

TASMANIA

WILLS BILL 2008

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WILLS BILL 2008

*(Brought in by the Minister for Justice, the Honourable
Larissa Tahireh Giddings)*

A BILL FOR

An Act to reform the law relating to the making, alteration, rectification, construction and revocation of wills and for other purposes

Be it enacted by His Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:

PART 1 – PRELIMINARY

1. Short title

This Act may be cited as the *Wills Act 2008*.

2. Commencement

This Act commences on a day to be proclaimed.

3. Purpose

The purpose of this Act is to reform the law relating to the making, alteration, rectification, construction and revocation of wills and to make particular provision for –

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- (a) the formalities required for the making, alteration, rectification 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.

4. Interpretation

In this Act, unless the contrary intention appears –

“Board” means the Guardianship and Administration Board established under the *Guardianship and Administration Act 1995*;

“Court” means the Supreme Court of Tasmania;

“disposition” includes –

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

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“document”, except in section 10(4), means any paper or other material on which there is writing;

“grant of probate” includes grant of administration with the will annexed;

“internal law”, used in relation to a country or place, means the law that would apply in a case where no question of the law in force in any other country or place arose;

“law practice” has the same meaning as in the *Legal Profession Act 2007*;

“minor” means a person under the age of 18 years;

“property” includes –

- (a) any contingent, executory or future interest in property; and
- (b) any right of entry or recovery of property or right to call for the transfer of title to property;

“Public Trustee” means The Public Trustee referred to in section 4 of the *Public Trustee Act 1930*;

“Registrar” means the Registrar of the Court;

“Rules” means Rules of Court made and in force under section 65;

“spouse”, in relation to a person, includes the person who is in a significant

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relationship, within the meaning of the *Relationships Act 2003*, with that person;

“statutory will” means a will executed by virtue of a statutory provision on behalf of a person who, at the time of execution, lacked testamentary capacity;

“will” includes a codicil and any other testamentary disposition.

5. Application of Act

- (1) This Act, except as provided in this section applies only to wills made on or after the commencement of this Act.
- (2) The *Wills Act 1992*, as in force immediately before the commencement of this Act, continues to apply to wills made before that commencement, in so far as those wills do not come under the operation of subsection (4), (5), (6) or (7) or under the operation of the sections specified in subsections (3) and (9).
- (3) Sections 9, 10, 42, 43, 44, 45, 47, 48, 50, 51, 52, 54, 57, 58, 59, 60, 61, 62 and 63 apply to wills whether or not they are executed before, on or after the commencement of this Act, where the testator dies on or after that commencement.
- (4) Sections 7, 15, 18 and 19 apply to the alteration, revocation or renewal of a will on or after the commencement of this Act even if the will was made before that commencement.

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- (5) Section 11 applies to a document that alters or revokes a will and that is made on or after the commencement of this Act even if the will was made before that commencement.
 - (6) Section 16 applies to a will made before the commencement of this Act in relation to a marriage solemnised, or the registration under Part 2 of the *Relationships Act 2003* of a deed of relationship, on or after that commencement.
 - (7) Section 17 applies to a will made before the commencement of this Act, if the granting of the decree absolute of the dissolution of the marriage or the annulment of the marriage has taken place, or the revocation under Part 2 of the *Relationships Act 2003* of a deed of relationships registered under that Part has occurred, on or after the commencement of this Act.
 - (8) The Court may make an order under section 20 or 22 with respect to the alteration or revocation of a will or part of a will even if the will was made before the commencement of this Act.
 - (9) Despite subsection (1), section 55 applies to a will made before the commencement of this Act if the testator has died on or after the death of the issue and the deaths occurred on or after that commencement.

**PART 2 – CAPACITY AND FORMAL
REQUIREMENTS**

Division 1 – Capacity

6. Property that may be disposed of by will

- (1) A person may dispose by will of property to which the person is entitled at the time of his or her death.
- (2) A person may dispose by will of property to which the personal representative of that person becomes entitled by virtue of the office of personal representative after the death of that person.
- (3) It does not matter if the entitlement of the person or of the personal representative did not exist at the date of the making of the will or at the time of the person's death.
- (4) A person may not dispose by will of property of which the person was trustee at the time of the death of the person.

7. Minimum age for making a will

- (1) A will made by a minor is not valid.
- (2) Despite subsection (1) –
 - (a) a minor may make a will in contemplation of marriage (and may alter or revoke such a will) but the will is of

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no effect if the marriage contemplated
does not take place; and

- (b) a minor who is married may make, alter or revoke a will; and
- (c) a minor who has been married may revoke the whole or any part of a will made while the minor was married or in contemplation of that marriage.

