



# Succession Act 2006 No 80

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### Provisions in force

All the provisions displayed in this version of the legislation have commenced. For commencement and other details see the Historical notes.

### Does not include amendments by:

Succession Amendment (International Wills) Act 2012 No 63 (not commenced)



New South Wales

# Succession Act 2006 No 80

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New South Wales

## **Succession Act 2006 No 80**

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An Act to restate, with reforms, the law relating to wills in New South Wales; to ensure that adequate provision is made for the members of the family of a deceased person, and certain other persons, from the estate of the deceased person; to make provision for the distribution of intestate estates; and for other purposes.

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## Chapter 1 Preliminary

### 1 Name of Act

This Act is the *Succession Act 2006*.

### 2 Commencement

This Act commences on a day or days to be appointed by proclamation.

### 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 1984*.

**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 estate or 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) for 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

### Part 2.1 The making, alteration, revocation and revival of wills

#### Division 1 Making a will

##### 4 What property may be disposed of by will? (cf WPA 5)

- (1) A person may dispose by will of property to which the person is entitled at the time of the person's death.
- (2) Subsection (1) applies whether or not the entitlement existed at the date of the making of the will.
- (3) A person may dispose by will of property to which the person's personal representative becomes entitled, in the capacity of personal representative, after the person's death.
- (4) Subsection (3) applies whether or not the entitlement existed at the time of the person's death.
- (5) A person may not dispose by will of property of which the person is trustee at the time of the person's death.

##### 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

##### 6 How should a will be executed? (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 of 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).

#### **7 Must witnesses know that they are signing a will?**

A will that is executed in accordance with this Act is validly executed even if one or more witnesses to the will did not know that the document he or she attested and signed was a will.

### **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 made by the will, and
  - (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:
- (a) 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
  - (b) 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:
- (a) any right of the former spouse of a testator to make any application under Chapter 3 of this Act, 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 the administrator of the estate of the former spouse.
- (6) In this section:
- annulment**, in relation to a testator, means:
- (a) the annulment of the testator's marriage by the Family Court of Australia, or
  - (b) 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) a divorce order in relation to the marriage taking effect under the *Family Law Act 1975* of the Commonwealth, or

- (b) a decree of nullity in respect of the marriage by the Family Court of Australia, or
- (c) 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:
  - (a) is executed in the manner in which a will is required to be executed under this Part, or
  - (b) 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
  - (c) 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:
  - (a) in the margin, or on some other part of the will beside, near or otherwise relating to the alteration, or
  - (b) 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)

- (1) 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.
- (2) A revival of a will that was partly revoked and later revoked as to the balance only revives that part of the will most recently revoked.
- (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.

## **Part 2.2 Wills made or rectified under Court authorisation**

### **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.

#### **17 Will made by minor under an order of a foreign court**

- (1) A will of a deceased person that is a court authorised will for a minor is a valid will.
- (2) A will is a *court authorised will for a minor* if:
  - (a) a court, in a place outside New South Wales, made an order authorising a minor to make the will, and
  - (b) the will was executed according to the law of the place relating to wills of minors, and
  - (c) the minor was a resident in the place at the time the will was executed.

### **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 Court thinks fit—see section 86 of the *Civil Procedure Act 2005*. The Court also has extensive powers to make 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.

**19 Information required in support of application for leave**

- (1) A person must obtain the leave of the Court to make an application to the Court for an order under section 18.
- (2) In applying for leave, the person must (unless the Court otherwise directs) give the Court the following information:
  - (a) a written statement of the general nature of the application and the reasons for making it,
  - (b) satisfactory evidence of the lack of testamentary capacity of the person in relation to whom an order under section 18 is sought,
  - (c) a reasonable estimate, formed from the evidence available to the applicant, of the size and character of the estate of the person in relation to whom an order under section 18 is sought,
  - (d) a draft of the proposed will, alteration or revocation for which the applicant is seeking the Court's approval,
  - (e) any evidence available to the applicant of the person's wishes,
  - (f) any evidence available to the applicant of the likelihood of the person acquiring or regaining testamentary capacity,
  - (g) any evidence available to the applicant of the terms of any will previously made by the person,
  - (h) any evidence available to the applicant, or that can be discovered with reasonable diligence, of any persons who might be entitled to claim on the intestacy of the person,
  - (i) any evidence available to the applicant of the likelihood of an application being made under Chapter 3 of this Act in respect of the property of the person,
  - (j) any evidence available to the applicant, or that can be discovered with reasonable diligence, of the circumstances of any person for whom provision might reasonably be expected to be made by will by the person,
  - (k) any evidence available to the applicant of a gift for a charitable or other purpose that the person might reasonably be expected to make by will,
  - (l) any other facts of which the applicant is aware that are relevant to the application.

## **20 Hearing of application for leave**

- (1) On hearing an application for leave the Court may:
  - (a) give leave and allow the application for leave to proceed as an application for an order under section 18, and
  - (b) if satisfied of the matters set out in section 22, make the order.
- (2) Without limiting the action the Court may take in hearing an application for leave, the Court may revise the terms of any draft of the proposed will, alteration or revocation for which the Court's approval is sought.

## **21 Hearing an application for an order**

In considering an application for an order under section 18, the Court:

- (a) may have regard to any information given to the Court in support of the application under section 19, and
- (b) may inform itself of any other matter in any manner it sees fit, and
- (c) is not bound by the rules of evidence.

## **22 Court must be satisfied about certain matters**

The Court must refuse leave to make an application for an order under section 18 unless the Court is satisfied that:

- (a) there is reason to believe that the person in relation to whom the order is sought is, or is reasonably likely to be, incapable of making a will, and
- (b) the proposed will, alteration or revocation is, or is reasonably likely to be, one that would have been made by the person if he or she had testamentary capacity, and
- (c) it is or may be appropriate for the order to be made, and
- (d) the applicant for leave is an appropriate person to make the application, and
- (e) adequate steps have been taken to allow representation of all persons with a legitimate interest in the application, including persons who have reason to expect a gift or benefit from the estate of the person in relation to whom the order is sought.

