

Queensland



ANNO TRICESIMO

ELIZABETHAE SECUNDAE REGINAE

No. 69 of 1981

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

[ASSENTED TO 7TH OCTOBER, 1981]

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Assembly of Queensland in Parliament assembled, and by the authority of the same, as follows:—

PART I—PRELIMINARY

1. Short title and commencement. (1) This Act may be cited as the *Succession Act 1981*.

(2) This Act shall come into operation on a date to be fixed by Proclamation.

2. Arrangement of Act. This Act is divided into Parts, Divisions and Schedules as follows:—

PART I—PRELIMINARY, ss. 1–6;

PART II—WILLS, ss. 7–33;

Division 1—The Making of Wills, ss. 7–16;

Division 2—The Revocation and Revival of Wills, ss. 17–21;

Division 3—Formal Validity of Wills, ss. 22–25;

Division 4—The Construction and Rectification of Wills, ss. 26–33;

PART III—DISTRIBUTION ON INTESTACY, ss. 34–39;

PART IV—FAMILY PROVISION, ss. 40–44;

PART V—ADMINISTRATION, ss. 45–61;

Division 1—Devolution of Property, Probate and Administration, ss. 45–54;

Division 2—Administration of Assets, ss. 55–61;

PART VI—MISCELLANEOUS, ss. 62–72;

FIRST SCHEDULE—ACTS REPEALED OR AMENDED;

SECOND SCHEDULE—DISTRIBUTION OF RESIDUARY ESTATE UPON INTESTACY.

In Parts II, III and IV the abbreviations used in references to other Acts in notes to sections appearing at the beginning of the sections have the following meanings: Qld. *Succession Acts 1867–1968* (Queensland); Eng. *Wills Act, 1837* (England); Vic. *Wills Act 1958* (Victoria); A.C.T. *Wills Ordinance 1968* (A.C.T.); and in Part V have the following meanings: Qld. *Probate Act 1867* (Queensland); Eng. *Administration of Estates Act, 1925* (England); N.S.W. *Wills Probate and Administration Act 1898* (New South Wales); Vic. *Administration and Probate Act 1958* (Victoria); W.A. *Administration Act 1903* (Western Australia); N.Z. *Administration Act 1969* (New Zealand).

3. Repeals and Savings. [Qld. *Trusts Act, 1973, s. 3.*] (1) The Acts specified in the First Schedule are repealed or amended (as indicated) to the extent mentioned in that Schedule.

Upon the amendments of the Acts specified in the First Schedule taking effect the mode of citation of an Act or of an Act or Acts as previously amended specified in the first column of the following

Table shall become and be the mode of citation specified in the second column of the Table in relation to that Act or those Acts:—

Table

<i>Common Law Practice Act</i> 1867–1978	<i>Common Law Practice Act</i> 1867–1981
<i>Equity Act</i> 1867–1974	<i>Equity Act</i> 1867–1981
<i>Supreme Court Acts</i> 1861–1980	<i>Supreme Court Acts</i> 1861–1981
<i>Property Law Act</i> 1974–1978	<i>Property Law Act</i> 1974–1981
<i>Public Trustee Act</i> 1978	<i>Public Trustee Act</i> 1978–1981

(2) Without limiting the operation of the *Acts Interpretation Act* 1954–1977 to or in relation to the repeals effected by subsection (1), unless the contrary intention appears in this Act—

- (a) all persons, things and circumstances appointed or created by or under any of the repealed provisions, or existing or continuing under such a provision immediately before the commencement of this Act shall, under and subject to this section, continue to have the same status, operation and effect as they respectively would have had if those provisions had not been repealed; and
- (b) in particular and without affecting the generality of the foregoing paragraph, such repeal shall not disturb the continuity of operation or effect of any order, rule, regulation, scale of fees, instrument, document, disposition, execution, attestation, appointment, revival, duty, obligation, proceeding, matter or thing done, effected, given, issued, entered into, accrued, incurred, existing, pending or acquired by or under any of those provisions before the commencement of this Act; and
- (c) nothing in this Act shall affect the construction of the will of any person who died before the commencement of this Act.

4. Application. [Cf. *Trusts Act*, 1973, s. 4; England: *Administration of Estates Act*, 1925, s. 54.] (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 of Queensland but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

5. Interpretation. [Cf. *Property Law Act*, 1974, s. 4; England: *Administration of Estates Act*, 1925, s. 55.] (1) In this Act unless a contrary intention appears—

- “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 of Australia, or country, where the adoption takes place, as in force at the date of the adoption;
- “country” means any place or group of places having its own law of nationality, including Australia and its Territories;

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- “ 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 ” includes any gift, devise, bequest or appointment of or affecting property contained in a will; and “ dispose of ” has a corresponding meaning;
 - “ 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;
 - “ internal law ” in relation to any country or place means the law that would apply in a case where no question of the law in force in any other country arose;
 - “ income ” includes rents and profits;
 - “ intestate ” means a person who dies and either does not leave a will, or leaves a will but does not dispose effectively by his will of the whole or part of his property; and “ intestacy ” has a corresponding meaning;
 - “ 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;
 - “ property ” includes real and personal property and any estate or interest therein and any thing in action and any other right;
 - “ Public Trustee ” means The Public Trustee of Queensland constituted by the *Public Trustee Act 1978*;
 - “ residuary estate ” in Part III of this Act has the meaning given to it by s. 34 and in Part V, Division 2, the meaning given to it by s. 55;
 - “ 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 of 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 codicil.

(2) 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 thirty days.

(3) 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 his will.

