

# Administration and Probate Act 1958

Version No. 095

Administration and Probate Act 1958

Act No. 6191/1958

Version incorporating amendments as at 8 November 2001

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An Act to consolidate the Law relating to the Administration of the Estates of  
Deceased Persons.

**BE IT ENACTED** by the Queen's Most Excellent Majesty by and with the advice  
and consent of the Legislative Council and the Legislative Assembly of Victoria  
in this present Parliament assembled and by the authority of the same as follows  
(that is to say):

*S. 1*

*amended by Nos 6505*

*s. 2, 6920 s. 2, 7332*

*s. 2(Sch. 1 item 1), 9044 s. 3(a), 57/1989*

*s. 3(Sch. item 4.1).*

### **1. *Short title and commencement***

This Act may be cited as the **Administration and Probate Act 1958**, and shall come  
into operation on a day to be fixed by proclamation of the Governor in Council  
published in the Government Gazette.

*S. 2*

*repealed by No. 10/1994*

*s. 13(a).*[\[1\]](#)

\* \* \* \* \*

*Nos 3632 s. 3, 4654 s. 3(3), 5329 s. 11(2).*

### 3. *Definitions*

*S. 3(1) amended by No. 10/1994*

*s. 4(1)(a).*

(1) In this Act unless inconsistent with the context or subject-matter--

**"Court"** means the Supreme Court of Victoria;

*S. 3(1) def. of "domestic partner" inserted by No. 27/2001 s. 3(Sch. 1 item 1.1).*

**"domestic partner"** of a person who dies means a person who, although not married to the person--

(a) was living with the person at the time of the person's death as a couple on a genuine domestic basis (irrespective of gender); and

(b) either--

(i) had lived with the person in that manner continuously for a period of at least 2 years immediately before the person's death; or

(ii) is the parent of a child of the person who was under 18 years of age at the time of the person's death;

*S. 3(1) def. of "dust-related condition" inserted by No. 15/2000 s. 3.*

**"dust-related condition"** means--

(a) a disease specified in the First Schedule; or

(b) any other pathological condition of the lungs, pleura, peritoneum or sinus that is attributable to dust;

**"Master"** means Master of the Supreme Court of Victoria;

*S. 3(1) def. of "parent" inserted by No. 27/2001 s. 3(Sch. 1 item 1.1).*

**"parent"** of a child includes a person who has day to day care and control of the child and with whom the child is ordinarily resident;

**"Part"** means Part of this Act;

*S. 3(1) def. of "partner" inserted by No. 27/2001 s. 3(Sch. 1 item 1.1).*

**"partner"** of a person who dies means the person's spouse or domestic partner;

*S. 3(1) def. of "public trustee" repealed by No. 55/1987*

*s. 57(3)(Sch. 5 item 1).*

\* \* \* \* \*

*S. 3(1) def. of "registrar" substituted by No. 8951*

*s. 5(1)(a), amended by No. 57/1989*

*s. 3(Sch. item 4.2).*

**"registrar"** means the registrar of probates appointed pursuant to the **Supreme Court Act 1986** and includes an assistant registrar of probates;

*S. 3(1) def. of "small estate" inserted by No. 45/1994*

*s. 38.*

**"small estate"** means an estate not exceeding the values specified in section 71(1);

*S. 3(1) def. of "spouse" inserted by No. 27/2001 s. 3(Sch. 1 item 1.1).*

**"spouse"** of a person who dies means a person who was married to the person at the time of the person's death;

*S. 3(1) def. of "State Trustees" inserted by No. 45/1994*

*s. 38, substituted by No. 44/2001 s. 3(Sch. item 2).*

**"State Trustees"** means State Trustees Limited (A.C.N. 064 593 148);

*S. 3(1) def. of "the Rules" inserted by No. 78/2000 s. 3.*

**"the Rules"** means the Rules of Court made by the Judges of the Court whether made under powers conferred under this Act or otherwise.

*S. 3(2) inserted by No. 10/1994*

*s. 4(1)(b).*

(2) In this Act, if the context requires--

(a) a reference to the granting of probate or administration is to be construed as a reference to the making of an order granting probate or administration; and

(b) a reference to a grant is to be construed as a reference to an order for a grant; and

(c) a reference to probate is to be construed as a reference to an order for a grant of probate; and

(d) a reference to administration is to be construed as a reference to an order granting letters of administration.

*S. 3(3) inserted by No. 27/2001 s. 3(Sch. 1 item 1.2).*

(3) For the purposes of the definition of "domestic partner" in sub-section (1), in determining whether persons were domestic partners of each other, all the circumstances of their relationship are to be taken into account, including any one or more of the matters referred to in section 275(2) of the **Property Law Act 1958** as may be relevant in a particular case.

#### 4. *Application of Act*

(1) Save as otherwise expressly provided and subject to the operation of the next succeeding sub-section this Act applies to and with respect to persons and the estates of persons dying before on or after the commencement of this Act.

(2) Where an enactment repealed by this Act provides that any statutory provision specified therein or any rule of law statutory or otherwise shall, with or without modification, apply to or with respect to or in respect of or have force and effect with respect to persons or the estates of persons dying before or on or after the commencement of any Act or any other date specified in such repealed enactment, that enactment and any provision or rule of law so applied or given force or effect shall notwithstanding the repeal of that enactment continue to have full force and effect according to the tenor thereof.

### **PART I--GENERAL**

#### **Division 1--Interpretation**

*Nos 3623*

*s. 4, 4654*

*s. 3(3).*

#### 5. *Definitions*

(1) In this Part unless inconsistent with the context or subject-matter--

**"administration"** means with reference to the estate of a deceased person letters of administration whether general special or limited or with the will annexed or otherwise;

**"administrator"** means a person to whom administration is granted;

**"conveyance"** includes a mortgage lease assent vesting declaration disclaimer release and every other assurance of property or of an interest therein by any instrument except a will and **"convey"** has a corresponding meaning and **"disposition"** includes a **"conveyance"** also a devise bequest and an appointment of property contained in a will and **"dispose of"** has a corresponding meaning;

**"estate"** means real and personal estate;

**"grant"** means a grant of probate or administration;

**"income"** includes rents and profits;

**"intestate"** includes a person who leaves a will but dies intestate as to some beneficial interest in his real or personal estate;

*S. 5(1) def. of "lunatic" repealed by No. 59/1986*

*s. 143(2).*

\* \* \* \* \*

**"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 a 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 chattels"** means carriages horses stable furniture and effects (not used for business purposes) motor cars and accessories (not used for business purposes) garden effects domestic animals plate plated articles linen china glass books pictures prints furniture jewellery articles of household or personal use or ornament musical and scientific instruments and apparatus wines liquors and consumable stores but does not include any chattels used at the death of the intestate for business purposes nor money or securities for money; **"personal representative"** means the executor original or by representation or administrator for the time being of a deceased person;

**"possession"** includes the receipt of rents and profits or the right to receive the same (if any);

**"probate"** means the probate of a will;

**"property"** includes a thing in action and any interest in real or personal property;

**"purchaser"** means a lessee mortgagee or other person who in good faith acquires an interest in property for valuable consideration also an intending purchaser and **"valuable consideration"** includes marriage but does not include a nominal consideration in money;

**"representation"** (except in section fifty-two) means the probate of a will and administration;

**"rent"** includes a rent service or a rent charge or other rent toll duty or annual or periodical payment in money or money's worth issuing out of or charged upon land but does not include mortgage interest as such; and rent charge includes a fee farm rent;

**"securities"** includes stocks funds or shares;

*S. 5(1) def. of "trustee company" amended by No. 10168 s. 3.*

**"trustee company"** means a trustee company under the **Trustee Companies Act 1984**; **"trust for sale"** in relation to land means as immediate binding trust for sale whether or not exercisable at the request or with the consent of any person and with or without a power at discretion to postpone the sale; and **"power to postpone a sale"** means power to postpone in the exercise of a discretion;

**"will"** includes codicil and every other testamentary instrument.

- (2) References to a child or issue living at the death of any person include a child or issue en ventre sa mere at the death.
- (3) References to the estate of a deceased person include property over which the deceased exercises a general power of appointment (including the statutory power to dispose of entailed interests) by his will.

*Pt 1 Div. 1A (Heading and ss 5A-5C) inserted by No. 10/1994*

*s. 5 (as amended by No. 9/1995*

*s. 12).*

### **Division 1A--Deposit of Wills with Registrar**

**S. 5A**

*inserted by No. 10/1994*

*s. 5.*

#### **5A. Will may be deposited with registrar**

- (1) Any person may deposit a will in the office of the registrar.
- (2) Any will deposited in the office of the registrar must be in a sealed envelope which has written on it--
- (a) the testator's name and address (as they appear in the will); and
  - (b) the name and address (as they appear in the will) of any executor; and
  - (c) the date of the will; and
  - (d) the name of the person depositing the will--

and must be accompanied by the prescribed fee.

