



Succession Act 1981

Reprinted as in force on 30 January 2012

Reprint No. 7A

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This Act is reprinted as at 30 January 2012. The reprint shows the law as amended by all amendments that commenced on or before that day (Reprints Act 1992 s 5(c)).

The reprint includes a reference to the law by which each amendment was made—see list of legislation and list of annotations in endnotes. Also see list of legislation for any uncommenced amendments.

This page is specific to this reprint. See previous reprints for information about earlier changes made under the Reprints Act 1992. A table of reprints is included in the endnotes.

Also see endnotes for information about—

- **when provisions commenced**
- **editorial changes made in earlier reprints.**

Spelling

The spelling of certain words or phrases may be inconsistent in this reprint or with other reprints because of changes made in various editions of the Macquarie Dictionary (for example, in the dictionary, ‘lodgement’ has replaced ‘lodgment’). Variations of spelling will be updated in the next authorised reprint.

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Queensland

Succession Act 1981

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Succession Act 1981

[as amended by all amendments that commenced on or before 30 January 2012]

An Act to consolidate and amend the law of succession and the administration of estates of deceased persons and for related purposes

Part 1 Preliminary

1 Short title

This Act may be cited as the *Succession Act 1981*.

4 Application

- (1) Save where otherwise expressly provided, this Act applies in the case of deaths occurring after the commencement of this Act.
- (2) This Act binds the Crown not only in right of the State but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

5 Definitions

In this Act—

adopted child means, in relation to any person, a child that is adopted by such person or by such person and another person jointly, in accordance with the law of the State or Territory, or country, where the adoption takes place, as in force at the date of the adoption.

annulment see section 15.

[s 5]

country means any place or group of places having its own law of nationality, including Australia and its Territories.

court means the Supreme Court or a judge thereof.

debts include funeral, testamentary and administration expenses, debts and other liabilities payable out of the estate of a deceased person.

disposition means a disposition by will and includes the following—

- (a) a gift, devise or bequest of property by 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.

divorce see section 15.

document—

- (a) for part 2, other than section 18, means any paper or material on which there is writing; or
- (b) for section 18, see the *Acts Interpretation Act 1954*, section 36.

grant means grant of probate of the will or letters of administration of the estate of a deceased person and includes the grant of an order to administer and the filing of an election to administer such an estate.

income includes rents and profits.

internal law, for part 2, in relation to a place, means the law that would apply if no question of the law in force in any other place arose.

interpret means to render orally into another language one person's words for other persons at the time the words are uttered or immediately thereafter.

intestate means a person who dies and either does not leave a will, or leaves a will but does not dispose effectively by will of the whole or part of his or her property.

pecuniary legacy includes an annuity, a general legacy, a demonstrative legacy, so far as it is not discharged out of the designated property, and any other general direction by the testator for the payment of money including all duties relating to the estate or property of a deceased person free from which any devise, bequest or payment is made to take effect.

personal representative means the executor, original or by representation, or administrator of a deceased person.

public trustee means the public trustee constituted by the *Public Trustee Act 1978*.

registrar, for part 2, means a registrar or deputy registrar of the Supreme Court.

residuary estate in part 3 has the meaning given to it by section 34 and in part 5, division 2, the meaning given to it by section 55.

spouse see section 5AA.

stepchild for part 4, see section 40A.

translate means to render in writing or by any other means of record a text from one language to another language.

trustee includes—

- (a) any person who immediately before 1 July 1973, was a trustee of the settlement or in any way a trustee under the *Settled Land Act 1886* and who, if that Act had not been repealed, would be such a trustee; and
- (b) a statutory trustee within the meaning of the *Trusts Act 1973*.

will includes a codicil and any other testamentary disposition.

5AA Who is a person's spouse

- (1) Generally, a person's *spouse* is the person's—
 - (a) husband or wife; or
 - (b) de facto partner, as defined in the *Acts Interpretation Act 1954* (the *AIA*), section 32DA.

[s 5A]

- (2) However, a person is a *spouse* of a deceased person only if, on the deceased's death—
- (a) the person was the deceased's husband or wife; or
 - (b) the following applied to the person—
 - (i) the person was the deceased's de facto partner, as defined in the AIA, section 32DA;
 - (ii) the person and the deceased had lived together as a couple on a genuine domestic basis within the meaning of the AIA, section 32DA for a continuous period of at least 2 years ending on the deceased's death; or
 - (c) for part 4, the person was—
 - (i) a person mentioned in paragraph (a) or (b); or
 - (ii) the deceased's dependant former husband or wife.
- (3) Subsection (2) applies—
- (a) despite the AIA, section 32DA(6) and section 36, definition *spouse*; and
 - (b) whether the deceased died testate or intestate.
- (4) In this section—
- dependant former husband or wife***, of a deceased person, means a person who—
- (a) was divorced by or from the deceased at any time, whether before or after the commencement of this Act; and
 - (b) had not remarried before the deceased's death; and
 - (c) was on the deceased's death receiving, or entitled to receive, maintenance from the deceased.

5A Reference to child or issue of a person

A reference in this Act to a child or issue of any person includes a child or issue *en ventre sa mere* at the death,

provided such child or issue is born alive and remains alive for a period of 30 days.

5B Reference to estate of deceased person

A reference in this Act to the estate of a deceased person includes property over which the deceased exercises or is entitled to exercise a general power of appointment by will.

5C Notes in text

A note in the text of this Act is part of the Act.

6 Jurisdiction

- (1) Subject to this Act, the court has jurisdiction in every respect as may be convenient to grant and revoke probate of the will or letters of administration of the estate of any deceased person, to hear and determine all testamentary matters and to hear and determine all matters relating to the estate and the administration of the estate of any deceased person; and has jurisdiction to make all such declarations and to make and enforce all such orders as may be necessary or convenient in every such respect.
- (2) The court may in its discretion grant probate of the will or letters of administration of the estate of a deceased person notwithstanding that the deceased person left no estate in Queensland or elsewhere or that the person to whom the grant is made is not resident or domiciled in Queensland.
- (3) A grant may be made to such person and subject to such provisions, including conditions or limitations, as the court may think fit.
- (4) Without restricting the generality of subsections (1) to (3) the court has jurisdiction to make, for the more convenient administration of any property comprised in the estate of a deceased person, any order which it has jurisdiction to make in relation to the administration of trust property under the provisions of the *Trusts Act 1973*.

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- (5) This section applies whether the death has occurred before or after the commencement of this Act.

Part 2 Wills

Division 1 Application of part 2

7 Application of pt 2

Subject to section 76, this part applies only to a will of a person who dies after the commencement of this section.

Division 2 Making a will

8 Property that may be disposed of by will

- (1) A person may dispose by will of any 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 any property to which the person's personal representative becomes entitled, in the person's capacity as 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.

9 Minimum age for making a will

- (1) A will made by a minor is not valid.

- (2) However—
 - (a) a minor may make a will in contemplation of marriage, and may alter or revoke the 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 whose marriage has ended, whether by divorce, annulment or death of the minor's spouse, may revoke part or all of a will made—
 - (i) in contemplation of the marriage; or
 - (ii) while the person was married.
- (3) Subsection (1) does not apply to a will—
 - (a) made under an order made under section 19; or
 - (b) mentioned in section 33X.

10 How a will must be executed

- (1) This section sets out the way a will must be executed.
- (2) A will must be—
 - (a) in writing; and
 - (b) signed by—
 - (i) the testator; or
 - (ii) someone else, in the presence of and at the direction of the testator.
- (3) The signature must be made or acknowledged by the testator in the presence of 2 or more witnesses present at the same time.
- (4) At least 2 of the witnesses must attest and sign the will in the presence of the testator, but not necessarily in the presence of each other.

[s 11]

- (5) However, none of the witnesses need to know that the document attested and signed is a will.
- (6) The signatures need not be at the foot of the will.
- (7) The signature of the testator must be made with the intention of executing the will.
- (8) The signature of a person, other than the testator, made in the presence of and at the direction of the testator must be made with the intention of executing the will.
- (9) A will need not have an attestation clause.
- (10) A person who can not see and attest that a testator has signed a document may not act as a witness to a will.
- (11) If a testator purports to make an appointment by will in the exercise of a power of appointment by will, the appointment is not valid unless the will is executed under this section.
- (12) If a power is conferred on a person to make an appointment by will and the appointment must be executed in a particular way or with a particular solemnity, the person may make the appointment by a will that is executed under this section but is not executed in the particular way or with the particular solemnity.
- (13) This section does not apply to a will made under an order under section 21.

11 When an interested witness may benefit from a disposition

- (1) This section applies if a disposition of property is made by a will to a person (the *interested witness*) who attests the execution of the will.
- (2) The disposition is void to the extent it concerns the interested witness or a person claiming under the interested witness.
- (3) However, subsection (2) does not apply 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 the consent; or
 - (c) the court is satisfied that the testator knew and approved of the disposition and it was made freely and voluntarily by the testator.
- (4) In this section—
- disposition of property* does not include a charge or direction for the payment of—
- (a) a debt; or
 - (b) appropriate remuneration to an executor, administrator, legal practitioner or other person for acting in relation to the administration of the testator's estate.

12 When an interpreter may benefit from a disposition

- (1) This section applies if—
 - (a) for the purposes of making a will the services of a person (an *interpreter*) are used to interpret or translate from or to a language understood by the testator; and
 - (b) a disposition of property is made by the will to the interpreter.
- (2) The disposition is void to the extent it concerns the interpreter or a person claiming under the interpreter.
- (3) However, subsection (2) does not apply if—
 - (a) 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 the consent; or
 - (b) the court is satisfied that the testator knew and approved of the disposition and it was made freely and voluntarily by the testator.
- (4) In this section—

disposition of property does not include a charge or direction for the payment of appropriate remuneration for being an interpreter for the testator in relation to the will.

Division 3 Revoking, altering or reviving a will

13 How a will may be revoked

A will or part of a will may be revoked only—

- (a) under section 14 or 15; or
- (b) by a will or other instrument made under an order under section 19 or 21; or
- (c) by a later will; or
- (d) by a document that—
 - (i) declares an intention to revoke the will or part; and
 - (ii) is executed in the way in which a will is required to be executed under this part; or
- (e) by the testator, or someone in the testator's presence and at the testator's direction—
 - (i) burning, tearing or otherwise destroying the will with the intention of the testator to revoke it; or
 - (ii) writing on the will, or dealing with the will, in a way that satisfies the court, from the state of the will, that the testator intended to revoke it.

14 Effect of marriage on a will

- (1) A will is revoked by the marriage of the testator.

Note—

For wills made before the commencement of section 7 as inserted by the *Succession Amendment Act 2006*, see section 76(2) and (3).

- (2) However, 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 the testator's death;
 - (b) an appointment as executor, trustee, advisory trustee or guardian of the person to whom the testator is married at the time of the testator's death;
 - (c) a will, to the extent it exercises a power of appointment, if the property in relation to which the appointment is exercised would not pass to an executor under any other will of the testator or to an administrator of any estate of the testator if the power of appointment were not exercised.
- (3) Also—
- (a) a will made in contemplation of a marriage, whether or not that contemplation is stated in the will, is not revoked by the solemnisation of the marriage contemplated; and
 - (b) a will that is stated to be made in contemplation of marriage generally is not revoked by the solemnisation of a marriage of the testator.