Division 2 – Execution of a will

8. How a will should be executed

- (1) A will is not valid unless –
 - (a) it is in writing and signed by the testator or by some other person in the presence of and at the direction of the testator; and
 - (b) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
 - (c) at least 2 of those witnesses attest and sign the will in the presence of the testator (but not necessarily in the presence of each other).
- (2) The signature of the testator must be made with the intention of executing the will, but it is not essential that the signature be made at the foot of the will.

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- (3) It is not essential for a will to have an attestation clause.
- (4) If a testator purports to make an appointment by his or her will in the exercise of a power of appointment by will, the appointment is not valid unless the will is executed in accordance with this section.
- (5) If a power is conferred on a person to make an appointment by a will that is to be executed in some particular manner or with some particular solemnity, the person may exercise the power by a will that is executed in accordance with this section, but is not executed in that manner or with that solemnity.
- (6) If a person who attests the execution of a will is, at the time of the execution of the will or at any time afterwards, incompetent to be admitted as a witness to prove the execution of the will, the will is not on that account invalid.
- (7) A person who is an executor of a will is not on that account incompetent to be admitted as a witness to prove the execution of that will or its validity or invalidity.

9. Witnesses need not know contents of what they are signing

A will that is executed in accordance with this Act is validly executed even if one or more witnesses to the will did not know that it was a will.

10. When Court may dispense with requirements for execution of wills

- (1) A document or part of a document purporting to embody the testamentary intentions of a deceased person, even though it has not been executed in the manner required by this Act, constitutes a will of the deceased person, an alteration of such a will or the revocation of such a will, if the Court is satisfied beyond reasonable doubt that the deceased person intended the document to constitute his or her will, an alteration of his or her will or the revocation of his or her will.
- (2) In forming its view, the Court may have regard (in addition to the document or any part of the document) to any evidence relating to the manner of execution or testamentary intentions of the deceased person, including evidence (whether admissible before the commencement of this Act or otherwise) of statements made by the deceased person.
- (3) This section applies to a document whether it came into existence within or outside Tasmania.
- (4) For the purposes of this section –

“document” has the same meaning as in section 24(bb) of the *Acts Interpretation Act 1931*.

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11. Persons who cannot act as witnesses to wills

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

12. Can interested witness benefit from disposition under a will?

- (1) Except as provided by subsection (2), where a beneficial disposition is made by a will to a person who attests the execution of the will, the disposition is void so far only as concerns that person or any person claiming under that person.
- (2) A beneficial disposition made by a will is not made void by subsection (1) if –
 - (a) more than 2 persons have attested the execution of the will and at least 2 of them are not persons to whom any such disposition is made or the spouses of any such persons; or
 - (b) all the persons who would benefit directly from the avoidance of the disposition consent in writing to the distribution of the disposition according to the will and they all have capacity at law to do so.
- (3) Notwithstanding anything contained in this section, a person who attests the execution of a will is a competent witness to prove the execution of the will or its validity or invalidity.

13. Application to Court to validate dispositions to interested witnesses

- (1) Where, but for the operation of section 12, a person would be entitled to a beneficial disposition, that person may, subject to and in accordance with the Rules, apply to the Court for an order that that person is to be entitled under the will as if that section did not apply in relation to him or her.
- (2) An application under this section may be made before the grant of probate of the will but, subject to subsection (3), is not to be made more than 6 months after that date.
- (3) The Court may extend the time for the making of an application under this section, whether or not the time appointed under subsection (2) has expired, but no application may be made after the final distribution of the estate and no order under this section affects the distribution of any part of the estate made before the making of the application.

14. Declaration by Court as to non-application of section 12

- (1) Where the Court is satisfied that the entitlement of the applicant under the will was known to and approved by the testator and was not included in the will as the result of fraud, duress or the exercise of undue influence by any person, the Court may, by order, declare that section 12 does not apply in relation to the applicant in respect of

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the will in respect of which the application was made.

- (2) On a copy of an order under subsection (1) being served on the personal representative of the testator, the will of the testator has effect as if section 12 does not apply in relation to the applicant in respect of the will of the testator.
- (3) In an application under section 13, the applicant is not entitled to rely on any evidentiary presumption to prove or assist in proving that the testator knew and approved the contents of the will.

Division 3 – Revocation, alteration and revival of wills

15. How a will may be revoked

- (1) The whole or any part of a will may be revoked only –
 - (a) in the circumstances mentioned in Division 1 or 2 of Part 3 or by the operation of section 16 or 17; or
 - (b) by a later will; or
 - (c) by some writing declaring an intention to revoke it, executed in the manner in which a will is required to be executed by this Act; or
 - (d) by the testator, or some person in his or her presence and by his or her direction, burning, tearing or otherwise destroying

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it with the intention of the testator of
revoking it; or

- (e) by the testator, or some person in his or her presence and by his or her direction, writing on the will or dealing with the will in such a manner that the Court is satisfied from the state of the will that the testator intended to revoke it.

- (2) A will is not revoked by a presumption of intention on the ground of an alteration in circumstances.