**S. 5A(3) amended by No. 35/1996**

*s. 453(Sch. 1 item 3.1)*

- (3) No fee is payable in respect of any will deposited with the registrar if the deposit is made because a legal practitioner has died, or has ceased, or is about to cease, practising in Victoria.

**S. 5B**

*inserted by No. 10/1994*

*s. 5.*

#### **5B. Power to prescribe fees**

- (1) The Governor in Council may make regulations for or with respect to prescribing fees for the purposes of this Division.
- (2) Regulations made under sub-section (1)--

- (a) may prescribe fees in respect of a particular class or classes of wills or will makers; and
- (b) may prescribe different fees in respect of different classes of wills or will makers; and
- (c) may authorise the registrar to waive fees in particular cases or classes of cases.

*S. 5C*

*inserted by No. 10/1994*

*s. 5 (as amended by No. 9/1995*

*s. 12).*

***5C. Delivery of wills by registrar***

- (1) Upon receiving an application in writing and the prescribed fees, the registrar may give any will deposited with the registrar--
- (a) to the testator; or

*S. 5C(1)(b) amended by No. 35/1996*

*s. 453(Sch. 1 item 3.2)*

- (b) to a legal practitioner or trustee company nominated by the testator; or
- (c) upon the death of the testator--

*S. 5C(1)(c)(i) amended by No. 35/1996*

*s. 453(Sch. 1 item 3.2).*

- (i) to any executor named in the will or any legal practitioner or trustee company nominated by an executor; or

*S. 5C(1)(c)(ii) amended by No 35/1996*

*s. 453(Sch. 1 item 3.2).*

- (ii) to any person entitled to apply for letters of administration with the will annexed or a legal practitioner nominated by that person.

(2) The registrar may examine any will to enable the registrar to comply with this Division.

(3) The registrar must ensure that an accurate copy of every will given to a person under sub-section (1) is made and retained.

(4) If there is any doubt as to whom a will should be given, the registrar, or any other person, may apply to the Court for directions as to whom the registrar should give the will.

(5) The registrar may transfer any will that has been held by the registrar for more than 70 years to the Keeper of Public Records for preservation in accordance with section 7 of the **Public Records Act 1973** and the provisions of this section continue to apply to the will.

(6) For the purposes of sub-section (5), wills held by the Registrar-General are deemed to have been held by the registrar.

## **Division 2--Grants of Probate and Administration**

*No. 3632 s. 5.*

6. ***Jurisdiction of Court to grant probate etc.*** The Court shall have jurisdiction to grant probate of the will or administration of the estate of any deceased person leaving property whether real or personal within Victoria.

*No. 4141 s. 2.*

### ***7. Grant of probate etc. on evidence or presumption of death***

(1) Where the Court is satisfied, whether by direct evidence or on presumption of death, that any person has died leaving property whether real or personal in Victoria, the Court shall have and shall at all times be deemed to have had jurisdiction to grant probate of his will or administration of his estate as if he were a deceased person, notwithstanding that it may subsequently to the grant appear that he was living at the date of the grant.

(2) Subject to the provisions of this Act, where a grant is or has been made of probate of the will or administration of the estate of any person with respect to whom the Court is satisfied as aforesaid that he is dead, notwithstanding that it may subsequently appear that the person in respect of whose estate the grant was made was living at the date of the grant, the person administering the estate for the time being by virtue of such grant shall have and be deemed to have had the like rights powers privileges duties and liabilities as the personal representative of a deceased person, and in any Act the expression "**personal representative**" shall include and be deemed at all times to have included the person administering the estate for the time being by virtue of such grant.

*S. 7(3) repealed by No. 10/1994*

*s. 13(a).* [\[2\]](#)

\* \* \* \* \*

*No. 4141 s. 3.*

### ***8. Grant on presumption of death*** If a grant is made on presumption of death--

(a) the grant shall be expressed to be made on presumption of death only;  
(b) the estate shall not be distributed without the leave of the Court, which leave may be given in the grant or by a separate order, and either unconditionally or subject to such conditions as the Court deems reasonable, and, in particular, if the Court thinks fit, subject to an undertaking being entered into or security being given by any person who takes under the distribution that he will restore any money or property received by him or the amount or value thereof in the event of the grant being revoked;

*S. 8(c) amended by No. 6505 s. 2.*



*(c) the Court may direct the personal representative before distributing the estate to give such notices as the Court deems proper in the circumstances in order that the person whose death has been presumed, if he is still living, or in order that, if he has died since the date of the grant, any person interested in the estate may lodge with the registrar within such time as is specified by the Court a caveat against the distribution; and, if the Court directs any such notice to be given, the personal representative shall not have the benefit of paragraph (a) of section ten or of sub-section (2) of section thirty-one of this Act unless he complies with the direction;*

*(d) if a caveat is duly lodged within such time as is specified by the Court, the personal representative shall not distribute the estate until the caveat is withdrawn or removed;*

*(e) an application for leave to distribute the estate and for directions may be made and a caveat may be lodged withdrawn or removed in accordance with Rules of Court, and the Court may make such order in respect of costs and otherwise as it deems proper;*

***S. 8(f) repealed by No. 10/1994***

***s. 13(a).***[\[3\]](#)

\* \* \* \* \*

***No. 4141 s. 4.***

## ***9. Revocation of probate etc. of person living at date of grant***

(1) Where the Court grants probate of the will or administration of the estate of any person, and it subsequently appears that he was living at the date of the grant, the Court shall revoke the grant on such terms, if any, with respect to any proceedings commenced by or against the personal representative, and in respect of costs and otherwise, as the Court thinks proper.

***S. 9(2) amended by No. 110/1986 s. 140(2).***

(2) Proceedings for the revocation may be taken either by the person himself, or, if he has died since the date of the grant, by any person entitled to apply for probate or administration or by any person interested in the estate of the deceased person.

***S. 9(3) repealed by No. 10/1994***

***s. 13(a).***[\[4\]](#)

\* \* \* \* \*

***No. 4141 s. 5.***

## ***10. Effect of revocation*** If a grant is revoked under the last preceding section of this Act--

(a) the personal representative under the revoked grant shall be bound duly to account and to pay and transfer all money and property received by or vested in him as such personal representative and then remaining in his hands as the Court directs, but shall not be liable for any money or property paid or transferred by him in good faith under the representation before the revocation. Nothing in this paragraph shall affect any commission protection

indemnity reimbursement or right to which the personal representative is entitled under this Act;

(b) the revocation shall not invalidate any payment or transfer lawfully made by or to the personal representative in the course of administering the estate before the revocation, but nothing in this paragraph shall prejudice the right of the person himself, or, if he has died since the date of the grant, the personal representative to whom a grant is made consequent on the revocation, or any other person, to follow assets into the hands of the persons or any of them among whom the same have been distributed or who have received the same, other than purchasers for value without notice that the person supposed to be dead was actually alive at the date of the grant;

*S. 10(c) amended by No. 57/1989*

*s. 3(Sch. item 4.3).*

*(c) the person himself, or, if he has died since the date of the grant, the personal representative to whom a grant is made consequent on the revocation, shall be entitled to receive from the Consolidated Fund (which is hereby appropriated for the purpose accordingly) the amount of duty paid thereto in respect of the revoked grant;*

*(d) the Court may make such vesting order as it deems proper;*

*S. 10(e) repealed by No. 10/1994*

*s. 13(a).*[\[5\]](#)

\* \* \* \* \*

*S. 11 amended by No. 6640*

*s. 2(a)(i)(ii), repealed by No. 8951*

*s. 5(1)(b).*

\* \* \* \* \*

*Nos 3632*

*s. 7, 4486*

*s. 2, 6089*

*s. 2(1).*

## **12. Grants of probate and administration by registrar**

(1) Subject to the provisions of this section the registrar may, on application made to him supported by affidavits upon which in his opinion the Court would grant probate or administration, make a grant of probate or administration by signing his order for such grant and sealing it with the seal of the Court.

*S. 12(1A) inserted by No. 78/2000 s. 4(1).*

(1A) The registrar may make a grant of probate or administration, other than in the manner set out in sub-section (1), by authenticating the order for the grant in a manner prescribed by the Rules.

(2) The registrar shall not without an order of the Court grant probate or administration--

(a) in any case where a caveat has been lodged and has not expired or been withdrawn; or

(b) in any case in which it appears to him to be doubtful whether such probate or administration ought to be granted.

