WILLS ACT 2000: LEADING-EDGE LAW REFORM

The Wills Act 2000 overhauls and reforms Northern Territory law with regard to the making, alteration, rectification, revocation and construction of wills.

The need for reform

Succession laws were relatively uniform in the Australian colonies during the nineteenth century. However the laws of the states and territories have since diverged considerably. Apart from piecemeal reform on urgent or national popular issues,[1] the law of wills has remained static in the N T for most of the past 150 years. The current Wills Act is mainly a consolidation of the old South Australian Wills Act dating from 1842, which in turn was an adaptation of the Imperial Wills Act, 1837. There have been developments in other laws and social arrangements which have failed to be considered in succession laws such as the legislation dealing with wills. These developments have reflected shifts in social and legal principles.

A large number of the people in the NT have property or will inherit property located in other jurisdictions. The administration of their estates may be unduly complicated if different parts of their wills are to be administered under different laws concerning succession. The application of succession laws may depend on the place of death or place of location of the real or personal property of a deceased person. These differences between the laws of succession in each jurisdiction can lead to idiosyncratic outcomes and increased costs of administering the estate.

The reform process

The National Committee for Uniform Successions Law was established by the Standing Committee of Attorneys-General in 1991 to specifically develop model uniform succession laws for Australia. The formation of this Committee followed previous failures to develop uniformity and reform in matters such as the recognition of interstate probate orders. In fact, it was the Northern Territory Law Reform Committee, at a 1990 national meeting of law reform agencies, that proposed the need for uniformity in succession laws.

The National Committee's project will cover all major aspects of succession law. Its first major project was the law of wills. In 1997 the Committee issued a report and draft model legislation for wills[2]. Subsequently, this report was the subject of examination and report by the Northern Territory Law Reform Committee. That Committee recommended to the Northern Territory Attorney-General that the model Wills Bill be enacted[3].

Enactment of the new legislation dealing with wills

The Wills Bill 2000 was introduced into the Legislative Assembly on 17 August 2000 and enacted on 19 October 2000. The Bill received assent on 14 November 2000. It is expected to commence operation on 1 March 2001.

What does the Act do?

Capacity — wills made by persons under under 18 years

Current laws prevent a person aged under 18 from making a will. The main reason being that such a person may not have the maturity to make a responsible will. The Wills Act 2000 maintains this policy. However, the Act reforms the law by providing that such a person can make a will under two circumstances. Firstly, where the child is married or contemplates marriage[4], and secondly, where the Supreme Court authorises the making or revocation of a will by a person under the age of 18[5]. The Act contains specific rules concerning the making of wills pursuant to an order of the Court. These include that the will must be witnessed by the Registrar of the Supreme Court and that the will must be deposited with a person prescribed for the purposes of section 50[6].

Capacity — statutory wills for persons lacking testamentary capacity

The Wills Act 2000 gives power to the Supreme Court to authorise, on application, the making or revocation of wills on behalf of a person lacking testamentary capacity(7). In making such a will the Court must, amongst other matters, be satisfied that the proposed will or alteration might be one that would have been made if the proposed testator had testamentary capacity. Additionally, adequate steps must be taken to allow representation from all persons with a legitimate interest in the application.

Effect of divorce on a will

At present a will in the Northern Territory is not affected by the divorce of a couple. This is the case despite the fact that the couple may have reached a comprehensive property settlement. Such settlements should include consideration of wills. Often they don't. This can cause problems because in many cases the testator would not want their former spouse to benefit from their will. The Wills Act 2000 changes the law by providing that upon the ending of a marriage by divorce or annulment, certain dispositions, appointments and grants in favour of the former spouse are revoked(8). However, the Wills Act 2000 will not affect benefits to the spouse that are substantively for the benefit of the children of the couple's relationship [9].This amendment follows similar reforms in Victoria [10] and South Australia[11].

Dispensing with the requirements for the formal execution of a will

Under the current Act, strict compliance with the formalities of execution is required except for the wills of soldiers and sailors. A failure to execute the will as required is likely to invalidate the will even if the failure was inadvertent or slight. The Wills Act 2000 relaxes the requirements by allowing the court to admit to probate a document that has not been properly executed. However, the court must be satisfied that the deceased intended the document to constitute his or her will[12]. It can also be noted that the specific provisions[13] relaxing formal rules concerning the wills of certain soldiers and sailors are not in the Act.

