders

##### 57 Eligible persons

(cf FPA 6 (1), definition of “eligible person”)

- (1) The following are **eligible persons** who may apply to the Court for a family provision order in respect of the estate of a deceased person:
- (a) a person who was the wife or husband of the deceased person at the time of the deceased person's death,
  - (b) a person with whom the deceased person was living in a de facto relationship at the time of the deceased person's death,
  - (c) a child of the deceased person,
  - (d) a former wife or husband of the deceased person,
  - (e) a person:
    - (i) who was, at any particular time, wholly or partly dependent on the deceased person, and
    - (ii) who is a grandchild of the deceased person or was, at that particular time or at any other time, a member of the household of which the deceased person was a member,
  - (f) a person with whom the deceased person was living in a close personal relationship at the time of the deceased person's death.

**Note.** Section 60 sets out the matters that the Court may consider when determining whether to make a family provision order, and the nature of any such order. An application may be made by a tutor (within the meaning of the *Civil Procedure Act 2005*) for an eligible person who is under legal incapacity.

**Note.** “De facto relationship” is defined in section 21C of the *Interpretation Act 1987*.

- (2) In this section, a reference to a child of a deceased person includes, if the deceased person was in a de facto relationship, or a domestic relationship within the meaning of the *Property (Relationships) Act 1984*, at the time of death, a reference to the following:
- (a) a child born as a result of sexual relations between the parties to the relationship,
  - (b) a child adopted by both parties,
  - (c) in the case of a de facto relationship between a man and a woman, a child of the woman of whom the man is the father or of whom the man is presumed, by virtue of the *Status of Children Act 1996*, to be the father (except where the presumption is rebutted),
  - (d) in the case of a de facto relationship between 2 women, a child of whom both of those women are presumed to be parents by virtue of the *Status of Children Act 1996*,
  - (e) a child for whose long-term welfare both parties have parental responsibility (within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*).

##### 58 When an application may be made

(cf FPA 16 (1) (b) and 17)

- (1) An application for a family provision order may be made whether or not administration of the estate of the deceased person has been granted.

**Note.** Administration may be granted for the purposes of an application for a family provision order (see section 91).

- (2) An application for a family provision order must be made not later than 12 months after the date of the death of the deceased person, unless the Court otherwise orders.

- (3) An application is taken to be made on the day it is filed in the Court's registry.

## Division 2 Determination of applications

### 59 When family provision order may be made

(cf FPA 7–9)

- (1) The Court may, on application under Division 1, make a family provision order in relation to the estate of a deceased person, if the Court is satisfied that:
- the person in whose favour the order is to be made is an eligible person, and
  - in the case of a person who is an eligible person by reason only of paragraph (d), (e) or (f) of the definition of **eligible person** in section 57—having regard to all the circumstances of the case (whether past or present) there are factors which warrant the making of the application, and
  - at the time when the Court is considering the application, adequate provision for the proper maintenance, education or advancement in life of the person in whose favour the order is to be made has not been made by the will of the deceased person, or by the operation of the intestacy rules in relation to the estate of the deceased person, or both.
- (2) The Court may make such order for provision out of the estate of the deceased person as the Court thinks ought to be made for the maintenance, education or advancement in life of the eligible person, having regard to the facts known to the Court at the time the order is made.

**Note.** Property that may be the subject of a family provision order is set out in Division 3. This Part applies to property, including property that is designated as notional estate (see section 73). Part 3.3 sets out property that may be designated as part of the notional estate of a deceased person for the purpose of making a family provision order.

- (3) The Court may make a family provision order in favour of an eligible person in whose favour a family provision order has previously been made in relation to the same estate only if:
- the Court is satisfied that there has been a substantial detrimental change in the eligible person's circumstances since a family provision order was last made in favour of the person, or
  - at the time that a family provision order was last made in favour of the eligible person:
    - the evidence about the nature and extent of the deceased person's estate (including any property that was, or could have been, designated as notional estate of the deceased person) did not reveal the existence of certain property (**the undisclosed property**), and
    - the Court would have considered the deceased person's estate (including any property that was, or could have been, designated as notional estate of the deceased person) to be substantially greater in value if the evidence had revealed the existence of the undisclosed property, and
    - the Court would not have made the previous family provision order if the evidence had revealed the existence of the undisclosed property.
- (4) The Court may make a family provision order in favour of an eligible person whose application for a family provision order in relation to the same estate was previously refused only if, at the time of refusal, there existed all the circumstances regarding undisclosed property described in subsection (3) (b).

### 60 Matters to be considered by Court

(cf FPA 7–9)

- (1) The Court may have regard to the matters set out in subsection (2) for the purpose of determining:
- whether the person in whose favour the order is sought to be made (the **applicant**) is an eligible person, and
  - whether to make a family provision order and the nature of any such order.
- (2) The following matters may be considered by the Court:
- any family or other relationship between the applicant and the deceased person, including the nature and duration of the relationship,
  - the nature and extent of any obligations or responsibilities owed by the deceased person to the applicant, to any other person in respect of whom an application has been made for a family provision order or to any beneficiary of the deceased person's estate,
  - the nature and extent of the deceased person's estate (including any property that is, or could be, designated as notional estate of the deceased person) and of any liabilities or charges to which the estate is subject, as in existence when the application is being considered,
  - the financial resources (including earning capacity) and financial needs, both present and future, of the applicant, of any other person in respect of whom an application has been made for a family provision

- (e) if the applicant is cohabiting with another person—the financial circumstances of the applicant,
- (f) any physical, intellectual or mental disability of the applicant, any other person in respect of whom an application has been made for a family provision order or any beneficiary of the deceased person's estate that is in existence when the application is being considered or that may reasonably be anticipated,
- (g) the age of the applicant when the application is being considered,
- (h) any contribution (whether financial or otherwise) by the applicant to the acquisition, conservation or improvement of the estate of the deceased person or to the welfare of the deceased person or the deceased person's family, whether made before or after the deceased person's death, for which adequate consideration (not including any pension or other benefit) was not received, by the applicant,
- (i) any provision made for the applicant by the deceased person, either during the deceased person's lifetime or made from the deceased person's estate,
- (j) any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person,
- (k) whether the applicant was being maintained, either wholly or partly, by the deceased person before the deceased person's death and, if the Court considers it relevant, the extent to which and the basis on which the deceased person did so,
- (l) whether any other person is liable to support the applicant,
- (m) the character and conduct of the applicant before and after the date of the death of the deceased person,
- (n) the conduct of any other person before and after the date of the death of the deceased person,
- (o) any relevant Aboriginal or Torres Strait Islander customary law,
- (p) any other matter the Court considers relevant, including matters in existence at the time of the deceased person's death or at the time the application is being considered.

### Division 3 Property that may be used for family provision orders

#### 63 Property that may be used for family provision orders

(cf FPA 6 (1), definition of "estate", 6 (4) and (5))

- (1) A family provision order may be made in relation to the estate of a deceased person.
- (2) If the deceased person died leaving a will, the estate of the deceased person includes property that would, on a grant of probate of the will, vest in the executor of the will, or would on a grant of administration with the will annexed, vest in the legal representative appointed under that grant.
- (3) A family provision order may not be made in relation to property of the estate that has been distributed by the legal representative of the estate in compliance with the requirements of section 93, except as provided by subsection (5).
- (4) Where property of the estate of a deceased person is held by the legal representative of that estate as trustee for a person or for a charitable or other purpose, the property is to be treated, for the purposes of this Chapter, as not having been distributed unless it is vested in interest in that person or for that purpose.
- (5) A family provision order may be made in relation to property that is not part of the estate of a deceased person, or that has been distributed, if it is designated as notional estate of the deceased person by an order under Part 3.3.