*S. 12(3) amended by Nos 7597 s. 5, 78/2000 s. 4(2)(b).*

(3) Probate or administration shall be deemed to be granted--

*S. 12(3)(a) amended by No. 10/1994*

*s. 4(2).*

*(a) in the case of a grant by the Court, when the order for the grant has been authenticated and filed in the office of the registrar;*

*S. 12(3)(b) amended by No. 78/2000 s. 4(2)(a).*

*(b) in the case of a grant by the registrar, when the order for the grant has been signed by him and sealed with the seal of the Court or authenticated in a manner prescribed by the Rules--*

and every grant of probate or administration, if made by the Court, shall be issued by the registrar in the name and under the seal of the Court and, if made by the registrar, shall be issued by the registrar in the name and under the seal of the Court or authenticated in a manner prescribed by the Rules.

### **Division 3--Devolution of Real Estate etc.**

*Nos 3632*

*s. 8, 4654*

*s. 3(3).*

#### **13. Real estate to vest in executors and administrators**

(1) Upon the Court granting probate of the will or administration of the estate of any deceased person, then subject to any limitations expressed in the grant all the hereditaments or all the hereditaments then unadministered of such person, whether held by him beneficially or in trust, shall vest as from the death of such person in the executor or administrator to whom such probate or administration is granted (as the case may be) for all the estate therein of such person, and if there is more than one such executor or administrator shall vest in them as joint tenants.

(2) In this section the hereditaments of a deceased person shall be deemed to include--

(a) all the estate of such person passing under any gift contained in his will which operates as an appointment under a general power to appoint by will or

operates under the testamentary power conferred by statute to dispose of an entailed interest; and  
(b) every estate pur autre vie which such person could if of full age and capacity have disposed of by his will.

*No. 3632 s. 9.*

**14. *Rights and duties of executor or administrator with respect to real estate*** Subject to the provisions of this Act or of any other Act the executor or administrator of any deceased person shall have the same rights and be subject to the same duties with respect to the real estate of such person as prior to the first day of January One thousand eight hundred and seventy-three executors or administrators had or were subject to with respect to personal estate.

**Division 4--Executors and Administrators**  
***Subdivision 1--General Provisions***

*Nos 3632*

*s. 11, 4654*

*s. 3(3).*

*S. 15 amended by Nos 110/1986 s. 140(2), 55/1987*

*s. 57(3)(Sch. 5 item 2), 15/1998 s. 5(a).*

**15. *Executor etc. neglects to prove, renounce or bring in the will***

The Court shall continue to have power to summon any person named as executor in any will to prove or renounce probate of the will and to do such other things concerning the will as have heretofore been customary and in particular and without limiting the generality or effect of the foregoing provision in any case where the executor named in a will or any person having possession of any will neglects to bring such will into court within six weeks from the death of the testator or where the executor named in a will neglects to prove the same or renounce probate thereof within six weeks from the death of the testator any party interested under such will or in the estate or the State Trustees or any creditor of the testator may apply to the Court for an order calling upon the executor or any person having possession of such will to show cause why he should not bring such will into court or why such executor should not prove the same or renounce probate thereof or in the alternative why administration with such will annexed should not be granted to the applicant and upon proof of service of the summons, if the executor or such person does not appear or show sufficient cause as aforesaid, it shall be lawful for the Court to make an order upon such executor or person to bring such will into court and make such order in the premises and as to costs as appears just and the Court may grant administration of the estate to such applicant.

*Nos 3632*

*s. 12, 4191*

s. 2.

**16. *Cesser of right of executor to prove***

- (1) Where a person appointed executor by a will--
  - (a) survives the testator but dies without having taken out probate of the will;  
or
  - (b) is cited to take out probate of the will and does not appear to the citation;  
or
  - (c) renounces probate of the will--

his rights in respect of the executorship shall wholly cease, and the representation to 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.

*S. 16(2) amended by No. 10/1994*

s. 4(3).

- (2) An executor who has renounced probate may notwithstanding anything in the last preceding sub-section contained be permitted by the Court to withdraw the renunciation and prove the will and where an executor who has renounced probate has been so permitted, whether before or after the commencement of this Act, the probate shall take effect and be deemed always to have taken effect without prejudice to the previous acts and dealings of and notices to any other personal representative who has previously proved the will or taken out letters of administration, and a memorandum of the subsequent probate shall be indorsed on the original grant.

*Nos 3632*

s. 13, 4191

s. 2.

**17. *Executor of executor represents original testator***

- (1) An executor of a sole or last surviving proving executor of a testator is the executor 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 who afterwards proves the will of that testator, it shall cease to apply on such probate being granted.

- (2) So long as the chain of such representation is unbroken, the last executor in the chain is the executor of every preceding testator.
- (3) The chain of such representation shall be broken by--
  - (a) an intestacy; or
  - (b) the failure of a testator to appoint an executor; or
  - (c) the failure to obtain probate of a will;

but shall not be broken by a temporary grant of administration if probate is subsequently granted.

(4) Every person in the chain of representation to a testator--

(a) shall have the same rights in respect of the estate of that testator as the original executor would have had if living; and

(b) shall be to the extent to which the estate of that testator has come to his hands, answerable as if he were an original executor.

*No. 3632 s. 14.*

**18. *Right of proving executors to exercise powers*** Where probate is granted to one or some of two or more persons named as executors, whether or not power is reserved to the others or other to prove, all the powers which are by law conferred on the personal representative may be exercised by the proving executor or executors for the time being and shall be as effectual as if all the persons named as executors had concurred therein.

*Nos 3632*

*s. 15, 5286*

*s. 9(1).*

*S. 19 amended by Nos 7332*

*s. 2(Sch. 1 item 2), 55/1987*

*s. 57(3)(Sch. 5 item 3), 88/1997*

*s. 54.*

**19. *Estate of intestate to vest in State Trustees between death and grant of administration***

Where a person dies intestate his estate until administration is granted in respect thereof shall vest in the State Trustees in the same manner and to the same extent as formerly in the case of personal estate in England it vested in the Ordinary.

*No. 3632 s. 16.*

**20. *Power to grant representation of estate separately or together*** Representation in respect of the real estate of a deceased person or any part thereof may be granted either separately or together with representation in respect of his personal estate or any part thereof and may also be granted in respect of real estate only where there is no personal estate or in respect of a trust estate only and a grant of administration to real or personal estate or both may be limited in any way the Court thinks proper: Provided that where the estate of the deceased is known to be insolvent the grant of representation to the real and personal estate shall not be severed except as regards a trust estate.

*No. 3632 s. 17.*

*s. 13(b).*

**21. *Executor not to act while administration is in force***

Where administration has been granted in respect of any real or personal estate or real and personal estate of a deceased person no person shall have power to bring any proceeding or otherwise act as executor of the deceased person in respect of the estate comprised in or affected by the grant until the grant has been recalled or revoked.

*No. 3632 s. 18.*

**22. *Administration pending litigation***

(1) Where any legal proceedings touching the validity of the will of a deceased person or for obtaining recalling or revoking any grant are pending the Court may grant administration of the estate of the deceased to an administrator who shall have all the rights and powers of a general administrator other than the right of distributing the residue of the estate and every such administrator shall be subject to the immediate control of the Court and act under its direction.

(2) The Court may out of the estate of the deceased assign to any administrator appointed under this section such reasonable remuneration as the Court thinks fit.

*No. 3632 s. 19.*

**23. *Continuance of legal proceedings after revocation of temporary administration*** If while any legal proceeding is pending in any court by or against an administrator to whom a temporary administration has been granted that administration is revoked or otherwise terminates 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 that court directs. In this section "**court**" means any court having jurisdiction in relation to such proceedings.

*No. 3632 s. 20.*

**24. *Grant of administration where personal representative is abroad***

(1) If at the expiration of twelve months from the death of a person any personal representative of the deceased to whom a grant has been made is residing out of the jurisdiction of the Court the Court may on the application of any creditor or person interested in the estate of the deceased grant to him special administration of the estate of the deceased in such form as may be prescribed by Rules of Court or as may be directed by the Court.

*S. 24(2) amended by No. 6716 s. 2.*

(2) The court may for the purpose of any legal proceedings to which the administrator under the special administration is a party order the transfer into

court of any money or securities belonging to the estate of the deceased person and all persons shall obey any such order.

(3) If the personal representative capable of acting as such returns to and resides within the jurisdiction of the Court while any legal proceedings to which a special administrator is a party are pending that personal representative shall be made a party to the legal proceedings and the costs of and incidental to the special administration and the legal proceedings shall be paid by such person and out of such fund as the court in which the proceedings are pending directs. In this sub-section "**court**" means any court having jurisdiction in relation to such proceedings.

*S. 24A inserted by No. 45/1994*

s. 39.