6. Jurisdiction. [Cf. Qld. *Probate Act of 1867*, ss. 3-6; Eng. *Supreme Court of Judicature (Consolidation) Act 1925*, s. 20; Vic. *Supreme Court Act 1958*, ss. 17, 18; N.Z. *Administration Act, 1969*, s. 5.] (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 he 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 the foregoing provisions of this section 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*.

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

PART II—WILLS

Division 1—*The Making of Wills*

7. What property may be disposed of by will. [Qld. s. 36; Eng. s. 3; Vic. s. 5; A.C.T. s. 7.] (1) A person may, by his will, devise, bequeath or dispose of any property to which he is entitled at the time of his death, not being property of which he is trustee and in respect of which he has no power of disposition by will, whether he became entitled to the property before or after the execution of the will.

(2) Without limiting the generality of the last preceding subsection, a person may, by his will, dispose of—

- (a) property that, if not disposed of by his will, would devolve on the executor of his will or the administrator of his estate;
- (b) a contingent, executory or future interest in property, whether he becomes entitled to the interest by virtue of the instrument by virtue of which the interest was created or by virtue of a disposition of the interest by deed or will and whether he has or has not been ascertained as the person or one of the persons in whom the interest may become vested; and
- (c) a right of entry for condition broken and any other right of entry.

8. Legal capacity to make a will. [Cf. Qld. s. 37; Eng. s. 7; Vic. s. 6; A.C.T. s. 8.] (1) A person who has attained the age of eighteen may make a valid will and may also validly revoke a will with or without making a new will.

(2) A married person may make a valid will and may also validly revoke a will with or without making a new will irrespective of age.

(3) A person who has made a will while under the age of eighteen and married may, if he is subsequently unmarried and under the age of eighteen, revoke such will by any manner of revocation provided in this Act other than by the making of a later will.

(4) Nothing in this section affects the law with respect to the mental capacity required of a person for the making of a will.

9. Will to be in writing and signed before two witnesses. [Cf. Qld. s. 39; Eng. s. 9; Vic. s. 7; A.C.T. s. 9.] A will shall not be valid unless it is in writing and executed in manner hereinafter mentioned and required (that is to say) it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time and such witnesses shall attest and shall subscribe the will in the presence of the testator but no form of attestation shall be necessary provided that:

- (a) the Court may admit to probate a testamentary instrument executed in substantial compliance with the formalities prescribed by this section if the Court is satisfied that the instrument expresses the testamentary intention of the testator; and
- (b) the Court may admit extrinsic evidence including evidence of statements made at any time by the testator as to the manner of execution of a testamentary instrument.

10. When signature to a will shall be deemed valid. [Cf. Qld. s. 40; Eng. *Wills Act Amendment Act*, 1852, s. 1; Vic. s. 8; A.C.T. s. 10] (1) A will, so far only as regards the position of the signature of the testator on the will, is not invalid if the signature is so placed at, after, following, under, beside or opposite to the end of the will that it is apparent on the face of the will that the testator intended to give effect by that signature to the writing signed as his will.

(2) Without limiting the generality of the last preceding subsection, the validity of a will is not affected by reason of the fact—

- (a) that the signature of the testator does not follow, or is not immediately after, the foot or end of the will;
- (b) that a blank space intervenes between the concluding word of the will and the signature;
- (c) that the signature—
 - (i) is placed among the words of the testimonium clause or of the clause of attestation;
 - ii) follows, or is after or under, the clause of attestation, whether or not a blank space intervenes between the concluding word of that clause and the signature; or
 - (iii) follows, or is after, under or beside, the names, or one of the names, of the subscribing witnesses;

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

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

(3) The signature of the testator on a will does not operate to give effect to a disposition or direction that is underneath or follows that signature, or that is inserted in the will after that signature is made.

(4) In this section, references to the signature of the testator shall, in relation to a will signed by a person by the direction of the testator, be read as references to the signature of that person.

11. Appointments by will to be executed like other wills. [Qld. s. 42; Eng. s. 10; Vic. s. 9; A.C.T. s. 11.] (1) Where a testator purports to make an appointment by his will in exercise of a power of appointment by will, the appointment is not valid unless the will is executed in accordance with this Part.

(2) Where power is conferred on a person to make an appointment by a will that is executed in some particular manner or with some particular solemnity, the person may exercise the power by a will that is executed in accordance with this Part but is not executed in that manner or with that solemnity.

12. Alterations to be executed as a will. [Cf. Qld. s. 53; Eng. s. 21; Vic. s. 19; A.C.T. s. 12] (1) No alteration made in any will after the execution thereof shall be valid or have any effect unless such alteration is executed in like manner to that required by this Act for the execution of the will.

(2) Each alteration made in any will after the execution thereof shall be deemed to be executed in the manner referred to in subsection (1) if the signature of the testator and the subscription of the witnesses be made—

(a) in the margin or on some other part of the will opposite or near or otherwise relating to such alteration; or

(b) at the foot or end of or opposite to a memorandum referring to such alteration and written at the end or some other part of the will.

(3) An alteration that is invalid and of no effect made in any will shall be disregarded if the words or effect of the will before the alteration was made be apparent.

(4) In this section the expression "alteration" includes obliteration and interlineation.

13. Publication of will unnecessary. [Qld. s. 45; Eng. s. 13; Vic. s. 11; A.C.T. s. 13.] The validity of a will that has been executed in

accordance with the provisions of this Part is not affected by reason that a person who subscribed the will as a witness was unaware that the document was a will.

14. Competence of witnesses. [Cf. Qld. s. 46; Eng. s. 14; Vic. s. 12; A.C.T. s. 14; American Uniform Probate Code s. 2-505.] Any person competent to be a witness in civil proceedings in Court, other than a blind person, may act as a witness to a will.