### Division 4 General provisions relating to family provision orders

#### 72 Effect of family provision order

(cf FPA 14 (1))

- (1) A family provision order takes effect, unless the Court otherwise orders, as if the provision was made:
  - (a) in a codicil to the will of the deceased person, if the deceased person made a will, or
  - (b) in a will of the deceased person, if the deceased person died intestate.
- (2) Without limiting subsection (1), the Court may at the time of distribution of an estate that is insufficient to give effect to a family provision order make such orders concerning the abatement or adjustment of distributions from the estate as between the person in whose favour the family provision order is made and the other beneficiaries of the estate as it considers to be just and equitable among the persons affected.

#### Part 3.3 Notional estate orders

**Note.** This Part applies where, as a result of certain property transactions, property is not included in the estate of a deceased person or where property has been distributed from the estate of a deceased person. This Part enables the Court in limited circumstances to make an order designating property that is not included in the estate, or has

provision order under Part 3.2 in respect of the estate of the deceased person (or for the purpose of ensuring that costs in the proceedings be paid from the notional estate).

Property may be designated as notional estate if it is property held by, or on trust for, a person by whom property became held (whether or not as trustee), or the object of a trust for which property became held on trust:

- (a) as a result of a distribution from the estate of a deceased person (see section 79), whether or not the property was the subject of the distribution, or
- (b) as a result of a relevant property transaction, whether or not the property was the subject of the transaction (see section 80), or
- (c) as a result of a relevant property transaction entered into by a person by whom property became held, or for whom property became held on trust, as a result of a relevant property transaction or a distribution from the estate of a deceased person (see section 81), whether or not the property was the subject of the relevant property transaction.

Property may also be designated as notional estate if it is property:

- (a) held by the legal representative of the estate of a person by whom property became held as a result of a relevant property transaction or distribution referred to in paragraphs (a)–(c) above and who has since died (known as the **deceased transferee**), or
- (b) held by, or on trust for, a person by whom property became held, or for the object of a trust for which property became held on trust, as a result of a distribution from the estate of a deceased transferee,

whether or not the property was the subject of the relevant property transaction or the distribution from the estate of the deceased person or the deceased transferee (see section 82).

Section 92 enables the Court to replace property in the estate or notional estate of a deceased person that has been, or is proposed to be, affected by a family provision order with property offered in substitution for the affected property.

## Division 1 Relevant property transactions

### 74 Definition

In this Part:

**relevant property transaction** means a transaction or circumstance affecting property and described in section 75 or 76.

### 75 Transactions that are relevant property transactions

(cf FPA 22 (1), (3) and (7))

- (1) A person enters into a relevant property transaction if the person does, directly or indirectly, or does not do, any act that (immediately or at some later time) results in property being:
  - (a) held by another person (whether or not as trustee), or
  - (b) subject to a trust,and full valuable consideration is not given to the person for doing or not doing the act.
- (2) The fact that a person has entered into a relevant property transaction affecting property does not prevent the person from being taken to have entered into another relevant property transaction if the person subsequently does, or does not do, an act affecting the same property the subject of the first transaction.
- (3) The making of a will by a person, or the omission of a person to make a will, does not constitute an act or omission for the purposes of subsection (1), except in so far as it constitutes a failure to exercise a power of appointment or disposition in relation to property that is not in the person's estate.

### 76 Examples of relevant property transactions

(cf FPA 22 (4))

- (1) The circumstances set out in subsection (2), subject to full valuable consideration not being given, constitute the basis of a relevant property transaction for the purposes of section 75.
- (2) The circumstances are as follows:
  - (a) if a person is entitled to exercise a power to appoint, or dispose of, property that is not in the person's estate and does not exercise that power before ceasing (because of death or the occurrence of any other event) to be entitled to do so, with the result that the property becomes held by another person (whether or not as trustee) or subject to a trust or another person (immediately or at some later time)

- (b) if a person holds an interest in property as a joint tenant and the person does not exercise that interest before ceasing (because of death or the occurrence of any other event) to be entitled to exercise that interest with the result that, on the person's death, the property becomes, by operation of the right of survivorship, held by another person (whether or not as trustee) or subject to a trust,
- (c) if a person holds an interest in property in which another interest is held by another person (whether or not as trustee) or is subject to a trust, and the person is entitled to exercise a power to extinguish that other interest in the property and the power is not exercised before the person ceases (because of death or the occurrence of any other event) to be so entitled with the result that the other interest in the property continues to be so held or subject to the trust,
- (d) if a person is entitled, in relation to a life assurance policy on the person's life under which money is payable on the person's death or if some other event occurs to a person other than the legal representative of the person's estate, to exercise a power:
- (i) to substitute a person or a trust for the person to whom, or trust subject to which, money is payable under the policy, or
  - (ii) to surrender or otherwise deal with the policy,
- and the person does not exercise that power before ceasing (because of death or the occurrence of any other event) to be entitled to do so,
- (e) if a person who is a member of, or a participant in, a body (corporate or unincorporate), association, scheme, fund or plan, dies and property (immediately or at some later time) becomes held by another person (whether or not as trustee) or subject to a trust because of the person's membership or participation and the person's death or the occurrence of any other event,
- (f) if a person enters into a contract disposing of property out of the person's estate, whether or not the disposition is to take effect before, on or after the person's death or under the person's will or otherwise.
- (3) Nothing in this section prevents any other act or omission from constituting the basis of a relevant property transaction for the purposes of section 75.
- (4) For the purposes of this Chapter, in the circumstances described in subsection (2) (b), a person is not given full or any valuable consideration for not severing an interest in property held as a joint tenant merely because, by not severing that interest, the person retains, until his or her death, the benefit of the right of survivorship in respect of that property.

## 77 When relevant property transactions take effect

(cf FPA 22 (2), (5) and (6))

- (1) For the purposes of this Chapter, a relevant property transaction is taken to have effect when the property concerned becomes held by another person or subject to a trust or as otherwise provided by this section.
- (2) A relevant property transaction consisting of circumstances described in section 76 (2) (a), (c) or (d) is taken to have been entered into immediately before, and to take effect on, the person's death or the occurrence of the other event resulting in the person no longer being entitled to exercise the relevant power.
- (3) A relevant property transaction consisting of circumstances described in section 76 (2) (b) or (e) is taken to have been entered into immediately before, and to take effect on, the person's death or the occurrence of the other event referred to in those paragraphs.
- (4) A relevant property transaction that involves any kind of contract for which valuable consideration, though not full valuable consideration, is given for the person to enter into the transaction is taken to be entered into and take effect when the contract is entered into.

## Division 2 When notional estate orders may be made

### 78 Notional estate order may be made only if family provision order or certain costs orders to be made

- (1) The Court may make an order designating property as notional estate only:
  - (a) for the purposes of a family provision order to be made under Part 3.2, or
  - (b) for the purposes of an order that the whole or part of the costs of proceedings in relation to the estate or notional estate of a deceased person be paid from the notional estate of the deceased person.