**24A. *Uncared for property***

(1) This section applies if--

(a) the owner of any property in Victoria is absent from Victoria and has no agent or attorney in Victoria with authority to take possession of and administer the property; or

(b) it is not known who the owner of any property in Victoria is; or

(c) it is not known where the owner of any property in Victoria is; or

(d) it is not known whether the owner of any property in Victoria is alive or dead; or

(e) the owner of any property in Victoria is dead and has left executors or administrators and it is not known where they are.

*S. 24A(2) amended by No. 15/1998*

s. 5(b)(i)(ii).

(2) If a trustee company applies for an order and the Court is satisfied that it is in the interests of the owner of the property or of any other person, the Court may make an order on any terms and conditions it thinks fit authorising the trustee company to do any act, matter or thing in relation to the property or affairs of the owner of the property as is specified in the order.

*No. 3632 s. 21.*

**25. *Administration with will annexed*** Administration with the will annexed shall continue to be granted in every case where such grant has heretofore been customary and in such case the will of the deceased shall be performed and observed in like manner as if probate thereof had been granted to an executor.

*No. 3632*

s. 22.

*S. 26 amended by Nos 9075*



s. 5(1)(2), 9427 s. 5(Sch. 4 item 1).

**26. Administration during minority of executor**

(1) Where a minor is sole executor of a will administration with the will annexed shall be granted to his guardian or to such other person as the Court thinks fit until the minor attains the age of eighteen years and on his attaining that age and not before probate of the will may be granted to him.

*S. 26(2) amended by No. 9427*

s. 5(Sch. 4 item 1).

(2) The appointment in a will by a testator of a minor to be an executor shall not operate to transfer any interest in the property of the deceased to the minor or to constitute him a personal representative for any purpose unless and until probate is granted to him under this section.

*No. 3632 s. 23.*

**27. Rights and liabilities of administrator**

Every person to whom administration of the estate of a deceased person is granted shall subject to the limitations contained in the grant have the same rights and liabilities and be accountable in like manner as if he were the executor of the deceased.

***Subdivision 2--Duties Rights and Obligations***

*No. 3632 s. 24.*

**28. Duty of personal representative as to inventory and accounts**

(1) The personal representative of a deceased person shall when lawfully required so to do exhibit on oath in the Court, a true and perfect inventory and account of the real and personal estate of the deceased, and the Court shall have power as heretofore to require personal representatives to bring in inventories.

*S. 28(2) amended by Nos 6640*

s. 2(b), 110/1986

s. 140(2).

(2) Without limiting the generality or effect of the last preceding sub-section every creditor to whom a grant is made in his capacity of creditor shall deposit or cause to be deposited in the office of the registrar within fifteen months from the date of the grant a true and just account verified by him by affidavit of the administration of such estate as to receipts and disbursements and as to what portion is retained by him and what portion remains uncollected and

whenever on the application of the registrar ordered by the Court so to do after the expiration of the said fifteen months deposit in the office of the registrar such accounts verified by him by affidavit as the Court thinks fit.

*Nos 3632*

*s. 25, 4918*

*s. 2, 5846*

*s. 3(1).*

**29. *Effect of death on certain causes of action***

*S. 29(1) amended by No. 10/1994*

*s. 13(c).*

(1) Subject to the provisions of this section, on the death of any person, 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:

*S. 29(1) Proviso amended by No. 7597 s. 6.*

Provided that this sub-section shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other.

(2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person the damages recoverable for the benefit of the estate of that person--

(a) shall not include any exemplary damages;

(b) in the case of a breach of promise of marriage shall be limited to such damage (if any) to the estate of that person as flows from the breach of the promise to marry;

(c) where the death of that person has been caused by the act or omission which gives rise to the cause of action--

(i) shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included;

*S. 29(2)(c)(ii) amended by No. 15/2000 s. 4(1).*

*(ii) shall not, except as provided in sub-section (2A), include any damages for his pain or suffering or for any bodily or mental harm suffered by him or for the curtailment of his expectation of life;*

*S. 29(2)(c)(iii) inserted by No. 9847*

*s. 2(1).*

*(iii) shall be calculated without reference to the future probable earnings of the deceased had he survived and without any allowance for the loss of his earning capacity that relates to any period after his death.*

*S. 29(2A) inserted by No. 15/2000 s. 4(2).*

(2A) Where--

(a) a cause of action survives under sub-section (1) for the benefit of the estate of a deceased person; and

(b) the death of that person is from a dust-related condition which has been caused by the act or omission which gives rise to the cause of action; and

(c) proceedings in respect of that cause of action were commenced by that person before his or her death and were pending at his or her death--

the damages recoverable for the benefit of the estate of that person shall include damages for all or any of the following--

(d) that person's pain or suffering;

(e) any bodily or mental harm suffered by that person;

the curtailment of that person's expectation of life.

*S. 29(3) substituted by No. 7296 s. 2.*

(3) Where a cause of action in tort survives against the estate of a deceased person pursuant to the provisions of sub-section (1) of this section no proceedings in respect of the cause of action may be maintained against the estate of the deceased person except proceedings--

(a) that were commenced against the deceased before his death and were pending and not barred at the date of his death;

*S. 29(3)(b) substituted by No. 9884*

*s. 10(a).*

*(b) that are commenced against his personal representative after his death--*

*(i) within the period within which those proceedings might have been commenced against him had he lived; or*

*(ii) where the proceedings are proceedings for negligence nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) and the damages claimed by the plaintiff consist of or include damages in respect of personal injuries to any person, within such longer period as a court, on application made to it by the claimant and after hearing such of the persons likely to be affected by that application as it sees fit and subject to sub-section (3A), decides is just and reasonable;*

*(c) that were not barred at the date of his death and are commenced against his personal representative within six months after his personal representative takes out representation.*

*S. 29(3A) inserted by No. 9884*

*s. 10(b).*

(3A) In exercising the powers conferred on it by sub-paragraph (b)(ii) of sub-section (3) the court shall have regard to all the circumstances of the case including (without derogating from the generality of the foregoing) the following:

(a) The date when the claimant first knew that the deceased had died;

(b) The date when the claimant first knew he had a cause of action against the deceased;

(c) The date when the claimant first knew that the personal representative of the deceased had taken out representation; and

(d) Any prejudice which may be caused to the personal representative or any other person by extension of the said time.

(4) 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 is 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.

(5) The rights conferred by this section for the benefit of the estates of deceased persons shall be in addition to and not in derogation from any rights conferred on the dependants of a deceased person by Part III of the **Wrongs Act 1958**, and this section shall apply in relation to causes of action under the said Part III as it applies in relation to other causes of action not expressly excepted from the operation of sub-section (1) of this section.

*S. 29(6) repealed by No. 10/1994*

*s. 13(a).*[\[6\]](#)

\* \* \* \* \*

*No. 3632 s. 26.*

### **30. *Executors or administrators may serve notice on claimant***

(1) A personal representative, having notice, whether under the provisions of section thirty-three of the **Trustee Act 1958** or otherwise, that any claim has been or may be made against the estate of which he is the personal representative, may serve upon any person making or possibly entitled to make such claim a notice requiring such person to take within a period of three months from the date of receiving such notice all proceedings proper to enforce or to establish such claim and to duly prosecute the same.

*S. 30(2) amended by No. 110/1986 s. 140(2).*

(2) After the expiration of the said period of three months such personal representative may apply to the Court for an order to some such effect as hereinafter in this section mentioned.

*S. 30(3) amended by No. 110/1986 s. 140(2).*

(3) Upon the hearing of such application the Court, if not satisfied that such proceedings as aforesaid have been taken and are being duly prosecuted, may-

-

- (a) order that the said period be extended; or
- (b) order that the claim of any person so served with notice of the application be for all purposes barred; or
- (c) make any further or other order enabling the estate to be distributed or dealt with without regard to the claim; and

*S. 30(3)(d) amended by No. 110/1986 s. 140(2).*

*(d) in any case impose such conditions and give such directions including a direction as to the payment of the costs of or incidental to the application as to the Court seems just.*

***S. 30A inserted by No. 45/1994***

***s. 40.***

***30A. State Trustees' power to make distribution after notice of refusal***

(1) If State Trustees refuses to recognise in whole or in part the claim of any person against the estate of any deceased person, State Trustees must serve a notice of the refusal specifying that proceedings to enforce the claim must be instituted within 3 months of the notice being served on the person by registered post to the person's last known address.

(2) If the person does not institute proceedings to enforce the claim within 3 months of being served with the notice of refusal State Trustees may distribute the assets of the deceased person without regard to the claim specified in the notice of refusal.

(3) After the distribution is made the right of the person to recover the claim specified in the notice of refusal is absolutely barred.