## **23 Execution of will made under order**

- (1) A will that is made or altered by an order under section 18 is properly executed if:
  - (a) it is in writing, and
  - (b) it is signed by the Registrar and sealed with the seal of the Court.
- (2) A will may only be signed by the Registrar if the person in relation to whom the order was made is alive.

## **24 Retention of will**

- (1) Despite section 52 (Delivery of wills by Registrar), a will deposited with the Registrar in accordance with this Part may not be withdrawn from deposit with the Registrar by or on behalf of the person on whose behalf it was made unless:
  - (a) the Court has made an order under section 18 authorising the revocation of the whole of the will, or
  - (b) the person has acquired or regained testamentary capacity.
- (2) On being presented with a copy of an order under section 18 authorising the revocation of the whole of a will, the Registrar must withdraw the will from deposit.

## **25 Separate representation of person lacking testamentary capacity**

If it appears to the Court that the person who lacks testamentary capacity should be separately represented in proceedings under this Division, the Court may order that the person be separately represented, and may also make such orders as it considers necessary to secure that representation.

## **26 Recognition of statutory wills**

- (1) A statutory will made according to the law of the place where the deceased was resident at the time of the execution of the will is to be regarded as a valid will of the deceased.
- (2) In this section:  
*statutory will* means a will executed by virtue of a provision of an Act of New South Wales or other place on behalf of a person who, at the time of execution, lacked testamentary capacity.

## **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*.

## Part 2.3 Construction of wills

### Division 1 General rules about construction of wills

#### 29 What interest in property does a will dispose of? (cf WPA 20)

If:

- (a) a testator has made a will disposing of property, and
- (b) after the making of the will and before his or her death, the testator disposes of an interest in that property,

the will operates to dispose of any remaining interest the testator has in the property.

#### 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 will:
  - (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 any of 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**

### **36 What a general disposition of land includes** (cf WPA 23 (1))

- (1) A general disposition of land, or of land in a particular area, includes leasehold land whether or not the testator owns freehold land.
- (2) This section does not apply if a contrary intention appears in the will.

### **37 What a general disposition of property includes** (cf WPA 23 (2) and (3))

- (1) A general disposition of:
  - (a) all or the residue of the testator's property, or
  - (b) all or the residue of his or her property of a particular description,includes all of the property, or all of the property of the relevant description, over which he or she has a general power of appointment exercisable by will and operates as an exercise of the power.
- (2) This section does not apply if a contrary intention appears in the will.

### **38 Effect of devise of real property without words of limitation** (cf WPA 24 and 26)

- (1) A disposition of real property to a person without words of limitation is to be construed as passing the whole estate or interest of the testator in that property to that person.
- (2) This section does not apply if a contrary intention appears in the will.

### **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.
- (3) Subsection (2) does not apply if a contrary intention appears in the will.
- (4) (Repealed)
- (5) A gift to persons as joint tenants on its own indicates a contrary intention for the purposes of subsection (3).

#### **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.

#### **43 Dispositions to unincorporated associations of persons**

- (1) Each of the following dispositions of property has effect as a disposition in augmentation of the general funds of the association to which the disposition is made:
- (a) a disposition to an unincorporated association of persons that is not a charity,
  - (b) a disposition to or on trust for the aims, objects or purposes of an unincorporated association of persons that is not a charity,
  - (c) a disposition to or on trust for the present and future members of an unincorporated association of persons that is not a charity.
- (2) Property, a disposition of which is, or has effect under subsection (1) as, a disposition in augmentation of the general funds of an unincorporated association, must be:
- (a) paid into the general fund of the association, or
  - (b) transferred to the association, or
  - (c) sold or otherwise disposed of on behalf of the association, with the proceeds being paid into the general fund of the association.
- (3) If a personal representative pays an amount to an unincorporated association under a disposition, the receipt of the treasurer or a like officer of the association (however described) is an absolute discharge for the payment.
- (4) If a personal representative transfers property to an unincorporated association under a disposition, the transfer of the property to a person nominated in writing by any two persons holding the offices of president, chairperson, treasurer or secretary of the

association, or like officers of the association (however described), is an absolute discharge to the personal representative for the transfer of the property.

- (5) Subsections (3) and (4) do not apply if a contrary intention appears in the will.
- (6) It is not an objection to the validity of a disposition to an unincorporated association of persons that:
  - (a) a list of persons who were members of the association at the time of the testator's death cannot be compiled, or
  - (b) the members of the association may not divide assets of the association beneficially among themselves.
- (7) In this section:  
**charity** means a body constituted primarily for a purpose that is a charitable purpose under the general law.

#### **44 Can a person, by will, delegate the power to dispose of property?**

A power or a trust to dispose of property, created by will, is not void on the ground that it is a delegation of the testator's power to make a will, if the same power or trust would be valid if made by the testator by instrument during his or her lifetime.

#### **45 Effect of referring to a valuation in a will**

- (1) This section applies if:
  - (a) there is an express or implied requirement in a will that a valuation of property be made or accepted for a purpose, and
  - (b) either:
    - (i) the will does not provide an effective method of valuation, or
    - (ii) the method of valuation is not provided for by a law of New South Wales or of another place.
- (2) The reference to the valuation in the will is to be construed, to the extent the method of valuation is not provided for as mentioned in subsection (1) (b) (i) or (ii), as if the reference were a reference to a valuation of the property at the date of the testator's death made by a competent valuer.
- (3) Subsection (2) does not apply if a contrary intention appears in the will.

#### **46 Operation of wills relating to transgender persons** (cf WPA 14)

A beneficiary under a will does not, except in so far as the will may otherwise expressly provide, lose any right or entitlement under the will merely because the beneficiary is a transgender person as referred to in Part 3A of the *Anti-Discrimination Act 1977*.

## **Part 2.4 Wills under foreign law**

#### **47 Definition of "internal law"** (cf WPA 32A (1))

In this Part:

**internal law**, in relation to a place, means the law applying in a case where no question of the law in force in any other place arises.