**Note.** Section 63 (5) enables a family provision order to be made in relation to property designated as notional estate of a deceased person.

Section 99 enables the Court to order that costs be paid out of the notional estate of a deceased person.

- (2) The Court must not make an order under subsection (1) (b) for the purposes of an order that the whole or

or has made a family provision order in favour of the applicant.

## 79 Notional estate order may be made where property of estate distributed

(cf FPA 24)

The Court may, on application by an applicant for a family provision order or on its own motion, make a notional estate order designating property specified in the order as notional estate of a deceased person if the Court is satisfied that on, or as a result of, a distribution of the deceased person's estate, property (whether or not the subject of the distribution) became held by a person (whether or not as trustee) or subject to a trust.

## Division 2 When notional estate orders may be made

### 80 Notional estate order may be made where estate affected by relevant property transaction

(cf FPA 23)

- (1) The Court may, on application by an applicant for a family provision order or on its own motion, make a notional estate order designating property specified in the order as notional estate of a deceased person if the Court is satisfied that the deceased person entered into a relevant property transaction before his or her death and that the transaction is a transaction to which this section applies.

**Note.** The kinds of transactions that constitute relevant property transactions are set out in sections 75 and 76.

- (2) This section applies to the following relevant property transactions:
  - (a) a transaction that took effect within 3 years before the date of the death of the deceased person and was entered into with the intention, wholly or partly, of denying or limiting provision being made out of the estate of the deceased person for the maintenance, education or advancement in life of any person who is entitled to apply for a family provision order,
  - (b) a transaction that took effect within one year before the date of the death of the deceased person and was entered into when the deceased person had a moral obligation to make adequate provision, by will or otherwise, for the proper maintenance, education or advancement in life of any person who is entitled to apply for a family provision order which was substantially greater than any moral obligation of the deceased person to enter into the transaction,
  - (c) a transaction that took effect or is to take effect on or after the deceased person's death.
- (3) Property may be designated as notional estate by a notional estate order under this section if it is property that is held by, or on trust for:
  - (a) a person by whom property became held (whether or not as trustee) as the result of a relevant property transaction, or
  - (b) the object of a trust for which property became held on trust as the result of a relevant property transaction,

whether or not the property was the subject of the relevant property transaction.

### 81 Notional estate order may be made where estate affected by subsequent relevant property transaction

(cf FPA 25)

- (1) The Court may, on application by an applicant for a family provision order or on its own motion, make a notional estate order designating property specified in the order as notional estate of a deceased person if the Court is satisfied that:
  - (a) it:
    - (i) has power, under this or any other section of this Chapter, to make a notional estate order designating property held by, or on trust for, a person (***the transferee***) as notional estate of the deceased person, or
    - (ii) immediately before the date of the death of a person (***the deceased transferee***), had power, under this or any other section of this Chapter, to make a notional estate order designating property held by, or on trust for, the deceased transferee as notional estate of the deceased person, and
  - (b) since the relevant property transaction or distribution that gave rise to the power to make the order was entered into or made, the transferee, or the deceased transferee, entered into a relevant property transaction, and
  - (c) there are special circumstances that warrant the making of the order.

- (2) Property may be designated as notional estate by a notional estate order under this section if the property is property that is held by, or on trust for:
- a person by whom property became held (whether or not as trustee) as the result of the relevant property transaction entered into by the transferee or the deceased transferee, or
  - the object of a trust for which property became held on trust as the result of the relevant property transaction entered into by the transferee or the deceased transferee,
- whether or not the property was the subject of the relevant property transaction.
- (3) A notional estate order may be made under this section instead of or in addition to an order under section 79, 80 or 82.

## 82 Notional estate order may be made where property of deceased transferee's estate held by legal representative or distributed

- (1) The Court may, on application by an applicant for a family provision order or on its own motion, make a notional estate order designating property specified in the order as notional estate of a deceased person if the Court is satisfied that:
- immediately before the date of the death of a person (*the deceased transferee*), it had power, under this or any other section of this Chapter, to make a notional estate order designating property held by, or on trust for, the deceased transferee as notional estate of the deceased person, and
  - the power did not arise because property became held by the deceased transferee as trustee only, and
  - in the case of property referred to in subsection (2) (b), there are special circumstances that warrant the making of the order.
- (2) The following property may be designated as notional estate by a notional estate order under this section, whether or not it was the property the subject of the relevant property transaction or distribution from which the Court's power to make such an order arose:
- if administration has been granted in respect of the estate of the deceased transferee—property that is held by the legal representative of the estate of the deceased transferee in his or her capacity as legal representative of the estate of the deceased transferee,
  - if all or part of the estate of the deceased transferee has been distributed—property that is held by, or on trust for:
    - a person by whom property became held (whether or not as trustee) as the result of the distribution of the deceased transferee's estate, or
    - the object of a trust for which property became held on trust as the result of the distribution of the deceased transferee's estate.
- (3) A notional estate order may be made under this section instead of or in addition to an order under section 79, 80 or 81.

**Note.** Administration of the estate of a deceased transferee may be granted for the purposes of being able to designate property as notional estate under this section (see section 91).

## 83 Disadvantage and other matters required before order can be made

(cf FPA 26)

- (1) The Court must not, merely because a relevant property transaction has been entered into, make an order under section 80, 81 or 82 unless the Court is satisfied that the relevant property transaction or the holding of property resulting from the relevant property transaction:
- directly or indirectly disadvantaged the estate of the principal party to the transaction or a person entitled to apply for a family provision order from the estate or, if the deceased person was not the principal party to the transaction, the deceased person (whether before, on or after death), or
  - involved the exercise by the principal party to the transaction or any other person (whether alone or jointly or severally with any other person) of a right, a discretion or a power of appointment, disposition, nomination or direction that, if not exercised, could have resulted in a benefit to the estate of the principal party to the transaction or a person entitled to apply for a family provision order from the estate or, if the deceased person was not the principal party to the transaction, the deceased person (whether before, on or after death), or
  - involved the exercise by the principal party to the transaction or any other person (whether alone or jointly or severally with any other person) of a right, a discretion or a power of appointment, disposition, nomination or direction that could, when the relevant property transaction was entered into or at a later time, have been exercised so as to result in a benefit to the estate of the principal party to the transaction or a person entitled to apply for a family provision order from the estate or, if the

- on or after death), or
- (d) involved an omission to exercise a right, a discretion or a power of appointment, nomination or direction that could, when the relevant property transaction was entered into, or has, or is likely to be exercised by the principal party to the transaction or any other person (whether or jointly or severally with any other person) so as to result in a benefit to the estate of the deceased person or a person entitled to apply for a family provision order from the estate of the deceased person was not the principal party to the transaction, the deceased person (whether before, on or after death).

(2) In this section:

**principal party to the transaction**, in relation to a relevant property transaction, means the person who, under section 75 or 76, enters into the relevant property transaction.

## Division 3 Restrictions and protections relating to notional estate orders

### 87 General matters that must be considered by Court

(cf FPA 27 (1))

The Court must not make a notional estate order unless it has considered the following:

- (a) the importance of not interfering with reasonable expectations in relation to property,
- (b) the substantial justice and merits involved in making or refusing to make the order,
- (c) any other matter it considers relevant in the circumstances.