***S. 30B inserted by No. 45/1994***

***s. 40,***

***repealed by No. 15/1998***

***s. 5(c).***

***\* \* \* \* \****

***S. 30C inserted by No. 45/1994***

***s. 40.***

***30C. State Trustees' power to pay balance if deceased had property in and outside Victoria***

(1) In this section--

**"place outside Victoria"** means--

(a) another State or a Territory; or

(b) New Zealand; or

(c) any other country with which State Trustees has a reciprocity agreement;

**"proper officer"** means any officer in a place outside Victoria discharging duties corresponding to those discharged by State Trustees in Victoria.

(2) If State Trustees has been granted probate of the will or administration of the estate in Victoria of any person--

(a) who was at the time of his or her death domiciled in a place outside Victoria; and

(b) whose estate in the place outside Victoria is being administered by a proper officer--

State Trustees may pay or cause to be paid to the proper officer the balance of the estate after the payment of creditors and the fees and charges which State Trustees is entitled or required to deduct without seeing to the application of the balance and without incurring any liability in regard to the payment to the proper officer.

(3) If State Trustees has been granted probate of the will or administration of the estate in Victoria of any person--

(a) who was at the time of his or her death domiciled in Victoria; and

(b) whose estate in a place outside Victoria is being administered by a proper officer--

State Trustees may receive from the proper officer the balance of the estate in the place outside Victoria after the payment of creditors and the fees and charges provided for under the law of that place.

(4) Any balance received under sub-section (3) forms part of the estate of the deceased to be dealt with according to the law of Victoria.

*S. 30D inserted by No. 45/1994*

*s. 40.*

30D. ***Supreme Court--limitation of jurisdiction*** It is the intention of this section to alter or vary section 85 of the **Constitution Act 1975** to the extent necessary to prevent the Supreme Court entertaining claims in the circumstances described in section 30A(3) of this Act.

*S. 30E inserted by No. 15/1998*

*s. 6.*

30E. ***Transitional for certain State Trustees powers***

Despite the repeal of section 30B, that section as in force immediately before the commencement of section 6 of the **State Trustees (Amendment) Act 1998** continues to apply to State Trustees in respect of any action taken by State Trustees in accordance with that section before that commencement.

*No. 3632 s. 27.*

31. ***Protection of persons acting on probate or administration***

(1) Every person making or permitting to be made any payment or disposition in good faith under a representation shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of the representation.

(2) Where a representation is revoked, all payments and dispositions made in good faith to a personal representative under the representation before the revocation thereof shall be a valid discharge to the person making the same; and the personal representative who acted under the revoked representation may retain and reimburse himself in respect of any payments or dispositions made by him which the person to whom representation is afterwards granted might have properly made.

**32. Payment or transfer by employer of moneys etc. held on account of deceased employee**

*S. 32(1) amended by Nos 7663*

*s. 2(a)(b), 9041 s. 2, 10/1994*

*s. 7(b), 74/2000 s. 3(Sch. 1 item 3.1), 27/2001*

*s. 3(Sch. 1 item 1.3).*

(1) Where--

*S. 32(1)(a) amended by No. 74/2000 s. 3(Sch. 1 item 3.1).*

*(a) an employee has died (whether before or after the commencement of this Act) and his employer holds moneys or other personal property on account of the employee; and*

*S. 32(1)(b) amended by Nos 10/1994*

*s. 7(a), 74/2000 s. 3(Sch. 1 item 3.1).*

*(b) the employer is satisfied by statutory declaration that the value of the estate of the employee after payment of debts and testamentary expenses (if any) will not exceed \$25 000--*

the employer may, without requiring the production of probate or letters of administration, pay or transfer, to the surviving partner of the deceased employee or child of the deceased employee or of the deceased employee's partner or to any other person appearing to be entitled to the property of the deceased employee, such moneys or personal property to an amount not exceeding in the aggregate \$12 500<sup>[7]</sup>.

(2) A receipt signed by any person above the age of sixteen years to whom money or property is paid or transferred by an employer in the bona fide exercise of the powers conferred by this section shall be a complete discharge to the employer of all liability in respect of moneys or property so paid or transferred.

*S. 32(3) amended by No. 74/2000 s. 3(Sch. 1 item 3.1).*

(3) Nothing in this section shall prejudice or affect any right or remedy of any person entitled under the will of the deceased employee or under the law relating to the disposition of estates of deceased persons to recover any money or property paid or transferred from the person to whom it was paid or transferred by the employer under the powers conferred by this section.

*Nos 3632*

*s. 28, 4191*

*s. 2.*

**33. *Liability of person fraudulently obtaining or retaining estate of deceased***

(1) If any person, to the defrauding of creditors or without full valuable consideration, obtains receives or holds the estate or any part of the estate of a deceased person 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 to his hands, or the debt or liability released, after deducting any payment made by him which might properly be made by a personal representative.

(2) Where a person as personal representative of a deceased person (including an executor in his own wrong) wastes or converts to his own use any part of the estate of the deceased, and dies, his personal representative shall to the extent of the available assets of the defaulter be liable and chargeable in respect of such waste or conversion in the same manner as the defaulter would have been if living.

***Subdivision 3--Discharge and Removal of Executors and Administrators and New Appointments***

*No. 3632 s. 29.*

**34. *Discharge or removal of executor or administrator***

*S. 34(1) amended by No. 110/1986 s. 140(2).*

(1) Notwithstanding anything contained in any Act where an executor or administrator to whom probate or administration has been granted whether before or after the commencement of this Act or where an administrator who has been appointed under this section or any corresponding previous enactment--

(a) remains out of Victoria for more than two years;

(b) desires to be discharged from his office of executor or administrator; or

(c) after such grant or appointment refuses or is unfit to act in such office or is incapable of acting therein--

the Court upon application in accordance with the Rules of Court may order the discharge or removal of such an executor or administrator and also if the Court thinks fit the appointment of some proper person or trustee company as administrator in place of the executor or administrator so discharged or removed upon such terms and conditions as the Court thinks fit; and may make all necessary orders for vesting the estate in the new administrator and as to accounts and such order as to costs as the Court thinks fit.

*S. 34(2) amended by No. 110/1986 s. 140(2).*

(2) Notice of such application may be served if the Court thinks it necessary upon such persons as it directs.

(3) An executor or administrator so removed or discharged shall from the date of the order cease to be liable as such for acts and things done after that date.

(4) Upon such appointment the property and rights vested in and the liabilities property incurred in the due administration of the estate by the executor or



administrator so discharged or removed shall become and be vested in and transferred to the administrator appointed by such order who shall as such have the same privileges rights powers duties discretions and liabilities as if probate or administration had been granted to him originally.

*S. 34A inserted by No. 15/1998*

s. 7.

**34A. *Application for administration of estate administered by a creditor***

- (1) If a grant of administration of the property or estate of a deceased person has been granted to a creditor, a trustee company or any other person interested in the estate may apply to the Court for the removal of the creditor and the appointment of the trustee company or another person instead.
- (2) An application under sub-section (1) must be supported by an affidavit stating why it would be beneficial to any person interested in the estate that the creditor be removed and the trustee company or another person be appointed.
- (3) If a grant of administration of the property or estate of a deceased person has been granted to a creditor and the creditor has any property in his or her hands for at least 12 months after payment of creditors or for at least 3 years after the grant of administration (whether creditors have been paid or not), a trustee company or any other person interested in the estate may apply to the Court for the removal of the creditor and the appointment of the trustee company or another person instead.
- (4) On being satisfied that a creditor should be removed under this section, the Court may order the removal of such creditor from the position of administrator and appoint the trustee company or another person named in the order administrator in place of the creditor so removed on such terms and conditions as the Court thinks fit and may make all necessary orders for vesting the estate in the new administrator and as to accounts and such order for costs as the Court thinks fit.
- (5) Upon the appointment of a new administrator under sub-section (4), the provisions in section 34(3) and (4) apply so far as appropriate as if repeated in this section.

*Nos 3632*

s. 30, 4654

s. 3(3).

**35. *Court may assign bond and remove administrator***

*S. 35(1) amended by No. 110/1986 s. 140(2).*

- (1) On being satisfied that there has been negligence or maladministration of the estate of which a person has obtained administration in the capacity of a creditor or that the condition of any administration bond executed by any person who has obtained administration in such capacity has been broken in any substantial particular the Court--

*S. 35(1)(a) amended by Nos 55/1987*

*s. 57(3)(Sch. 5 item 4), 10/1994*

*s. 13(d), 15/1998*

*s. 5(d)(i).*

*(a) may order the registrar to assign the administration bond to a trustee company or any other person named in the order [\[8\]](#); and*

*S. 35(1)(b) amended by Nos 110/1986 s. 140(2), 55/1987*

*s. 57(3)(Sch. 5 item 5), 15/1998*

*s. 5(d)(ii).*

*(b) may if the Court thinks fit remove such creditor from the position of administrator and appoint a trustee company or any other person to be named in the order administrator in place of the administrator so removed upon such terms and conditions as the Court thinks fit and may make all necessary orders for vesting the estate in the new administrator and as to accounts and such order as to costs as the Court thinks fit.*

*S. 35(2) amended by No. 15/1998*

*s. 5(e).*

(2) Upon an appointment under paragraph (b) of the last preceding subsection, the provisions of section 34(3) and (4) shall so far as appropriate apply as if repeated in this section.