16. Effect of marriage or registration of deed of relationship on a will

- (1) A will is revoked by –
 - (a) the marriage of the testator; or
 - (b) the registration of a deed of relationship under Part 2 of the *Relationships Act 2003* to which the testator is a party.
- (2) However, the following are not revoked by the marriage of the testator or the registration of a deed of relationship under Part 2 of the *Relationships Act 2003* to which the testator is a party:
 - (a) a disposition to the person to whom the testator is married or with whom the testator is in a registered relationship at the time of his or her death;

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- (b) any appointment as executor, trustee, advisory trustee or guardian of the person to whom the testator is married or with whom the testator is in a registered relationship at the time of his or her death;
 - (c) a will made in exercise of a power of appointment, if the property so appointed would not pass to the executor of the will or the administrator of the deceased person's estate if the power of the appointment was not exercised.
- (3) A will made in contemplation of a marriage or the registration of a deed of relationship under Part 2 of the *Relationships Act 2003*, whether or not that contemplation is expressed in the will, is not revoked by the solemnisation of the marriage contemplated or the registration of the deed of relationship contemplated.
- (4) A will that is expressed to be made in contemplation of marriage generally or the registration of a deed of relationship under Part 2 of the *Relationships Act 2003* is not revoked by the solemnisation of a marriage of the testator or the registration of a deed of relationship to which the testator is a party.
- (5) In this section –
 - “registered relationship”** means a personal relationship within the meaning of the *Relationships Act 2003* registered under that Act.

17. Effect of divorce or revocation of deed of relationship on a will

- (1) The ending of a testator's marriage or the revocation under Part 2 of the *Relationships Act 2003* of a deed of relationship registered under that Part to which the testator is a party revokes –
- (a) any beneficial disposition made by a testator to the testator's spouse in a will in existence at the time the marriage ends or the deed of relationship is revoked; and
 - (b) any appointment of the testator's spouse as an executor, trustee, advisory trustee or guardian made by the will; and
 - (c) any grant made by the will of a power of appointment exercisable by, or in favour of, the testator's spouse.
- (2) However, the ending of a testator's marriage or the revocation under Part 2 of the *Relationships Act 2003* of a deed of relationship registered under that Part to which the testator is a party does not revoke –
- (a) the appointment of the testator's spouse as trustee of property left by the will on trust for beneficiaries that include the spouse's children; or
 - (b) the grant of a power of appointment exercisable by the testator's spouse exclusively in favour of the children of

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whom both the testator and spouse are
parents.

- (3) With respect to the revocation of any disposition, appointment or grant by this section, the will is to take effect as if the testator's spouse had died before the testator.
- (4) Subsection (1) does not apply if a contrary intention appears in the will or can otherwise be established.
- (5) For the purposes of this section, a marriage ends –
 - (a) when a decree of dissolution of the marriage becomes absolute under the *Family Law Act 1975* of the Commonwealth; or
 - (b) on the granting of a decree of nullity in respect of the marriage by the Family Court of Australia; or
 - (c) on the dissolution or annulment of the marriage in accordance with the law of a place outside Australia, but only if that dissolution or annulment is recognised in Australia under the *Family Law Act 1975* of the Commonwealth.
- (6) In this section –
 - “**testator's spouse**” means the person who –
 - (a) was the testator's spouse immediately before the marriage

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ended and includes a party to a purported or void marriage; or

- (b) was a party to a deed of relationship registered under Part 2 of the *Relationships Act 2003* to which the testator was also a party immediately before a deed of relationship was revoked under that Part, and includes a party to a purported or void deed or relationship under that Part.

18. How a will may be altered

- (1) An obliteration, interlineation or other alteration made in any will after the execution of the will is not valid, except so far as the words or effect of the will before the alteration are not apparent, unless the alteration is executed in accordance with Division 2 of this Part or Division 2 of Part 3.
- (2) A will, with an alteration as part of the will, is taken to be duly executed if the signature of the testator and the subscription of the witnesses are made in the margin or on some other part of the will opposite or near to the alteration or at the foot or end of, or opposite to, a memorandum referring to the alteration and written at the end or on some other part of the will.

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19. How a revoked will may be revived

- (1) A will or part of a will that has been revoked is revived by re-execution or by execution of a will showing an intention to revive the will or part.
- (2) A revival of a will that was partly revoked and later revoked as to the balance only revives that part of the will most recently revoked.
- (3) Subsection (2) does not apply if a contrary intention appears in the reviving will.
- (4) A will that has been revoked and later revived, either wholly or partly, is taken to have been executed on the date on which the will is revived.