Use of extrinsic evidence

Currently, there are very limited circumstances in which extrinsic evidence may be used to resolve difficulties in the administration of estates. Section 30 of the Wills Act 2000 provides a broad power for a Court to receive evidence to determine parts of a will that appear to be meaningless, ambiguous on the face of the will or ambiguous in the light of surrounding circumstances.

Introduction of 30 day rule of survivorship

The Wills Act 2000 provides that, in the absence of a contrary intention in the will, a beneficiary must survive a testator by 30 days in order to benefit[14]. Most Northern Territory wills contain this kind of provision. The effect of the provision is to avoid unnecessary double administration of the same property when related persons die in quick succession. Additionally, this provision simplifies matters where it is unclear which of two persons has survived the other[15]. The typical factual situation is where a husband and wife die in a car accident.

Modification of the 'interested witness' rule

Under current legislation, a witness to a will or his or her spouse are disqualified by taking any benefit under the will. This rule is harsh in that it fails to distinguish between interested witnesses who innocently witness a home-drawn will and a guilty witness who has defrauded or used undue influence on the testator.

The Wills Act 2000 maintains the 'interested witness rule'[16]. However, the Wills Act 2000 rule modifies the rule by providing that that the witness may take a benefit from the will if there are two or more disinterested witnesses or if he or she satisfies the court that the testator was aware of the disposition and that the disposition was freely and voluntarily given. Additionally, the disposition stands if the persons who would benefit from its avoidance consent to the disposition[17].

Transitional — Wills made before commencement of the Wills Act 2000

The Wills Act 2000 will apply mainly in respect of only to wills executed on or after the commencement of the Wills Act 2000[18]. In general terms, wills made before that time are to be subject to the law in place immediately before the commencement of the Wills Act 2000.

There are some exceptions to that rule. A number of remedial provisions in the Wills Act 2000 apply to certain wills and events regardless of the time of execution of the will or the time of the event. For example, the new legislation will apply in respect of issues concerning the capacity of the court to dispense with the formal requirements of execution or revocation, the requirements concerning interested witnesses, the requirements concerning revocation of a will, the rectification of a will by a court, and the construction of a will and the use of extrinsic evidence to clarify a will[19]. In respect of divorces and annulments, section 15 will apply to all wills (whenever executed) but only if the divorce or annulment occurs after the commencement of the Wills Act 2000[20].

Familiarisation with of the Wills Act 2000

The Wills Act 2000 is significant because it implements major innovations to Northern Territory law. The Attorney-General, the Hon. Denis Burke, MLA, has announced that there will be a period of at least three months between the enactment of the new legislation and its commencement.

It is intended that the Wills Act 2000 will commence on 1 March 2001. This lengthy period between the passage introduction of the Wills Act 2000 and its commencement is intended for the practical purpose of permitting legal practitioners and others to familiarise themselves with the contents of the Act. The NT Attorney-General's Department welcomes any queries or concerns from any person in relation pertaining to the Wills Act 2000.

Future reforms

The Northern Territory is the first Australian jurisdiction to enact the uniform wills legislation[21]. However, the National Committee is looking at many other aspects of succession law. These include family provisions legislation, administration of estates and laws relating to recognition of interstate probate orders.

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1 For example, concerning wills executed in accordance with the internal law of foreign places.
2 Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills, QLRC MP29, 1997. The Report was also published by the New South Wales Law Reform Commission, Report 85, 1998
3 Proposals for the Reform of Wills, Northern Territory Law Reform Committee, Report 19, 1998
4 Section 7, Wills Act 2000
5 Section 18, Wills Act 2000
6 Currently, the Public Trustee
7 Sections 19-26, Wills Act 2000
8 Section 15(3), Wills Act 2000
9 Section 15(5), Wills Act 2000
10 Section 146A, Wills Act 1997 (Vic) 1958 (Vic) -/// need to find current provision in 1997 act
11 Section 20A, Wills Act 1936 (SA)
12 Section 10, Wills Act 2000
13 Section 7A??, Wills Act 1938 (as amended)
14 Section 34, Wills Act 2000
15 See also sections 215-218 of the Law of Property Act. These sections containvarious presumptions about the order of death where there is uncertainty about the order of death or even the fact of death.
16 Section 12(1), Wills Act 2000
17 Section 12(2), Wills Act 2000
18 Section 5(1), Wills Act 2000
19 Section 5(4), Wills Act 2000
20 Section 5(3), Wills Act 2000
21 Though it can be noted that many of the provisions in the model Bill are derived from the Succession Act 1980 (Qld) and the Wills Act 1997 (Vic).