#### **Division 5--Administration of Assets**

*No. 3632 s. 31.*

### **36. Creditors to stand in equal degree**

(1) In the administration of the estate of any person no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond deed or other instrument under seal or is otherwise made or constituted a specialty debt, but all the creditors of such person as well specialty as simple contract shall be treated as standing in equal degree and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable any statute or law to the contrary notwithstanding: Provided that this Part shall not prejudice or affect any lien charge or other security which any creditor may hold or be entitled to for payment of his debt.

(2) In the administration of the estate of any person debts of record whether of record in the lifetime of such person or obtained against his executor or administrator for debts incurred by the deceased shall rank in the same degree as if they were specialty or simple contract debts.

(3) Every person who has obtained or obtains probate of the will or administration of the estate of a deceased person shall pay all and singular the just debts of such deceased person in due course of administration rateably and proportionably and according to the priority required by law but without

preferring his own debt by reason of his having obtained such probate or administration.

*No. 3632*

*s. 32(1).*

*S. 37 amended by Nos 7332*

*s. 2(Sch. 1 item 3), 74/2000 s. 3(Sch. 1 item 3.2).*

**37. *Estate of deceased assets for payment of debts***[\[9\]](#) The real and personal estate, whether legal or equitable, of a deceased person, to the extent of his beneficial interest therein, and the real and personal estate of which a deceased person in pursuance of any general power (including the statutory power to dispose of entailed interests) disposes by his will, shall be assets for payment of the debts of such deceased person (whether by specialty or simple contract) and of his liabilities, and any disposition by will inconsistent with this enactment is void as against the creditors, and the Court shall, if necessary, administer the property for the purpose of the payment of the debts and liabilities.

This section shall take effect without prejudice to the rights of incumbrancers.

*S. 37A (Heading) inserted by No. 27/2001 s. 3(Sch. 1 item 1.4).*

*S. 37A inserted by No. 10/1994*

*s. 8.*

**37A. *Partner may obtain intestate's interest in shared home***[\[10\]](#)

*S. 37A(1) substituted by No. 27/2001 s. 3(Sch. 1 item 1.5).*

(1) In this section--

**"residuary estate"** has the same meaning as in section 38(4);

**"shared home"** means a residence that was the principal place of residence of an intestate and the intestate's partner at the time of the intestate's death.

*S. 37A(2) substituted by No. 27/2001 s. 3(Sch. 1 item 1.5).*

(2) Despite anything to the contrary in this Act, if a person dies intestate as to an interest in the person's shared home, the person's partner may elect to acquire the interest at its value at the date of the person's death.

(3) The election must be made--

*S. 37A(3)(a) amended by No. 27/2001 s. 3(Sch. 1 item 1.6(a)).*

*(a) if the partner is a personal representative--within 3 months of the grant of administration;  
or*

**S. 37A(3)(b) amended by No. 27/2001 s. 3(Sch. 1 item 1.6(a)).**

*(b) if the partner is not a personal representative--within 3 months of the partner being given notice under sub-section (4).*

**S. 37A(4) amended by No. 27/2001 s. 3(Sch. 1 item 1.6(b)(ii)).**

**(4) If--**

**S. 37A(4)(a) amended by No. 27/2001 s. 3(Sch. 1 item 1.6(b)(i)).**

*(a) a person dies intestate as to an interest in his or her shared home; and*

**S. 37A(4)(b) amended by No. 27/2001 s. 3(Sch. 1 item 1.6(b)(ii)).**

*(b) his or her partner is not the person's personal representative--*

the personal representative must, within 30 days of the grant of administration, give the partner a written notice informing the partner of his or her rights under this section.

**(5) An election must be given in writing--**

**S. 37A(5)(a) amended by No. 27/2001 s. 3(Sch. 1 item 1.6(c)).**

*(a) if the partner is a personal representative--to the registrar; and*

**S. 37A(5)(b) amended by No. 27/2001 s. 3(Sch. 1 item 1.6(c)).**

*(b) if the partner is not a personal representative--to the personal representative who sent the partner the notice requiring the election.*

**S. 37A(6) amended by Nos 91/1994**

**s. 36(1), 27/2001 s. 3(Sch. 1 item 1.6(d)).**

**(6) If an intestate is also survived by a child or other issue--**

**(a) any notice under sub-section (4); and**

**(b) any election under sub-section (5)(a)--**

must show the sworn value of the intestate's interest in the shared home at the time of the intestate's death as fixed by a valuer.

**S. 37A(7) amended by No. 27/2001 s. 3(Sch. 1 item 1.6(e))**

**(i)(ii).**

**(7) If the partner elects to acquire the intestate's interest in the shared home--**

**(a) his or her share of the residuary estate is to be reduced by the value of the interest; and**

**S. 37A(7)(b) amended by No. 27/2001 s. 3(Sch. 1 item 1.6(e)(i)).**

*(b) if the value of the interest is more than the amount of his or her share of the residuary estate, the partner must pay the difference into the intestate's estate--*

(i) before the distribution of the residuary estate; or (ii) within 12 months of the making of the election--  
whichever occurs first.

**S. 37A(8) amended by No. 27/2001 s. 3(Sch. 1 item 1.6(e))**

(i)(ii).

(8) If the partner elects to acquire the intestate's interest in the shared home, the personal representative--

**S. 37A(8)(a) amended by No. 27/2001 s. 3(Sch. 1 item 1.6(e)(i)).**

(a) must transfer the interest to the partner within a reasonable time--  
(i) of receiving notice of the election; or

**S. 37A(8)(a)(ii) amended by No. 27/2001 s. 3(Sch. 1 item 1.6(e)(i)).**

(ii) if sub-section (7)(b) applies, of the partner paying the amount of the difference into the estate; and

(b) in any event, must transfer the interest before the distribution of the residuary estate.

**S. 37A(9) amended by No. 27/2001 s. 3(Sch. 1 item 1.6(f)).**

(9) A partner may acquire an interest under this section even though--

(a) he or she is a trustee; or

(b) he or she is a minor.

**S. 37A(10) amended by No. 27/2001 s. 3(Sch. 1 item 1.6(g)).**

(10) If a shared home is part of a larger property and the intestate's interest in the shared home cannot be severed from the intestate's interest in the larger property without subdividing that property, a reference to the shared home in this section is to be read as a reference to that property.

**S. 37A(11) amended by No. 27/2001 s. 3(Sch. 1 item 1.6(g)).**

(11) Despite sub-section (10), if a shared home is part of a farm, a reference to the shared home in this section is to be read as a reference to the entire farm.

**No. 3632 s. 33.**

### **38. Trust for sale on intestacy**

(1) On the death of a person intestate as to any real or personal estate, such estate shall be held by his personal representatives--

(a) as to the real estate (including chattels real) upon trust to sell the same; and

(b) as to the personal estate upon trust to call in sell and convert into money such part thereof as may not consist of money--

with power to postpone such sale and conversion for such a period as the personal representatives, without being liable to account, think proper, and so that any revisionary interest shall not be sold until it falls into possession, unless the personal representatives see special reason for sale, and so also that, unless required for

purposes of administration owing to want of other assets, personal chattels shall not be sold except for special reason.

(2) Out of the net money to arise from the sale and conversion of such real and personal estate (after payment of costs), and out of the ready money of the deceased (so far as not disposed of by his will, if any), the personal representative shall pay all such funeral testamentary and administration expenses debts and other liabilities as are properly payable thereout having regard to the rules of administration contained in this Division and out of the residue of the said money the personal representative shall set aside a fund sufficient to provide for any pecuniary legacies bequeathed by the will (if any) of the deceased.

(3) Pending the distribution of the whole or any part of the estate of the deceased, the personal representatives may invest the residue of the said money, or so much thereof as may not have been distributed, in any investments for the time being authorized by statute for the investment of trust money, with power, at the discretion of the personal representatives, to change such investments for others of a like nature. (4) The residue of the said money and any investments for the time being representing the same, including (but without prejudice to the trust for sale) any part of the estate of the deceased which may be retained unsold and is not required for the administration purposes aforesaid, is in Division six of this Part referred to as the "residuary estate" of an intestate.