15 Effect of divorce or annulment on a will

- (1) A testator's divorce or the annulment of a testator's marriage revokes—
- (a) a disposition to the testator's former spouse made by a will in existence when the divorce or annulment happens; and
 - (b) an appointment, made by the will, of the former spouse as an executor, trustee, advisory trustee or guardian; and
 - (c) any grant, made by the will, of a power of appointment exercisable by, or in favour of, the testator's former spouse.

Note—

For wills made before the commencement of section 7 as inserted by the *Succession Amendment Act 2006*, see section 76(4) and (5).

- (2) However, a testator's divorce or the annulment of a testator's 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 only in favour of children of whom both the testator and the former spouse are parents.
- (3) Subsection (1) does not apply if a contrary intention appears in the will.
- (4) If a disposition, appointment or grant is revoked by this section, the will takes effect as if the former spouse had died before the testator.

- (5) In this section—

annulment, in relation to a testator, means—

- (a) the granting of a decree of nullity in relation to the testator's marriage by the Family Court of Australia; or
- (b) the annulment of the testator's marriage under the law of a place outside Australia, if the annulment is recognised in Australia under the *Family Law Act 1975* (Cwlth).

divorce, in relation to a testator, means—

- (a) the taking effect of a divorce order for the testator under the *Family Law Act 1975* (Cwlth); or
- (b) the dissolution of the testator's marriage under the law of a place outside Australia, if the dissolution is recognised in Australia under the *Family Law Act 1975* (Cwlth).

former spouse, in relation to a testator, means the person who was the spouse of the testator immediately before the divorce or annulment.

spouse includes a party to a purported or void marriage.

16 How a will may be altered

- (1) An alteration to a will after it has been executed is not effective unless the alteration—
 - (a) is executed in the way a will is required to be executed under this part; or
 - (b) is authorised by an order under section 19 and is executed under section 20; or
 - (c) is authorised by an order under section 21 and is executed under section 26.
- (2) Subsection (1) does not apply to an alteration to a will made by, or at the direction of, the testator 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 under this section for execution of the alteration, if the signature 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.

17 How a revoked will may be revived

- (1) A will or part of a will that has been revoked is revived by re-execution or by execution of a will that shows 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 the part of the will most recently revoked.
- (3) Subsection (2) does not apply if a contrary intention appears in the document that revives the will.
- (4) A will that has been revoked and is later entirely or partly revived is taken to have been executed on the day on which the will is revived.

Division 4 Powers of court

Subdivision 1 Execution requirements

18 Court may dispense with execution requirements for will, alteration or revocation

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

Subdivision 2 Minors

19 Court may authorise minor to make, alter or revoke a will

- (1) The court may make an order authorising a minor to—

-
- (a) make or alter a will in the terms stated by the court; or
 - (b) revoke a will or part of a will.
- (2) A minor, or a person on behalf of a minor, may apply for an order under subsection (1).
- (3) The court may make the order only if the court—
- (a) is satisfied that the minor understands the nature and effect of the proposed will, alteration or revocation and the extent of any property disposed of under the proposed will or alteration; and
 - (b) is satisfied that the proposed will, alteration or revocation accurately reflects the intentions of the minor; and
 - (c) is satisfied that it is reasonable in all the circumstances that the order be made; and
 - (d) has approved the proposed will, alteration or revocation.
- (4) The court may make the order on the conditions it considers appropriate.
- (5) To remove any doubt, it is declared that an order under this section does not make, alter or revoke a will or dispose of any property.

20 Execution of will or other instrument made under order

A will or other instrument made under an order under section 19 is not valid unless the following requirements are satisfied—

- (a) for a will—the will is executed under this part;
- (b) for another instrument—the other instrument is executed in the way a will is required to be executed under this part;
- (c) 1 of the witnesses attesting the will or other instrument is the registrar;
- (d) the conditions of the order, if any, are complied with.

Note—

For the holding of the will or other instrument by the registrar, see subdivision 4.

Subdivision 3 Persons without testamentary capacity

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

- (1) The court may, on application, make an order authorising—
 - (a) a will to be made or altered, in the terms stated by the court, on behalf of a person without testamentary capacity; or
 - (b) a will or part of a will to be revoked on behalf of a person without testamentary capacity.
- (2) The court may make the order only if—
 - (a) the person in relation to whom the order is sought lacks testamentary capacity; and
 - (b) the person is alive when the order is made; and
 - (c) the court has approved the proposed will, alteration or revocation.
- (3) For the order, the court may make or give any necessary related orders or directions.
- (4) The court may make the order on the conditions the court considers appropriate.
- (5) The court may order that costs in relation to either or both of the following be paid out of the person's assets—
 - (a) an application for an order under this section;
 - (b) an application for leave under section 22.
- (6) To remove any doubt, it is declared that an order under this section does not make, alter or revoke a will or dispose of any property.

- (7) In this section—
person without testamentary capacity includes a minor.

22 Leave to apply for s 21 order

- (1) A person may apply for an order under section 21 only with the court's leave.
- (2) The court may give leave on the conditions the court considers appropriate.
- (3) The court may hear an application for an order under section 21 with or immediately after the application for leave to make the application.

23 Information required by court in support of application for leave

On the hearing of an application for leave under section 22, the applicant must give the court the following information, unless the court directs otherwise—

- (a) a written statement of the general nature of the application to be made by the applicant under section 21 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 21 is sought;
- (c) any evidence available to the applicant, or that can be discovered with reasonable diligence, of the likelihood of the person acquiring or regaining testamentary capacity;
- (d) a reasonable estimate, formed from the evidence available to the applicant, of the size and character of the person's estate;
- (e) a draft of the proposed will, alteration or revocation in relation to which the order is sought;

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- (f) any evidence available to the applicant of the person's wishes;
- (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 of the likelihood of an application being made under section 41 in relation to the person;
- (i) any evidence available to the applicant of a gift for a charitable or other purpose that the person might reasonably be expected to give by will;
- (j) any evidence available to the applicant, or that can be discovered with reasonable diligence, of the circumstances of a person for whom provision might reasonably be expected to be made by a will by the person in relation to whom the order is sought;
- (k) any evidence available to the applicant, or that can be discovered with reasonable diligence, of any persons who might be entitled to claim on intestacy;
- (l) any other facts of which the applicant is aware that are relevant to the application.

24 Matters court must be satisfied of before giving leave

A court may give leave under section 22 only if the court is satisfied of the following matters—

- (a) the applicant for leave is an appropriate person to make the application;
- (b) adequate steps have been taken to allow representation of all persons with a proper 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 an order under section 21 is sought;
- (c) there are reasonable grounds for believing that the person does not have testamentary capacity;

- (d) the proposed will, alteration or revocation is or may be a will, alteration or revocation that the person would make if the person were to have testamentary capacity;
- (e) it is or may be appropriate for an order to be made under section 21 in relation to the person.

25 Hearing an application for leave or for an order

On the hearing of an application for leave under section 22 or for an order under section 21, the court—

- (a) may have regard to any information given to the court under section 23; and
- (b) may inform itself of any other matter relating to the application in any way it considers appropriate; and
- (c) is not bound by the rules of evidence.

26 Execution of will or other instrument made under order

- (1) A will or other instrument made under an order under section 21 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 or other instrument made under an order under section 21 may only be signed by the registrar if the person in relation to whom the order was made is alive.

Note—

For the holding of the will or other instrument by the registrar, see subdivision 4.

27 Validity of will or other instrument made under order

- (1) A will made under an order under section 21 has the same effect for all purposes as if—

[s 28]

- (a) the person without testamentary capacity were capable of making a valid will; and
 - (b) the person executed the will under section 10.
- (2) An instrument, revoking a will or part of a will, made under an order under section 21 has the same effect for all purposes as if—
- (a) the person were capable of validly revoking a will or part of a will; and
 - (b) the person executed the instrument under section 13(d)(ii).
- (3) An instrument, altering a will, made under an order under section 21 has the same effect for all purposes as if—
- (a) the person were capable of making a valid alteration of a will; and
 - (b) the person executed the instrument under section 16(1)(a).

28 Relationship with Guardianship and Administration Act 2000 and Powers of Attorney Act 1998

Nothing in the *Guardianship and Administration Act 2000* or the *Powers of Attorney Act 1998* prevents a person from making an application for an order under section 21 or for leave under section 22.

Subdivision 4 Particular wills held by registrar

29 Registrar to hold will or other instrument made under order under s 19

- (1) A will or other instrument made under an order under section 19 must be held by the registrar.
- (2) The registrar may stop holding the will or other instrument only if—

- (a) the testator is at least 18 years and has testamentary capacity; or
 - (b) the court makes an order—
 - (i) under section 19 authorising the minor to revoke the will; or
 - (ii) under section 21 authorising the will to be revoked; or
 - (c) the will or other instrument is given to a person under section 32.
- (3) A failure to comply with subsection (1) or (2) does not affect the validity of the will or other instrument.

30 Registrar to hold will or other instrument made under order under s 21

- (1) A will or other instrument made under an order under section 21 must be held by the registrar.
- (2) The registrar may stop holding the will or other instrument only if—
 - (a) the person on whose behalf the will or other instrument has been made (the *relevant person*) has acquired or regained testamentary capacity; or
 - (b) the court makes an order—
 - (i) under section 19 authorising the relevant person to revoke the will; or
 - (ii) under section 21 authorising the will to be revoked; or
 - (c) the will or other instrument is given to a person under section 32.
- (3) A failure to comply with subsection (1) or (2) does not affect the validity of the will or other instrument.

[s 31]

31 Envelope required for will held by registrar

- (1) A will or other instrument held by the registrar under section 29 or 30 must be in a sealed envelope that has written on it—
 - (a) the name and address of the minor or other person without testamentary capacity as they appear on the will or other instrument; and
 - (b) the name and address, as they appear on the will, of any executor; and
 - (c) the date of the will or other instrument; and
 - (d) for a will or other instrument held under section 30—the name of the person who applied for the order under section 21.
- (2) The registrar may examine the will or other instrument to enable the registrar to comply with this subdivision.

32 Delivery of will or other instrument if testator has died

- (1) This section applies if—
 - (a) a will or other instrument is held by the registrar under section 29 or 30; and
 - (b) the minor or other person without testamentary capacity has died.
- (2) An executor named in the will, an executor by representation or a person entitled to apply for letters of administration with the will, may apply in writing to the registrar to be given the will or other instrument.
- (3) On receiving the application, the registrar must give the will or other instrument to—
 - (a) the applicant; or
 - (b) any legal practitioner or trustee company nominated by the applicant; or
 - (c) the public trustee, if nominated by the applicant.

-
- (4) If there is doubt about the person to whom the will or other instrument should be given, the registrar or anyone else may apply to the court for directions.
 - (5) The registrar must make an accurate copy of each will or other instrument given to a person under subsection (3) and hold the copy.
 - (6) In this section—
trustee company see the *Trustee Companies Act 1968*, section 4.

Subdivision 5 Rectification

33 Court may rectify a will

- (1) The court may make an order to rectify a will to carry out the intentions of the testator if the court is satisfied that 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) An application for an order to rectify a will may only be made within 6 months after the date of death of the testator.
- (3) However, the court may, at any time, extend the time for making an application under subsection (2) if—
 - (a) the court considers it appropriate; and
 - (b) the final distribution of the estate has not been made.
- (4) If the court makes an order to rectify a will, the court may direct that a certified copy of the order be attached to the will.
- (5) If the court gives a direction under subsection (4), the court must hold the will until the certified copy is attached to it.

