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**ESTATE AND
SUCCESSION PLANNING**
*Important Changes to the
Law of Wills and
Succession in NSW*

Written by/Presented by:

Ramena Kako

Barrister

8th Floor, Wentworth Chambers
180 Phillip Street, Sydney

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CHANGES TO THE LAW OF WILLS AND SUCCESSION IN NEW SOUTH WALES¹

INTRODUCTION AND BACKGROUND

Laws relating to wills and the administration of estates were received into Australian colonies from English law. Over time the succession laws in each jurisdiction changed, with the result that there was little consistency between succession laws across the States and Territories.

In 1991 the Standing Committee of Attorneys-General (“SCAG”) initiated the uniform succession laws project, with the object of developing model legislation to be used as a basis for reform by Australian States and Territories. The view was that each jurisdiction would adopt uniform or consistent succession laws so as to make it easier and cheaper to administer the estates of people who have moved between states or territories, or have held assets in different jurisdictions.

In 1995 the National Committee for Uniform Succession Laws was established to examine 4 areas of succession law – the law of wills, family provision, intestacy and the administration of estates.

In December 1997 the National Committee presented a final report to SCAG on the law of wills. The NSW Law Reform Commission released report number 85 on the law of wills in April 1998. The report contained a Model Wills Bill, which was generally based on the Victorian *Wills Act 1994*. Victoria, Northern Territory, Queensland and Western Australia have implemented the Model Bill. In New South Wales, the Succession Bill was assented to by the NSW Parliament on 27 October 2006. The Succession Bill largely mirrored the Model Bill.

The Succession Act commenced on 1 March 2008. The Succession Act renamed the *Wills, Probate and Administration Act 1898* (NSW) (“WPAA”) to the *Probate and Administration Act 1898* (NSW). The Succession Act also replaces parts 1 and 1A of the WPAA (except for sections 30 and 31).

The Succession Act makes a number of significant changes to the law of wills in NSW. It implements, with some changes, in NSW the first stage of the national uniform succession laws project – the ‘wills stage’.

At the time of introducing the new legislation, some people questioned why the Act is called the Succession Act rather than the Wills Act, as it only contains provisions relating to wills. In his second reading speech to the Succession Bill, the then Attorney-General for New South Wales, Mr Bob Debus stated: “The title is necessary as in the future it is intended to include other provisions relating to the law of succession in the Act.”² This reasoning has proved true, as the NSW Parliament has recently introduced the *Succession Amendment (Family Provision) Bill 2008*, which is intended to repeal the *Family Provision Act 1982* (NSW) and to implement family provision laws within the *Probate and Administration Act 1898* (NSW).

The purpose of the Model Wills Bill was summarised in clause 1 to ‘reform the law relating to the making, alteration, rectification, revocation and construction of wills’ and to make particular provision for:

- a) the formalities required for the making, alteration and revocation of wills and the dispensation of those requirements in appropriate cases, and
- b) the making of wills by minors and other persons lacking testamentary capacity, and
- c) the effect of marriage and divorce on wills.

The following is a summary of some of the significant changes introduced by the Succession Act:

- The Court’s dispensing powers regarding will formalities, such as the formal requirements for execution, alteration or revocation of a will apply to ‘documents’ and ‘documents’ is given an expansive definition to

¹ This paper is intended to provide an overview of the main provisions of the *Succession Act 2006* rather than an analysis of each provision of the Act.

² New South Wales, Legislative Assembly, *Parliamentary Debates (Hansard)*, Article 46 of 47, 19 September 2006 at 1858.

include 'anything from which sounds, images or writings can be reproduced with or without the aid of anything else'. Gone forever is 'signing at the foot or end of the will': section 8.³