### 88 Estate must not be sufficient for provision or order as to costs

(cf FPA 28 (1))

The Court must not make a notional estate order unless it is satisfied that:

- (a) the deceased person left no estate, or
- (b) the deceased person's estate is insufficient for the making of the family provision order, or any order as to costs, that the Court is of the opinion should be made, or
- (c) provision should not be made wholly out of the deceased person's estate because there are other persons entitled to apply for family provision orders or because there are special circumstances.

### 90 Restrictions on out of time or additional applications

(cf FPA 28 (5))

(1) This section applies to proceedings where:

- (a) an application for a family provision order is made later than 12 months after the date of the death of the deceased person, or
- (b) an application for a family provision order is made in relation to an estate that has been previously the subject of a family provision order.

(2) The Court must not make a notional estate order in the proceedings unless:

- (a) it is satisfied that:
  - (i) the property to be designated as notional estate is property that was the subject of a relevant property transaction or of a distribution from the estate of a deceased person or from the estate of a deceased transferee, and
  - (ii) the person who holds the property holds it as a result of the relevant property transaction or distribution as trustee only, and
  - (iii) the property is not vested in interest in any beneficiary under the trust, or
- (b) it is satisfied that there are other special circumstances that justify the making of the notional estate order.

## Part 3.4 Miscellaneous

### 91 Grant of probate or administration to enable application to be dealt with

(cf WPA 41A)

- (1) This section applies if an application is made by a person for a family provision order, or notional estate order, in respect of the estate of a deceased person, or deceased transferee, respectively, in relation to which administration has not been granted

- (2) The Court may, if it is satisfied that it is proper to do so, grant administration in respect of the estate of the deceased person or deceased transferee to the applicant for the purposes only of permitting the application concerned to be dealt with, whether or not the deceased person or deceased transferee left property in New South Wales.
- (3) The granting of administration under the *Probate and Administration Act 1898* does not:
- (a) prevent the Court from granting administration under this section, or
  - (b) unless the Court otherwise orders, affect any previous grant of administration under this section.
- (4) The provisions of the *Probate and Administration Act 1898* apply to a grant of administration under this section, and to the legal representative of the estate, in the same way as they apply to a grant of administration under that Act and the legal representative of any estate for which such a grant has been made.

### 93 Protection of legal representative who distributes after giving notice

(cf FPA 35 (1))

- (1) The legal representative of the estate of a deceased person may distribute the property in the estate if:
- (a) the property is distributed at least 6 months after the deceased person's death, and
  - (b) the legal representative has given notice in the form approved under section 17 of the *Civil Procedure Act 2005* that the legal representative intends to distribute the property in the estate after the expiration of a specified time, and

**Note.** Section 101 of this Act provides for the service of notices.

- (c) the time specified in the notice is not less than 30 days after the notice is given, and
  - (d) the time specified in the notice has expired, and
  - (e) at the time of distribution, the legal representative does not have notice of any application or intended application for a family provision order affecting the estate of the deceased person.
- (2) A legal representative who distributes property of the estate of a deceased person is not liable in respect of that distribution to any person who was an applicant for a family provision order affecting the estate if the legal representative did not have notice at the time of the distribution of the application and if:
- (a) the distribution was made in accordance with this section, and
  - (b) the distribution was properly made by the legal representative.
- (3) For the purposes of this section, notice to the legal representative of an application or intention to make any application under this Chapter must be in writing signed in accordance with rules for the signing of documents by a party in proceedings under the *Uniform Civil Procedure Rules 2005*.

**Note.** On the enactment of this subsection, rules for the signing of documents by a party in proceedings were contained in Rule 4.4 of the *Uniform Civil Procedure Rules 2005*.

### 94 Protection of legal representative in other circumstances

- (1) A legal representative of the estate of a deceased person who distributes property in the estate for the purpose of providing those things immediately necessary for the maintenance or education of an eligible person who was wholly or substantially dependent on the deceased person immediately before his or her death is not liable for any such distribution that is properly made.
- (2) Subsection (1) applies whether or not the legal representative had notice at the time of the distribution of any application or intended application for a family provision order affecting property in the estate.
- (3) No person who may have made or may be entitled to make an application under this Chapter is entitled to bring an action against the legal representative of the estate of a deceased person because the legal representative has distributed any part of the estate if the distribution was properly made by the legal representative after the person (being of full legal capacity) has notified the legal representative in writing that the person either:
- (a) consents to the distribution, or
  - (b) does not intend to make any application under this Chapter that would affect the proposed distribution.
- (4) A legal representative of the estate of a deceased person who receives notice of an intended application under this Chapter is not liable in respect of a distribution of any part of the estate if the distribution was made in compliance with section 93 (1) by the legal representative not earlier than 12 months after the deceased person's death.
- (5) Subsection (4) does not apply if the legal representative receives written notice that the application has been commenced in the Court or is served with a copy of the application before making the distribution.

application under this Chapter must be in writing signed in accordance with rules governing the signing of documents by a party in proceedings under the *Uniform Civil Procedure Rules 2005*.

**Note.** On the enactment of this subsection, rules for the signing of documents by a party in proceedings under the *Uniform Civil Procedure Rules 2005* contained in Rule 4.4 of the *Uniform Civil Procedure Rules 2005*.

## 95 Release of rights under Chapter

(cf FPA 31 (1)–(6))

- (1) A release by a person of the person's rights to apply for a family provision order has effect only if it has been approved by the Court and to the extent that the approval has not been revoked by the Court.
- (2) Proceedings for the approval by the Court of a release of a person's rights to apply for a family provision order may be commenced before or after the date of the death of the person whose estate may be the subject of the order.
- (3) The Court may approve of a release in relation to the whole or any part of the estate or notional estate of a person.
- (4) In determining an application for approval of a release, the Court is to take into account all the circumstances of the case, including whether:
  - (a) it is or was, at the time any agreement to make the release was made, to the advantage, financially or otherwise, of the releasing party to make the release, and
  - (b) it is or was, at that time, prudent for the releasing party to make the release, and
  - (c) the provisions of any agreement to make the release are or were, at that time, fair and reasonable, and
  - (d) the releasing party has taken independent advice in relation to the release and, if so, has given due consideration to that advice.
- (5) In this section:

**release of rights to apply for a family provision order** means a release of such rights, if any, as a person has to apply for a family provision order, and includes a reference to:

- (a) an instrument executed by the person that would be effective as a release of those rights if approved by the Court under this section, and
- (b) an agreement to execute such an instrument.

## Chapter 4 Intestacy

### Part 4.1 Preliminary

#### 101 Definitions

In this Chapter:

**brother or sister**—a person is the **brother or sister** of another if they have one or both parents in common.

**deceased person**—a **deceased person** is one who did not survive the intestate.

**domestic partnership**—see section 105.

**eligible relative** means a relative of the intestate who is entitled to share in the distribution of the intestate estate under Part 4.3.

**entitlement to the whole of the intestate estate**—see section 103.

**Indigenous person** is a person who:

- (a) is of Aboriginal or Torres Strait Islander descent, and
- (b) identifies as an Aboriginal person or Torres Strait Islander, and
- (c) is accepted as an Aboriginal person by an Aboriginal community or as a Torres Strait Islander by a Torres Strait Islander community.