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**PART 3 – WILLS MADE, ALTERED, REVOKED OR
RECTIFIED UNDER AUTHORISATION OF COURT
OR MADE UNDER AUTHORISATION OF BOARD**

Division 1 – Wills by minors

20. Court may authorise wills by minors

- (1) The Court may, on application by or on behalf of a minor, make an order authorising the minor to make or alter a will in specific terms approved by the Court, or to revoke the whole or any part of a will of the minor.
- (2) An authorisation under this section may be granted on such conditions as the Court thinks fit.
- (3) Before making an order under this section, the Court must be satisfied that –
 - (a) the minor understands the nature and effect of the proposed will, alteration or revocation and the extent of the property disposed of by it; and
 - (b) the proposed will, alteration or revocation accurately reflects the intentions of the minor; and
 - (c) it is reasonable in all the circumstances that the order should be made.
- (4) A will or instrument making or altering, or revoking the whole or any part of, a will made pursuant to an order under this section –

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- (a) must be executed as required by law and one of the attesting witnesses must be the Registrar; and
 - (b) must be retained by the Registrar; and
 - (c) is not valid if it is made in breach of any condition subject to which an authorisation under this section is granted.
- (5) A will made by a deceased minor according to the law relating to wills of minors of the place where the deceased was resident at the time of execution is a valid will of the deceased.
- (6) The Court may make an order under this section even if the will was made before the commencement of this Act.

Division 2 – Power of Court to authorise making of statutory will, or alteration or revocation of a will for persons lacking testamentary capacity

21. Interpretation

In this Division –

“proposed testator” means the person on whose behalf authorisation for the making of a will or of any alteration or revocation of a will is sought under this Division.

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22. Court may make certain orders

- (1) The Court may, on application by any person make an order authorising the making or alteration of a will in specific terms approved by the Court, or the revocation of the whole or any part of a will, on behalf of a person who lacks testamentary capacity.
- (2) The Court may authorise the making or alteration of a will that deals with the whole of the property of a person, the making or alteration of a will that deals with part only of the property of a person or the alteration of part only of any will.
- (3) The Court is not to make an order under this Division unless the person on whose behalf approval for the making of a will is sought is alive when the order is made.
- (4) The Court may make an order under this Division in respect of a minor who lacks testamentary capacity by reason of disability or injury.
- (5) The Court may make an order under this Division even if the will was made before the commencement of this Act.

23. Leave of Court required to make application

- (1) The leave of the Court must be obtained before an application for an order under this Division is made.

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- (2) In applying for leave to make an application for an order under this Division, the applicant for leave must, subject to the Court's discretion, furnish to the Court –
- (a) a written statement of the general nature of the application and the reasons for making it; and
 - (b) satisfactory evidence of the lack of testamentary capacity of the proposed testator; and
 - (c) an estimate, so far as the applicant is aware of it, of the size and character of the estate of the proposed testator; and
 - (d) an initial draft of the proposed will, alteration or revocation for which the applicant is seeking the Court's approval; and
 - (e) any evidence, so far as it is available, relating to the wishes of the proposed testator; and
 - (f) evidence of the likelihood of the proposed testator acquiring or regaining capacity to make a will at any future time; and
 - (g) any will, or any copy of any will, in the possession of the applicant, or details known to the applicant of any will, of the proposed testator; and

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- (h) any evidence of the interests, so far as they are known to the applicant, or can be discovered with reasonable diligence, of any person who would be entitled to receive any part of the estate of the proposed testator if the proposed testator were to die intestate; and
- (i) any evidence of any facts so far as they are known to the applicant, or can be discovered with reasonable diligence, indicating the likelihood of an application being made under the *Testator's Family Maintenance Act 1912*; and
- (j) any evidence of the circumstances, so far as they are known to the applicant, or can be discovered with reasonable diligence, of any person for whom the proposed testator might reasonably be expected to make provision under a will; and
- (k) a reference to any disposition for a body, whether charitable or not, or for a charitable purpose that the proposed testator might reasonably be expected to give or make by will; and
- (l) any other facts that the applicant considers to be relevant to the application.

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24. Court must be satisfied as to certain matters

The Court must refuse leave to make an application for an order under this Division unless the Court is satisfied that –

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

25. Hearing of application for leave

- (1) On hearing an application for leave, the Court may –

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- (a) give leave and allow the application for leave to proceed as an application for an order under section 22; and
 - (b) if satisfied of the matters set out in section 24, make the order.
- (2) Without limiting the action the Court may take in hearing an application for leave, the Court may revise the terms of any draft of the proposed will, alteration or revocation for which the Court's authorisation is sought.

26. Hearing of application for order

In considering an application for an order authorising the making, alteration or revocation of a will, the Court –

- (a) may have regard to any information given to the Court in support of an application for leave under section 23; and
- (b) may inform itself of any other matter in any manner it sees fit; and
- (c) is not bound by the Rules of evidence.

27. Execution of a will

A will, or instrument altering or revoking a will, made pursuant to an order under this Division,

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must be signed by the Registrar and must be
sealed with the seal of the Court.