33A Protection of personal representatives who distribute as if the will had not been rectified

- (1) This section applies if—
 - (a) a will is rectified under section 33; and
 - (b) a personal representative makes a distribution to a beneficiary as if the will had not been rectified.
- (2) The personal representative is not liable if the distribution is made under section 49A.
- (3) The personal representative is also not liable if the distribution is made not earlier than 6 months after the testator's death and without notice of either of the following—
 - (a) an application, or intended application, for an order to rectify the will;
 - (b) an application, or intended application, under section 41(1) or 42 in relation to the testator.
- (4) If the personal representative receives notice of an application or intended application mentioned in subsection (3) (a ***relevant application***), the personal representative is not liable if—
 - (a) the distribution is made not earlier than 9 months after the testator's death; and
 - (b) the personal representative has not—
 - (i) received notice that a relevant application has been started in the court; or
 - (ii) been served with a copy of a relevant application.
- (5) For subsections (3) and (4), a notice in relation to an application or intended application must be in writing signed by the applicant or the applicant's legal practitioner.

Division 5 Interpretation of wills

33B Beneficiaries must survive testator for 30 days

- (1) If a disposition of property is made to a person who dies within 30 days after the testator's death, the will takes effect as if the person had died immediately before the testator.
- (2) Subsection (1) does not apply if a contrary intention appears in the will.
- (3) A general requirement or condition that a beneficiary survive the testator is not a contrary intention.

33C Use of evidence to interpret a will

- (1) In a proceeding to interpret a will, evidence, including evidence of the testator's intention, is admissible to help in the interpretation of the language used in the will if the language makes the will or part of it—
 - (a) meaningless; or
 - (b) ambiguous on the face of the will; or
 - (c) ambiguous in the light of surrounding circumstances.
- (2) However, evidence of the testator's intention is not admissible to establish any of the circumstances mentioned in subsection (1)(c).
- (3) This section does not prevent the admission of evidence that would otherwise be admissible in a proceeding to interpret a will.

33D Effect of a change in testator's domicile

The interpretation of a will is not changed by a change in the testator's domicile after the testator has executed the will.

[s 33E]

33E When a will takes effect

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

33F Will operates to dispose of remaining interest in property if part interest disposed of before death

- (1) This section applies if—
 - (a) a testator has made a will disposing of property; and
 - (b) after the making of the will and before the testator's death, the testator disposes of an interest in the property.
- (2) The will operates to dispose of any remaining interest the testator has in the property.

33G Effect of a failure of a disposition of property

- (1) If a disposition of property by a will is fully or partly ineffective, the will takes effect as if the property were part of the residuary estate of the testator.
- (2) Subsection (1) 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.

33H Income of contingent, future or deferred disposition of property

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 the will.

33I What a general disposition of land includes

- (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) Subsection (1) does not apply if a contrary intention appears in the will.

33J What a general disposition of property includes

- (1) A general disposition of all of the testator's property—
 - (a) includes any property over which the testator has a general power of appointment exercisable by will; and
 - (b) operates as an exercise of the power of appointment.
- (2) A general disposition of all of the testator's property of a particular description—
 - (a) includes any property of that description over which the testator has a general power of appointment exercisable by will; and
 - (b) operates as an exercise of the power of appointment.
- (3) A general disposition of the residue of the testator's property—
 - (a) includes any property over which the testator has a general power of appointment exercisable by will; and
 - (b) operates as an exercise of the power of appointment.
- (4) A general disposition of the residue of the testator's property of a particular description—
 - (a) includes any property of that description over which the testator has a general power of appointment exercisable by will; and
 - (b) operates as an exercise of the power of appointment.
- (5) Subsection (1), (2), (3) or (4) does not apply if a contrary intention appears in the will.

[s 33K]

33K Effect of a disposition of real property without words of limitation

- (1) A disposition of real property to a person without words of limitation passes the whole estate or interest of the testator in the property to the person.
- (2) Subsection (1) does not apply if a contrary intention appears in the will.

33L How dispositions of property to issue operate

- (1) A disposition of property to a person's issue, without limitation as to remoteness, must be distributed to the person's issue in the same way as the person's estate would be distributed if the person had died intestate leaving only issue surviving.
- (2) Subsection (1) does not apply if a contrary intention appears in the will.

33M How requirements to survive with issue are interpreted

- (1) This section applies if there is a disposition of property to a person that, apart from this section, would be interpreted to mean that the disposition fails if there is an indefinite failure of issue of the person.
- (2) The disposition must be interpreted to mean that the disposition fails if there is a want or a failure of issue of the person either in the person's lifetime or at the person's death.
- (3) This section does not apply if a contrary intention appears in the will, other than if the result would be to cause a failure of the disposition.

33N Dispositions not to fail because issue have died before testator

- (1) This section applies if—

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- (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 (an *original beneficiary*); and
 - (b) under the will, the interest of the original beneficiary in the property does not come to an end at 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.
- (2) The issue of the original beneficiary who survive the testator for 30 days 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) the original beneficiary did not fulfil a condition imposed on the original beneficiary in the will; or
 - (b) a contrary intention appears in the will.
- (4) A general requirement or condition that issue survive the testator or reach a specified age does not show a contrary intention for subsection (3)(b).
- (5) A disposition of property to issue as joint tenants does not, of itself, show a contrary intention for subsection (3)(b).

330 Disposition of real estate or personal estate may include both in particular case

- (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, must be interpreted as referring to both the real and personal estate of the testator.
- (2) Subsection (1) does not apply if a contrary intention appears in the will.

[s 33P]

33P Disposition of fractional part in particular case

- (1) 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 1 part that does not fail, to all those parts proportionately.
- (2) Subsection (1) does not apply if a contrary intention appears in the will.

33Q 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 the personal representative pays an amount to an unincorporated association under a disposition, the receipt of the treasurer or a similar officer of the association (however described) is an absolute discharge for the payment.
- (4) If the personal representative transfers property to an unincorporated association under a disposition, the transfer of

the property to a person nominated in writing by any 2 persons holding the offices of president, chairperson, treasurer or secretary of the association, or similar 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—
 - (a) limit the way an absolute discharge may otherwise be obtained in accordance with the will; or
 - (b) 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 can not be compiled; or
 - (b) the members of the association may not divide assets of the association beneficially among themselves.

33R When a person may delegate power to dispose of property by a will

A power or a trust, created by will, to dispose of property 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, in the testator's lifetime.

33S Effect of reference to valuation in 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 a method of valuation; or
 - (ii) the method of valuation is not provided for by the law of Queensland or another place.

[s 33T]

- (2) The reference in the will to the valuation must be interpreted, 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 as 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.

Division 6 Wills with a foreign connection

33T Wills that are taken to be properly executed

- (1) A will is taken to be properly executed if its execution is in accordance with the internal law in force in the place—
 - (a) where it was 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 and in accordance with the internal law in force in the place with which the vessel or aircraft was most closely connected having regard to its registration and other relevant circumstances;
 - (b) a will, to the extent it disposes of immovable property, executed in accordance with the internal law in force in the place where the property is situated;
 - (c) a will, to the extent it exercises a power of appointment, executed in accordance with the law governing the essential validity of the power;
 - (d) a will to the extent it revokes—

-
- (i) a will, or a provision of a will, that has been executed under this part; or
 - (ii) a will, or a provision of a will, that is taken by this section to be properly executed;
if the later will has been executed in accordance with a law under which the earlier will or provision would be taken to be validly executed.
- (3) A will to which this section applies is not improperly executed to the extent it exercises a power of appointment only because it has not been executed in the particular way or with the particular solemnity required by the instrument creating the power.

Example of subsection (3)—

A will to which this section applies exercises a power of appointment. The instrument creating the power requires the instrument exercising the power to be witnessed by a notary public. The will, to the extent it exercises the power, is not improperly executed only because the will is not witnessed by a notary public.

33U Deciding system of law to apply if more than 1 system of internal law

- (1) This section applies if—
 - (a) the internal law of a place must be applied under section 33T; and
 - (b) there is more than 1 system of internal law, in force in the place, relating to the formal validity of wills.
- (2) The system of internal law to be applied under section 33T is decided as follows—
 - (a) if there is a rule in force throughout the place that states which system applies to the will, the rule must be followed;
 - (b) otherwise, the system is that with which the testator was most closely connected—

[s 33V]

- (i) if the matter is to be decided by reference to circumstances prevailing at the testator's death—at the time of the testator's death; or
- (ii) otherwise—at the time the will was executed.

33V Formal requirements at time of execution apply

- (1) In deciding, for the purpose of section 33T, whether a will has been executed in accordance with a particular law, regard must be had to the formal requirements of the particular law at the time the will was executed.
- (2) However, regard may be had to a later change of the particular law affecting wills executed at the time the relevant will was executed, if the change enables the relevant will to be treated as properly executed.

33W Matters that are taken to be formal requirements

- (1) This section applies if a particular law of a place outside Queensland is to be applied to a will, whether or not for the purpose of section 33T.
- (2) The following requirements of the particular law are taken to be formal requirements only—
 - (a) a requirement that special formalities be complied with by particular testators;
 - (b) a requirement that the witnesses to the execution of a will have particular qualifications.
- (3) Subsection (2) applies despite any contrary rule of the particular law.

33X Will by minor made 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—

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- (a) a court, in a place outside Queensland, made an order authorising a minor to make the will; and
 - (b) the will is 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.

33Y Recognition of statutory wills made by non-Queensland resident

- (1) A statutory will made under the law of the place outside Queensland where a deceased person was resident at the time the statutory will was executed is a valid will of the person.
- (2) In this section—

statutory will means a will executed in accordance with a statutory provision on behalf of a person who, at the time the will was executed, did not have testamentary capacity.

Division 7 Miscellaneous

33Z Persons entitled to inspect a will or to obtain a copy of a will

- (1) A person who has possession or control of a will of a deceased testator must, if asked, do either or both of the following—
 - (a) allow an entitled person to inspect the will;
 - (b) give an entitled person a certified copy of the will on payment of the person's reasonable expenses of giving the certified copy.
- (2) If a will of a deceased testator has been lost, stolen or destroyed, a person who has possession or control of a copy of the will must, if asked, do either or both of the following—
 - (a) allow an entitled person to inspect the copy;

[s 33Z]

- (b) give an entitled person a certified copy of the copy on payment of the person's reasonable expenses of giving the certified copy.
- (3) A person who has possession or control of a will, or a copy of a will, of a deceased person must produce it in court if the court requires it.

- (4) In this section—

certified copy—

- (a) of a will—means a copy of the will that has a statement on it, signed by the person giving the copy, that the copy is a true copy of the will; or
- (b) of a copy of a will—means a copy of the copy of the will that has a statement on it, signed by the person giving the copy, that the copy is a true copy of what it purports to be.

entitled person, in relation to a will, means—

- (a) a person mentioned in the will, whether as beneficiary or not and whether named or not; or
- (b) a person mentioned in any earlier will of the testator as a beneficiary and whether named or not; or
- (c) a spouse, parent or issue of the testator; or
- (d) a person who would be entitled to a share of the estate of the testator if the testator had died intestate; or
- (e) a parent or guardian of a minor mentioned in the will or who would be entitled to a share of the estate if the testator had died intestate; or
- (f) a creditor or other person who has a claim at law or in equity against the estate; or
- (g) a person who may apply for an order under section 41.

parent see section 61A.

will includes—

- (a) a purported will or revoked will; and
- (b) a part of a will, purported will or revoked will.