(5) The income, including net rents and profits of real estate (including chattels real) after payment of rates taxes rent costs of insurance repairs and other outgoings properly attributable to income, of so much of the estate of the deceased as is not disposed of by his will (if any) or is not required for the administration purposes aforesaid, may, however such estate is invested, as from the death of the deceased, be treated and applied as income.

(6) Nothing in this section shall affect the rights of any creditor of the deceased or the rights of the Crown in respect of duties.

(7) Where the deceased leaves a will, this section has effect subject to the provisions contained in the will.

(8) In this section "**real and personal estate**" means every beneficial interest (including rights of entry and reverter) of the intestate in real and personal estate which (otherwise than in right of a power of appointment or of the testamentary power conferred by Statute to dispose of entailed interests) he could if of full age and capacity have disposed of by his will.

*No. 3632 s. 34.*

### **39. Administration of assets**

(1) Where the estate of a deceased person is not solvent, his real and personal estate shall be administered in accordance with the rules set out in Part I of the Second Schedule to this Act.

(2) Where the estate of a deceased person is solvent his real and personal estate shall subject to Rules of Court and the provisions hereinafter contained as to charges on property of the deceased and to the provisions (if any) contained in his will be applicable towards the discharge of the funeral

testamentary and administration expenses debts and liabilities payable thereout in the order mentioned in Part II of the Second Schedule to this Act.

*S. 39(3) amended by No. 7332*

*s. 2(Sch. 1 item 4), repealed by No. 74/2000 s. 3(Sch. 1 item 3.3).*

\* \* \* \* \*

*No. 3632 s. 35.*

***40. Charges on property of deceased to be paid primarily out of the property charged***

(1) Where a person dies possessed of or entitled to or under a general power of appointment (including the statutory power to dispose of entailed interests) by his will disposes of an interest in property which at the time of his death is charged with the payment of money whether by way of mortgage charge or otherwise (including a lien for unpaid purchase money) and the deceased has not by will deed or other document 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 charge; and every part of the said interest according to its value shall bear a proportionate part of the charge on the whole thereof.

(2) Such contrary or other intention shall not be deemed to be signified--

(a) by a general direction for the payment of debts or of all the debts of the testator out of his personal estate or his residuary real and personal estate or his residuary real estate; or

(b) by a charge of debts upon any such estate--

unless such intention is further signified by words expressly or by necessary implication referring to all or some part of the charge.

(3) Nothing in this section shall affect the right of a person entitled to the charge to obtain payment or satisfaction thereof either out of the other assets of the deceased or otherwise.

*No. 3632 s. 36.*

***41. Effect of assent or conveyance by personal representative***

(1) A personal representative may assent to the vesting in any person who (whether by devise bequest devolution appropriation or otherwise) is entitled thereto either beneficially or as a trustee or personal representative of any estate or interest in real estate (including chattels real) to which the testator or intestate was entitled or over which he exercised a general power of appointment by his will including the statutory power to dispose of entailed interests and which devolved upon the personal representative.

(2) The assent shall operate to vest in that person the estate or interest to which the assent relates and unless a contrary intention appears the assent shall relate back to the death of the deceased.

(3) The statutory covenants implied by a person being expressed to convey as personal representative, may be implied in an assent in like manner as in a conveyance by deed.

(4) An assent to the vesting of a legal estate shall be in writing signed by the personal representative and shall name the person in whose favour it is given and shall operate to vest in that person the legal estate to which it relates; and an assent not in writing or not in favour of a named person shall not be effectual to pass a legal estate.

(5) A conveyance of a legal estate by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts liabilities funeral and testamentary or administration expenses duties and legacies of the deceased have been discharged or provided for.

(6) An assent or conveyance given or made by a personal representative shall not except in favour of a purchaser of a legal estate prejudice the right of the personal representative or any other person to recover the estate or interest to which the assent or conveyance relates or to be indemnified out of such estate or interest against any duties debt or liability to which such estate or interest would have been subject if there had not been any assent or conveyance.

(7) A personal representative may as a condition of giving an assent or making a conveyance require security for the discharge of any such duties debt or liability but shall not be entitled to postpone the giving of an assent merely by reason of the subsistence of any such duties debt or liability if reasonable arrangements have been made for discharging the same; and an assent may be given subject to any estate by way of mortgage. (8) In this section "**purchaser**" means a purchaser for money or money's worth.

(9) This section shall apply to assents and conveyances made after the eighteenth day of December One thousand nine hundred and twenty-nine whether the testator or intestate died before on or after such date.

(10) In the case of land under the **Transfer of Land Act 1958** an assent may be given or made by the personal representative registered as proprietor by a transfer in the form prescribed under that Act with such necessary modifications as the case requires.

*No. 3632 s. 37.*

#### ***42. Validity of conveyance not affected by revocation of representation***

(1) All conveyances of any interest in real or personal estate made to a purchaser either before or after the commencement of this Act by a person to whom probate or letters of administration have been granted are valid notwithstanding any subsequent revocation or variation either before or after the commencement of this Act of the probate or administration.

*S. 42(2) repealed by No. 10/1994*

*s. 13(a).*[\[11\]](#)

\* \* \* \* \*

*No. 3632 s. 38.*



**43. *Right to follow property etc.***

- (1) An assent or conveyance by a personal representative to a person other than a purchaser shall not prejudice the rights of any person to follow the property to which the assent or conveyance relates or any property representing the same into the hands of the person in whom it is vested by the assent or conveyance or of any other person (not being a purchaser) who may have received the same or in whom it may be vested.
- (2) Notwithstanding any such assent or conveyance the Court may on the application of any creditor or other person interested--
  - (a) order a sale exchange mortgage charge lease payment transfer or other transaction to be carried out which the court considers requisite for the purpose of giving effect to the rights of the persons interested;
  - (b) declare that the person not being a purchaser in whom the property is vested is a trustee for those purposes;
  - (c) give directions respecting the preparation and execution of any conveyance or other instrument or as to any other matter required for giving effect to the order;
  - (d) make any vesting order or appoint a person to convey in accordance with the provisions of the **Trustee Act 1958**.
- (3) This section shall not prejudice the rights of a purchaser or a person deriving title under him.

*No. 3632 s. 39.*

**44. *Powers of management***

- (1) In dealing with the real and personal estate of the deceased his personal representatives shall for purposes of administration have--
  - (a) the same powers and discretions including power to raise money by mortgage with or without a power of sale or charge (whether or not by deposit of documents) as a personal representative had before the first day of January One thousand eight hundred and seventy-three with respect to personal estate vested in him; and
  - (b) all the powers discretions and duties conferred or imposed by law on trustees holding land upon an effectual trust for sale; and
  - (c) all the powers conferred by statute on trustees for sale and so that every contract entered into by a personal representative shall be binding on and be enforceable against and by the personal representative for the time being of the deceased, and may be carried into effect or be varied or rescinded by him and in the case of a contract entered into by a predecessor as if it had been entered into by himself.
- (2) Nothing in this section shall affect the right of any person to require an assent or conveyance to be made.

*No. 3632 s. 40.*

**45. *Powers of personal representative for raising money etc.***

(1) For giving effect to beneficial interests the personal representative may limit or demise land for a term of years absolute with or without impeachment for waste to trustees on usual trusts for raising or securing any principal sum and the interest thereon for which the land or any part thereof is liable and may limit or grant a rentcharge for giving effect to any annual or periodical sum for which the land or the income thereof or any part thereof is liable.  
(2) In this section "**term of years absolute**" has the same meaning as in the **Settled Land Act 1958**.

*No. 3632 s. 41.*

#### ***46. Powers of personal representative as to appropriation***

(1) The personal representative may appropriate any part of the estate including things in action of the deceased in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or of any other interest or share in his property whether settled or not as to the personal representative seems just and reasonable according to the respective rights of the persons interested in the property of the deceased:

Provided that--

(a) an appropriation shall not be made under this section so as to affect prejudicially any specific devise or bequest;

*S. 46(1)(b) amended by Nos 9075*

*s. 5(1), 9427*

*s. 5, 59/1986*

*s. 143(2).*

*(b) an appropriation of property whether or not being an investment authorized by law or by the will (if any) of the deceased for the investment of money subject to the trust shall not (save as hereinafter mentioned) be made under this section except with the following consents--*

*(i) when made for the benefit of a person absolutely and beneficially entitled in possession the consent of that person;*

*(ii) when made in respect of any settled legacy share or interest the consent of either the trustee thereof if any (not being also the personal representative) or the person who is for the time being entitled to the income.*

*If the person whose consent is so required as aforesaid is a minor the consent shall be given on his behalf by his parents or parent testamentary or other guardian or if there is no such parent or guardian by the Court on the application of his next friend;*

*(c) no consent (save of such trustee as aforesaid) shall be required on behalf of a person who may come into existence after the time of appropriation or who cannot be found or ascertained at that time;*

*(d) if independently of the personal representative there is no trustee of a settled legacy share or interest and no person of full age and capacity entitled to the income thereof no consent shall be required to an appropriation in respect of such legacy share or interest provided that the appropriation is of an investment authorized as aforesaid.*

(2) Any property duly appropriated under the powers conferred by this section shall thereafter be treated as an authorized investment and may be retained or dealt with accordingly.