- Blind witnesses or persons who are temporarily unable to see are banned from acting as attesting witness to any wills made on or after 1 March 2008: section 9.
- Interested witnesses have an exit plan and the avoidance of gifts to spouses is abandoned: section 10.
- The revocation on marriage provision is retained, however the Succession Act also includes parts of the Victorian *Wills Act 1997* which save gifts to the spouse or the appointment of the spouse as executor or trustee, notwithstanding the marriage. In these cases, the will does not have to be made, or expressed to be made, in contemplation of marriage: section 12.
- Unless a contrary intention appears in the will, divorce revokes gifts to, and appointments of, the former spouse by the will and the spouse is to be treated as having predeceased the testator: section 13.
- The Court may authorise a minor to make, revoke or alter a will: section 16.
- The Court may authorise the making, alteration or revocation of 'statutory wills'—a will for an adult who lacks testamentary capacity: section 17.
- Wills may be rectified – however the Succession Act specifies 2 grounds for rectification: the Court must be satisfied that the will does not carry out the testator's intentions because of either a clerical error or the will does not give effect to the testator's instructions: section 27.⁴
- The use of extrinsic evidence in aid of the construction of wills made on or after 1 March 2008 is clarified: section 32.
- A provision is introduced under which all beneficiaries must survive the testator by 30 days, or any other date specified in the will: section 35.⁵
- Substitutional gifts are added to the anti-lapse rule in the case of gifts to issue: section 39.
- Legacies to unincorporated associations are saved: section 43

³ In *Estate of Edwards; Treacey v Edwards* [2000] NSWSC 846 at [10] Austin J had to consider the application of the dispensing power in NSW to a cassette tape. The testator, David Michael Edwards, left a will together with a cassette tape. The will directed his executor to dispose of all of his property in accordance with an 'audio tape recorded list which accompanies this will'. The audio tape was labelled, 'Notes on will of David Edwards' and was signed by him. While Austin J considered the tape to be 'a rambling presentation', it was, he held, 'sufficiently certain to dispose of the deceased's assets.'

Austin J admitted the tape as part of the will either because of the dispensing power—which he considered 'the firmer ground'—or because of the doctrine of incorporation by reference. The dispensing power was held to apply to the tape as a *document* using the Interpretation Act definition of document. This may have been somewhat beyond what was contemplated when the dispensing provision was introduced, when oral wills were not considered as being included, but the approach has been followed subsequently both in New South Wales and Victoria: see *Will of Trethewey* [2002] VSC 83 (will on a computer is a 'document' for the relevant purpose - *Treacey v Edwards* not mentioned, however); *Cassie v Koumans*; *Estate of Cassie* [2007] NSWSC 481 (videotape—can be 'document' for relevant purpose, but dispensing power not satisfied in this case; some disquiet expressed about implications).

The model provision expressly includes the broader concept of 'document' to extend, in particular, to computer-generated material.

⁴ There is no provision in s 27 corresponding to s 29A(5) of the WPAA preserving the rights of a beneficiary under the rectified will to recover assets from a beneficiary who received a distribution under the rectified will. However, these rights still exist in equity.

⁵ Practitioners will need to have particular regard to s 35 when drafting wills, as to whether the 30 day or a specified survival period is to be incorporated, excluded or varied, and include effective substitutional or other provisions in the event of the gift lapsing.

- The anti-delegation rule is equated with the inter vivos rule for powers: section 44.
- A default position is created regarding references to the valuation of property in a will: section 45.
- Those who must be allowed to see the will are listed—including creditors: section 54.

RULES ABOUT BENEFICIARIES WHO WITNESS WILLS: “INTERESTED WITNESSES”

The ‘witness beneficiary rule’ under s13 of the WPAA avoided a beneficial gift in a will made to a person who attested the execution of the will (‘the interested witness’) or was the interested witness’s spouse or if there was any other person claiming under either of them. Of course, there were exceptions, such as: where there were 2 other attesting witnesses to the execution of the will and who themselves and their spouses did not benefit under the will; all the persons who would benefit directly from the avoidance of the gift consent in writing to the distribution of the gift according to the will; or the Court is satisfied that the testator knew and approved the gift and that the gift was given or made freely and voluntarily by the testator.

The basis of the ‘witness beneficiary rule’ is that allowing a spouse of a beneficiary to witness a will provides an opportunity for the person to exert undue influence over the testator. Unintended consequences flowed from the application of these rules. For example, wills have been witnessed by spouses of persons who were not contemplated at the time of execution as being a potential beneficiary, but who through the passage of time became a beneficiary because the others died before the testator. The rule meant that any dispositions to these witnesses failed. To address this, the Act provides that a gift to an attesting witness (the ‘interested witness’) of a will is void unless the court is satisfied that the testator knew and approved the making of the gift and the gift was made freely and voluntarily; or all of the people who would benefit if the gift to the witness was void consent to the witness receiving the gift; or there are at least 2 other witnesses to the will who do not receive a gift under the will. The significant difference between s10 and the former s13 is that s10 only makes gifts to the interested witness (and not their spouse) void.

Section 10 applies to all wills whenever made, provided that the testator died on or after 1 March 2008.