**28. Will or instrument to be forwarded to certain
persons**

On the execution of a statutory will, or an
instrument altering or revoking a will made
pursuant to an order under this Division the
Registrar must forward –

- (a) the will to the executor named in the will
or, if the executor is not the Public
Trustee or a trustee company within the
meaning of the *Trustee Companies Act*
1953, to a law practice nominated by the
executor; and
- (b) the instrument to the executor named in
the will which the instrument is altering
or revoking and any executor named in
the instrument or if the executor is not
the Public Trustee or a trustee company
within the meaning of the *Trustee*
Companies Act 1953, to a law practice
nominated by the executor; and
- (c) a copy of the will or instrument to the
proposed testator.

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***Division 3 – Power of Board to make statutory will for person
lacking in testamentary capacity***

29. Interpretation

In this Division –

“proposed testator” means the person on
whose behalf an order authorising the
making of a will is sought under this
Division.

30. Board may make certain orders

- (1) The Board may, in accordance with this Division, make orders authorising the making of a will in specific terms approved by the Board on behalf of a person who lacks testamentary capacity.
- (2) For the purposes of this Division, a person does not lack testamentary capacity by reason only of the fact that he or she is a minor, but does lack testamentary capacity if he or she is a minor and lacks testamentary capacity by reason of disability or injury.
- (3) The powers of the Board under subsection (1) may be exercised –
 - (a) on the application of any person; or
 - (b) of its own motion –

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but the Board must first hold a hearing in accordance with Division 1 of Part 10 of the *Guardianship and Administration Act 1995*.

- (4) The Board may not make an order under subsection (1) unless it is satisfied, after making such enquiries as it considers reasonable, that the person has not made a will or any purported will.
- (5) The Board may authorise the making of a will that deals with the whole or part of the property of the person.
- (6) The Board is not to make an order under this Division unless the person on whose behalf authorisation for the making of the will is sought is alive when the order is made.
- (7) The Board may at any time direct that a matter before the Board pursuant to this Division proceed by way of an application to the Court under Division 2.

31. Validity of statutory wills made by Board

A statutory will made by the Board is invalid if there exists a prior will, which is not a statutory will made by the Board, of the person for whom it is made.

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32. Application for a statutory will

- (1) In applying to the Board for a statutory will under this Division, the applicant must, subject to the Board's discretion, furnish to the Board –
- (a) a written statement of the general nature of the application and the reasons for making it, including the grounds on which it is alleged that the person for whom the will is proposed to be made lacks testamentary capacity; and
 - (b) an estimate, so far as the applicant is aware of it, of the size and character of the estate of the proposed testator; and
 - (c) a proposal nominating the persons who should benefit under the proposed will and the extent to which each person nominated should share in the estate; and
 - (d) any evidence, so far as it is available, relating to the wishes of the proposed testator; and
 - (e) evidence of the likelihood of the proposed testator acquiring or regaining capacity to make a will at any future time; and
 - (f) a statutory declaration stating that it is the applicant's belief that the proposed testator has not made a will or any purported will and setting out the reasons for that belief; and

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- (g) any evidence of the interests, so far as they are known to the applicant, or can be discovered with reasonable diligence, of any person who would be entitled to receive any part of the estate of the proposed testator if the proposed testator were to die intestate; and
 - (h) any evidence of any facts indicating the likelihood, so far as they are known to the applicant, or can be discovered with reasonable diligence, of an application being made under the *Testator's Family Maintenance Act 1912*; and
 - (i) any evidence of the circumstances, so far as they are known to the applicant, or can be discovered with reasonable diligence, of any person for whom the proposed testator might reasonably be expected to make provision under a will; and
 - (j) a reference to any disposition for a body, whether charitable or not, or for a charitable purpose that the proposed testator might reasonably be expected to give or make by will; and
 - (k) any other facts that the applicant considers to be relevant to the application.
- (2) An application under subsection (1) is to be lodged with the registrar of the Board.

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33. Board must be satisfied of certain matters

The Board must not make an order authorising the making of a will for a proposed testator unless it is satisfied –

- (a) if there is an applicant, that the applicant is an appropriate person to make the application; and
- (b) that there is reason to believe that the proposed testator is incapable of making a will; and
- (c) following such enquiries as are reasonable, that the proposed testator has not made a will or any purported will; and
- (d) that adequate steps have been taken to allow representation of all persons with a legitimate interest in the application, including persons who have reason to expect a disposition or benefit from the estate of the proposed testator; and
- (e) that it is appropriate to make an order for the execution of a will for a proposed testator; and
- (f) that the proposed will, alteration of revocation is or is reasonably likely to be one that would have been made by the proposed testator if he or she had had testamentary capacity.

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34. Hearing by Board of application

In considering an application for an order authorising the making of a will, the Board –

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

35. Execution of a will made under this Division

If the Board makes an order authorising the making of a will for any person, a will executed under that order is to be –

- (a) signed by the President or Deputy President of the Board in the presence of 2 or more witnesses present at the same time; and
- (b) attested and subscribed by those witnesses in the presence of the President or Deputy President.