#### **48 General rule as to the validity of a will executed in a foreign place** (cf WPA 32C and 32D)

- (1) A will is taken to be properly executed if its execution conforms to the internal law in force in the place:



- (a) where it is executed, or
  - (b) that was the testator's domicile or habitual residence, either at the time the will was executed or at the time of the testator's death, or
  - (c) of which the testator was a national, either at the time the will was executed or at the time of the testator's death.
- (2) The following wills are also taken to be properly executed:
- (a) a will executed on board a vessel or aircraft in conformity with the internal law in force at the place with which the vessel or aircraft may be taken to have been most closely connected having regard to its registration and other relevant circumstances,
  - (b) a will, to the extent that it disposes of immovable property, executed in conformity with the internal law in force in the place where the property is situated,
  - (c) a will, to the extent that it revokes:
    - (i) a will, or a provision of a will, that has been executed in accordance with this Act, or
    - (ii) a will, or a provision of a will, that is taken by this Act to be properly executed,if the later will has been executed in conformity with any law under which the earlier will or provision would be taken to have been validly executed.
- (3) A will to which this section applies is not, to the extent that it exercises a power of appointment, to be taken to have been improperly executed only because it has not been executed in accordance with the formalities required by the instrument creating the power.

**49 Deciding system of law to apply if more than one system of law** (cf WPA 32A (2))

- (1) This section applies if:
- (a) the internal law in force in a place must be applied under section 48, and
  - (b) there is more than one system of internal law in force in that place relating to the formal validity of wills.
- (2) The system of law to be applied under section 48 is to be determined as follows:
- (a) if there is a rule in force throughout the place that indicates which system of internal law applies to the will, that rule must be followed,
  - (b) if there is no rule, the system of internal law is that with which the testator was most closely connected:
    - (i) if the matter is to be determined by reference to circumstances prevailing at the testator's death—at the time of the testator's death, or
    - (ii) in any other case—at the time of execution of the will.

**50 Construction of the law applying to wills under foreign law** (cf WPA 32A (4))

- (1) In determining, for the purposes of section 48, whether a will has been executed in conformity with a particular law, regard must be had to the formal requirements of that law at the time of execution, but account may be taken of a later alteration of the law affecting wills executed at that time, if the alteration enables the will to be treated as properly executed.
- (2) If a law outside New South Wales is applied to a will (whether or not for the purposes of section 48), a requirement of that law that special formalities must be observed by testators of a particular description, or that the witnesses to the execution of the will

must have certain qualifications, is taken to be a formal requirement only, despite any rule of law to the contrary.

**Note.** Section 17 provides for the recognition in New South Wales of a court authorised will for a minor made in another jurisdiction. Section 26 provides for the recognition of statutory wills (including such wills made in other jurisdictions) made for persons lacking testamentary capacity.

## Part 2.5 Deposit of and access to wills

### 51 Will may be deposited with Registrar

- (1) Any person may deposit a will in the office of the Registrar.
- (2) A will is not to be deposited unless it is in a sealed envelope that has written on it the following information:
  - (a) the testator's name and address (as they appear in the will),
  - (b) the name and address (as they appear in the will) of any executor,
  - (c) the date of the will,
  - (d) the name of the person depositing the will.
- (3) A will that is deposited must be accompanied by the fee prescribed by the regulations.
- (4) Despite subsection (3), a fee is not payable for the deposit of a will if:
  - (a) the will is deposited:
    - (i) in accordance with section 16 or 18, or
    - (ii) because a local legal practitioner has died, or has ceased, or is about to cease practising law in New South Wales, or
  - (b) the fee is waived by the Registrar in accordance with regulations made under the *Civil Procedure Act 2005*.

### 52 Delivery of wills by Registrar (cf WPA 32)

- (1) If a will has been deposited with the Registrar under this Act, the testator may at any time apply in writing to the Registrar to be given the will or to have the will given to another person authorised by the testator in writing to receive it.
- (2) On receiving the application, the Registrar must give the will to the testator or the person authorised by the testator unless the testator is a minor or a person who lacks testamentary capacity.
- (3) If a will has been deposited with the Registrar under this Act and the testator has died, any executor named in the will or any person entitled to apply for letters of administration with the will annexed may apply in writing to the Registrar to be given the will.
- (4) On receiving the application referred to in subsection (3), the Registrar must give the will to the executor or other person or to any Australian legal practitioner or trustee company nominated by the executor or person.
- (5) The Registrar may examine any will to enable the Registrar to comply with this Part.
- (6) The Registrar must ensure that an accurate copy of every will given to a person under this section is made and retained by the Registrar.
- (7) If there is any doubt as to whom a will should be given, the Registrar, or any other person, may apply to the Court for directions as to whom the Registrar should give the will.

**53 Failure to retain does not affect validity of will**

Any failure of the Registrar to retain a will as required by this Act does not affect the validity of the will.

**54 Persons entitled to inspect will of deceased person**

- (1) In this section:  
*will* includes a revoked will, a document purporting to be a will, a part of a will and a copy of a will.
- (2) A person who has possession or control of a will of a deceased person must allow any one or more of the following persons to inspect or be given copies of the will (at their own expense):
  - (a) any person named or referred to in the will, whether as a beneficiary or not,
  - (b) any person named or referred to in an earlier will as a beneficiary of the deceased person,
  - (c) the surviving spouse, de facto partner (whether of the same or the opposite sex) or issue of the deceased person,
  - (d) a parent or guardian of the deceased person,
  - (e) any person who would be entitled to a share of the estate of the deceased person if the deceased person had died intestate,
  - (f) any parent or guardian of a minor referred to in the will or who would be entitled to a share of the estate of the testator if the testator had died intestate,
  - (g) any person (including a creditor) who has or may have a claim at law or in equity against the estate of the deceased person,
  - (h) any person committed with the management of the deceased person's estate under the *NSW Trustee and Guardian Act 2009* immediately before the death of the deceased person,
  - (i) any attorney under an enduring power of attorney made by the deceased person,
  - (j) any person belonging to a class of persons prescribed by the regulations.

**Note.** "De facto partner" is defined in section 21C of the *Interpretation Act 1987*.
- (3) A person who has possession or control of a will of a deceased person must produce it in a court if the court requires the person to do so.