15. Gifts to attesting witnesses to be void. [Cf. Qld. s. 47; Eng. s. 15; Vic. s. 16; A.C.T. s. 15.] (1) Where any disposition of property (other than a charge or direction for the payment of any debt or for the payment of proper remuneration to any person, whether executor, administrator, solicitor or conveyancer, for acting in or about the administration of the estate of the testator) is, by will, made in favour of a person who attested the signing of the will, or the spouse of such person, to be held by that person beneficially, the disposition is null and void to the extent that it entitles that person, the spouse of that person or another person claiming under that person or that spouse to take property under it.

(2) The attestation of a will by a person to whom or to whose spouse there is made any disposition as aforesaid shall be disregarded if the will is duly executed without his attestation and without that of any other such person, whether or not the attestation was made upon the execution of a will before the passing of this Act.

16. Privileged wills. [Cf. Qld. s. 43; Eng. s. 11; Vic. s. 10; W.A. ss. 17-19; A.C.T. s. 10.] A will made by a person having the legal capacity to make a will being—

- (a) any person, whether as a member or not, serving with the armed forces of the Commonwealth or its allies while in actual military, naval or air service in connection with operations that are or have been taking place, or are believed to be imminent in relation to a war declared or undeclared or other armed conflict in which members of such armed forces are, or have been or are likely to be engaged;
- (b) any mariner or seaman being at sea; or
- (c) any person who is a prisoner of war or internee in an enemy or neutral country—

need not be executed in the manner prescribed by section 9 of this Act but may be made without any formality by any form of words, whether written or spoken, if it is clear that that person thereby intended to dispose of his property after his death.

Division 2—The Revocation and Revival of Wills

17. Revocation of will by marriage. [Cf. Eng. s. 18; Qld. s. 50; *Law Reform (Wills) Act of 1962*, s. 3; Vic. s. 16; A.C.T. s. 20.] (1) Subject to subsection (2) of this section, where a person marries after making a will, the will is revoked by the marriage unless it contains an expression of contemplation of that marriage; and extrinsic evidence, including evidence of statements made by the testator, is admissible to establish that an expression contained in the will is an expression of contemplation of that marriage.

(2) Where a testator marries after he has made a will by which he has exercised a power of appointing property by will, the marriage does not revoke the will, in so far as it constitutes an exercise of that power, if the property so appointed would not, in default of the testator exercising that power, pass to an executor under any other will of the testator or to an administrator of any estate of the testator.

18. Effect of divorce on will. [Cf. American Uniform Probate Code s. 2—508.] (1) The dissolution or annulment of the marriage of a testator revokes—

- (a) any beneficial disposition of property made by will by the testator in favour of his spouse; and
- (b) any appointment made by will by the testator of his spouse as executrix, trustee, advisory trustee or guardian.

(2) So far as any beneficial disposition of property which is revoked by the operation of subsection (1) of this section is concerned the will shall take effect as if the spouse had predeceased the testator.

19. No will to be revoked by presumption. [Cf. Eng. s. 19; Qld. s. 51; Vic. s. 17.] Subject to this Act no will shall be revoked by any presumption of an intention on the ground of an alteration of circumstance.

20. Revocation by instrument or destruction. [Cf. Qld. s. 52; Eng. s. 20; Vic. s. 18; A.C.T. s. 21.] (1) No will or codicil or any part thereof shall be revoked otherwise than—

- (a) as provided by section 17 or 18; or
- (b) by another will or codicil executed in manner hereinbefore required or, if not so executed, admitted to probate under section 9; or
- (c) by some writing declaring an intention to revoke the same and executed in the manner in which a will is hereinbefore required to be executed; or
- (d) by the burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

(2) Notwithstanding the provisions of subsection (1) a person included in a class of person specified in section 16 may revoke a will in the same manner as he may make a will under the provisions of that section.

21. Revival of revoked wills. [Cf. Qld. s. 54; Eng. s. 22; Vic. s. 20; A.C.T. s. 22.] (1) A will or a part of a will that has been revoked is not revived unless—

- (a) the testator re-executes it in the manner in which a valid will is required to be executed by this Part; or
- (b) the testator executes, in the manner in which a valid will is required to be executed by this Part, a valid codicil showing an intention to revive the will.

(2) Where a will that has been partly revoked and afterwards wholly revoked is revived the revival operates, unless a contrary intention appears, to revive only so much of the will as was last revoked.

(3) A will that is revoked and subsequently revived shall, for the purpose of this Act, be deemed to have been made at the time when it is revived.

Division 3—Formal Validity of Wills

[Cf. Eng. *Wills Act*, 1963; Vic. *Wills (Formal Validity) Act*, 1964; W.A. *Wills Act*, 1970, Part VII.]

22. Operation of this Division. The provisions of this Division take effect notwithstanding any other provisions of this Act.

23. General rule as to formal validity. A will shall be treated as properly executed if its execution conformed to the internal law in force in the place where it was executed, or in the place where, at the time of its execution or of the testator's death, he was domiciled or had his habitual residence, or in a country of which, at either of those times, he was a national.

24. Additional rules. Without prejudice to the provisions of section 23 the following wills shall be treated as properly executed:—

- (a) a will executed on board a vessel or aircraft of any description, if the execution of the will conformed to the internal law in force in the place with which, having regard to its registration if any, and other relevant circumstances, the vessel or aircraft may be taken to have been most closely connected;
- (b) a will so far as it disposes of immovable property, if its execution conformed to the internal law in force in the place where the property was situated;
- (c) a will so far as it revokes a will which under this Division would be treated as properly executed or revokes a provision which under this Division would be treated as comprised in a properly executed will, if the execution of the later will conformed to any law by reference to which the revoked will or provision would be so treated;
- (d) a will so far as it exercises a power of appointment if the execution of the will conformed to the law governing the essential validity of the power.