Part 3 Distribution on intestacy

Division 1 Interpretation

34 Interpretation

- (1) In this part—

building see section 34B(2).

household chattels see section 34A.

interest, in an intestate's shared home, see section 34B(3).

residuary estate in relation to an intestate means—

- (a) in the case of an intestate who leaves a will—the property of the intestate that is not effectively disposed of by the will; or
- (b) in any other case—the property of the intestate, which is available for distribution after payment thereout of all such debts as are properly payable thereout.

shared home see section 34B(1).

transfer value see section 34B(4).

- (2) For the purposes of this part, in ascertaining relationship it is immaterial whether the relationship is of the whole blood or of the half-blood.
- (3) The provisions of this part shall be subject to the provisions of an order made under and in accordance with the provisions of part 4 and shall be applied accordingly.

[s 34A]

34A Meaning of *household chattels*

- (1) ***Household chattels*** means all furniture, curtains, drapes, carpets, linen, china, glassware, ornaments, domestic appliances and utensils, garden appliances, utensils and effects and other chattels of ordinary household use or decoration, liquors, wines, consumable stores and domestic animals owned by the intestate immediately before the intestate's death.
- (2) ***Household chattels*** does not include a motor vehicle, boat, aircraft, racing animal, original painting or other original work of art, trophy, clothing, jewellery, or other chattel of a personal nature.
- (3) A thing is taken to be owned by the intestate even if—
 - (a) it is owned subject to a security interest under the *Personal Property Securities Act 2009* (Cwlth); or
 - (b) the intestate only held an interest in the thing as hirer under a hire purchase agreement within the meaning of the *Hire-purchase Act 1959*, section 2(1) or a corresponding provision of a law of another State or the Commonwealth.
- (4) This definition applies for the purposes of applying schedule 2 under this part.

34B Meaning of *shared home* and related definitions

- (1) A ***shared home*** means a building, or part of a building, designed to be used solely or principally as a separate residence for 1 family or person.
- (2) A ***building*** includes a caravan and a manufactured home.
- (3) An ***interest***, in an intestate's shared home, means—
 - (a) an interest registered or registrable under an Act that is or includes a shared home; or
 - (b) if the shared home is a caravan—an interest in the caravan; or

-
- (c) if the shared home is a manufactured home—an interest in the manufactured home and any interest in a site agreement for the site on which the manufactured home is positioned.
- (4) The **transfer value**, of an intestate's interest in a shared home, means the market value of the interest at the date of the intestate's death, less the amount (if any) needed to discharge any mortgage, charge, encumbrance or lien to which the interest may be subject at the time of transfer.
- (5) In this section—
- caravan** see the *Residential Tenancies and Rooming Accommodation Act 2008*, section 7.
- manufactured home** see the *Manufactured Homes (Residential Parks) Act 2003*, section 10.
- site** see the *Manufactured Homes (Residential Parks) Act 2003*, section 13.
- site agreement** see the *Manufactured Homes (Residential Parks) Act 2003*, section 14.

Division 2 Distribution rules

35 Distribution of residuary estate on intestacy

- (1) Subject to subsection (2) and division 3, the person or persons entitled to take an interest in the residuary estate of an intestate, and the interest in that estate which that person is or those persons are entitled to take shall be ascertained by reference to schedule 2 according to the facts and circumstances existing in relation to the intestate.
- (1A) For the purposes of this Act—
- (a) the brothers and sisters of the intestate; and
 - (b) the grandparents of the intestate; and
 - (c) the brothers and sisters of a parent of the intestate; and

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- (d) the children of any brothers or sisters of an intestate who predecease the intestate; and
 - (e) the children of any brothers or sisters of a parent of an intestate who predecease the intestate;
- are the next of kin of the intestate.
- (2) Where a person entitled to take any part of the residuary estate of an intestate under this part does not survive the intestate for a period of 30 days that part of the residuary estate shall be treated as if that person had died before the intestate.

36 Distribution of entitlement if more than 1 spouse

- (1) If more than 1 spouse of an intestate are entitled to the whole or a part of the intestate's residuary estate, the entitlement is to be distributed between them—
- (a) in accordance with a written agreement between the spouses about distributing the entitlement between them (a *distribution agreement*); or
 - (b) in accordance with an order made under this section distributing the entitlement between the spouses (a *distribution order*); or
 - (c) in equal shares as decided by the personal representative, if, at the time of distribution—
 - (i) the spouses have been given a notice under subsection (3) and 3 months have passed since the last of the notices was given; and
 - (ii) the personal representative has no notice of a distribution agreement; and
 - (iii) the personal representative—
 - (A) has no notice of an application for a distribution order; or
 - (B) has been notified in writing by the spouses that the personal representative may distribute their entitlement equally even

though an application for a distribution order has previously been made; or

- (C) has a copy of an order of the court striking out or discontinuing an application for a distribution order.
- (2) However, for a distribution under subsection (1)(c), if the intestate is survived by issue, the entitlement under schedule 2 to the \$150000 must be distributed in equal shares.
- (3) The personal representative may give the spouses a notice stating the personal representative may be entitled to distribute any entitlement of the spouses equally if they do not, within 3 months after the notice is given—
- (a) enter into a written agreement about distributing the entitlement between them and give the personal representative written notice of the agreement; or
- (b) apply to the court for an order distributing the entitlement between them and give the personal representative written notice of the application.
- (4) If any of the spouses asks the personal representative to give the notices that may be given under subsection (3), the personal representative must give the notices (including a notice to that person) as soon as practicable.
- (5) An intestate's spouse or personal representative may apply to the court for a distribution order.
- (6) However, an application for a distribution order may not be made if there is a distribution agreement or distribution of the entitlement has commenced under subsection (1)(c).
- (7) The court may order that the entitlement be distributed in the way it considers is just and equitable.
- (8) In deciding what is just and equitable, no assumption is to be made in favour of an equal distribution as a starting point or otherwise.
- (9) If the court considers it is just and equitable, it may order that an entitlement be distributed solely to 1 of the spouses.

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- (10) A distribution order may include conditions.
- (11) Nothing in this section requires a personal representative to distribute an entitlement at a time that would preclude the operation of section 44(3) in relation to the distribution.
- (12) To prevent any doubt, it is declared that the *Trusts Act 1973*, section 67(3) does not authorise a personal representative to distribute an entitlement of the spouses before the time the personal representative becomes entitled to distribute the entitlement under subsection (1).

36A Distribution of issue's entitlement

- (1) In this section—
survive means survive the intestate.
- (2) If an intestate's issue are entitled to the whole or a part of the intestate's residuary estate, the entitlement is to be distributed among the issue as set out in this section.
- (3) If the intestate had only 1 child and the child survived, the child takes.
- (4) If the intestate had 2 or more children, all of whom survived, the children take in equal shares.
- (5) If the intestate had 2 or more children, of whom some survived and the remainder did not survive and did not leave surviving issue, the surviving children take in equal shares.
- (6) If subsections (3) to (5) do not apply, the entitlement is divided into as many equal shares as the intestate had children who survived or who did not survive but left surviving issue.
- (7) The equal shares are then taken as follows—
 - (a) the intestate's surviving children (if any) take 1 share each;
 - (b) for each child of the intestate who did not survive but left surviving issue—1 share is taken by representation by the child's surviving issue.

37 Distribution of next of kin's entitlement

- (1) Where, by virtue of this Act, the next of kin of an intestate are entitled to the residuary estate of the intestate, the persons entitled to that residuary estate shall be ascertained in accordance with the following paragraphs—
 - (a) the brothers and sisters of the intestate who survived the intestate, and the children of a brother or sister of the intestate who died before the intestate, being children who survived the intestate, are entitled to the residuary estate of the intestate;
 - (b) if the intestate is not survived by any persons entitled to the residuary estate under paragraph (a) but is survived by 1 or more of his or her grandparents—the grandparent is entitled to the residuary estate of the intestate, or the grandparents are entitled to the residuary estate in equal shares, as the case requires;
 - (c) if the intestate is not survived by any persons entitled to the residuary estate under paragraphs (a) and (b)—the uncles and aunts of the intestate who survived the intestate and the children of an uncle or aunt who died before the intestate, being children who survived the intestate, are entitled to the residuary estate of the intestate.
- (2) The residuary estate of an intestate shall be divided amongst—
 - (a) the brothers and sisters of the intestate and the children of those brothers or sisters who died before the intestate, in the same manner as the residuary estate would have been divided amongst those persons, if the brothers and sisters had been children of the intestate and the children of a brother or sister who died before the intestate had been children of a child of the intestate who died before the intestate; or
 - (b) the uncles and aunts of the intestate and the children of those uncles or aunts who died before the intestate, in the same manner as the residuary estate would have been divided amongst those persons if the uncles and

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aunts had been children of the intestate and the children of an uncle or aunt who died before the intestate had been children of a child of the intestate who died before the intestate.

- (3) However, the said residuary estate of the intestate shall not be divided amongst the issue of a brother or sister or of an uncle or aunt who died before the intestate more remote than the children of any such brother or sister, uncle or aunt.

38 Partial intestacies

The executor of the will of an intestate shall hold, subject to the executor's rights and powers for the purposes of administration, the residuary estate of an intestate on trust for the persons entitled to it.

39 Construction of documents—references to statutes of distribution—meaning of 'heir'

References to any statutes of distribution in an instrument inter vivos made or in a will coming into operation after the commencement of this Act shall be construed as references to this part; and references in such an instrument or will to an heir or heir at law or next of kin of a person shall be construed, unless the context otherwise requires, as referring to the persons who would take beneficially on the intestacy of that person under the provisions of this part.

Division 3 Provisions about shared home

39A Election by spouse to acquire shared home

- (1) This section applies if—
- (a) an intestate has an interest in a shared home that is not effectively disposed of by a will (whether or not the intestate leaves a will); and

-
- (b) at the time of the intestate's death, the intestate's spouse (the *resident*) ordinarily resided in the shared home.
- (2) Subject to section 39B, the resident may, by written notice, elect to acquire the intestate's interest in the shared home at transfer value.
- (3) The election must be made—
- (a) if the resident is a personal representative—within 3 months after the resident's appointment as personal representative; or
- (b) if the resident is not a personal representative—within 3 months after the personal representative gives the resident a written notice stating that—
- (i) if the resident wants to acquire the intestate's interest in the shared home, the resident must elect to do so in accordance with this section within 3 months after the notice is given; and
- (ii) in certain circumstances, the resident must first obtain an order of the court under section 39B allowing the election to be made.
- (4) The election must be given—
- (a) if the resident is not a personal representative—to the personal representative; or
- (b) if the resident is a joint personal representative—to each other personal representative; or
- (c) if the resident is the sole personal representative—to the registrar of the court.
- (5) To enable the resident to decide whether to make an election, the resident may ask the personal representative to obtain a valuation of the intestate's interest in the shared home from a registered valuer and give a copy of it to the resident.
- (6) The personal representative must promptly comply with the request.
- (7) An election may only be revoked with the personal representative's written consent.