## Chapter 3 Family provision

### Part 3.1 Application of Chapter

#### 55 Interpretation

- (1) For the purposes of this Chapter, **administration** is granted in respect of the estate of a deceased person if:
  - (a) probate of the will of the deceased person is granted in New South Wales or granted outside New South Wales but sealed in accordance with section 107 (1) of the *Probate and Administration Act 1898*, or
  - (b) letters of administration of the estate of the deceased person are granted in New South Wales or granted outside New South Wales but sealed in accordance with section 107 (1) of the *Probate and Administration Act 1898*, whether the letters were granted with or without a will annexed and whether for general, special or limited purposes, or
  - (c) an order is made under section 24 or 25 of the *NSW Trustee and Guardian Act 2009* in respect of the estate of the deceased person, or
  - (d) an election is made by the NSW Trustee and Guardian under Division 1 of Part 3.2 of the *NSW Trustee and Guardian Act 2009* in respect of the estate of the deceased person, or
  - (e) an election is made by a trustee company under section 15A or 15AA of the *Trustee Companies Act 1964* in respect of the estate of the deceased person.
- (2) For the purposes of this Chapter, the **legal representative** of the estate is the person to whom administration is granted.
- (3) A reference in this Chapter to a **person entitled to exercise a power** means a person entitled to exercise a power, whether or not the power:
  - (a) is absolute or conditional, or
  - (b) arises under a trust or in some other manner, or
  - (c) is to be exercised solely by the person or by the person together with one or more other persons (whether jointly or severally).
- (4) A reference in this Chapter to **property held by a person** includes property in relation to which the person is entitled to exercise a power of appointment or disposition in favour of himself or herself.

#### 56 Chapter to bind Crown (cf FPA 5)

This Chapter binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.

### 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 on sufficient cause being shown.
- (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:

- (a) the person in whose favour the order is to be made is an eligible person, and
  - (b) 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
  - (c) 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:
- (a) 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
  - (b) at the time that a family provision order was last made in favour of the eligible person:
    - (i) 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
    - (ii) 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
    - (iii) 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:
- (a) whether the person in whose favour the order is sought to be made (the *applicant*) is an eligible person, and
  - (b) whether to make a family provision order and the nature of any such order.
- (2) The following matters may be considered by the Court:
- (a) any family or other relationship between the applicant and the deceased person, including the nature and duration of the relationship,

- (b) 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,
- (c) 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,
- (d) 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 order or of any beneficiary of the deceased person's estate,
- (e) if the applicant is cohabiting with another person—the financial circumstances of the other person,
- (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 and 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.

**61 Other possible applicants** (cf FPA 20)

- (1) In determining an application for a family provision order, the Court may disregard the interests of any other person by or in respect of whom an application for a family provision order may be made (other than a beneficiary of the deceased person's estate) but who has not made an application.
- (2) However, the Court may disregard any such interests only if:

- (a) notice of the application, and of the Court's power to disregard the interests, is served on the person concerned, in the manner and form prescribed by the regulations or rules of court, or
- (b) the Court determines that service of any such notice is unnecessary, unreasonable or impracticable in the circumstances of the case.

**62 Interim family provision orders and orders restraining distribution of the estate** (cf FPA 9 (5) and (6))

- (1) The Court may make an interim family provision order before it has fully considered an application for a family provision order if it is of the opinion that no less provision than that proposed in the interim order would be made in favour of the eligible person concerned in the final order.
- (2) After making an interim family provision order, the Court must proceed to finally determine the application for a family provision order by confirming, revoking or varying the interim order.
- (3) The Court may make an order restraining the final or partial distribution of an estate (other than a distribution under section 94 (1) of this Act or section 92A of the *Probate and Administration Act 1898*) pending its determination of an application for a family provision order.

### **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.

**64 Orders may affect property in or outside jurisdiction** (cf FPA 11 (1) (b))

A family provision order may be made in respect of property situated in or outside New South Wales when, or at any time after, the order is made, whether or not the deceased person was, at the time of death, domiciled in New South Wales.

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

**65 Nature of orders** (cf FPA 11 (1) (a) and (d))

- (1) A family provision order must specify:
  - (a) the person or persons for whom provision is to be made, and



- (b) the amount and nature of the provision, and
  - (c) the manner in which the provision is to be provided and the part or parts of the estate out of which it is to be provided, and
  - (d) any conditions, restrictions or limitations imposed by the Court.
- (2) A family provision order may require the provision to be made in one or more of the following ways:
- (a) by payment of a lump sum of money,
  - (b) by periodic payments of money,
  - (c) by application of specified existing or future property,
  - (d) by way of an absolute interest, or a limited interest only, in property,
  - (e) by way of property set aside as a class fund for the benefit of 2 or more persons,
  - (f) in any other manner the Court thinks fit.
- (3) If provision is to be made by payment of an amount of money, the family provision order may specify whether interest is payable on the whole or any part of the amount payable for the period, and, if so, the period during which interest is payable and the rate of the interest.

**66 Consequential and ancillary orders** (cf FPA 15 (1), 34)

- (1) The Court may, in addition to, or as part of, a family provision order, make orders for or with respect to all or any of the following matters for the purpose of giving effect to the family provision order:
- (a) the transfer of property of the estate directly to the eligible person in whose favour the order is made, or to any other person as trustee for that person,
  - (b) where property is to be held on trust, the purpose of the trust and the way in which it is to be constituted,
  - (c) the appointment of a trustee of property of the estate,
  - (d) the powers and duties of a trustee of property of the estate, including any trustee constituted or appointed under this section,
  - (e) the vesting in any person of property of the estate,
  - (f) the exercise of a right or power to obtain property for the estate,
  - (g) the sale of or dealing with property of the estate,
  - (h) the disposal of the proceeds of any sale or other realising of property of the estate,
  - (i) the securing, either wholly or partially, of the due performance of an order under this Part,
  - (j) the management of the property of the estate,
  - (k) the execution of any necessary conveyance, document or instrument, the production of documents of title or the doing of such other things as the Court thinks necessary in relation to the performance of the family provision order,
  - (l) any other matter the Court thinks necessary.
- (2) The Court may make such additional orders as it considers necessary to adjust the interests of any person affected by a family provision order and to be just and equitable to all persons affected by the order.

- (3) The execution of an instrument relating to property in the notional estate of a deceased person pursuant to an order under this section is not liable to duty under the *Duties Act 1997*.