25. Ascertainment of system of internal law. (1) Where, under this Division, the internal law in force in any country or place is to be applied in the case of a will, but there are in the country or place two or more systems of internal law relating to the formal validity of wills, the system to be applied shall be ascertained as follows:—

- (a) if there is in force throughout the country or place a rule indicating which of those systems can properly be applied in the case in question, that rule shall be followed; or
- (b) if there is no such rule, the system shall be that with which the testator was most closely connected at the relevant time and for this purpose the relevant time is the time of the testator's death

where the matter is to be determined by reference to circumstances prevailing at his death and at the time of execution of the will in any other case.

(2) In determining for the purpose of this Division whether or not the execution of a will conformed to a particular law, regard shall be had to the formal requirements of that law at the time of the execution of the will, but this does not prevent account being taken of an alteration of law affecting wills executed at that time, if the alteration enables the will to be treated as properly executed.

(3) Where a law in force outside the State falls, whether in pursuance of this Division or not, to be applied in relation to a will, any requirement of that law whereby special formalities are to be observed by testators answering a particular description or witnesses to the execution of a will are to possess certain qualifications, shall be treated, notwithstanding any rule of that law to the contrary, as a formal requirement only.

Division 4—The Construction and Rectification of Wills

26. Change of domicile. [Cf. *Eng. Wills Act*, 1963, s. 4; *Vic. Wills Act*, 1958, s. 20D; *W.A. Wills Act* 1970, s. 23.] The construction of a will shall not be altered by reason of any change in the testator's domicile after the execution of the will.

27. Effect of subsequent conveyance on operation of will. [Qld. s. 55; *Eng. s. 23*; *Vic. s. 21*; *W.A. s. 25*; *A.C.T. s. 23*.] No conveyance or other act made or done subsequently to the execution of a will of or relating to any property therein comprised except an act by which such will is revoked as provided in this Act shall prevent the operation of the will with respect to such estate or interest in such property as the testator shall have power to dispose of by will at the time of his death.

28. General rules for the construction of wills. [Cf. Qld. ss. 56–60, 62, 63; *Eng. ss. 24–28, 30, 31*; *Vic. ss. 22–26, 28, 29*; *W.A. s. 26*; *A.C.T. ss. 24–26, 29, 30*.] Unless a contrary intention appears by the will—

- (a) the will is to be construed, with reference to the property comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator;
- (b) property that is the subject of a disposition that is void or fails wholly or in part to take effect is to be included so far as the disposition is void or fails to take effect in any residuary disposition contained in the will;
- (c) a general disposition of land or of land in a particular area includes leasehold land whether or not the testator owns freehold land;
- (d) a general disposition of all the testator's property or of all his property of a particular kind includes property or that kind of property over which he had a general power of appointment exercisable by will and operates as an execution of the power;
- (e) a disposition of property without words of limitation whether to a person beneficially or as executor or trustee is to be construed as passing the whole estate or interest of the testator therein.

29. Construction of residuary dispositions. [Cf. American Uniform Probate Code s. 2—606.] Unless a contrary intention appears by the will—

- (a) a residuary disposition referring only to the real estate of the testator or only to the personal estate of the testator shall be construed to include all the residuary estate of the testator both real and personal; and
- (b) subject to this Act, where a residuary disposition in fractional parts fails as to any of such parts for any reason that part shall pass to that part of the residuary disposition which does not fail and if there is more than one part which does not fail to all those parts proportionately.

30. Construction of documents: “Die without issue”; mode of distribution amongst issue. [Qld. s. 61; cf. s. 33.] (1) Any disposition or appointment of property using the words “die without issue”, or “died without leaving issue”, or “having no issue”, or any words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person and not an indefinite failure of his issue.

(2) Unless a contrary intention appears by the will, a beneficial disposition of property to the issue of a person shall be distributed to the nearest issue of that person and if there be more than one such nearest issue, among them in equal shares and by representation among the remoter issue of that person.

31. Power of Court to rectify wills. (1) As from the commencement of this Act the Court shall have the same jurisdiction to insert in the probate copy of a will material which was accidentally or inadvertently omitted from the will when it was made as it has hitherto exercised to omit from the probate copy of a will material which was accidentally or inadvertently inserted in the will when it was made.

(2) Unless the Court otherwise directs, no application shall be heard by the Court to have inserted in or omitted from the probate copy of a will material which was accidentally or inadvertently omitted from or inserted in the will when it was made unless proceedings for such application are instituted before or within six months after the date of the grant in Queensland.

32. Lapse of benefit where beneficiary does not survive testator by thirty days. [Cf. Qld. s. 95; Eng. *Law of Property Act*, 1925, s. 184; American Uniform Probate Code, s. 2—601.] (1) Unless a contrary intention appears by the will, where any beneficial disposition of property is made to a person who does not survive the testator for a period of thirty days the disposition shall be treated as if that person had died before the testator and, subject to this Act, shall lapse.

(2) A general requirement or condition that a beneficiary survive the testator is not a contrary intention for the purpose of this section.