**intestate estate** means:

- (a) in the case of an intestate who leaves a will—property that is not effectively disposed of by will, and
- (b) in any other case—all the property left by the intestate.

**leave**—a person **leaves** another if the person dies and is survived by the other.

**personal effects** of an intestate means the intestate's tangible personal property except the following:

- (a) property used exclusively for business purposes,

purpose),

(c) property held as a pledge or other form of security,

(d) property (such as gold bullion or uncut diamonds):

- (i) in which the intestate has invested as a hedge against inflation or adverse currency movements,
- (ii) which is not an object of household, or personal, use, decoration or adornment,

(e) an interest in land (whether freehold or leasehold).

**predecease**—a person is taken to **predecease** the intestate if the person does not survive the intestate.

**presumptive share** of an intestate estate of a deceased eligible relative of the intestate means the entitlement the relative would have had if he or she had survived the intestate.

**registered valuer** has the same meaning as it has in the *Valuers Act 2003*.

**spouse**—see section 104.

**statutory legacy** for a spouse—see section 106.

**survive**—see section 107.

## 102 Intestate

An intestate is a person who dies and either does not leave a will or leaves a will but does not dispose effectively by will of all or part of his or her property.

## 103 Entitlement to the whole of the intestate estate

A reference in this Chapter to an entitlement to the whole of the intestate estate is a reference to so much of the estate as remains after payment of all such funeral and administration expenses, debts and other liabilities as are properly payable out of the estate.

## 104 Spouse

A spouse of an intestate is a person:

- (a) who was married to the intestate immediately before the intestate's death, or
- (b) who was a party to a domestic partnership with the intestate immediately before the intestate's death.

## 105 Domestic partnership

A domestic partnership is a relationship between the intestate and another person that is a registered relationship, or interstate registered relationship, within the meaning of the *Relationships Register Act 2010*, or a de facto relationship that:

- (a) has been in existence for a continuous period of 2 years, or
- (b) has resulted in the birth of a child.

## 106 Spouse's statutory legacy

(1) The statutory legacy for a spouse consists of:

- (a) the CPI adjusted legacy, and
- (b) if the statutory legacy is not paid, or not paid in full, within 1 year after the intestate's death—interest at the relevant rate on the amount outstanding from time to time (excluding interest) from the first anniversary of the intestate's death to the date of payment of the legacy in full.

(2) The **CPI adjusted legacy** is to be determined in accordance with the following formula:

where:

**R** represents the CPI adjusted legacy.

**A** is \$350,000.

**C** represents the Consumer Price Index number for the last quarter for which such a number was published before the date on which the intestate died.

**D** represents the Consumer Price Index number for the December 2005 quarter.

(3) If, however, a spouse is entitled to a statutory legacy under this Act and under the law of another Australian jurisdiction or jurisdictions:

- (a) the spouse's statutory legacy is an amount equivalent to the highest amount fixed by way of statutory legacy under any of the relevant laws (including this Act), but
- (b) the following qualifications apply:

- (i) amounts received by the spouse, by way of statutory legacy, under any of the relevant laws are taken to have been paid towards satisfaction of the spouse's statutory entitlement under this Act,
  - (ii) if any of the relevant laws contain no provision corresponding to subparagraph (i), the amount payable by way of statutory legacy under this Act until the spouse's entitlement under that law is satisfied, or the spouse renounces the spouse's entitlement to payment, or further payment by way of statutory legacy, under that law.
- (4) If the value of an intestate estate is insufficient to allow for the payment of a statutory legacy (or statutory legacies) in full, the statutory legacy abates to the necessary extent and, if 2 or more statutory legacies are payable, they abate ratably.
- (5) The **relevant rate** of interest is the rate that lies 2% above the cash rate last published by the Reserve Bank of Australia before 1 January in the calendar year in which interest begins to accrue.
- (6) If the Australian Statistician publishes a Consumer Price Index number in respect of a particular quarter in substitution for a Consumer Price Index number previously published in respect of that quarter:
- (a) except as provided by paragraph (b)—the publication of the later Index number is to be disregarded, or
  - (b) if the Minister so directs—regard is to be had to the later and not to the earlier Index number.
- (7) If the reference base for the Consumer Price Index is changed, regard is to be had only to Index numbers published in terms of the new reference base or to Index numbers converted to the new reference base in accordance with an arithmetical conversion factor specified by the Australian Statistician.
- (8) An adjustment under subsection (3) is to be made to the nearest whole dollar.
- (9) In this section:

**Consumer Price Index number**, for a quarter, means the All Groups Consumer Price index number, being the weighted average of the 8 capital cities, published by the Australian Statistician in respect of that quarter.

## 107 Survivorship

- (1) A person will not be regarded as having survived an intestate unless:
- (a) the person is born before the intestate's death and survives the intestate by at least 30 days, or
  - (b) the person is born after the intestate's death after a period of gestation in the uterus that commenced before the intestate's death and survives the intestate for at least 30 days after birth.
- (2) The rules stated in subsection (1) are not to be applied if, as a result of their application, the intestate estate would pass to the State.

## 108 General limitation of non-spousal entitlements

- (1) A person is not entitled to participate in the distribution of an intestate estate unless the person survives the intestate.
- (2) A reference in this Act to a child, issue, relative, or issue of a relative, of an intestate is limited to a person of the relevant description whose entitlement to share in the distribution of the intestate estate is not excluded under subsection (1).

## 109 Adoption

An adopted child is to be regarded, for the purposes of distribution on an intestacy, as a child of the adoptive parent or parents and:

- (a) the child's family relationships are to be determined accordingly, and
- (b) family relationships that exist as a matter of biological fact, and are not consistent with the relationship created by adoption, are to be ignored.

## Part 4.2 Spouse's entitlements

**Note.** In the case of an Indigenous person's estate, this Part is subject to exclusion or modification by a distribution order under Part 4.4.

### Division 1 Entitlement of surviving spouse

#### 110 Application of this Division

This Division applies where the intestate leaves a spouse (but not more than one spouse).

#### 111 Spouse's entitlement where no issue

If an intestate leaves a spouse but no issue, the spouse is entitled to the whole of the intestate estate.

### 112 Spouse's entitlement where issue are also issue of the spouse

If an intestate leaves a spouse and issue and the issue are all also issue of the spouse, the spouse is entitled to the whole of the intestate estate.

### 113 Spouse's entitlement where any issue are not issue of the spouse

If an intestate leaves a spouse and any issue who are not issue of the spouse, the spouse is entitled to:

- (a) the intestate's personal effects, and
- (b) a statutory legacy, and
- (c) one-half of the remainder (if any) of the intestate estate.

## Division 2 Spouse's preferential right to acquire property from the estate

### 114 Application of this Division

This Division applies where the intestate leaves a spouse (but not more than one spouse).

### 115 Spouse's right of election

- (1) A spouse is entitled to elect to acquire property from an intestate estate.
- (2) A spouse's election to acquire property from an intestate estate requires the Court's authorisation if:
  - (a) the property forms part of a larger aggregate, and
  - (b) the acquisition could substantially diminish the value of the remainder of the property or make the administration of the estate substantially more difficult.