**67 Undertakings to restore property** (cf FPA 18)

- (1) The Court may make a family provision order subject to a condition that the eligible person in whose favour the order is made is to enter into an undertaking, or give security, that, if the order is revoked because the deceased person was not deceased when the order was made, the person will restore any property received under the order, or otherwise make restitution, in accordance with any order of the Court made on the revocation.
- (2) In this section:  
*deceased person* means the person (whether or not deceased) from whose estate a family provision order is made.

**68 Payment for exoneration from liability for orders**

- (1) The Court may, as part of a family provision order, or at any time, on the application of a beneficiary of the estate of a deceased person, by order:
- (a) fix a periodic payment or lump sum payable by a beneficiary of an estate affected by a family provision order to represent the proportion of the property in the estate affected by the family provision order that is borne by the beneficiary's portion of the estate, and
  - (b) exonerate the beneficiary's portion of the estate from any further liability under the family provision order, on condition that payment is made as directed by the Court.
- (2) Without limiting subsection (1), in making any order under this section, the Court may do any of the following:
- (a) specify the person to whom the payment or lump sum is to be paid,
  - (b) specify how any periodic payment is to be secured,
  - (c) specify how any lump sum is to be invested for the benefit of any proposed beneficiary.

**Note.** 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.

**69 Effect of order vesting property in estate** (cf FPA 15 (2))

The provisions of sections 78 (except subsection (1)) and 79 of the *Trustee Act 1925* apply to and in relation to an order under section 66 for the vesting of property in a person in the same way as they apply to and in relation to a vesting order referred to in those provisions and, in the case of section 78 (2) of that Act, as if the provisions of section 66 and the other provisions of this Act relating to the making of orders under this Act were contained in Part 3 of that Act.

**70 Variation and revocation of family provision orders** (cf FPA 19 (1)–(3) and 20 (4))

- (1) A family provision order may be varied or revoked by the Court only in accordance with this Chapter.
- (2) The Court may, by order, vary or revoke a family provision order so as to allow provision to be made in favour of another eligible person wholly or partly from all or any property affected by the order.
- (3) The Court must not vary or revoke a family provision order so as to allow provision to be made in favour of another eligible person unless that person shows sufficient

cause for not having applied for a family provision order before the order sought to be varied or revoked was made.

- (4) A family provision order is revoked if the grant of administration in respect of the estate of the deceased person is revoked or rescinded, unless the Court otherwise provides when revoking or rescinding the grant.

**Note.** The Court may also vary a family provision order under sections 62 and 92.

#### **71 Variation and revocation of other orders** (cf FPA 19 (4))

If a family provision order is varied or revoked, the Court may:

- (a) vary or revoke any other orders made by it as a consequence of, or in relation to, the order to such extent as may be necessary as a result of the variation or revocation, and
- (b) make such additional orders as may be so necessary.

#### **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.

#### **73 Application**

- (1) This Part applies to interim family provision orders in the same way as it applies to family provision orders.
- (2) This Part (other than section 63) applies to property designated as part of the notional estate of a deceased person in the same way as it applies to property that is part of the estate of a deceased person.

### **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 been distributed from the estate, as “notional estate” of the deceased person for the purpose of making a family provision order under Part 3.2 in respect of the estate of the deceased person (or for the purpose of ordering 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) becomes, or continues to be, entitled to exercise the power,
  - (b) if a person holds an interest in property as a joint tenant and the person does not sever that interest before ceasing (because of death or the occurrence of any other event) to be entitled to do so, 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 the 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 part of an applicant's costs be paid from the notional estate of the deceased person unless the Court makes 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.

### 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 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 the relevant property transaction entered into by the transferee or the deceased transferee, or
  - (b) 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:
  - (a) 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
  - (b) the power did not arise because property became held by the deceased transferee as trustee only, and
  - (c) 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:
- (a) 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,
  - (b) if all or part of the estate of the deceased transferee has been distributed—property that is held by, or on trust for:
    - (i) 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
    - (ii) 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:
- (a) 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
  - (b) 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
  - (c) 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 deceased person was not the principal party to the transaction, the deceased person (whether before, on or after death), or
  - (d) involved an omission to exercise 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 by the principal party to the transaction or any other person (whether alone or jointly or severally with any other person) 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 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.

**84 Effect of notional estate order** (cf FPA 29)

A person's rights are extinguished to the extent that they are affected by a notional estate order.

**85 More than one notional estate order may be made** (cf FPA 28 (3))

The Court may make one or more notional estate orders in connection with the same proceedings for a family provision order, or any subsequent proceedings relating to the estate of the same deceased person.

**86 Power subject to Division 3**

The Court's power to make a notional estate order under this Division is subject to Division 3.

**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.

**89 Determination of property to be subject to notional estate order** (cf FPA 27 (2), 28 (2) and (4))

(1) In determining what property should be designated as notional estate of a deceased person, the Court must have regard to the following:

- (a) the value and nature of any property:
  - (i) the subject of a relevant property transaction, or
  - (ii) the subject of a distribution from the estate of the deceased person or from the estate of a deceased transferee, or

- (iii) held by the legal representative of the estate of any deceased transferee in his or her capacity as legal representative of the estate of the deceased transferee,
  - (b) the value and nature of any consideration given in a relevant property transaction,
  - (c) any changes in the value of property of the same nature as the property referred to in paragraph (a), or the consideration referred to in paragraph (b), in the time since the relevant property transaction was entered into, the distribution was made, the property became held by the legal representative of the estate of the deceased transferee or the consideration was given,
  - (d) whether property of the same nature as the property referred to in paragraph (a), or the consideration referred to in paragraph (b), could have been used to obtain income in the time since the relevant property transaction was entered into, the distribution was made, the property became held by the legal representative of the estate of the deceased transferee or the consideration was given,
  - (e) any other matter it considers relevant in the circumstances.
- (2) The Court must not designate as notional estate property that exceeds that necessary, in the Court's opinion, to allow the provision that should be made, or, if the Court makes an order that costs be paid from the notional estate under section 99, to allow costs to be paid as ordered, or both.
- (3) If, as a result of a relevant property transaction or of a distribution from the estate of a deceased person or from the estate of a deceased transferee, property becomes held by a person as a trustee only, the Court must not designate as notional estate any property held by the person other than the property held by the person as a trustee as a consequence of any such relevant property transaction or distribution.