33. Statutory substitutional provisions in the event of lapse. [Cf. Qld. s. 65; Eng. s. 33; Vic. s. 31; W.A. s. 27; A.C.T. s. 31.] (1) Unless a contrary intention appears by the will, where any beneficial disposition of property is made to any issue of the testator (whether as an individual or as a member of a class) for an estate or interest not determinable at or before the death of that issue and that issue is dead at the time of the execution of the will or does not survive the testator for a period of thirty days, the nearest issue of that issue who survive the testator for a period of thirty days shall take in the place of that issue and if more than one nearest issue so survive, shall take in equal shares and the more remote issue of that issue who survive the testator for a period of thirty days shall take by representation.

(2) A general requirement or condition that such issue survive the testator or attain a specified age is not a contrary intention for the purpose of this section.

(3) This section applies only to wills executed or republished after the commencement of this Act.

PART III—DISTRIBUTION ON INTESTACY

34. Interpretation. [Qld. s. 29.] (1) In this Part, unless a contrary intention appears "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.

(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 IV of this Act and shall be applied accordingly.

35. Distribution of residuary estate on intestacy. [Qld. s. 30.] (1) Subject to the provisions of subsection (2) 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 the Second Schedule of this Act according to the facts and circumstances existing in relation to the intestate.

For the purposes of this Act—

- (a) the brothers and sisters of the intestate;
- (b) the grandparents of the intestate;
- (c) the brothers and sisters of a parent of the intestate;
- (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 thirty days that part of the residuary estate shall be treated as if that person had died before the intestate.

36. Manner of distribution to issue. [Qld. s. 31.] Where an intestate is survived by issue who are entitled to the whole or a part of the residuary estate of the intestate the nearest issue of the intestate shall take that whole or part and if there be more than one such nearest issue among them in equal shares and the more remote issue of the intestate shall take that whole or part by representation.

37. Manner of distribution to next of kin. [Qld. s. 32.] (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 the last preceding paragraph but is survived by one or more of his 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; and
 - (c) if the intestate is not survived by any persons entitled to the residuary estate under the last two preceding paragraphs, 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;
 - (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 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:

Provided that 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. [Qld. s. 34.] (1) The executor of the will of an intestate shall hold, subject to his rights and powers for the purposes of administration, the residuary estate of an intestate on trust for the persons entitled to it.

(2) Where the spouse of an intestate acquires a beneficial interest under the will of the intestate in the property of the intestate, item 3 of Part I of the Second Schedule to this Act applies as if—

- (a) in a case where the value of the beneficial interest so acquired by the spouse under the will does not exceed \$50,000, the references to the sum of \$50,000 were references to that sum less the value of that beneficial interest; or
- (b) in any other case, the references to the sum of \$50,000 or the whole of the residuary estate, whichever is the less, were omitted.

For the purposes of this subsection, a beneficial interest in real or personal property acquired by virtue of the exercise, by will, of a general power of appointment, shall be taken to be an interest acquired under that will.

39. Construction of documents: references to Statutes of Distribution; meaning of "heir". [Cf. Eng. *Administration of Estates*, 1925, s. 50.]

(1) 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.

(2) Section 28 of the *Property Law Act* 1974 is amended by omitting the words " , and in the case of an interest in any property expressed to be given to an heir or heirs or any particular heir or class of heirs, the same person shall take as would in the case of freehold land have answered that description under the general law in force before the commencement of this Act "

PART IV—FAMILY PROVISION

40. Meaning of terms. [Qld. s. 89.] In this Part unless a contrary intention appears—

- "child" means, in relation to a deceased person, any child, stepchild or adopted child of that person;
- "dependent" 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 his death being—
 - (a) a parent of that deceased person;
 - (b) the parent of a surviving child under the age of eighteen years of that deceased person;
 - (c) a person under the age of eighteen years; or

(d) a person who—

- (i) has lived in a connubial relationship with that deceased person for a continuous period of five years at least terminating on the death of that deceased person; or
- (ii) within the period of six years terminating on the death of that deceased person, has lived in a connubial relationship with that deceased person for periods aggregating five years at least including a period terminating on the death of that deceased person;

“ spouse ” means, in relation to a deceased person, the husband or wife of that person and includes a husband or wife who has been divorced whether before, on or after the commencement of this Act by or from that person and who has not remarried before the death of that person, if he is receiving or entitled to receive maintenance from that person at the time of that person’s death;

“ stepchild ” means, in relation to a deceased person, a child of that person’s spouse who is not a child of the deceased person.

41. Estate of deceased person liable for maintenance. [Qld. s. 90.]

(1) If any person (hereinafter called “ 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 shall be made out of the estate of the deceased person for such spouse, child or dependant:

Provided that 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 his 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 he 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 of Queensland or the Director of Children's Services, or any person acting as the next friend of any infant or any mentally ill person, may apply on behalf of any person being an infant, or being mentally ill in any case where such person might apply, or may apply to the Court for advice or directions as to whether he 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 nine 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 his 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 he 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.

(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. [Qld. s. 91.] (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 his 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:

Provided that 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 subsection (1) of this section, 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. (1) Manner of computing duty on estate. [Qld. s. 92.] 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) **Refund of duty paid in excess.** 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. [Qld. s. 93.] (1) No action shall lie against the personal representative by reason of his 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 wife, husband 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.

(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 his 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 his having distributed any part of the estate if the distribution was properly made by the personal representative after the expiration of six months from the death of the deceased and without notice of any application or intended application under subsection (1) of section 41 or under section 42 in respect of the estate.

(4) For the purposes of this section notice to a personal representative of intention to make any application under this Part shall be in writing signed by the applicant or his solicitor and shall lapse and be incapable of being renewed, and the personal representative may act as if he had not received the notice, unless, before the expiration of three months after the day on which he first receives notice of intention to make the application, the personal representative receives notice in writing that the application has been made to the Court or is served with a copy of the application:

Provided that nothing in this subsection shall prevent the subsequent making of an application within any other period allowed by or pursuant to this Part.