**Note.** For example:

- (a) The acquisition of a single item from a group of items might substantially diminish the value of the remainder of the group or make it substantially more difficult to dispose of the remainder of the group.
  - (b) The acquisition of the farmhouse from a farming property might substantially diminish the value of the remainder of the farming property or make it substantially more difficult to dispose of it.
- (3) The Court may grant an authorisation under subsection (2) and may impose such conditions as it considers just and equitable to address the matters referred to in that subsection, including a condition that the spouse pay compensation to the estate in addition to consideration to be given for the property under this Division and a condition as to costs.
  - (4) The Court must refuse authorisation if it considers that the matters referred to in subsection (2) cannot be adequately addressed by granting an authorisation subject to such conditions.
  - (5) A spouse is not entitled to elect to acquire property from an intestate estate if the transfer or conveyance by the personal representative to the spouse of the interest of the intestate in the property would require compliance with the mandatory provisions unless those provisions would be complied with and the costs of complying with the provisions are paid by the spouse.
  - (6) A spouse who is a personal representative of the intestate is not prevented from making an election to acquire property from the intestate estate by the fact that the spouse is a trustee of the intestate estate.
  - (7) Nothing in this section confers on a spouse any right against a person who in good faith purchased for value from the personal representative of the intestate any property of the intestate.
  - (8) In this section:

**mandatory provisions** means the following:

- (a) the *Environmental Planning and Assessment Act 1979*, the *Conveyancing Act 1919* and any other Act with respect to the manner of dividing land into parts, and with respect to any requirement incidental to the manner of dividing land into parts,
- (b) the *Strata Schemes (Freehold Development) Act 1973* with respect to the manner of subdividing land within the meaning of section 7 (1) of that Act or of any lot within the meaning of section 5 (1) of that Act, and with respect to any requirement incidental to the manner of subdividing any such land or lot,
- (c) the *Strata Schemes (Leasehold Development) Act 1986*, with respect to the manner of subdividing land within the meaning of section 6 (1) of that Act or of any lot within the meaning of section 4 (1) of that Act, and with respect to any requirement incidental to the manner of subdividing any such land or lot.

### 116 Notice to be given to spouse of right of election

estate, give notice to the intestate's spouse of the spouse's right of election stating:

- (a) how the right is to be exercised, and
  - (b) the fact that the election may be subject to the Court's authorisation and the circumstances in which such an authorisation is required, and
  - (c) that the right must be exercised within 3 months (or a longer period allowed by the Court) after the date of the notice.
- (2) Notice is not required under this section if the spouse is the personal representative, or one of the personal representatives, of the intestate.

### 117 Time for making election

- (1) The election must be made:
  - (a) if the spouse is entitled to notice of the right of election—within 3 months after the date of the notice, or
  - (b) if the spouse is the intestate's personal representative (or one of the personal representatives)—within 3 months after the grant of administration of the intestate estate.
- (2) The Court may, however, if it considers there is sufficient cause for doing so, extend the time for making the election.

**Note.** The Court might, for example, extend the period for making an election if the Court's authorisation for making the election is required or if a question remains unresolved regarding the existence, or the nature, of a person's interest in the intestate estate.

- (3) The Court may extend the time for making the election whether or not the time for making the election has passed, but not after the administration of the estate has been completed.

### 118 How election to be made

- (1) A spouse's election is made by written notice identifying, with reasonable particularity, the property the spouse elects to acquire.
- (2) Except as provided by subsection (3), the notice of election must be given:
  - (a) to each person, apart from the spouse, who is a personal representative of the intestate, and
  - (b) to each person, apart from the spouse, who is entitled to share in the intestate estate.
- (3) The Court may direct that any of the persons referred to in subsection (2) need not be given the notice of election if it considers that giving the notice is unnecessary, unreasonable or impracticable in the circumstances of the case.
- (4) A spouse who has not reached the age of majority may make an election as validly and effectively as an adult.
- (5) A spouse may revoke his or her election at any time before the transfer of the property to the spouse.
- (6) A revocation is made by written notice of revocation given to the same persons as the notice of election.

### 119 Basis of the election

- (1) The price for which a spouse may elect to acquire property from the intestate estate (the **exercise price**) is the market value of the property as at the date of the intestate's death.
- (2) If, however, the spouse and the holder of a mortgage, charge or encumbrance over property that the spouse has elected to acquire agree to the assumption by the spouse of the liability secured by the mortgage, charge or encumbrance the exercise price is to be reduced by the amount of the liability (as at the date of transfer) secured by the mortgage, charge or encumbrance, but:
  - (a) the spouse takes the property subject to the mortgage, charge or encumbrance, and
  - (b) on the transfer of the property, the liability passes to the spouse and the estate is exonerated from it.
- (3) The personal representative of an intestate must obtain a valuation from a registered valuer of property forming part of the intestate estate if:
  - (a) a spouse elects to acquire the property, or
  - (b) a spouse asks the personal representative to obtain a valuation to enable the spouse to decide whether to elect to acquire it.
- (4) The personal representative must give a copy of the valuation to the spouse and to the other beneficiaries entitled to share in the intestate estate.
- (5) The requirement for a personal representative to obtain a valuation under subsection (3) may be waived with

## 120 Exercise price—how satisfied

If a spouse elects to acquire property from the intestate estate, the exercise price is to be satisfied:

- (a) first from money to which the spouse is entitled from the intestate estate, and
- (b) if that is insufficient, from money paid by the spouse to the estate on or before the date of transfer.

## 121 Restriction on disposal of property from intestate estate

- (1) The personal representative of an intestate must not dispose of property from the intestate estate (except to a spouse who has elected to acquire it) unless:
  - (a) the personal representative is the spouse entitled to make the election, or
  - (b) the time for exercising the election has elapsed and no election has been made, or
  - (c) the election requires the Court's authorisation but:
    - (i) the necessary authorisation has been refused, or
    - (ii) the application for authorisation has been withdrawn, or
  - (d) the spouse has notified the personal representative, in writing, that he or she does not propose to exercise the right to acquire property from the estate, or
  - (e) sale of the property is required to meet funeral and administration expenses, debts and other liabilities of the estate, or
  - (f) the property is perishable or likely to decrease rapidly in value.
- (2) A transaction entered into contrary to this section is not invalid.

## Division 3 Multiple spouses

### 122 Spouses' entitlement where there are more than one spouse but no issue

If an intestate leaves more than one spouse, but no issue, the spouses are entitled to the whole of the intestate estate in shares determined in accordance with this Division.

### 123 Spouses' entitlement where issue are also issue of one or more of the spouses

If an intestate leaves more than one spouse and issue who are all issue of one or more of the surviving spouses, the spouses are entitled to the whole of the intestate estate in shares determined in accordance with this Division.

### 124 Spouses' entitlement where any issue are not issue of a surviving spouse

If an intestate leaves more than one spouse and any issue who are not issue of a surviving spouse:

- (a) the spouses are entitled to share the intestate's personal effects in accordance with this Division, and
- (b) each spouse is entitled to share the statutory legacy that would be payable if the intestate had left only one surviving spouse, and
- (c) the spouses are entitled to share one-half of the remainder (if any) of the intestate estate in accordance with this Division.