36. Alteration of statutory will made by Board

The Board may alter a statutory will made by the Board on application by a person in accordance with this Division as if references to the procedure for making a statutory will were read

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as references to the procedure for alteration of a
statutory will.

37. Revocation of statutory will made by Board

- (1) The Board may revoke a statutory will made by the Board on application by a person in accordance with this Division as if references to the procedure for making a statutory will were read as references to the procedure for revocation of a statutory will.
- (2) A person who acquires or regains capacity to make a will after a statutory will has been made on his or her behalf may revoke the statutory will in the same manner as a will may be revoked under Division 3 of Part 2.

38. Statutory will made by Board to be forwarded to executor

On the execution of a statutory will, the Board must forward –

- (a) the will to the executor named in the will or, if the executor is not the Public Trustee or a Trustee Company within the meaning of the *Trustee Companies Act 1953*, to a law practice nominated by the executor; and
- (b) a copy of the will to the proposed testator.

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Division 4 – Statutory wills generally

39. Effect of statutory will

A statutory will has the same effect for all purposes as if –

- (a) the person for whom it is made were capable of making a will; and
- (b) the statutory will had been executed by him or her in the manner required by Division 2 of Part 2.

40. Recognition of statutory wills

A statutory will made according to the law of the place where the deceased was resident at the time of execution is to be regarded as a valid will of the deceased.

41. Application of common law and equity to statutory wills

The principles and Rules of the common law and of equity are, to the extent that they are not inconsistent with this Part, to apply to a valid statutory will in the same way as they apply to a will executed in accordance with Division 2 of Part 2.

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Division 5 – Rectification of wills by Court

42. Court may rectify a will

- (1) The Court may make an order to rectify a will to carry out the intentions of the testator if the Court is satisfied beyond reasonable doubt that the will does not carry out the testator's intentions because –
 - (a) a clerical error was made; or
 - (b) the will does not give effect to the testator's instructions.
- (2) A person who wishes to make an application for an order under this section must apply to the Court within 3 months after the date of the death of the testator.
- (3) The Court may extend the period of time for making the application if the Court thinks this is necessary, even if the original period of time has expired, but not if the final distribution of the estate has been made.
- (4) A personal representative who makes a distribution to a beneficiary is not liable if –
 - (a) the distribution is made under section 64; or
 - (b) the distribution is made –
 - (i) at a time when the personal representative was not aware of any application for rectification

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or any application having been
made under the *Testator's Family
Maintenance Act 1912*; and

(ii) at least 3 months after the death
of the testator.

- (5) The Court may direct that a certified copy of an order made under this section be attached to a will to which it applies and must, if it so directs, retain the will until the copy of the order is attached.

PART 4 – CONSTRUCTION OF WILLS

43. What interest in property does a will dispose of?

If –

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

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

44. When a will takes effect

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

45. Effect of failure of disposition

- (1) To the extent that any disposition of property in a will, other than the exercise of a power of appointment, is ineffective wholly or in part, the will takes effect as if the property or the

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undisposed part of the property were part of the residuary estate of the testator.

- (2) This section does not apply if a contrary intention appears in the will.

46. Use of extrinsic evidence to clarify a will

- (1) In proceedings to construe a will, evidence, including evidence of the testator's intention, is admissible to the extent that the language used in the will renders the will, or any part of the will –
- (a) meaningless; or
 - (b) ambiguous on the face of the will; or
 - (c) ambiguous in the light of the surrounding circumstances.
- (2) Evidence of a testator's intention is not admissible to establish any of the circumstances referred to in subsection (1)(c).
- (3) Nothing in this section prevents evidence that is otherwise admissible at law from being admissible in proceedings to construe a will.

47. Effect of change in testator's domicile

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

48. Income on contingent, future or deferred dispositions

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

49. Beneficiaries must survive testator for 30 days

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

50. What does general disposition of property include?

A general disposition in a will of all or the residue of the testator's property, or of all or the residue of his or her property of a particular description, includes all the property of the relevant description over which he or she has a general power of appointment exercisable by will and operates as an exercise of the power.

51. What does general disposition of land include?

A general disposition, in a will, of land or of land in a particular area includes leasehold land whether or not the testator owns freehold land.

52. Effect of devise of real property without words of limitation

- (1) A disposition of real property, in a will, to a person without words of limitation is to be construed as passing the whole estate or interest of the testator in that property to that person.
- (2) Where –
 - (a) any real estate is devised to a trustee, without any express limitation of the estate to be taken by the trustee; and
 - (b) the beneficial interest in that real estate, or in the surplus rents and profits of that real estate, is not given to a person for life, or that beneficial interest is given to a person for life, but the purposes of the trust may continue beyond the life of that person –

that devise is to be construed to vest in that trustee the whole legal estate (whether the fee simple or any other estate) which the testator had power to dispose of by will in that real estate, and not an estate determinable when the purposes of the trust are satisfied.