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39B Restriction on right to elect to acquire shared home

- (1) This section applies if, apart from this section, an intestate's spouse (the *resident*) would be entitled to make an election under section 39A to acquire the intestate's interest in a shared home and—
 - (a) the shared home forms part of a building, and the deceased's estate includes an interest in the whole of the building; or
 - (b) the shared home forms part of a registered or registrable interest in land and—
 - (i) the deceased's estate includes an interest in the whole of that interest; and
 - (ii) part or all of the land is used for agricultural purposes; or
 - (c) the shared home forms part of a building used as a hotel, motel, boarding house or hostel at the date of the intestate's death; or
 - (d) part of the shared home was used for purposes other than domestic purposes at the date of the intestate's death.
- (2) The resident may make an election under section 39A only if the court makes an order allowing the election to be made.
- (3) The resident may apply to the court for the order.
- (4) The application must be made—
 - (a) if the resident is a personal representative—within 3 months after the resident's appointment as personal representative; or
 - (b) if the resident is not a personal representative—within 3 months after the resident is given the notice mentioned in section 39A(3)(b).
- (5) The court may make the order only if it is satisfied the resident's acquisition of the intestate's interest in the shared home is not likely to—

-
- (a) substantially diminish the value of the assets in the deceased's estate; or
 - (b) make disposal of the assets substantially more difficult.
- (6) If the court makes an order allowing an election to be made, the time for making the election under section 39A is extended until 1 month after the order is made.

39C Acquisition of shared home under election

- (1) This section applies if a spouse (the *resident*) makes an election under section 39A to acquire an intestate's interest in a shared home at transfer value.
- (2) On payment of the transfer value adjusted on an equitable basis to apportion any outgoings paid or payable, or rent or other amount received, that are ordinarily adjusted on sale, the resident is entitled to transfer of the intestate's interest.
- (3) However—
 - (a) before payment of the transfer value, the transfer documentation must be properly stamped under the *Duties Act 2001* at the resident's expense; and
 - (b) the resident is not entitled to a discharge of any mortgage, charge, encumbrance or lien over the intestate's interest in the shared home.
- (3A) Subsection (3)(a) has effect despite the *Duties Act 2001*, section 17(2).
- (4) At the resident's option, money that may at the time of transfer be distributed to the resident from the deceased's estate (whether under a will or on intestacy) may be set off to reduce the amount of the transfer value.
- (5) A resident may acquire an intestate's interest in a shared home under this section even if the resident is a personal representative of the intestate.
- (6) If production of a document or other assistance by a person (other than the resident or personal representative) is necessary to effect the acquisition, the person must, at the

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personal representative's request, give the assistance on payment of the person's reasonable costs and outlays by the personal representative.

39D Personal representative not to dispose of intestate's interest in shared home pending election or if election made

- (1) This section applies if a spouse is entitled to make an election under section 39A to acquire an intestate's interest in a shared home.
- (2) The personal representative must not sell or otherwise dispose of the intestate's interest in the shared home—
 - (a) if the time within which the election may be made has not ended; or
 - (b) contrary to an election under section 39A.
- (3) However, subsection (2) does not prevent an intestate's interest in the shared home being disposed of as a last resort to pay a liability of the intestate.
- (4) A disposal of the intestate's interest in the shared home in contravention of subsection (2) does not affect the validity of the disposal.

Part 4 Family provision

40 Definitions for pt 4

In this part—

child means, in relation to a deceased person, any child, stepchild or adopted child of that person.

dependant means, in relation to a deceased person, any person who was being wholly or substantially maintained or

supported (otherwise than for full valuable consideration) by that deceased person at the time of the person's death being—

- (a) a parent of that deceased person; or
- (b) the parent of a surviving child under the age of 18 years of that deceased person; or
- (c) a person under the age of 18 years.

40A Meaning of *stepchild*

- (1) A person is a *stepchild* of a deceased person for this part if—
 - (a) the person is the child of a spouse of the deceased person; and
 - (b) a relationship of stepchild and step-parent between the person and the deceased person did not stop under subsection (2).
- (2) The relationship of stepchild and step-parent stops on the divorce of the deceased person and the stepchild's parent.
- (3) To remove any doubt, it is declared that the relationship of stepchild and step-parent does not stop merely because—
 - (a) the stepchild's parent died before the deceased person, if the deceased person's marriage to the parent subsisted when the parent died; or
 - (b) the deceased person remarried after the death of the stepchild's parent, if the deceased person's marriage to the parent subsisted when the parent died.

41 Estate of deceased person liable for maintenance

- (1) If any person (the *deceased person*) dies whether testate or intestate and in terms of the will or as a result of the intestacy adequate provision is not made from the estate for the proper maintenance and support of the deceased person's spouse, child or dependant, the court may, in its discretion, on application by or on behalf of the said spouse, child or dependant, order that such provision as the court thinks fit

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shall be made out of the estate of the deceased person for such spouse, child or dependant.

- (1A) However, the court shall not make an order in respect of a dependant unless it is satisfied, having regard to the extent to which the dependant was being maintained or supported by the deceased person before the deceased person's death, the need of the dependant for the continuance of that maintenance or support and the circumstances of the case, that it is proper that some provision should be made for the dependant.
- (2) The court may—
 - (a) attach such conditions to the order as it thinks fit; or
 - (b) if it thinks fit—by the order direct that the provision shall consist of a lump sum or a periodical or other payment; or
 - (c) refuse to make an order in favour of any person whose character or conduct is such as, in the opinion of the court, disentitles him or her to the benefit of an order, or whose circumstances are such as make such refusal reasonable.
- (3) The incidence of the payment or payments ordered shall, unless the court otherwise directs, fall rateably upon the whole estate of the deceased person or upon so much thereof as is or may be made directly or indirectly subject to the jurisdiction of the court.
- (4) The court may, by such order or any subsequent order, exonerate any part of the estate of the deceased person from the incidence of the order, after hearing such of the parties as may be affected by such exoneration as it thinks necessary, and may for that purpose direct the personal representative to represent, or appoint any person to represent, any such party.
- (5) The court may at any time fix a periodic payment or lump sum to be paid by any beneficiary in the estate, to represent, or in commutation of, such proportion of the sum ordered to be paid as falls upon the portion of the estate in which the beneficiary is interested, and exonerate such portion from further liability, and direct in what manner such periodic

payment shall be secured, and to whom such lump sum shall be paid, and in what manner it shall be invested for the benefit of the person to whom the commuted payment was payable.

- (6) Where an application has been filed on behalf of any person it may be treated by the court as, and, so far as regards the question of limitation, shall be deemed to be, an application on behalf of all persons who might apply.
- (7) The personal representative or the public trustee or the chief executive of the department in which the *Child Protection Act 1999* is administered, or any person acting as the litigation guardian of a person under a legal incapacity, may apply on behalf of a person under a legal incapacity in any case where such person might apply, or may apply to the court for advice or directions as to whether the person ought so to apply; and, in the latter case, the court may treat such application as an application on behalf of such person for the purpose of avoiding the effect of limitation.
- (8) Unless the court otherwise directs, no application shall be heard by the court at the instance of a party claiming the benefit of this part unless the proceedings for such application be instituted within 9 months after the death of the deceased; but the court may at its discretion hear and determine an application under this part although a grant has not been made.
- (9) A person who, if a declaration of paternity were made upon the person's application under the provisions of the *Status of Children Act 1978*, would be entitled to make an application under this part may make an application under this part but such application shall not be proceeded with until the person has obtained a declaration of paternity under that Act; and the court may give such directions and act as it thinks fit to facilitate the making and determination of all necessary applications on behalf of that person under that Act and this part.
- (10) Upon any order being made, the portion of the estate comprised therein or affected thereby shall be held subject to the provisions of the order.

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- (11) No mortgage, charge or assignment of any kind whatsoever of or over such provision, made before the order is made, shall be of any force, validity or effect, and no such mortgage, charge or assignment made after the order is made shall be of any force, validity or effect unless made with the permission of the court.
- (12) Where any sum of money or other property is received by any person as a *donatio mortis causa* made by the deceased person that sum of money or that other property shall be treated for the purposes of this part as part of the estate of the deceased; but this subsection shall not render any person liable for having paid that sum or transferred that other property in order to give effect to that *donatio mortis causa*.

42 Court may vary order

- (1) Where (whether before or after the commencement of this Act) the court has ordered a periodical payment or has ordered any part of an estate or a lump sum to be invested for the benefit of any person, it may from time to time on the application of any person inquire whether any party deriving benefit under the order is still living or has become possessed of or entitled to provision for the party's proper maintenance or support and into the adequacy of the provision, or whether the provision made by the order for any such party remains adequate, and may increase or reduce the provision so made or discharge, vary or suspend the order, or make such other order as is just in the circumstances.
- (1A) However, the court shall not increase the provision so made unless the income of the estate or, as the case may be, the capital or income of the part of the estate or lump sum invested for the benefit of the person concerned in pursuance of the original order is considered by the court to be sufficient for the purposes of such increase and all other lawful payments (if any) therefrom.
- (2) Without derogating from the provisions of subsections (1) and (1A), where the court has increased the provision so made for the benefit of any person and at any subsequent date the

income of the estate or, as the case may be, the capital or income of the part of the estate or lump sum invested for the benefit of the person concerned is considered by the court to be insufficient for the purposes of such provision and all other lawful payments (if any) therefrom, the court may reduce or suspend any increase or discharge, vary or suspend the original order, or make such other order as is just in the circumstances.

43 Manner of computing duty on estate

- (1) Where an order is made by the court under this part, all duties payable in consequence of the death of the deceased person shall be computed in the following manner—
 - (a) where the deceased person leaves a will—as if the provisions of such order had been part of the will;
 - (b) where the deceased person did not leave a will—as if the provisions of such order had been part of the law governing the distribution of the estates of persons dying intestate.
- (2) Any duty paid in excess of the amount required to be paid under this section shall, on application and without further appropriation than this part, be refunded to the person entitled to receive the same.

44 Protection of personal representative

- (1) No action shall lie against the personal representative by reason of the personal representative having distributed any part of the estate and no application or order under this part shall disturb the distribution, if it was properly made by the personal representative for the purpose of providing for the maintenance or support of the spouse or any child of the deceased person totally or partially dependent on the deceased person immediately before the death of the deceased person whether or not the personal representative had notice at the time of the distribution of any application or intended application under this part in respect of the estate.

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- (2) No person who may have made or may be entitled to make an application under this part shall be entitled to bring an action against the personal representative by reason of the personal representative having distributed any part of the estate if the distribution was properly made by the personal representative after the person (being of full legal capacity) has notified the personal representative in writing that the person either—
 - (a) consents to the distribution; or
 - (b) does not intend to make any application that would affect the proposed distribution.
- (3) No action shall lie against the personal representative by reason of the personal representative having distributed any part of the estate if the distribution was properly made by the personal representative—
 - (a) not earlier than 6 months after the deceased's death and without notice of any application or intended application under section 41(1) or 42 in relation to the estate; or
 - (b) if notice under section 41(1) or 42 has been received—not earlier than 9 months after the deceased's death, unless the personal representative receives written notice that the application has been commenced in the court or is served with a copy of the application.
- (4) For the purposes of this section notice to a personal representative of an application or intention to make any application under this part shall be in writing signed by the applicant or the applicant's solicitor.
- (5) However, nothing in subsection (4) shall prevent the subsequent making of an application within any other period allowed by or pursuant to this part.