PART V—ADMINISTRATION

Division 1—Devolution of Property Probate and Administration

45. Devolution of property on death. [Qld. *Intestacy Act*, 1877, s. 14; *Public Trustee Act* 1978, s. 56; Eng. s. 1. N.S.W. s. 44; Vic. ss. 13, 19; W.A. s. 8; N.Z. s. 24.] (1) The property to which a deceased person was entitled for an interest not ceasing on his death (other than property of which he was trustee) shall on his death and notwithstanding any testamentary disposition devolve to and vest in his executor and if more than one 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 executor or in the Public Trustee under the provisions of the preceding subsection shall devolve to and vest in the person to whom the grant is made and if more than one 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 him 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 him 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:

Provided that all acts lawfully done by to or in regard to the Public Trustee before the appointment of an administrator shall 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 section 16 of the *Trusts Act* 1973, 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 shall affect the operation of section 88 of the *Real Property Act* 1861–1981, sections 32 and 32A of the *Real Property Act* 1877–1979, section 290 of the *Land Act* 1962–1981 or the provisions of any other 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. [Qld. ss. 17, 18; Eng. s. 5; N.S.W. s. 69; Vic. s. 16 (1); W.A. s. 32; N.Z. s. 11; Cf. *Trusts Act*, 1973, s. 18.] Where a person appointed executor by a will—

(i) survives the testator but dies without having taken out probate of the will; or

(ii) renounces probate; or

(iii) after being duly cited or summoned fails to apply for probate, his rights in respect of the executorship shall wholly cease, and the representation of the testator and the administration of his 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. [Eng. s. 7; Vic. s. 17; N.Z. s. 13.] (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.

This provision shall not apply to an executor who does not prove the will of his testator, and, in the case of an executor who on his death leaves surviving him some other executor of his 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 hands, answerable as if he were an original executor.

(5) An executor may renounce his executorship by representation before intermeddling without renouncing the executorship in relation to his own testator.

48. Provisions as to the number of personal representatives. [Cf. *Eng. Judicature Act*, 1925, s. 160; *Trusts Act* 1973, s. 11.] (1) A grant shall not be made to more than four persons at any one time and where a testator appoints more than four 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. Powers of personal representatives. [Cf. *Eng. s. 1 (3)*; *N.S.W. s. 48*; *N.Z. s. 23*.] (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) The personal representatives may, during and after the period of thirty days after the death of a deceased person, make reasonable provision out of the estate for the maintenance (including hospital and medical expenses) of any spouse or issue of the deceased who would, if he survived the deceased for a period of thirty days, be entitled to a share in the estate, and any sum so expended shall be deducted from that share; but if any spouse or issue of the deceased for whom any provision has been so made does not survive the deceased for a period of thirty days any sum expended in making such provision shall be treated as an administration expense.

(4) 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.

(5) The powers of personal representatives shall be exercised by them jointly.

(6) The Court may confer on a personal representative such further powers in the administration of the estate as may be convenient.

50. Rights and liabilities of administrators. [Eng. s. 21; Vic. s. 27; W.A. s. 41.] 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 he were the executor of the deceased.

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. [Qld. s. 6; Eng. *Administration of Estates Act* 1971, s. 9; Vic. s. 28.] (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;
- (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;
- (c) when required to do so by the Court, deliver up the grant of probate or letters of administration to the Court;
- (d) distribute the estate of the deceased, subject to the administration thereof, as soon as may be;
- (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 eight per cent 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.

Nothing in this subsection 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 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 his hands and the costs of the application.

53. Effect of revocation of grant. [Qld. ss. 39, 40; Eng. ss. 17, 27, 37; Vic. ss. 23, 31, 42.] (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 in respect of payments and dispositions made by him 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 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 his 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 him, 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. [Eng. s. 28; Vic. s. 33 (1).] (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,

he shall be charged as executor in his own wrong to the extent of the estate received or coming into his hands, or the debt or liability released, after deducting any payment made by him 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 executorship notwithstanding his 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.

Division 2—Administration of Assets

55. Interpretation. In this Division unless a contrary intention appears “residuary estate” means—

- (a) property of the deceased that is not effectively disposed of by his 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. [Eng. s. 32; Vic. s. 37.] (1) The property of a deceased person which on his death devolves to and vests in his executor or the Public Trustee is assets for the payment of his 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 encumbrances.

57. Payment of debts in the case of insolvent estates. [Eng. s. 34; Vic. s. 39; Cf. *Commonwealth Bankruptcy Act 1966–1973*, s. 109 (1) (e).] 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. [Eng. *Administration of Estates Act 1971*, s. 10.] (1) The right of retainer of a personal representative and his 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 he has no reason to believe that the deceased’s

estate is insolvent, pays the debt of any person (including himself) who is a creditor of the estate; or

- (b) to whom letters of administration have been granted solely by reason of his 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. [Eng. s. 34 (3), 35 (2); N.S.W. s. 46c; Vic. s. 39, 40 (2).] (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 his estate or out of his residuary estate or by a gift of any such estate after or subject to the payment of debts.

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. [Eng. s. 35; Vic. s. 40.] (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 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 his estate or out of his residuary estate or by a gift of any such estate after or subject to the payment of debts.

PART VI—MISCELLANEOUS

62. Intermediate income on contingent and future bequests and devises. A contingent, future or deferred bequest or devise of property whether specific or residuary carries the intermediate income of such property except so far as such income or any part thereof is otherwise disposed of by the will.

