

South Australia



**WILLS (WILLS FOR PERSONS LACKING TESTAMENTARY
CAPACITY) AMENDMENT ACT 1996**

No. 36 of 1996

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PART 3

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ANNO QUADRAGESIMO QUINTO

ELIZABETHAE II REGINAE

A.D. 1996

No. 36 of 1996

An Act to amend the Wills Act 1936.

[Assented to 2 May 1996]

The Parliament of South Australia enacts as follows:

Short title

1. (1) This Act may be cited as the *Wills (Wills for Persons Lacking Testamentary Capacity) Amendment Act 1996*.

(2) The *Wills Act 1936* is referred to in this Act as "the principal Act".

Commencement

2. This Act will come into operation on a day to be fixed by proclamation.

Insertion of s. 7

3. The following section is inserted after section 6 of the principal Act:

Will of person lacking testamentary capacity pursuant to leave of court

7. (1) The Court may, on application by any person made with the leave of the Court, make an order authorising the making or alteration of a will in specific terms approved by the Court, or the revocation of a will, on behalf of a person who lacks testamentary capacity.

(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 person lacks testamentary capacity; and
- (b) the proposed will, alteration or revocation would accurately reflect the likely intentions of the person if he or she had testamentary capacity; and
- (c) it is reasonable in all the circumstances that the order should be made.

(4) In considering an application for an order under this section, the Court must take into account the following matters:

- (a) any evidence relating to the wishes of the person;
- (b) the likelihood of the person acquiring or regaining testamentary capacity;
- (c) the terms of any will previously made by the person;
- (d) the interests of—
 - (i) the beneficiaries under any will previously made by the person;
 - (ii) any person who would be entitled to receive any part of the estate of the person if the person were to die intestate;
 - (iii) any person who would be entitled to claim the benefit of the *Inheritance (Family Provision) Act 1972* in relation to the estate of the person if the person were to die;
 - (iv) any other person who has cared for or provided emotional support to the person;
- (g) any gift for a charitable or other purpose the person might reasonably be expected to give by a will;
- (h) the likely size of the estate;
- (i) any other matter that the Court considers to be relevant.

(5) An order may be made under this section in relation to a minor.

(6) The Court is not bound by rules of evidence in proceedings under this section.

(7) The following persons are entitled to appear and be heard at proceedings under this section:

- (a) the person in relation to whom the order is proposed to be made;
- (b) a legal practitioner representing the person or, with the leave of the Court, some other person representing the person;
- (c) the person holding or acting in the office of Public Advocate under the *Guardianship and Administration Act 1993*;
- (d) the person's administrator, if one has been appointed under the *Guardianship and Administration Act 1993*;
- (e) the person's guardian or enduring guardian, if one has been appointed under the *Guardianship and Administration Act 1993*;
- (f) the person's manager, if one has been appointed under the *Aged and Infirm Persons' Property Act 1940*;

- (g) the person's attorney, if one has been appointed under an enduring power of attorney;
- (h) any other person who has, in the opinion of the Court, a proper interest in the matter.

(8) In determining an application under this section, the Court may make such incidental orders relating to costs or other matters as it thinks fit.

(9) A will or instrument altering or revoking a will made pursuant to an order under this section must be executed as follows:

- (a) it must be signed by the Registrar; and
- (b) it must be sealed with the seal of the Court.

(10) The will or instrument altering or revoking a will must be retained by the Registrar and will be taken to have been deposited with the Registrar under section 13 of the *Administration and Probate Act 1919*.

(11) The will may not be withdrawn from deposit with the Registrar by or on behalf of the person on whose behalf it was made unless the Court has made an order under this section authorising the revocation of the will (in which case the Registrar must withdraw it on presentation of a copy of the order) or the person has acquired or regained testamentary capacity.

(12) In this section—

"testamentary capacity" means the capacity to make a will¹.

- 1. The cause of incapacity to make a will may arise from mental incapacity or from physical incapacity to communicate testamentary intentions.

Substitution of heading to Part 3

4. The heading to Part 3 of the principal Act is repealed and the following heading is substituted:

PART 3 VALIDITY OF WILLS MADE OUTSIDE THE STATE

Insertion of s. 25D

5. The following section is inserted after section 25C of the principal Act:

Validity of statutory wills made outside the State

25D. (1) A statutory will made according to the law of the place where the deceased was resident at the time of execution will be regarded as a valid will of the deceased.

(2) In this section—

"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.

In the name and on behalf of Her Majesty, I hereby assent to this Bill.

ROMA MITCHELL Governor