Part 5 Administration

Division 1 Devolution of property probate and administration

45 Devolution of property on death

- (1) The property to which a deceased person was entitled for an interest not ceasing on his or her death (other than property of which the deceased person was trustee) shall on his or her death and notwithstanding any testamentary disposition devolve to and vest in his or her executor and if more than 1 as joint tenants, or, if there is no executor or no executor able and willing to act, the public trustee.
- (2) Upon the court granting probate of the will or letters of administration of the estate of any deceased person the property vested in his or her executor or in the public trustee under the provisions of subsection (1) shall devolve to and vest in the person to whom the grant is made and if more than 1 as joint tenants.
- (3) Where at any time a grant is recalled or revoked or otherwise determined the property of the deceased vested at that time in the person to whom the grant was made shall be divested from the person and shall devolve to and vest in the person to whom a subsequent grant is made; and during any interval of time between the recall, revocation or other determination of a grant and the making of a subsequent grant the property of the deceased shall devolve to and vest in the public trustee.
- (4) The title of any administrator appointed under this Act to any property which devolves to and vests in the administrator shall relate back to and be deemed to have arisen upon the death of the deceased as if there had been no interval of time between the death and the appointment.
- (4A) However, all acts lawfully done by to or in regard to the public trustee before the appointment of an administrator shall

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be as valid and effectual as if they had been done by to or in regard to the administrator.

- (5) For the purposes of this section, and notwithstanding the provisions of the *Trusts Act 1973*, section 16, an executor includes an executor by representation under the provisions of section 47 of this Act.
- (6) While the property of a deceased person is vested in the public trustee under this section, the public trustee shall not be required to act in the administration of the estate of the deceased person or in any trusts created by the will of the deceased person, or exercise any discretions, powers, or authorities of a personal representative, trustee or devisee, merely because of the provisions of this section.
- (7) Nothing in this section affects the operation of an Act providing for the registration or recording of any person as entitled to any estate or interest in land in consequence of the death of any person notwithstanding that there has been no grant in the estate of the deceased person.

46 Cesser of right of executor to prove

Where a person appointed executor by a will—

- (a) survives the testator but dies without having taken out probate of the will; or
- (b) renounces probate; or
- (c) after being duly cited or summoned fails to apply for probate;

the person's rights in respect of the executorship shall wholly cease, and the representation of the testator and the administration of the testator's estate shall devolve and be committed in like manner as if that person had not been appointed executor.

47 Executor of executor represents original testator

- (1) Subject to this section an executor of a sole or last surviving executor of a testator is the executor by representation of that testator.
- (1A) Subsection (1) shall not apply to an executor who does not prove the will of his or her testator, and, in the case of an executor who on his or her death leaves surviving the executor some other executor of his or her testator to whom probate of the will of that testator is afterwards granted, it shall cease to apply on such probate being granted.
- (2) So long as the chain of executorial representation is unbroken, the last executor in the chain is the executor of every preceding testator.
- (3) The chain of executorial representation is broken by—
 - (a) an intestacy; or
 - (b) the failure of a testator to appoint an executor; or
 - (c) the failure to obtain probate of the will in Queensland; or
 - (d) the renunciation by the executor of the executorship by representation;but it is not broken by a temporary grant of administration if probate is subsequently granted.
- (4) Every person in the chain of executorial representation in relation to a testator—
 - (a) has the same rights in respect of the estate of that testator as the original executor would have had if living; and
 - (b) is, to the extent to which the estate of the testator has come into his or her hands, answerable as if the executor were an original executor.
- (5) An executor may renounce his or her executorship by representation before intermeddling without renouncing the executorship in relation to his or her own testator.

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48 Provisions as to the number of personal representatives

- (1) A grant shall not be made to more than 4 persons at any one time and where a testator appoints more than 4 persons as executors the order of their entitlement to a grant shall be the order in which they are named.
- (2) This section shall apply to grants made after the commencement of this Act whether the testator or intestate died before or after such commencement.

49 Particular powers of personal representatives

- (1) Subject to this Act a personal representative represents the real and personal estate of the deceased and has in relation to all such estate from the death of the deceased all the powers hitherto exercisable by an executor in relation to personal estate and all the powers conferred on personal representatives by the *Trusts Act 1973*.
- (2) Upon the making of a grant and subject thereto, the powers of personal representatives may be exercised from time to time only by those personal representatives to whom the grant is made; and no other person shall have power to bring actions or otherwise act as personal representative without the consent of the court.
- (3) Subject to the grant, the powers of those personal representatives to whom a grant is made shall relate back to and be deemed to have arisen upon the death of the deceased as if there had been no interval of time between the death and the grant.
- (4) The powers of personal representatives shall be exercised by them jointly.
- (5) The court may confer on a personal representative such further powers in the administration of the estate as may be convenient.

49A Personal representatives may make particular maintenance distribution

- (1) This section applies if a person—
 - (a) survives a deceased person; and
 - (b) at the time of the deceased person's death, was totally or substantially dependent on the deceased person; and
 - (c) will be entitled to part or all of the deceased person's estate if the person survives the deceased person for 30 days.
- (2) The deceased person's personal representative may make a distribution for the person's maintenance, support or education at any time after the death of the deceased person, including within 30 days after the death of the deceased person.
- (3) The personal representative may make the distribution even though the personal representative knows, when the distribution is made, of a pending application or an intended application for an order under section 41 in relation to the deceased person.
- (4) The personal representative is not liable for a distribution under subsection (2) made in good faith.
- (5) An amount distributed under subsection (2) to a person must be deducted from any share of the estate to which the person becomes entitled.
- (6) However, if the person does not survive the deceased person for 30 days, the distribution must be treated as an administration expense.

50 Rights and liabilities of administrators

Subject to any provision contained in the grant every person to whom administration of the estate of a deceased person is granted shall have the same rights and liabilities and be accountable in like manner as if the person were the executor of the deceased.

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51 Abolition of administration bond and sureties

As from the commencement of this Act neither an administration bond nor sureties in support of an administration bond shall be required of any administrator.

52 The duties of personal representatives

- (1) The personal representative of a deceased person shall be under a duty to—
 - (a) collect and get in the real and personal estate of the deceased and administer it according to law; and
 - (b) when required to do so by the court, exhibit on oath in the court a full inventory of the estate and when so required render an account of the administration of the estate to the court; and
 - (c) when required to do so by the court, deliver up the grant of probate or letters of administration to the court; and
 - (d) distribute the estate of the deceased, subject to the administration thereof, as soon as may be; and
 - (e) pay interest upon any general legacy—
 - (i) from the first anniversary of the death of the testator until payment of the legacy; or
 - (ii) in the case of a legacy that is, pursuant to a provision of the will, payable at a future date—from that date until payment of the legacy;

at the rate of 8% per annum or at such other rate as the court may either generally or in a specific case determine, unless any contrary intention respecting the payment of the interest appears by the will.
- (1A) Nothing in subsection (1) abrogates any rule or practice deriving from the principle of the executor's year or any rule or practice under which a beneficiary is entitled to receive interest upon any legacy from the date of the testator's death.
- (2) If the personal representative neglects to perform his or her duties as aforesaid the court may, upon the application of any

person aggrieved by such neglect, make such order as it thinks fit including an order for damages and an order requiring the personal representative to pay interest on such sums of money as have been in the personal representative's hands and the costs of the application.

52A Liability of executors for waste

Where a personal representative in his or her own wrong wastes or converts to his or her own use any part of the estate of the deceased person and dies, his or her personal representative shall to the extent of the available assets of the defaulter be liable and chargeable in respect of such waste or conversion in the same manner as the defaulter would have been if living.

53 Effect of revocation of grant

- (1) Every person making or permitting to be made any payment or disposition in good faith under a grant shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of the grant.
- (2) All payments and dispositions made in good faith to the personal representative named in a grant before the making or the revocation thereof shall be a valid discharge to the person making the same; and a personal representative who has acted under a grant which is subsequently revoked may retain and reimburse himself or herself in respect of payments and dispositions made by him or her which the person to whom a grant is afterwards made might properly have made.
- (3) Without prejudice to any order of the court made before the commencement of this Act all dispositions of any interest in property made to a purchaser in good faith by a person to whom a grant has been made are valid notwithstanding any subsequent revocation thereof.
- (4) A personal representative who in good faith and without negligence has sought and obtained a grant is not liable for any legacy paid or asset distributed in good faith and without

[s 54]

negligence in reliance on the grant notwithstanding any subsequent revocation thereof.

- (5) The personal representative under any grant made subsequent to a grant which has been revoked may recover any legacy paid or asset distributed (or the value thereof) in reliance on the revoked grant from the person to whom the legacy or asset was paid or distributed, being a legacy or asset which is not payable or distributable to that person under the subsequent grant, but if that person has received the payment or distribution in good faith and has so altered that person's position in reliance on the propriety of the payment or distribution that, in the opinion of the court, it would be inequitable to order the repayment of the legacy or the return of the asset or its value, the court may make such order as it considers to be just in all the circumstances.
- (6) If, while any legal proceeding is pending in any court by or against a personal representative to whom a grant has been made, the grant is revoked, that court may order that the proceeding be continued by or against the new personal representative in like manner as if the same had been originally commenced by or against the personal representative, but subject to such conditions and variations (if any) as the court directs.
- (7) For the purposes of this section revocation includes any partial revocation by way of a variation of the grant or otherwise.

54 Protection of persons acting informally

- (1) Where any person, not being a person to whom a grant is made, obtains, receives or holds the estate or any part of the estate of a deceased person otherwise than for full and valuable consideration, or effects the release of any debt or liability due to the estate of the deceased, the person shall be charged as executor in the person's own wrong to the extent of the estate received or coming into the person's hands, or the debt or liability released, after deducting any payment

made by the person which might properly be made by a personal representative to whom a grant is made.

- (2) An executor who has intermeddled in the administration of the estate before applying for a grant of probate may renounce his or her executorship notwithstanding his or her intermeddling.
- (3) A personal representative may ratify and adopt any act done on behalf of the estate by another if the act was one which the personal representative might properly have done himself or herself.

Division 2 Administration of assets

55 Definition for div 2

In this division—

residuary estate means—

- (a) property of the deceased that is not effectively disposed of by his or her will; and
- (b) property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary disposition.

56 Property of deceased assets for the payment of debts

- (1) The property of a deceased person which on his or her death devolves to and vests in his or her executor or the public trustee is assets for the payment of his or her debts and any disposition by will inconsistent with this enactment is void as against creditors, and the court shall, if necessary, administer the property for the purposes of the payment of the debts.
- (2) This section shall take effect without prejudice to the rights of mortgagees or other encumbrancees.

57 Payment of debts in the case of insolvent estates

Where the estate of a deceased person is insolvent—

- (a) the funeral, testamentary and administration expenses have priority; and
- (b) subject as aforesaid and to this Act, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities, respectively, and as to the priorities of debts and liabilities as may be in force for the time being under the law of bankruptcy with respect to the administration of estates of deceased persons in bankruptcy.

58 Retainer, preference and the payment of debts by personal representatives

- (1) The right of retainer of a personal representative and the personal representative's right to prefer creditors are hereby abolished.
- (2) Nevertheless a personal representative—
 - (a) other than one mentioned in paragraph (b), who, in good faith and at a time when the personal representative has no reason to believe that the deceased's estate is insolvent, pays the debt of any person (including himself or herself) who is a creditor of the estate; or
 - (b) to whom letters of administration have been granted solely by reason of the personal representative being a creditor and who, in good faith and at such a time pays the debt of another person who is a creditor of the estate;shall not, if it subsequently appears that the estate is insolvent, be liable to account to a creditor of the same degree as the paid creditor for the sum so paid.