63. Legacies and devises to unincorporated associations of persons. (1) A legacy or devise to an unincorporated association of persons or to or upon trust for the aims, objects or purposes of an unincorporated association of persons or to or upon trust for the present and future members of an unincorporated association of persons shall have effect as a legacy or devise in augmentation of the general funds of the association.

(2) Money or property representing a legacy or devise in augmentation of the general funds of an unincorporated association of persons whether expressed by the will or having effect by virtue of subsection (1) of this section shall be paid or transferred to or sold or otherwise disposed of on behalf of the association and the money property or proceeds of sale thereof shall be applied by the association in accordance with the provisions of its constitution from time to time with respect to the application of its general funds.

(3) Subject to the will—

- (a) the receipt of the Treasurer or like officer for the time being of an unincorporated association of persons is an absolute discharge to the personal representative for the payment of any pecuniary legacy or other moneys to the association;
- (b) the transfer of property representing a legacy or devise to a person or persons designated in writing by any two persons holding the offices of President, Chairman, Treasurer or Secretary (or like offices if those offices are not so named) of an unincorporated association of persons is an absolute discharge to the personal representatives for the payment or transfer of money or property representing such legacy or devise; and

(c) a transfer of devised property which is land under the provisions of the *Real Property Act 1861-1979* shall be effected by means of a Nomination of Trustees under and pursuant to the provisions of that Act upon trust for the association and in respect of other land a transfer thereof shall be effected in accordance with the requirements of the Registrar of Dealings or Registering Officer pursuant to the relevant legislation relating to the registration of such transfer; and a declaration made by those persons claiming to be the officers of the unincorporated association duly authorised to designate the transferee or transferees in relation to such property shall be sufficient evidence of such designation to the Registrar of Titles, Registrar of Dealings or Registering Officer as the case may be.

(4) It shall not be an objection to the validity of a legacy or devise to an unincorporated association of persons that a list of all the members of the association at the death of the testator cannot be compiled.

64. Certain powers and trusts not invalid as delegation of will-making power. A power to appoint or a trust to distribute property, created by will, is not void as a delegation of the testator's power to make a will if the same power or trust would be valid if created by an instrument made *inter vivos*.

65. Presumption of survivorship. [Qld. *Succession Act of 1867*, s. 95.] Subject to this Act, where two 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 one day.

66. Survival of actions. [Cf. *Common Law Practice Act 1867-1972*, s. 15D; Eng. *Proceedings Against Estates Act*, 1960.] (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 15th October, 1940, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his 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;
- (b) shall not include exemplary damages;
- (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;

(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;
- (ii) future probable earnings of the deceased had he survived.

(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 him before his death such cause of action in respect of that act or omission as would have subsisted if he 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 *Common Law Practice Act 1867–1978* 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) of this section.

(5) Nothing in this section enables any proceedings to be taken which had ceased to be maintainable before the commencement of this Act.

(6)—

- (a) An action which survives pursuant to subsection (1) of this section 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.
- (b) 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 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 for the payment of the debts of the deceased, and he may join any such beneficiary as a party to the action brought against him.
- (c) 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 he has received the distribution made to him in good faith and has so altered his 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.

- (d) In no case may a judgment against a beneficiary exceed the amount of the distribution made to him.

67. Provisions in wills referring to values placed on property. (1)

Where the effect of a provision in a will of a person who has died, whether before or after the passing of this Act is, by the terms of that will however expressed made to depend upon the value placed upon property—

- (a) in the assessment of Probate Duty, Succession Duty or some other death duty; or
 (b) in any valuation obtained for the purposes of Probate Duty, Succession Duty or some other death duty,

but a value is not required to be placed thereon for those purposes the will shall take effect as if it directed the personal representative of the deceased to have a valuation of the property made by a duly qualified person (whether employed by him or not) and the valuation so made shall be taken to be the value on which the effect of the provision in the will was made to depend:

Provided that where the property is assessed for duty pursuant to the *Estate Duty Assessment Act* 1914 of the Commonwealth (or any other Commonwealth Act providing for the assessment of death duty) the personal representative of the deceased may elect, instead of having a valuation made as aforesaid, that the valuation placed upon the property for the purposes of that assessment shall be taken to be the value on which the effect of the provision in the will was made to depend.

(2) On the application of the personal representative or of any other person having a proper interest in respect of such provisions in the will, the Court may, if it considers it desirable in all circumstances, direct that the provisions of subsection (1) shall not take effect but that the provisions of the will of the deceased in regard to the property shall be varied in such manner as the Court considers would give the most nearly practicable effect to the intentions of the deceased and may in addition or in the alternative make any other order that it thinks desirable.

(3) In this section the expression “death duty” means a duty or tax which by the law of any place is or may be payable consequent upon the death of a person in respect of any property.

68. Commission. [Qld. *Probate Act*, 1867, s. 6.] The Court may authorise the payment of such remuneration or commission to the personal representative for his services as personal representative as it thinks fit, and may attach such conditions to the payment thereof as it thinks fit.

69. The Registrar. [Cf. Qld. *Probate Act of* 1867, ss. 11, 12.] 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 him from time to time by the Court and by the Rules of Court and otherwise all such powers and authorities as he exercised before the passing of this Act.

70. Practice. [Qld. *Probate Act of 1867*, s. 8; Vic. s. 67.] 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.

71. Rules of Court. [Qld. *Succession Acts 1867-1968*, s. 94; Eng. *The Proceedings Against Estates Act 1970*, s. 2.] (1) All such Rules of Court as may be necessary or convenient for regulating the practice and procedure of the Court for the purpose of giving full effect to the provisions of this Act may be made and the provisions of *The Supreme Court Act of 1921* and *The Supreme Court Acts Amendment (Rules Ratification) Act of 1928* shall apply and extend in respect of such Rules of Court.