**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.

**92 Substitution of property affected by orders or proposed orders** (cf FPA 30)

- (1) If the Court has made, or proposes to make, a family provision order affecting certain property in the estate of a deceased person or a deceased transferee, the Court may, on application by a person who offers other property in substitution (***the replacement property***):
  - (a) vary the family provision order by substituting the replacement property for the property affected by the order, or
  - (b) make a family provision order in respect of the replacement property instead of the property proposed to be affected by such an order,  
as appropriate.
- (2) If the Court has made, or proposes to make, a notional estate order designating certain property as notional estate, the Court may, on application by a person who offers other property in substitution (***the replacement property***):
  - (a) vary the notional estate order by substituting the replacement property for the property designated as notional estate by the order, or
  - (b) make a notional estate order designating the replacement property as notional estate instead of the property proposed to be designated as notional estate by such an order,  
as appropriate.
- (3) The Court may vary or make an order under this section only if it is satisfied that the replacement property can properly be substituted for the property affected or proposed to be affected by the family provision order, or the property designated or proposed to be designated as notional estate, as appropriate.
- (4) An order varied or made under this section is taken to be an order in respect of property of the estate or notional estate of the deceased person for the purposes of this Chapter (except section 72 (Effect of family provision order)).

**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
  - (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.
- (6) 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*.

**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.

**96 Revocation of approval of release** (cf FPA 31 (7)–(9))

- (1) The Court may not revoke an approval of a release given by it under section 95, except as provided by this section.
- (2) The Court may revoke an approval if it is satisfied:
  - (a) that its approval was obtained by fraud, or
  - (b) that the release was obtained by fraud or undue influence.
- (3) The Court may also revoke an approval, either wholly or partially in respect of specified property, if it is satisfied that all persons who would be, in the Court's opinion, sufficiently affected by the revocation consent to the revocation.

**97 Court may determine date of death** (cf FPA 6 (8))

The Court may, if the date or time of death of a person is uncertain, determine, for the purpose of giving effect to any provision of this Chapter, a date or time of death that the Court thinks is reasonable for the purposes of the provision.

**98 Mediation, orders with consent and costs** (cf FPA 33 (1))

- (1) The object of this section is to encourage the settlement by affected parties of disputes concerning the estate of a deceased person.
- (2) Unless the Court, for special reasons, otherwise orders, it must refer an application for a family provision order for mediation before it considers the application.
- (3) The Court may make a family provision order in terms of a written agreement (a **consent order**) that:
  - (a) is produced to the Court by the affected parties in relation to an application after mediation, or on the advice of a legal practitioner, and
  - (b) indicates the parties' consent to the making of the family provision order in those terms.
- (4) The regulations may make provision for or with respect to the following:
  - (a) mediations and consent orders under this section,
  - (b) regulating or prohibiting advertising concerning the provision of legal services in connection with mediations and other proceedings under this Chapter in relation to the estate or notional estate of a deceased person.
- (5) In this section, **legal services** has the same meaning as in the *Legal Profession Act 2004*.

**99 Costs** (cf FPA 33 (1))

- (1) The Court may order that the costs of proceedings under this Chapter in relation to the estate or notional estate of a deceased person (including costs in connection with mediation) be paid out of the estate or notional estate, or both, in such manner as the Court thinks fit.

**Note.** Section 78 sets out the circumstances in which the Court may make a notional estate order for the purpose of ordering that costs be paid from the notional estate of a deceased person.
- (2) The regulations may make provision for or with respect to the costs in connection with proceedings under this Chapter, including the fixing of the maximum costs for legal services that may be paid out of the estate or notional estate of a deceased person.
- (3) This section and any regulations under this section prevail to the extent of any inconsistency with the *Legal Profession Act 2004* and the regulations under that Act. An assessment under that Act of any costs in respect of which provision is made by a regulation under this section is to be made so as to give effect to that regulation.
- (4) In this section, **legal services** has the same meaning as in the *Legal Profession Act 2004*.

**100 Evidence** (cf FPA 32)

- (1) In this section:

**statement** includes any representation of fact whether or not in writing.
- (2) In any proceedings under this Chapter, evidence of a statement made by a deceased person is, subject to this section, admissible as evidence of any fact stated in it of which direct oral evidence by the deceased person would, if the person were able to give that evidence, be admissible.
- (3) Subject to subsection (4) and unless the Court otherwise orders, where a statement was made by a deceased person during the person's lifetime otherwise than in a document, no evidence other than direct testimony (including oral evidence, evidence by affidavit and evidence taken before a commissioner or other person

authorised to receive evidence for the purpose of the proceedings) by a person who heard or otherwise perceived the statement being made is admissible for the purpose of proving it.

- (4) Where a statement was made by a deceased person during the person's lifetime while giving oral evidence in a legal proceeding (being a civil or criminal proceeding or inquiry in which evidence is or may be given, or an arbitration), the statement may be approved in any manner authorised by the Court.
- (5) Where a statement made by a deceased person during the person's lifetime was contained in a document, the statement may be proved by the production of the document or, whether or not the document is still in existence, by leave of the Court, by the production of a copy of the document, or of the material part of the document, authenticated in such manner as the Court may approve.
- (6) Where, under this section, a person proposes to tender, or tenders, evidence of a statement contained in a document, the Court may require that any other document relating to the statement be produced and, in default, may reject the evidence or, if it has been received, exclude it.
- (7) For the purpose of determining questions of admissibility of a statement under this section, the Court may draw any reasonable inference from the circumstances in which the statement was made or from any other circumstances, including, in the case of a statement contained in a document, the form or content of the document.
- (8) In estimating the weight, if any, to be attached to evidence of a statement tendered for admission or admitted under this section, regard must be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, including:
  - (a) the recency or otherwise, at the time when the deceased person made the statement, of any relevant matter dealt with in the statement, and
  - (b) the presence or absence of any incentive for the deceased person to conceal or misrepresent any relevant matter in the statement.
- (9) Subject to subsection (11), where evidence of a statement of a deceased person is admitted under this section, evidence is admissible for the purpose of destroying or supporting the credibility of the deceased person.
- (10) Subject to subsection (11), where evidence of a statement of a deceased person is admitted under this section, evidence is admissible for the purpose of showing that the statement is inconsistent with another statement made at any time by the deceased person.
- (11) No evidence of a matter is admissible under subsection (9) or (10) in relation to a statement of a deceased person where, if the deceased person had been called as a witness and had denied the matter in cross-examination, evidence would not be admissible if adduced by the cross-examining party.
- (12) This section applies notwithstanding the rules against hearsay and notwithstanding that a statement is in such a form that it would not be admissible if given as oral testimony, but does not make admissible a statement of a deceased person which is otherwise inadmissible.
- (13) The exceptions to the rules against hearsay set out in this section are in addition to the exceptions to the hearsay rule set out in the *Evidence Act 1995*.