53. How dispositions to issue operate

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

54. How requirements to survive with issue are construed

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

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

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

55. Dispositions not to fail because issue have died before testator

- (1) This section applies if –
- (a) a testator makes a disposition of property to a person, whether as an individual or as a member of a class, who is issue of the testator (in this section referred to as an original beneficiary); and
 - (b) under the will, the interest of the original beneficiary in the property does not come to an end at or before the original beneficiary's death; and
 - (c) the disposition is not a disposition of property to the testator's issue, without limitation as to remoteness; and
 - (d) the original beneficiary does not survive the testator for 30 days.
- (2) The issue of the original beneficiary who survive the testator for 30 days take the original beneficiary's share of the property in place of the original beneficiary as if the original beneficiary had died intestate leaving only issue surviving.
- (3) Subsection (2) does not apply if –
- (a) the original beneficiary did not fulfil a condition imposed on the original beneficiary in the will; or
 - (b) a contrary intention appears in the will.

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- (4) A general requirement or condition that issue survive the testator or reach a specified age does not show a contrary intention for the purposes of subsection (3)(b).
 - (5) A disposition of property to issue as joint tenants does not, of itself, show a contrary intention for the purposes of subsection (3)(b).

56. Construction of dispositions

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

57. Legacies to unincorporated associations of persons

- (1) A disposition –
 - (a) to an unincorporated association of persons that is not a charity; or

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- (b) to or on trust for the aims, objects or purposes of an unincorporated association of persons that is not a charity; or
- (c) to or on trust for the present and future members of an unincorporated association of persons that is not a charity –

has effect as a legacy or devise in augmentation of the general funds of the association.

- (2) Property that is, or that is to be taken to be, a disposition in augmentation of the general funds of an unincorporated association must be –
 - (a) paid in the general fund of the association; or
 - (b) transferred to the association; or
 - (c) sold or otherwise disposed of on behalf of the association and the proceeds paid into the general fund of the association.
- (3) If the personal representative pays money to an association under a disposition, the receipt of the Treasurer or a like officer, if the officer is not so named, of the association is an absolute discharge for that payment.
- (4) If the personal representative transfers property to an association under a disposition, the transfer of that property to a person or persons designated in writing by any two persons holding the offices of President, Chairperson,

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Treasurer or Secretary or like officers, if those officers are not so named, is an absolute discharge to the personal representative for the transfer of that property.

- (5) Subsections (3) and (4) do not apply if a contrary intention appears in the will.
- (6) It is not an objection to the validity of a disposition to an unincorporated association of persons that a list of persons who were members of the association at the time the testator died cannot be compiled, or that the members of the association have no power to divide assets of the association beneficially among themselves.

58. Can a person, by a will, delegate the power to dispose of property?

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

59. Effect of referring to valuation in a will

- (1) Except to the extent that a method of valuation is at the relevant time required under a law of Tasmania or any other place, or is provided for in the will, an express or implied requirement in a will that a valuation of property be made or accepted for any purpose is to be construed as if

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it were a reference to a valuation of the property as at the date of the testator's death made by a competent valuer.

- (2) This section does not apply if a contrary intention appears in the will.

PART 5 – WILLS UNDER FOREIGN LAW

60. General rule as to formal validity

- (1) A will is taken to be properly executed if its execution conforms to the internal law in force in the place –
 - (a) where it was executed; or
 - (b) that was the testator's domicile or habitual residence, either at the time the will was executed, or at the testator's death; or
 - (c) of which the testator was a national, either at the date of execution of the will, or at the testator's death.
- (2) The following wills are also taken to be properly executed:
 - (a) a will executed on board a vessel or aircraft, if the will has been executed in conformity with the internal law in force in the place with which the vessel or aircraft may be taken to have been most closely connected having regard to its registration and other relevant circumstances;
 - (b) a will, so far as it disposes of immovable property, if it has been executed in conformity with the internal law in force in the place where the property is situated;

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- (c) a will, so far as it revokes a will or a provision of a will that has been executed in accordance with this Act, or that is taken to have been properly executed by this Act, if the later will has been executed in conformity with any law by which the earlier will or provision would be taken to have been validly executed;
 - (d) a will, so far as it exercises a power of appointment, if the will has been executed in conformity with the law governing the essential validity of the power.
- (3) A will to which this section applies, so far as it exercises a power of appointment, is not taken to have been improperly executed because it has not been executed in accordance with the formalities required by the instrument creating the power.