59 Payment of debts in the case of solvent estates

- (1) Where the estate of a deceased person is solvent the estate shall, subject to this Act, be applicable towards the discharge of the debts payable thereout in the following order, namely—
- class 1**—property specifically appropriated devised or bequeathed (either by a specific or general description) for the payment of debts; and property charged with, or devised or bequeathed (either by a specific or general description) subject to a charge for the payment of debts;
- class 2**—property comprising the residuary estate of the deceased including property in respect of which any residuary disposition operates as the execution of a general power of appointment;
- class 3**—property specifically devised or bequeathed including property specifically appointed under a general power of appointment and any legacy charged on property so devised bequeathed or appointed;
- class 4**—*donationes mortis causa*.
- (2) Property within each class as aforesaid shall be applied in the discharge of the debts and, where applicable, the payment of pecuniary legacies rateably according to value; and where a legacy is charged on a specific property the legacy and the property shall be applied rateably.
- (3) The order in which the estate is applicable towards the discharge of debts and the incidence of rateability as between different properties within each class may be varied by a contrary or other intention signified by the will, but a contrary or other intention is not signified by a general direction, charge or trust for the payment of debts or of all the debts of the testator out of the testator's estate or out of the testator's residuary estate or by a gift of any such estate after or subject to the payment of debts.

[s 60]

60 Payment of pecuniary legacies

Subject to a contrary or other intention signified by the will—

- (a) pecuniary legacies shall be paid out of the property comprised in class 2 referred to in section 59 after the discharge of the debts or such part thereof as are payable out of that property; and
- (b) to the extent to which the property comprised in class 2 referred to in section 59 is insufficient the pecuniary legacies shall abate proportionately.

61 Payments of debts on property mortgaged or charged

- (1) Where a person dies possessed of, or entitled to, or under a general power of appointment by will disposes of, an interest in property, which at the time of his or her death is charged with the payment of any debt, whether by way of mortgage, charge or otherwise, legal or equitable (including a lien for unpaid purchase money), and the deceased has not by will signified a contrary or other intention, the interest so charged shall, as between the different persons claiming through the deceased, be primarily liable for the payment of the debt; and every part of the said interest, according to its value, shall bear a proportionate part of the charge of the whole thereof.
- (2) A contrary or other intention is not signified by a general direction, charge or trust for the payment of debts or of all the debts of the testator out of the testator's estate or out of the testator's residuary estate or by a gift of any such estate after or subject to the payment of debts.

Part 5A Testamentary appointment of guardians of children

Division 1 Preliminary

61A Definitions for pt 5A

In this part—

child means an individual under 18 years who is not, and has never been, married.

guardian, of a child, does not include a person who has guardianship of the child, under another Act, in the person's capacity as the chief executive of a department of government of the Commonwealth or a State or as a Minister of the Commonwealth or a State.

parent, of a child—

- (a) includes—
 - (i) for an Aboriginal child—a person who, under Aboriginal tradition, is regarded as a parent of the child; and
 - (ii) for a Torres Strait Islander child—a person who, under Island custom, is regarded as a parent of the child; but
- (b) does not include a parent whose parental responsibility for the child has been ended by—
 - (i) a decision or order of a federal court or a court of a State; or
 - (ii) a decision or order of another court that has effect in Queensland.

testamentary guardian, of a child, means a person who is a guardian of the child under an appointment by will.

[s 61B]

61B Application of pt 5A

- (1) This part applies to a child—
 - (a) whether the child was born in Queensland or elsewhere; and
 - (b) whether the child was born before or after the commencement of this part.
- (2) This part applies to an appointment made by will whether the will was made before or after the commencement of this part.

Division 2 Appointment of testamentary guardian

61C Appointment of guardian by will

- (1) A parent or guardian of a child may, by will, appoint a person as a guardian of the child.
- (2) The appointment is of no effect if the appointor is not a parent or guardian of the child immediately before the appointor's death.

61D When the appointment takes effect

- (1) This section provides for when an appointment by will of a person as a guardian of a child takes effect.
- (2) If the appointor is not survived by a parent of the child, the appointment takes effect on the appointor's death.
- (3) If the appointor is survived by 1 or more parents of the child, the appointment takes effect as follows—
 - (a) if the will shows that the appointor intended the appointment to take effect on the appointor's death, the appointment takes effect on the appointor's death;
 - (b) otherwise, the appointment takes effect on the death of the last surviving parent.

61E Effect of appointment

- (1) A testamentary guardian of a child has all the powers, rights and responsibilities, for making decisions about the long-term care, welfare and development of the child, that are ordinarily vested in a guardian.

Examples of matters concerned with a child's long term care, welfare and development—

the child's education and religious upbringing

- (2) The appointment of a person as testamentary guardian of a child gives the person daily care authority for the child if and only if—
- (a) the child has no surviving parent; and
 - (b) no-one else has daily care authority for the child (however described) under a decision or order of a federal court or a court of a State.
- (3) In this section—
- daily care authority***, for a child, means—
- (a) the right to have the child's daily care; and
 - (b) the right and responsibility to make decisions about the child's daily care.

61F Testamentary guardian to act jointly with other guardians

- (1) This section applies to a testamentary guardian of a child if the child has 1 or more other guardians.
- (2) The testamentary guardian must discharge his or her rights and responsibilities, and exercise his or her powers, as testamentary guardian of the child jointly with the other guardian or guardians.

Division 3 Applications to the Supreme Court

61G Application by testamentary guardian

- (1) This section applies to a person appointed as a testamentary guardian of a child if the appointor has died and the appointment has not taken effect.
- (2) The person may apply to the Supreme Court for an order that the appointment take effect immediately.

61H Application by parent

- (1) This section applies to a parent of a child if a person has been appointed as a testamentary guardian of the child and the appointment has taken effect.
- (2) The parent may apply to the Supreme Court for an order that the appointment be revoked, suspended until the parent's death or suspended for another period stated in the application.

61I Supreme Court decision on application

On receiving an application under this division, the Supreme Court may make the orders it considers appropriate.

61J Supreme Court's powers not limited

This division does not limit the powers of the Supreme Court under another law.

Part 6 Miscellaneous

65 **Presumption of survivorship**

Subject to this Act, where 2 or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder for a period of 1 day.

66 **Survival of actions**

- (1) Subject to the provisions of this section and with the exception of causes of action for defamation or seduction, on the death of any person after the 15 October 1940 all causes of action subsisting against or vested in the person shall survive against, or, as the case may be, for the benefit of, the person's estate.
- (2) Where a cause of action survives pursuant to subsection (1) for the benefit of the estate of a deceased person, the damages recoverable in any action brought—
 - (a) shall not include damages for pain and suffering, for any bodily or mental harm or for curtailment of expectation of life; and
 - (b) shall not include exemplary damages; and
 - (c) in the case of a breach of promise to marry—shall be limited to damages in respect of such damages as flow from the breach of promise to marry; and
 - (d) where the death has been caused by the act or omission which gives rise to the cause of action—shall be calculated without reference to—
 - (i) loss or gain to the estate consequent upon the death save that a sum in respect of funeral expenses may be included; or

- (ii) future probable earnings of the deceased had the deceased survived.
- (2A) Despite subsection (2)(a), damages for pain and suffering, for any bodily or mental harm or for curtailment of expectation of life, may be recovered if—
 - (a) the cause of action related to personal injury resulting from a dust-related condition; and
 - (b) the deceased person commenced a proceeding in relation to the cause of action before the deceased person died; and
 - (c) the deceased person died as a result of the dust-related condition or the dust-related condition was a contributing factor to the deceased person's death.
- (2B) To remove any doubt, it is declared that personal injury resulting from a dust-related condition does not include personal injury resulting from smoking or other use of tobacco products or exposure to tobacco smoke.
- (3) Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this section, to have been subsisting against that person before his or her death such cause of action in respect of that act or omission as would have subsisted if that person had died after the damage was suffered.
- (4) The rights conferred by this section for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the provisions of the *Supreme Court Act 1995*, part 4 and so much of this section as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under those Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1).

- (5) Nothing in this section enables any proceedings to be taken which had ceased to be maintainable before the commencement of this Act.
- (6) An action which survives pursuant to subsection (1) against the estate of a deceased person may be brought against any beneficiary to whom any part of the estate has been distributed as well as against the personal representatives.
- (7) Where an action is brought against a beneficiary to whom a part of the estate has been distributed that beneficiary is entitled to contribution from any beneficiary to whom a distribution has been made, being a beneficiary ranking in equal degree with himself or herself for the payment of the debts of the deceased, and to an indemnity from any beneficiary to whom a distribution has been made, being a beneficiary ranking in lower degree than himself or herself for the payment of the debts of the deceased, and the beneficiary may join any such beneficiary as a party to the action brought against him or her.
- (8) Where an action is brought against a beneficiary (including a beneficiary who has been joined as aforesaid) whether in respect of an action which has survived against the estate or for contribution or indemnity, the beneficiary may plead equitable defences and if the beneficiary has received the distribution made to the beneficiary in good faith and has so altered the beneficiary's position in reliance on the propriety of the distribution that, in the opinion of the court, it would be inequitable to enforce the action, the court may make such order as it thinks fit.
- (9) In no case may a judgment against a beneficiary exceed the amount of the distribution made to the beneficiary.
- (10) In this section—
dust-related condition see the *Civil Liability Act 2003*, schedule 2.
personal injury includes disease.

[s 68]

68 Commission

The court may authorise the payment of such remuneration or commission to the personal representative for his or her services as personal representative as it thinks fit, and may attach such conditions to the payment thereof as it thinks fit.

69 The registrar

Subject to this Act the registrar of the Supreme Court is invested with and shall and may exercise with reference to proceedings in the court under this Act all such powers and authorities as may be conferred on the registrar from time to time by the court and by the rules of court and otherwise all such powers and authorities as the registrar exercised before the passing of this Act.

70 Practice

The practice of the court shall, except where otherwise provided in or under this or any other Act or by rules of court for the time being in force, be regulated so far as the circumstances of the case will admit by the practice of the court before the passing of this Act.

72 Service

In any case where any person desires to effect within a prescribed time service of any proceedings against, or of any notice or other document required or permitted to be served in respect of the estate of a deceased person and that person is uncertain as to the person upon whom service should be effected the court may, if application for directions is made to it within the time prescribed for service, direct the mode of service in that case and, if it thinks fit, allow an extension of the time within which service may be effected.

Part 7 Transitional provisions

Division 1 Transitional provision for Succession Amendment Act 1997

73 Application of amendments made by Succession Amendment Act 1997

To prevent any doubt, it is declared that the amendments of this Act made by the *Succession Amendment Act 1997* do not apply to the estate of a person who died before the commencement of the amendments.

Division 2 Transitional provision for Discrimination Law Amendment Act 2002

74 Application of amendments made by Discrimination Law Amendment Act 2002

The amendments of this Act and the *Acts Interpretation Act 1954* made by the *Discrimination Law Amendment Act 2002* do not apply in relation to this Act for—

- (a) a will executed before the amendments commenced; or
- (b) the estate of a person who died before the amendments commenced.