## 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,
- (b) banknotes or coins (unless forming a collection made in pursuit of a hobby or for some other non-commercial 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, and
  - (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:

$$R = A \times \frac{C}{D}$$

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 other relevant laws are taken to have been paid towards satisfaction of the spouse's statutory legacy under this Act,
    - (ii) if any of the relevant laws contain no provision corresponding to subparagraph (i), no amount is 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.

#### **109A Surrogacy arrangements**

- (1) A child of a surrogacy arrangement in respect of whom a parentage order is made is to be regarded, for the purposes of distribution on an intestacy, as a child of the intended parent or parents named in the parentage order 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 parentage order, are to be ignored.
- (2) In this section, a *parentage order* means a parentage order, or an Interstate parentage order, within the meaning of the *Surrogacy Act 2010*.

## **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**

- (1) An intestate's personal representative must, within one month of the grant of administration of the intestate 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 the consent of all the beneficiaries entitled to share in the intestate estate.

**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 division of property under subsection (1) (c), the personal representative must, as soon as practicable:
  - (a) give the notices required under subsection (2) (a), or
  - (b) make an application to the Court for a distribution order.

## 126 Distribution orders

- (1) An intestate's spouse or personal representative may apply to the Court for a distribution order.
- (2) 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.
- (3) 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.
- (4) 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.
- (5) 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

- (1) If an intestate leaves no spouse but leaves issue, the intestate's children are entitled to the whole of the intestate estate.
- (2) If:
  - (a) an intestate leaves:
    - (i) a spouse or spouses, and
    - (ii) any issue who are not also issue of a surviving spouse, and
  - (b) 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.
- (3) If no child predeceased the intestate leaving issue who survived the intestate, then:
  - (a) if there is only one surviving child—the entitlement vests in the child, or
  - (b) if there are 2 or more surviving children—the entitlement vests in them in equal shares.
- (4) If one or more of the intestate's children predeceased the intestate leaving issue who survived the intestate:
  - (a) allowance must be made in the division of the entitlement between children for the presumptive share of any such deceased child, and
  - (b) 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

- (1) The parents of an intestate are entitled to the whole of the intestate estate if the intestate leaves:
  - (a) no spouse, and
  - (b) no issue.



- (2) 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**

- (1) The brothers and sisters of an intestate are entitled to the whole of the intestate estate if the intestate leaves:
- (a) no spouse, and
  - (b) no issue, and
  - (c) no parent.
- (2) If no brother or sister predeceased the intestate leaving issue 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 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 presumptive 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:
  - (a) the application has been determined, or
  - (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 intestate 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:

- (a) during the intestate's lifetime, or
- (b) in the case of a partial intestacy—by will.

## Chapter 5 Miscellaneous

### 141 Service of documents

A document that is authorised or required by this Act or the regulations to be served on any person may be served in accordance with rules for the various methods of service of documents under the *Uniform Civil Procedure Rules 2005*.

**Note.** On the enactment of this section, Rule 10.5 of the *Uniform Civil Procedure Rules 2005* contained the rules for general service of documents.

### 142 Rules of Court

- (1) Rules of Court may be made under the *Supreme Court Act 1970* for or with respect to the practice and procedure to be followed in respect of proceedings under this Act and any matters incidental to, or relating to, such practice and procedure.

**Note.** Under section 9 (2) and clause 30 of Schedule 3 to the *Civil Procedure Act 2005* rules may also be made under that Act.

- (2) Without limiting subsection (1), rules of court may be made for or with respect to the following:
- (a) the service of documents (including the service of documents outside New South Wales),
  - (b) the giving of notices under this Act,
  - (c) applications under this Act,
  - (d) matters relating to costs (including the costs payable out of small estates and other estates) in proceedings under this Act,
  - (e) dispensing with the rules of evidence for proving any matter that is not bona fide in dispute or in which formal proof may give rise to expense or delay,
  - (f) without limiting the generality of paragraph (e), permitting informal evidence to be given of property valuations or the medical condition of the deceased or any other persons concerned with proceedings under Chapter 3,
  - (g) the circumstances in which proceedings under Chapter 3 in respect of small estates may be dealt with in the absence of the parties,
  - (h) the making of elections by the spouses of intestates under Chapter 4.
- (3) This section does not limit the rule-making powers conferred by the *Supreme Court Act 1970*.
- (4) In this section:  
**small estate** means an estate the value of which is less than \$750,000 or such other amount as may be prescribed by the regulations.

### 143 Regulations

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

### 144 Savings, transitional and other provisions

Schedule 1 has effect.

**145 Review of Act**

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

## 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.

#### **4 Will of minor pursuant to leave of Court**

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 under that section before its repeal.

#### **5 (Repealed)**

#### **6 Construction of references**

Subject to this Schedule and the regulations, in any Act (other than this Act) or instrument:

- (a) a reference to a repealed provision for which there is a corresponding provision in this Act extends to the corresponding provision of this Act, and
- (b) a reference to any act, matter or thing referred to in a repealed provision for which there is a corresponding provision in this Act extends to the corresponding act, matter or thing referred to in the corresponding provision of this Act.

#### **7 Pending proceedings**

- (1) Subject to this Schedule and the regulations, this Act and the rules apply to proceedings commenced before the commencement of this clause in relation to the repealed provisions in the same way as they apply to proceedings commenced on or after the commencement.
- (2) The Court may in such proceedings make such orders dispensing with the requirements of this Act or the rules in relation to the proceedings, and such consequential orders (including orders as to costs) and directions, as are appropriate in the circumstances.