## 125 Sharing between spouses

- (1) If property is to be shared between spouses under this Division, the property is to be shared:
  - (a) in accordance with a written agreement between the spouses (a **distribution agreement**), or
  - (b) in accordance with an order of the Court (a **distribution order**), or
  - (c) if the conditions prescribed by subsection (2) are satisfied—in equal shares.
- (2) The following conditions must be satisfied if the personal representative is to make an equal division of property between spouses under subsection (1) (c):
  - (a) the personal representative has given each spouse a notice in writing stating that the personal representative may distribute the property equally between the spouses unless, within 3 months after the date of the notice:
    - (i) they enter into a distribution agreement and submit the agreement to the personal representative, or
    - (ii) at least one of the spouses applies to the Court for a distribution order,
  - (b) at least 3 months have elapsed since the giving of the notices and:
    - (i) the personal representative has not received a distribution agreement or notice of an application for a distribution order, or
    - (ii) an application for a distribution order has been made but the application has been dismissed or discontinued.

- (3) If a spouse asks the personal representative to initiate the process for making an equal distribution of property under subsection (1) (c), the personal representative must, as soon as practicable:
- give the notices required under subsection (2) (a), or
  - make an application to the Court for a distribution order.

## 126 Distribution orders

- An intestate's spouse or personal representative may apply to the Court for a distribution order.
- If, however, the personal representative has given written notice under section 125 (3), the application cannot (unless the Court otherwise allows) be made more than 3 months after the date of the notice.
- On an application under this section, the Court may order that the property be distributed between the spouses in any way it considers just and equitable.
- If the Court considers it just and equitable to do so, it may allocate the whole of the property to one of the spouses to the exclusion of the other or others.
- A distribution order may include conditions.

## Part 4.3 Distribution among relatives

**Note.** In the case of an Indigenous person's estate, this Part is subject to exclusion or modification by a distribution order under Part 4.4.

## 127 Entitlement of children

- If an intestate leaves no spouse but leaves issue, the intestate's children are entitled to the whole of the intestate estate.
- If:
  - an intestate leaves:
    - a spouse or spouses, and
    - any issue who are not also issue of a surviving spouse, and
  - a part of the estate remains after satisfying the spouse's entitlement, or the spouses' entitlements, the intestate's children are entitled to the remaining part of the intestate estate.
- If no child predeceased the intestate leaving issue who survived the intestate, then:
  - if there is only one surviving child—the entitlement vests in the child, or
  - if there are 2 or more surviving children—the entitlement vests in them in equal shares.
- If one or more of the intestate's children predeceased the intestate leaving issue who survived the intestate:
  - allowance must be made in the division of the entitlement between children for the presumptive share of any such deceased child, and
  - the presumptive share of any such deceased child is to be divided between that child's children and, if any of these grandchildren (of the intestate) predeceased the intestate leaving issue who survived the intestate, the deceased grandchild's presumptive share is to be divided between the grandchild's children (again allowing for the presumptive share of a great grandchild who predeceased the intestate leaving issue who survived the intestate), and so on until the entitlement is exhausted.

## 128 Parents

- The parents of an intestate are entitled to the whole of the intestate estate if the intestate leaves:
  - no spouse, and
  - no issue.
- If there is only one surviving parent, the entitlement vests in the parent and, if both survive, it vests in equal shares.

## 129 Brothers and sisters

- The brothers and sisters of an intestate are entitled to the whole of the intestate estate if the intestate leaves:
  - no spouse, and
  - no issue, and
  - no parent.
- If no brother or sister predeceased the intestate leaving issue who survived the intestate, then:

- (b) if 2 or more survive—the entitlement vests in them in equal shares.
- (3) If a brother or sister predeceased the intestate leaving issue who survived the intestate:
  - (a) allowance must be made in the division of the estate between brothers and sisters for the share of any such deceased brother or sister, and
  - (b) the presumptive share of any such deceased brother or sister is to be divided between the brother's or sister's children and, if any of these children predeceased the intestate leaving issue who survived the intestate, the deceased child's presumptive share is to be divided between the child's children (again allowing for the presumptive share of a grandchild who predeceased the intestate leaving issue who survived the intestate), and so on until the entitlement is exhausted.

### 130 Grandparents

- (1) The grandparents of an intestate are entitled to the whole of an intestate estate if the intestate leaves:
  - (a) no spouse, and
  - (b) no issue, and
  - (c) no parent, and
  - (d) no brother or sister, or issue of a deceased brother or sister.
- (2) If there is only one surviving grandparent, the entitlement vests in the grandparent and, if 2 or more survive, it vests in them in equal shares.

### 131 Aunts and uncles

- (1) The brothers and sisters of each of an intestate's parents are entitled to the whole of the intestate estate if the intestate leaves:
  - (a) no spouse, and
  - (b) no issue, and
  - (c) no parent, and
  - (d) no brother or sister, or issue of a deceased brother or sister, and
  - (e) no grandparent.
- (2) If no brother or sister of a parent of the intestate predeceased the intestate leaving a child who survived the intestate, then:
  - (a) if only one survives—the entitlement vests in the surviving brother or sister, or
  - (b) if 2 or more survive—the entitlement vests in them in equal shares.
- (3) If a brother or sister of a parent of the intestate predeceased the intestate leaving a child who survived the intestate, the child is entitled to the deceased parent's presumptive share and, if there are 2 or more children, they share equally.

### 132 Entitlement to take in separate capacities

A relative may be entitled to participate in the distribution of an intestate estate in separate capacities.

**Note.** For example, suppose that an intestate dies leaving no spouse and no surviving relatives except children of a deceased maternal aunt and paternal uncle who had a child in common as well as children of other unions. In this case, the child of the union between the maternal aunt and the paternal uncle would be entitled to participate in the estate both as representative of the maternal aunt and as representative of the paternal uncle.

## Part 4.4 Indigenous persons' estates

### 133 Application for distribution order

- (1) The personal representative of an Indigenous intestate, or a person claiming to be entitled to share in an intestate estate under the laws, customs, traditions and practices of the Indigenous community or group to which an Indigenous intestate belonged, may apply to the Court for an order for distribution of the intestate estate under this Part.
- (2) An application under this section must be accompanied by a scheme for distribution of the estate in accordance with the laws, customs, traditions and practices of the community or group to which the intestate belonged.
- (3) An application under this section must be made within 12 months of the grant of administration or a longer period allowed by the Court but no application may be made after the intestate estate has been fully distributed.
- (4) After a personal representative makes, or receives notice of, an application under this section, the personal representative must not distribute (or continue with the distribution of) property comprised in the estate until:

- (b) the Court authorises the distribution.

### 134 Distribution orders

- (1) The Court may, on an application under this Part, order that the intestate estate, or part of the estate, be distributed in accordance with the terms of the order.
- (2) An order under this Part may require a person to whom property was distributed before the date of the application to return the property to the personal representative for distribution in accordance with the terms of the order (but no distribution that has been, or is to be, used for the maintenance, education or advancement in life of a person who was totally or partially dependent on the intestate immediately before the intestate's death can be disturbed).

**Note.** For example, a distribution may have been made under section 92A of the *Probate and Administration Act 1898* or section 94 of this Act.