61. Ascertainment of system of internal law

If the internal law in force in a place is to be applied to a will, but there is more than one system of internal law in force in the place that relates to the formal validity of wills, the system to be applied is determined as follows:

- (a) if there is a rule in force throughout the place that indicates which system of internal law applies to the will, that rule must be followed;

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- (b) if there is no rule, the system of internal law is that with which the testator was most closely connected either –
 - (i) at the time of his or her death, if the matter is to be determined by reference to circumstances prevailing at his or her death; or
 - (ii) in any other case, at the time of execution of the will.

62. Construction of law applying to wills under foreign law

- (1) In determining whether a will has been executed in conformity with a particular law, regard must be had to the formal requirements of that law at the time of execution, but account may be taken of a later alteration of the law affecting wills executed at that time, if the alteration enables the will to be treated as properly executed.
- (2) If a law in force outside Tasmania is applied to a will, a requirement of that law that special formalities must be observed by testators of a particular description, or that the witnesses to the execution of a will must have certain qualifications, is to be taken to be a formal requirement only, despite any rule of that law to the contrary.

PART 6 – MISCELLANEOUS

63. Persons entitled to see will

- (1) Any person having the possession or control of a will (including a revoked will) or a copy of any such will and any part of such a will (including a purported will) of a deceased person must allow any or all of the following persons to inspect and, at their own expense, take copies of it:
 - (a) any person named or referred to in it, whether as beneficiary or not;
 - (b) the surviving spouse, any parent or guardian and any issue of the testator;
 - (c) any person who would be entitled to a share of the estate of the testator if the testator had died intestate;
 - (d) any creditor or other person having any claim at law or in equity against the estate of the deceased;
 - (e) any beneficiaries of prior wills of the deceased;
 - (f) a 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.
- (2) Any person having the possession or control of a will (including a revoked will) or a copy of any such will and any part of such a will (including a

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purported will), of a deceased person must produce it in Court if required to do so.

- (3) Nothing in this section authorises the inspection or production of a will, a revoked will, a copy of any such will or any part of such a will while the testator is alive.
- (4) Nothing in this section limits the rights of a person under any other law.

64. Personal representatives may make maintenance distributions within 30 days

- (1) If a surviving person who is wholly or substantially dependent on the testator has an entitlement under a will that does not become absolute until 30 days after the testator's death, the personal representative may make a distribution for the maintenance, support or education of that person within that 30-day period.
- (2) The personal representative is not liable for any such distribution that is made in good faith.
- (3) The personal representative may make such a distribution even though the personal representative knew, at the time the distribution was made, of a pending application under the *Testator's Family Maintenance Act 1912*.
- (4) Any sum distributed is to be deducted from any share of the estate to which the person receiving the distribution becomes entitled, but, if any

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person to whom any distribution has been made does not survive the testator for 30 days, any such distribution is to be treated as an administration expense.

65. Rules of Court

The judges of the Court or a majority of them, in the exercise of their powers under the *Supreme Court Civil Procedure Act 1932*, may make Rules of Court regulating the procedure to be followed in making an application to the Court under, or for the purposes of, this Act.

66. Regulations

- (1) The Governor may make regulations for the purposes of this Act, except for the purpose of regulating the procedure to be followed in making an application to the Court under, or for the purposes of, this Act.
- (2) The regulations may be made so as to apply differently according to such factors as are specified in the regulations.
- (3) The regulations may authorise any matter to be from time to time determined, applied or regulated by any person or body specified in the regulations.

67. Administration of Act

Until provision is made in relation to this Act by order under section 4 of the *Administrative Arrangements Act 1990* –

- (a) the administration of this Act is assigned to the Minister for Justice; and
- (b) the department responsible to that Minister in relation to the administration of this Act is the Department of Justice.

68. Consequential amendments

The legislation specified in Schedule 1 is amended as specified in that Schedule.

69. Legislation repealed

The legislation specified in Schedule 2 is repealed.

70. Legislation rescinded

The legislation specified in Schedule 3 is rescinded.

71. Legislation revoked

The legislation specified in Schedule 4 is revoked.

SCHEDULE 1 – CONSEQUENTIAL AMENDMENTS

Section 68

Testator's Family Maintenance Act 1912

- 1.** Section 8A is amended by omitting subsection (1A) and substituting the following subsection:

(1A) Where an application under section 3(1) relates to a will made under Part 3 of the *Wills Act 2008* by the Guardianship and Administration Board or the Court, the Court or judge may have regard to the records of the Board or Court relating to the person for whom the will was made and the reasons given by the Board or Court for making an order authorising the making or alteration of a will in specific terms.

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SCHEDULE 2 – LEGISLATION REPEALED

Section 69

Wills Act 1992 (No. 29 of 1992)

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SCHEDULE 3 – LEGISLATION RESCINDED

Section 70

Wills Regulations 1997 (No. 124 of 1997)

SCHEDULE 4 – LEGISLATION REVOKED

Section 71

Proclamation under the Wills Act 1992 (No. 52 of 1995)