COURT AUTHORISED/STATUTORY WILLS – WHERE THE TESTATOR LACKS TESTAMENTARY CAPACITY

The most significant change brought in by the Succession Act is the expansion of the jurisdiction of the Supreme Court by enabling it to authorise the making, alteration or revocation of a will on behalf of a person who lacks testamentary capacity. The issue of whether a testator has testamentary capacity to have the power to make a will is determined by the test in a judgment from the Court of Queen’s Bench in *Banks v Goodfellow*⁶. The test is stated as follows:

“It is essential to the exercise of such power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.”⁷

A person who lacks testamentary capacity may never have had the capacity to make a will or may have lost capacity, for example due to illness or disease. The situation concerning the estates of persons lacking testamentary capacity is that when the person dies, their property is distributed according to the intestacy rules. Where a person has lost capacity, the person may have previously made a valid will which is no longer appropriate due to a change of circumstances, for example, the subsequent birth of a child not mentioned in the will. In those situations, the child would have to bring a family provision application under the *Family Provision Act 1982* (NSW) for a share of their parent’s estate.

⁶ (1870) 5 QB 549, delivered by Cockburn LCJ.

⁷ *Ibid* at 565.

Section 18 enables “any person” to make an application for a Court order authorising a will to be made or altered, in specific terms approved by the Court, on behalf of a person lacking testamentary capacity, or a will or part of a will to be revoked on behalf of a person who lacks testamentary capacity. Thus, there is no restriction on who can apply for a court authorised will for a person lacking testamentary capacity. It is expected that most applications will be made by the person’s spouse, family member or guardian.

Given the wide range of possible applicants for a court-authorized will, important safeguards have been built into the process for applying for a court-authorized will. An applicant must first obtain the Court’s leave before applying for an order for a court-authorized will. The requirement for leave is intended to be a screening process to allow only adequately founded applications to proceed.

The Court may only make an order for a court-authorized will where the testator is alive. A leave application must be accompanied by comprehensive material including evidence of:

- The person’s lack of testamentary capacity and the likelihood of acquiring or regaining it;
- A reasonable estimate of the size and character of the person’s estate;
- The person’s testamentary wishes;
- The terms of any previous wills;
- The likelihood of someone bringing a family provision application;
- The circumstances of any other person for whom the person lacking testamentary capacity might reasonably be expected to make provision for under a will;
- Any other persons who might be entitled to claim on intestacy;
- Whether the person lacking testamentary capacity might reasonably be expected to make a gift for a charitable or other purpose by will.

The applicant must also provide a written statement of the general nature of the application and the reasons for making it, together with a draft of the proposed will, alteration or revocation for which the applicant is seeking the Court’s approval.

There is also opportunity for persons with an interest in the proceedings, for example, the person alleged to lack testamentary capacity, family members etc to be separately represented and heard at an application for leave hearing.⁸

The Court cannot grant leave unless satisfied that:

- The applicant is an appropriate person to make the application;
- Adequate steps have been taken to allow all persons with a legitimate interest in the application to be represented, including persons who have reason to expect a gift or benefit from the estate of the person;
- There are reasonable grounds for believing the person does not have testamentary capacity;
- The proposed will, alteration or revocation is, or is reasonably likely to be, one that would have been made by the person if the person had testamentary capacity; and
- The applicant’s testamentary proposal is, or may be, appropriate for an order to be made in relation to the person.⁹

⁸ On the operation of the Victorian equivalent of this statutory power in Div 2 (s 21–30 of the *Wills Act 1997*), see *Boulton v Sanders* (2004) 9 VR 495; [2004] VSCA 112; BC200403477 and *DeGois v Korp* [2005] VSC 326; BC200505933.

The will must be signed by the Registrar of the Supreme Court and retained by the registrar until further court order, or the person dies or acquires or regains testamentary capacity.¹⁰

This new aspect of the court's jurisdiction also applies to minors. The Court can make a statutory will for a minor to whom the court cannot otherwise give authorization because the minor lacks the requisite degree of understanding, for example, because of immaturity.

The Act moves us from a system where formalities were paramount to one where the Court has greater discretion to interpret the testator's intentions. The policy underlying the Act is that the greatest possible effect should be given to the testator's intentions.¹¹

THE MAKING, ALTERATION AND REVOCATION OF WILLS BY MINORS

Although not an entirely new concept, the Succession Act provides statutory guidance of the matters that the Supreme Court may consider when authorising a minor to make a will. The position under section 6A of the WPAA was that minors could be granted leave by the Court to make a will in terms which were disclosed to the Court.