- (3) In formulating an order under this Part, the Court must have regard to:
  - (a) the scheme for distribution submitted by the applicant, and
  - (b) the laws, customs, traditions and practices of the Indigenous community or group to which the intestate belonged.
- (4) The Court may not, however, make an order under this Part unless satisfied that the terms of the order are, in all the circumstances, just and equitable.

### 135 Effect of distribution order under this Part

A distribution order under this Part operates (subject to its terms) to the exclusion of all other provisions of this Act governing the distribution of the intestate estate.

### Part 4.5 Absence of persons entitled

#### 136 Intestate leaving no persons entitled

If an intestate dies leaving no person who is entitled to the intestate estate, the State is entitled to the whole of the intestate estate.

#### 137 State has discretion to make provision out of property to which it becomes entitled

- (1) If the State is entitled to an intestate estate under this Part, the Minister may, on application in accordance with subsection (3) for a waiver of the State's rights, waive the State's rights in whole or part in favour of:
  - (a) dependants of the intestate, or
  - (b) any persons who have, in the Minister's opinion, a just or moral claim on the intestate, or
  - (c) any organisation or person for whom the intestate might reasonably be expected to have made provision, or
  - (d) the trustees for any person or organisation mentioned in paragraph (a), (b) or (c).
- (2) The Minister may grant a waiver under this section on conditions the Minister considers appropriate.
- (3) Application for a waiver of the State's rights to an intestate estate under this Part is to be made in writing to the Crown Solicitor.

### Part 4.6 Miscellaneous

#### 138 Non-deferral of the interest of a minor

The entitlement of a minor to an interest in an intestate estate vests immediately (that is, it is not deferred until the minor reaches majority or marries).

#### 139 Effect of disclaimer etc

For the purposes of the distribution of an intestate estate, a person will be treated as having predeceased the intestate if the person:

- (a) disclaims an interest, to which he or she would otherwise be entitled, in the intestate estate, or
- (b) is disqualified from taking an interest in the intestate estate for any reason.

**Note.** It follows that, if the person has issue, they may be entitled to take the person's presumptive share of the intestate estate by representation.

#### 140 Effect of testamentary and other gifts

The distribution of an intestate estate is not affected by gifts made by the intestate to persons entitled:

- (b) in the case of a partial intestacy—by will.

## **Schedule 1 Savings, transitional and other provisions (Section 104)**

### **Part 1 General**

#### **1 Regulations**

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:
- this Act
- Statute Law (Miscellaneous Provisions) Act (No 2) 2007*, to the extent that it amends this Act
- Succession Amendment (Family Provision) Act 2008*
- Succession Amendment (Intestacy) Act 2009*
- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
- (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
- (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.
- (4) Regulations made as referred to in subclause (1) may have effect despite the terms of any savings or transitional provisions contained in this Schedule, if the regulations so provide.

### **Part 2 Provisions consequent on enactment of this Act**

#### **2 Definition**

In this Part:

**repealed provisions** means the provisions of the *Wills, Probate and Administration Act 1898* repealed by Schedule 2 to this Act (as in force immediately before Schedule 2 was repealed by the *Statute Law (Miscellaneous Provisions) Act (No 2) 2008*).

#### **3 Transitional provisions**

- (1) Sections 4, 5, 6, 17, 19–26, 32, 35, 39, 41 and 42 apply to wills made on or after the commencement of this clause.
- (2) Despite subclause (1), section 41 (Dispositions not to fail because issue have died before testator) applies to a will made before the commencement of this clause if the testator has died on or after the death of the issue and the deaths occurred on or after the commencement.
- (3) Sections 7, 8, 10, 27–31, 33, 34, 36–38, 40, 43–54 apply to a will whenever made, if the testator dies on or after the commencement of this clause.
- (4) Sections 5, 11, 14 and 15 apply to the alteration, revocation or revival of a will on or after the commencement of this clause even if the will was made before the commencement.
- (5) The Court may make an order under section 16 or 18 with respect to the alteration or revocation of a will or part of a will even if the will was made before the commencement of this clause.
- (6) The repealed provisions, as in force immediately before the commencement of this clause, continue to apply to wills made before the commencement, in so far as they are not affected by the operation of subclauses (7), (8) and (9) or by the operation of the sections specified in subclause (1), (2), (3) or (4).
- (7) Section 9 (Persons who cannot act as witnesses to wills) extends to a document that alters or revokes a will and that is made on or after the commencement of this clause even if the will was made before the commencement.
- (8) Section 12 (Effect of marriage on a will) extends to a will made before the commencement of this clause, in relation to a marriage solemnised on or after the commencement.
- (9) Section 13 (What is the effect of divorce or an annulment on a will?) extends to a will made before the commencement of this clause, if the divorce or the annulment of the marriage occurs on or after the commencement.

Despite the repeal of section 6A of the *Wills, Probate and Administration Act 1898*, a will may be made by a minor after repeal of that section pursuant to (and in accordance with any conditions of) leave granted to that section before its repeal.

## 5 (Repealed)

### Part 3 Provisions consequent on enactment of Succession Amendment (Family Provision) Act 2008

#### 9 Definitions

In this Part:

**amending Act** means the *Succession Amendment (Family Provision) Act 2008*.

**the 1916 provisions** means Part 2 of the *Testator's Family Maintenance and Guardianship of Infants Act 1916* as in force before its repeal by the *Succession Amendment (Intestacy) Act 2009*.

**the 1982 Act** means the *Family Provision Act 1982*.

#### 10 General savings

- (1) Without limiting section 30 of the *Interpretation Act 1987*, any act, matter or thing done or omitted to be done under a provision of the 1982 Act and having any force or effect immediately before the commencement of a provision of this Act that replaces that provision is, on that commencement, taken to have been done or omitted under the relevant provision of this Act.
- (2) This clause does not apply:
  - (a) to the extent that its application is inconsistent with any other provision of this Schedule or a provision of a regulation under clause 1, or
  - (b) to the extent that its application would be inappropriate in a particular case.

#### 11 Transitional provisions

- (1) Chapter 3, as inserted by the amending Act, applies in relation to the estate of a person who dies on or after the commencement of this clause.
- (2) The provisions of the 1982 Act, as in force before the commencement of this clause, continue to apply in relation to the estate of a person who dies before the commencement of this clause, in so far as they are not affected by the operation of this Part.
- (3) Without limiting subclause (2), the provisions of the 1982 Act, as in force immediately before the commencement of this clause, continue to have effect in relation to the determination of an application made before that commencement.
- (4) Section 59 (3) (b) and (4) (relating to undisclosed property) extend to an order for provision out of the estate or notional estate of a deceased person made before the commencement of this clause.
- (5) The 1916 provisions continue to apply in relation to any estate of a person who died before the repeal of the provisions to which those provisions would have applied but for the repeal.

### Part 4 Provisions consequent on enactment of Succession Amendment (Intestacy) Act 2009

#### 12 Definition

In this Part:

**amending Act** means the *Succession Amendment (Intestacy) Act 2009*.

#### 13 Transitional provision—intestacy

- (1) Chapter 4 (Intestacy) applies to the distribution of the intestate estate of a person who dies intestate on or after the commencement of this clause.
- (2) The distribution of the intestate estate of a person who died intestate before the commencement of this clause is governed by the law of this State as in force at the date of death.