#### **8 Wills deposited in registry of Court**

A will deposited in the registry of the Court under section 32 of the *Wills, Probate and Administration Act 1898*, as in force immediately before the repeal of that section by this Act, is taken to have been deposited with the Registrar under section 51 (Will may be deposited with Registrar).

## 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.

**Schedules 2, 3 (Repealed)**

## Historical notes

The following abbreviations are used in the Historical notes:

Am	amended	LW	legislation website	Sch	Schedule
Cl	clause	No	number	Schs	Schedules
ClI	clauses	p	page	Sec	section
Div	Division	pp	pages	Secs	sections
Divs	Divisions	Reg	Regulation	Subdiv	Subdivision
GG	Government Gazette	Regs	Regulations	Subdivs	Subdivisions
Ins	inserted	Rep	repealed	Subst	substituted

## Table of amending instruments

Succession Act 2006 No 80. Second reading speech made: Legislative Assembly, 19.9.2006; Legislative Council, 18.10.2006. Assented to 27.10.2006. Date of commencement, 1.3.2008, sec 2 and GG No 16 of 15.2.2008, p 707. This Act has been amended as follows:

- 2007** No 82 Statute Law (Miscellaneous Provisions) Act (No 2) 2007. Assented to 7.12.2007.  
Date of commencement of Sch 1, assent, sec 2 (2).
- 2008** No 75 Succession Amendment (Family Provision) Act 2008. Assented to 28.10.2008.  
Date of commencement of Sch 1, 1.3.2009, sec 2 (1) and GG No 38 of 20.2.2009, p 1036. The amendments made by Sch 1 [14] and [18] were without effect as the provisions being amended were repealed by the Statute Law (Miscellaneous Provisions) Act (No 2) 2008 No 114.
- No 114 Statute Law (Miscellaneous Provisions) Act (No 2) 2008. Assented to 10.12.2008.  
Date of commencement of Sch 4, assent, sec 2 (1).
- 2009** No 29 Succession Amendment (Intestacy) Act 2009. Assented to 9.6.2009.  
Date of commencement, 1.3.2010, sec 2 and 2010 (55) LW 26.2.2010.
- No 49 NSW Trustee and Guardian Act 2009. Assented to 26.6.2009.  
Date of commencement, 1.7.2009, sec 2 and 2009 (305) LW 1.7.2009.
- 2010** No 19 Relationships Register Act 2010. Assented to 19.5.2010.  
Date of commencement of Sch 3, assent, sec 2 (2).
- No 102 Surrogacy Act 2010. Assented to 16.11.2010.  
Date of commencement, 1.3.2011, sec 2 and 2011 (49) LW 11.2.2011.
- 2011** No 27 Statute Law (Miscellaneous Provisions) Act 2011. Assented to 27.6.2011.  
Date of commencement of Sch 2.54, 8.7.2011, sec 2 (2).

## Table of amendments

Long title	Am 2008 No 75, Sch 1 [1]; 2009 No 29, Sch 1 [1].
Sec 3	Am 2008 No 75, Sch 1 [2]–[5]; 2009 No 29, Sch 1 [2] [3]; 2010 No 19, Sch 3.105 [1].
Sec 6	Am 2007 No 82, Sch 1.23 [1].
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Chapter 3	Ins 2008 No 75, Sch 1 [10].
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Sec 55	Ins 2008 No 75, Sch 1 [10]. Am 2009 No 49, Sch 2.57 [3]–[5].
Sec 56	Ins 2008 No 75, Sch 1 [10].
Chapter 3, Part 3.2	Ins 2008 No 75, Sch 1 [10].
Chapter 3, Part 3.2, Div 1	Ins 2008 No 75, Sch 1 [10].
Sec 57	Ins 2008 No 75, Sch 1 [10]. Am 2010 No 19, Sch 3.105 [3]–[5].
Sec 58	Ins 2008 No 75, Sch 1 [10].
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Chapter 3, Part 3.3, Divs 1–3 (secs 74–90)	Ins 2008 No 75, Sch 1 [10].
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Secs 91, 92	Ins 2008 No 75, Sch 1 [10].
Sec 93	Ins 2008 No 75, Sch 1 [10]. Am 2011 No 27, Sch 2.54.
Secs 94–100	Ins 2008 No 75, Sch 1 [10].
Chapter 4, Part 4.1	Ins 2009 No 29, Sch 1 [4].
Secs 101–104	Ins 2009 No 29, Sch 1 [4].
Sec 105 (previously sec 59)	Rep 2008 No 114, Sch 4. See also renumbering by 2008 No 75, Sch 1 [10]. Ins 2009 No 29, Sch 1 [4]. Am 2010 No 19, Sch 3.105 [6].
Secs 106–109	Ins 2009 No 29, Sch 1 [4].
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Chapter 5 (previously Chapter 4 (previously Chapter 3))	Renumbered 2008 No 75, Sch 1 [10]; 2009 No 29, Sch 1 [4].
Sec 141 (previously sec 101 (previously sec 55))	Renumbered 2008 No 75, Sch 1 [10]; 2009 No 29, Sch 1 [4].
Sec 142 (previously sec 102 (previously sec 56))	Renumbered 2008 No 75, Sch 1 [10]. Am 2008 No 75, Sch 1 [11]–[13]. Renumbered 2009 No 29, Sch 1 [4]. Am 2009 No 29, Sch 1 [5].
Secs 143, 144 (previously secs 103, 104 (previously secs 57, 58))	Renumbered 2008 No 75, Sch 1 [10]; 2009 No 29, Sch 1 [4].
Sec 145 (previously sec 106 (previously sec 60))	Renumbered 2008 No 75, Sch 1 [10]; 2009 No 29, Sch 1 [4].
Sch 1	Am 2007 No 82, Sch 1.23 [15]–[17]; 2008 No 75, Sch 1 [15]–[17]; 2009 No 29, Sch 1 [6]–[10].
Sch 2	Am 2007 No 82, Sch 1.23 [18]–[21]. Rep 2008 No 114, Sch 4.
Sch 3	Am 2007 No 82, Sch 1.23 [22] [23]. Rep 2008 No 114, Sch 4.