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Division 3 Transitional provision for Civil Liability (Dust Diseases) and Other Legislation Amendment Act 2005

75 Application of amendment made by Civil Liability (Dust Diseases) and Other Legislation Amendment Act 2005

Section 66, as amended by the *Civil Liability (Dust Diseases) and Other Legislation Amendment Act 2005*, applies in relation to all proceedings surviving for the benefit of a deceased person's estate whether commenced before or after the commencement of this section unless judgment has been given in the proceeding or the proceeding has otherwise ended.

Division 4 Transitional provision for Succession Amendment Act 2006

76 Transitional provision for Succession Amendment Act 2006

- (1) The repeal of old section 16 does not affect the validity of a will made under that section.
- (2) Old section 17 continues to apply to a will made before the commencement in relation to a marriage solemnised before the commencement.
- (3) New section 14 applies to a will made before the commencement in relation to a marriage solemnised on or after the commencement.
- (4) Old section 18 continues to apply to a will made before the commencement in relation to a divorce or annulment that happens before the commencement.
- (5) New section 15 applies to a will made before the commencement in relation to a divorce or annulment that happens on or after the commencement.

- (6) For the purposes of subsections (2) and (4), section 5 as in force immediately before the commencement applies.
- (7) For the purposes of subsections (3) and (5), section 5 as amended by the *Succession Amendment Act 2006* applies.
- (8) New section 33Z applies to a will regardless of when the testator died.
- (9) In this section—

commencement means the commencement of section 7 as inserted by the *Succession Amendment Act 2006*.

new section 14 means section 14 as inserted by the *Succession Amendment Act 2006*.

new section 15 means section 15 as inserted by the *Succession Amendment Act 2006*.

new section 33Z means section 33Z as inserted by the *Succession Amendment Act 2006*.

old section 16 means section 16 as in force immediately before the commencement.

old section 17 means section 17 as in force immediately before the commencement.

old section 18 means section 18 as in force immediately before the commencement.

Schedule 2 Distribution of residuary estate on intestacy

sections 35 to 37

Part 1 Intestate survived by spouse

Circumstance	Way in which the intestate's residuary estate is to be distributed
1 If the intestate is not survived by issue	1 If there is only 1 surviving spouse, the spouse is entitled to the whole of the residuary estate. 2 If there is more than 1 surviving spouse, they are entitled to the whole of the residuary estate in accordance with section 36. ^a
2 If the intestate is survived by issue	1 If there is only 1 surviving spouse, the spouse is entitled to— (a) \$150000 and the household chattels; and (b) the following part of the residuary estate then remaining— (i) if there is only 1 child of the intestate who survived, or who did not survive but left issue who survived, the intestate— $\frac{1}{2}$; (ii) otherwise— $\frac{1}{3}$. 2 If there is more than 1 surviving spouse, they are entitled, in accordance with section 36, to— (a) \$150000 and the household chattels; and

Circumstance	Way in which the intestate's residuary estate is to be distributed
	<p>(b) the following part of the residuary estate then remaining—</p> <p>(i) if there is only 1 child of the intestate who survived, or who did not survive but left issue who survived, the intestate—$\frac{1}{2}$;</p> <p>(ii) otherwise—$\frac{1}{3}$.</p>
	<p>3 The issue of the intestate are entitled to the balance of the residuary estate in accordance with section 36A.</p>

a For when there may be more than 1 surviving spouse, see section 5AA (Who is a person's *spouse*).

Part 2 Intestate not survived by any spouse

Circumstance	Way in which the intestate's residuary estate is to be distributed
<p>1 Where the intestate is survived by issue</p>	<p>The issue are entitled to the whole of the residuary estate in accordance with section 36A.</p>
<p>2 Where the intestate is not survived by issue but is survived by a parent or both parents</p>	<p>The parent is entitled to the whole of the residuary estate or, if both parents survive the intestate, the parents are entitled to the whole of the residuary estate in equal shares.</p>

Circumstance

Way in which the intestate's residuary estate is to be distributed

- | | | |
|---|--|--|
| 3 | Where the intestate is not survived by issue or by a parent but is survived by next of kin | The next of kin are entitled to the residuary estate in accordance with section 37. |
| 4 | Where the intestate is not survived by issue, by a parent or by next of kin | The residuary estate shall be deemed to be <i>bona vacantia</i> and the Crown is entitled to it. |

Endnotes

1 Index to endnotes

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2 Date to which amendments incorporated

This is the reprint date mentioned in the Reprints Act 1992, section 5(c). Accordingly, this reprint includes all amendments that commenced operation on or before 30 January 2012. Future amendments of the Succession Act 1981 may be made in accordance with this reprint under the Reprints Act 1992, section 49.

3 Key

Key to abbreviations in list of legislation and annotations

Key	Explanation	Key	Explanation
AIA	= Acts Interpretation Act 1954	(prev)	= previously
amd	= amended	proc	= proclamation
amdt	= amendment	prov	= provision
ch	= chapter	pt	= part
def	= definition	pubd	= published
div	= division	R[X]	= Reprint No. [X]
exp	= expires/expired	RA	= Reprints Act 1992
gaz	= gazette	reloc	= relocated
hdg	= heading	renum	= renumbered
ins	= inserted	rep	= repealed
lap	= lapsed	(retro)	= retrospectively
notfd	= notified	rv	= revised edition
num	= numbered	s	= section
o in c	= order in council	sch	= schedule
om	= omitted	sdiv	= subdivision
orig	= original	SIA	= Statutory Instruments Act 1992
p	= page	SIR	= Statutory Instruments Regulation 2002
para	= paragraph	SL	= subordinate legislation
prec	= preceding	sub	= substituted
pres	= present	unnum	= unnumbered
prev	= previous		

4 Table of reprints

Reprints are issued for both future and past effective dates. For the most up-to-date table of reprints, see the reprint with the latest effective date.

If a reprint number includes a letter of the alphabet, the reprint was released in unauthorised, electronic form only.

Reprint No.	Amendments to	Effective	Reprint date
1	1987 Act No. 32	9 June 1987	31 August 1994
2	1994 Act No. 81	1 July 1995	31 July 1995
3	1995 Act No. 58	28 November 1995	30 January 1996
3A	1997 Act No. 9	20 June 1997	18 July 1997
3B	1997 Act No. 54	1 May 1998	1 May 1998
4	1997 Act No. 54	1 May 1998	4 June 1998
4A	1999 Act No. 10	10 September 1999	20 October 1999
4B	1999 Act No. 10	23 March 2000	24 March 2000
5	2000 Act No. 55	23 March 2000	19 January 2001
5A	2001 Act No. 71	28 February 2002	28 February 2002
5B	2001 Act No. 71	1 March 2002	15 March 2002

Reprint No.	Amendments included	Effective	Notes
5C rv	2002 Act No. 74	1 April 2003	
6	2003 Act No. 74	1 March 2004	
6A	2004 Act No. 43	3 December 2004	
6B	2005 Act No. 43	14 October 2005	
6C	2006 Act No. 1	1 April 2006	
6D	2008 Act No. 73	1 July 2009	R6D withdrawn, see R7
7	—	1 July 2009	
7A	2010 Act No. 44	30 January 2012	

5 Tables in earlier reprints

Name of table	Reprint No.
Changed citations and remade laws	1, 3
Changed names and titles	1
Comparative legislation	1
Corrected minor errors	1
Obsolete and redundant provisions	1
Renumbered provisions	1

6 List of legislation

Succession Act 1981 No. 69

date of assent 7 October 1981

commenced 1 January 1982 (proc pubd gaz 19 December 1981 p 1622)

amending legislation—

Succession Act Amendment Act 1983 No. 45

date of assent 28 April 1983

commenced on date of assent

Imperial Acts Application Act 1984 No. 70 s 13

date of assent 12 October 1984

commenced on date of assent

Real Property Acts and Other Acts Amendment Act 1986 No. 26 s 4 sch

date of assent 8 April 1986

commenced on date of assent

Family Services Act 1987 No. 32 s 69(1), (10) 35 sch (prev Family and Youth Services Act 1987)

date of assent 30 April 1987

commenced 9 June 1987 (proc pubd gaz 30 May 1987 p 846)

Land Act 1994 No. 81 ss 1–2, 527 sch 5

date of assent 1 December 1994

ss 1–2 commenced on date of assent

remaining provisions commenced 1 July 1995 (1995 SL No. 185)

Statute Law Revision Act (No. 2) 1995 No. 58 ss 1–2, 4 sch 1, s 5(3) sch 9

date of assent 28 November 1995

commenced on date of assent

Justice and Other Legislation (Miscellaneous Provisions) Act 1997 No. 9 ss 1, 2(5) pt 21

date of assent 15 May 1997

ss 1–2 commenced on date of assent

remaining provisions commenced 20 June 1997 (1997 SL No. 155)

Succession Amendment Act 1997 No. 54

date of assent 16 October 1997

ss 1–2 commenced on date of assent

remaining provisions commenced 1 May 1998 (1998 SL No. 50)

Child Protection Act 1999 No. 10 ss 1, 2(2), 205 sch 3

date of assent 30 March 1999

ss 1–2 commenced on date of assent

remaining provisions commenced 23 March 2000 (2000 SL No. 45)

Mental Health Act 2000 No. 16 ss 1–2, 590 sch 1 pt 2

date of assent 8 June 2000

ss 1–2, 590 commenced on date of assent (see s 2(1))

remaining provisions commenced 28 February 2002 (2002 SL No. 27)

Succession and Other Acts Amendment Act 2000 No. 55 pts 1–2

date of assent 17 November 2000

ss 1–2 commenced on date of assent

remaining provisions commenced 23 March 2000 (see s 2)

Duties Act 2001 No. 71 ss 1–2(1), 551 sch 1

date of assent 13 November 2001

ss 1–2 commenced on date of assent

remaining provisions commenced 1 March 2002 (2002 SL No. 10)

Discrimination Law Amendment Act 2002 No. 74 pts 1, 11, s 90 sch

date of assent 13 December 2002

ss 1–2 commenced on date of assent

s 90 commenced 31 March 2003 (2003 SL No. 51)

remaining provisions commenced 1 April 2003 (2003 SL No. 51)

Manufactured Homes (Residential Parks) Act 2003 No. 74 ss 1–2, 155 sch 1

date of assent 22 October 2003

ss 1–2 commenced on date of assent

remaining provisions commenced 1 March 2004 (2003 SL No. 336)

Justice and Other Legislation Amendment Act 2004 No. 43 pts 1, 23, s 3 sch

date of assent 18 November 2004

ss 1–2 commenced on date of assent

remaining provisions commenced 3 December 2004 (2004 SL No. 263)

Civil Liability (Dust Diseases) and Other Legislation Amendment Act 2005 No. 43 pts 1–2 div 1

date of assent 14 October 2005

commenced on date of assent

Succession Amendment Act 2006 No. 1

date of assent 22 February 2006

ss 1–2 commenced on date of assent

remaining provisions commenced 1 April 2006 (2006 SL No. 44)

Residential Tenancies and Rooming Accommodation Act 2008 No. 73 ss 1–2, 554 sch 1

date of assent 11 December 2008

ss 1–2 commenced on date of assent

remaining provisions commenced 1 July 2009 (2009 SL No. 40)

Personal Property Securities (Ancillary Provisions) Act 2010 No. 44 ss 1–2, ch 4 pt 48

date of assent 14 October 2010

ss 1–2 commenced on date of assent

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7 List of annotations

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def “**intestate**” amd 1995 No. 58 s 4 sch 1
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