(2) Without affecting the generality of the foregoing subsection Rules of Court may make provision—

- (a) for enabling proceedings to be commenced against the estate of a deceased person (whether by the appointment of a person to represent the estate or otherwise) where no grant has been made;
- (b) for enabling proceedings purported to be commenced against any person who has died to be treated as having been commenced against his estate;
- (c) for enabling any proceedings commenced or treated as commenced against the estate of a deceased person to be maintained (whether by substitution of parties, amendment or otherwise) against a person appointed to represent the estate or, if a grant is made, against the personal representatives; and
- (d) for the mode of service and for extension of time within which service may be made 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.

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.

FIRST SCHEDULE
Acts repealed or amended
[Section 3]

Year & Number	Short Title (if any) or subject-matter	Extent of repeal or amendment
1867 31 Vic. No. 9	<i>Probate Act of 1867</i>	The whole
1867 31 Vic. No. 17	<i>Common Law Practice Act of 1867</i> as amended	Sections 8, 11 & 15D
1867 31 Vic. No. 18	<i>Equity Act of 1867</i>	Section 76
1867 31 Vic. No. 23	<i>Supreme Court Act of 1867</i>	Section 23
1867 31 Vic. No. 24	<i>Succession Act of 1867</i> as amended ..	The whole
1871 34 Vic. No. 27	<i>The Specialty and Simple Contract Debts Equalisation Act, 1871</i>	The whole
1877 41 Vic. No. 24	<i>Intestacy Act of 1877</i>	The whole
1940 4 Geo. 6 No. 4	<i>The Wills (Soldiers, Sailors and Members of the Air Force) Act of 1940</i>	The whole
1940 4 Geo. 6 No. 6	<i>The Common Law Practice Act Amendment Act 1940</i>	The whole
1942 6 Geo. 6 No. 20	<i>The Succession Acts Amendment Act of 1942</i>	The whole
1943 7 Geo. 6 No. 28	<i>The Succession Acts and Another Act Amendment Act of 1943</i>	The whole
1956 5 Eliz. 2 No. 19	<i>The Law Reform (Limitation of Actions) Act of 1956</i>	Section 7
1962 11 Eliz. 2 No. 19	<i>The Law Reform (Wills) Act of 1962</i> ..	The whole
No. 8 of 1968	<i>The Succession Acts Amendment Act of 1968</i>	The whole
No. 34 of 1972	<i>Common Law Practice Act Amendment Act 1972</i>	Section 3
No. 6 of 1974	<i>Intestacy Act Amendment Act 1974</i> ..	The whole
No. 76 of 1974	<i>Property Law Act 1974</i>	Section 28 amended to the extent provided in s. 39 of this Act
No. 39 of 1977	<i>Succession Act Amendment Act 1977</i> ..	The whole
No. 73 of 1978	<i>Public Trustee Act 1978</i>	Section 56

SECOND SCHEDULE
 DISTRIBUTION OF RESIDUARY ESTATE UPON INTESTACY
 PART I—MANNER OF DISTRIBUTION WHERE INTESTATE IS SURVIVED BY
 A SPOUSE
 [Sections 34–39]

Item	Circumstances	Manner in which the residuary estate of the intestate is to be distributed
1	Where the intestate is not survived by— (a) issue; or (b) a parent, a brother or sister or a child or children of a brother or sister	The spouse is entitled to the whole of the residuary estate.
2	Where the intestate is survived by issue	1. The spouse is entitled to one-half of the residuary estate if there is only one child or to one-third of the residuary estate if there is more than one child. 2. The issue of the intestate are entitled to the balance of the residuary estate.
3	Where the intestate is not survived by issue but is survived by a parent, a brother or sister or a child or children of a brother or sister	1. The spouse is entitled— (a) to the sum of fifty thousand dollars together with interest thereon from the first anniversary of the death of the intestate at the rate of eight per cent per annum from the residuary estate or to the whole of the residuary estate, which ever is the less; and (b) if the value of the residuary estate exceeds fifty thousand dollars, to one-half of the balance of the residuary estate. 2. If the intestate is survived by one or both of his parents (whether or not the intestate is also survived by a brother or sister or a child or children of a brother or sister), the surviving parent is entitled or

SECOND SCHEDULE—*continued*

DISTRIBUTION OF RESIDUARY ESTATE UPON INTESTACY
 PART I—MANNER OF DISTRIBUTION WHERE INTESTATE IS SURVIVED BY
 A SPOUSE
 [Sections 34–39]

Item	Circumstances	Manner in which the residuary estate of the intestate is to be distributed
		<p>the surviving parents are entitled in equal shares, as the case may be, to the remaining one-half of the balance of the residuary estate.</p> <p>3. If the intestate is not survived by a parent, the brothers and sisters of the intestate, who survive the intestate, and a child or children who survive the intestate of a brother or sister of the intestate who died before the intestate, are entitled to the remaining one-half of the balance of the residuary estate in such shares as he or they would have been entitled to the residuary estate of the intestate if the intestate had not been survived by his spouse.</p>

PART II—MANNER OF DISTRIBUTION WHERE INTESTATE IS NOT SURVIVED BY A SPOUSE
(Sections 34–39)

Item	Circumstances	Manner in which the residuary estate of the intestate is to be distributed
1	Where the intestate is survived by issue	The issue are entitled to the whole of the residuary estate.
2	Where the intestate is not survived by issue but is survived by a parent or both parents	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.
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 s. 37 of this Act.
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.