It was envisaged that the jurisdiction to make wills for unmarried minors would be only in such circumstances where it 'would be very much needed', for example, where a minor was suffering from an illness or injury that may well be fatal; had a sufficient estate to make application to the court worthwhile; and wishes the estate to be distributed otherwise than in accordance with the intestacy rules, which might well benefit both the parents of the minor.¹²

A minor may wish his or her estate to go to one parent rather than both, especially where the minor is estranged from one of his or her parents, or the minor may simply wish to benefit another person, for example, a de facto spouse, a particular sibling or a carer.¹³

Section 16 of the Succession Act now extends the Court's powers to the revocation and alteration of wills in addition to the making of wills.

Before exercising this jurisdiction however, the Court must however be satisfied of the following:

- That the minor understands the nature and effect of the proposed will, alteration or revocation of the will or part of the will;
- That the minor understands the extent of the property to be disposed under of under the will, alteration or revocation; and
- It is reasonable in all the circumstances that the order should be made.¹⁴

The will made for a minor under such provisions is still based on a concept of understanding, as the Court must be satisfied that the minor understands the nature and effect of the proposed will, alteration or revocation and that it accurately reflects the intentions of the minor. The provision requires evidence of the actual and subjective intentions of the minor.

⁹ Section 22 of the *Succession Act* 2008.

¹⁰ Sections 23 and 24 of the *Succession Act* 2008.

¹¹ The Honorable Mr Bob Debus, former Attorney-General, New South Wales, Legislative Assembly, *Parliamentary Debates (Hansard)*, Article 46 of 47, 19 September 2006 at 1858.

¹² Croucher, Rosalind F., 'The Uniform Succession Laws Project in Australia – Challenges Past, Present and Future' Keynote address presented to the *Succession Law Conference – The Future of Succession Law and Uniform Legislation*, Adelaide, 18-19 October 2007.

¹³ New South Wales Law Reform Commission, *Uniform Succession Laws—The Law of Wills* (Report 85), 1998, [5.4].

¹⁴ Section 16(4) of the Succession Act.

It must be understood that the Court is not actually 'making' a will for the minor, but rather, the Court is conferring capacity on the minor to make the will in question. If the minor lacks such understanding then a will may only be made for the minor under the provisions that authorise the Court to make a will for a person who lacks capacity—a 'statutory will'.

The Registrar of the Supreme Court must be a witness to the will and must retain it in safe custody.

WHO IS ENTITLED TO SEE THE WILL OF A DECEASED PERSON?

This is the one area that creates so much controversy amongst families! Generally, only a named beneficiary has a right to see the will. Section 54 of the Act is a new provision which requires the person who has custody or control of a will of a deceased person to allow certain categories of people to inspect the will and copy it. The entitlement to inspect the will extends to a part of a will and to purported and revoked wills, and parts thereof, as well as copies. These testamentary instruments can be significant to the determination of questions concerning, for example, the testator's capacity, undue influence or interpretation.

The provision is intended to ensure that persons with a proper interest can see the contents of a will prior to the will's admission to probate, upon which it becomes a public document. Providing individuals with a right to see the will may assist those who wish to make a claim against the estate.

Those who are entitled to see or obtain a copy of the will are:

- Any person named or referred to in the will, whether as a beneficiary or not;
- Any person named or referred to in an earlier will as a beneficiary;
- The surviving spouse, de facto partner (whether the same or the opposite sex) or issue of the deceased;
- A parent or guardian of the deceased;
- Any person who would be entitled to a share of the estate of the deceased if the deceased had died intestate;
- Any parent or guardian of a minor referred to in the will or who would be entitled to a share of the estate of the testator if the testator had died intestate;
- Any person (including a creditor) who has or may have a claim at law or in equity against the estate of a deceased person;
- Any person committed with the management of the deceased person's estate under the *Protected Estates Act 1983* immediately before the death of the deceased;
- Any attorney under an enduring power of attorney made by the deceased;
- Any person belonging to a class of persons prescribed by the regulations.

The provision applies to all wills, regardless of when they were made. Valid wills made prior to this legislation will continue to be effective. People do not have to remake their wills just because we have a new Act. However introduction of this legislation is a good reminder for people to make a will or to review their will.