(3) For the purposes of such appropriation the personal representative may ascertain and fix the value of the respective parts of the real and personal estate and the liabilities of the deceased as he thinks fit and shall for that purpose employ a duly qualified valuer in any case where such employment may be necessary; and may make any conveyance (including an assent) which may be requisite for giving effect to the appropriation. (4) An appropriation made pursuant to this section shall bind all persons interested in the property of the deceased whose consent is not hereby made requisite.

(5) The personal representative shall in making the appropriation have regard to the rights of any person who may thereafter come into existence or who cannot be found or ascertained at the time of appropriation and of any other person whose consent is not required by this section.

(6) This section shall not prejudice any other power of appropriation conferred by law or by the will (if any) of the deceased and shall take effect with any extended powers conferred by the will (if any) of the deceased and where an appropriation is made under this section in respect of a settled legacy share or interest the property appropriated shall remain subject to all trusts for sale and powers of leasing disposition and management or varying investments which would have been applicable thereto or to the legacy share or interest in respect of which the appropriation is made if no such appropriation had been made.

(7) If after any real estate (including chattels real) has been appropriated in purported exercise of the powers conferred by this section the person to whom it was conveyed disposes of it or any interest therein then in favour of a purchaser the appropriation shall be deemed to have been made in accordance with the requirements of this section and after all requisite consents (if any) had been given.

(8) In this section a settled legacy share or interest includes any legacy share or interest to which a person is not absolutely entitled in possession at the date of the appropriation also an annuity, and "**purchaser**" means a purchaser for money or money's worth.

(9) This section shall apply whether the deceased died intestate or not and shall extend to property over which a testator exercises a general power of appointment including the statutory power to dispose of entailed interests and shall authorize the setting apart of a fund to answer an annuity by means of the income of that fund or otherwise.

*No. 3632 s. 42.*

#### ***47. Power to appoint trustees of minor's property***

*S. 47(1) amended by Nos 9075*

*s. 5(1), 9427*

*s. 5.*

(1) Where a minor is absolutely entitled under the will or on the intestacy of a person (in this sub-section called "the deceased") to a devise or legacy, or to

the residue of the estate of the deceased, or any share therein, and such devise, legacy, residue or share is not under the will (if any) of the deceased, devised or bequeathed to trustees for the minor, the personal representatives of the deceased may appoint a trustee company or two or more individuals not exceeding four (whether or not including the personal representatives or one or more of the personal representatives) to be the trustee or trustees of such devise, legacy, residue or share for the minor, and to be trustees of any land devised or any land being or forming part of such residue or share for the purposes of the **Settled Land Act 1958** and of the statutory provisions relating to the management of land during a minority, and may execute or do any assurance or thing requisite for vesting such devise, legacy, residue or share in the trustee or trustees so appointed.

On such appointment the personal representatives, as such shall be discharged from all further liability in respect of such devise, legacy, residue or share, and the same may be retained in its existing condition or state of investment, or may be converted into money, and such money may be invested in any authorized investment.

*S. 47(2) repealed by No. 10/1994*

s. 13(a).[\[12\]](#)

\* \* \* \* \*

*No. 3632 s. 43.*

#### **48. *Obligations of personal representative to give possession***

(1) A personal representative, before giving an assent or making a conveyance in favour of any person entitled, may permit that person to take possession of the land, and such possession shall not prejudicially affect the right of the personal representative to take or resume possession nor his power to convey the land as if he were in possession thereof, but subject to the interest of any lessee, tenant or occupier in possession or in actual occupation of the land.

(2) Any person who as against the personal representative claims possession of real estate (including chattels real) or the appointment of a receiver thereof, or a conveyance thereof, or an assent to the vesting thereof, or to be registered as proprietor thereof under the **Transfer of Land Act 1958**, may apply to the Court for directions with reference thereto, and the Court may make such vesting or other order as may be deemed proper, and the provisions of the **Trustee Act 1958** relating to vesting orders and to the appointment of a person to convey, shall apply.

*No. 3632 s. 44.*

**49. *Power to postpone distribution*** Subject to the foregoing provisions of this Act, a personal representative is not bound to distribute the estate of the deceased before the expiration of one year from the death.

### **Division 6--Distribution of Intestate's Residuary Estate**

[\[13\]](#)

*S. 50 substituted by No. 7597*

*s. 2(1), amended by No. 9041 s. 3, substituted by No. 10/1994*

*s. 9.*

#### **50. Date of Valuation**[\[14\]](#)

In determining values for the purposes of this Division, the date of valuation is to be the date on which the value of the residuary estate within the meaning of section 38(4) is ascertained.

*S. 51 (Heading) inserted by No. 27/2001 s. 3(Sch. 1 item 1.7).*

*S. 51 amended by No. 6505*

*s. 2, repealed by No. 7597*

*s. 3(a),*

*new s. 51*

*inserted by No. 10/1994*

*s. 9.*

#### **51. Distribution if intestate leaves a partner**

*S. 51(1) amended by No. 27/2001 s. 3(Sch. 1 item 1.8).*

(1) The partner of an intestate who does not leave any child (or other issue) is entitled to the intestate's residuary estate.

*S. 51(2) amended by No. 27/2001 s. 3(Sch. 1 item 1.8).*

(2) The partner of an intestate who leaves a child (or other issue) is entitled--

(a) to the personal chattels of the intestate; and

(b) if the intestate's residuary estate is worth not more than \$100 000, to the whole of the estate; and

(c) if the intestate's residuary estate is worth more than \$100 000, to--

(i) \$100 000; and

(ii) interest on that amount calculated at the rate set out in sub-section (3) from the date of the death of the intestate to the date of payment of that amount; and

(iii) one third of the balance of the estate.

(3) The rate of interest is the rate fixed from time to time under section 2 of the **Penalty Interest Rates Act 1983** less 2½%.

*S. 51A inserted by No. 27/2001 s. 3(Sch. 1 item 1.9).*

#### **51A. Distribution between spouse and domestic partner**

(1) If an intestate leaves both a spouse and a domestic partner, the entitlement to the partner's share of the intestate's residuary estate is to be determined in accordance with the following table.

**TABLE**

<i>Period that domestic partner has lived as domestic partner of intestate continuously before intestate's death</i>	<i>Spouse's entitlement to partner's share</i>	<i>Domestic partner's entitlement to partner's share</i>
less than 4 years	two-thirds	one-third
4 years or more but less than 5 years	half	half
5 years or more but less than 6 years	one-third	two-thirds
6 years or more	none	all

Note: There is a minimum requirement that the domestic partner lived with the intestate continuously for at least 2 years immediately before the intestate's death, unless the domestic partner is the parent of a child of the intestate who was under 18 at the time of the intestate's death--see definition of "domestic partner" in section 3(1).

(2) In this section--

**"partner's share"** of an intestate's residuary estate means the share of the estate to which the partner of the intestate is entitled under this Division.

*Nos 3632*

*s. 47, 3822*

*s. 6(2), 4191*

*s. 2, 6112 s. 2.*

## **52. Distribution on intestacy**

*S. 52(1) amended by Nos 7597*

**s. 3(b)(i), 10/1994**

**s. 13(e), 27/2001 s. 3(Sch. 1 item 1.10(a)).**

(1) Where a person in respect of his or her residuary estate dies intestate then subject to the provisions of section 51 and 51A the following provisions shall have effect with respect to such estate:

**S. 52(1)(a) amended by Nos 7597**

**s. 2(2)(a), 27/2001 s. 3(Sch. 1 item 1.10(b)).**

*(a) If the intestate leaves a partner she or he shall be entitled if the intestate leaves any issue to one-third of such estate;*

**S. 52(1)(b) amended by Nos 7597**

**s. 3(b)(ii), 27/2001 s. 3(Sch. 1 item 1.10(b)).**

*(b) If the intestate leaves a father and a mother but no partner or issue such estate shall be distributed equally between the father and the mother;*

**S. 52(1)(c)(d) repealed by No. 7597**

**s. 2(2)(b).**

\* \* \* \* \*

**S. 52(1)(e) amended by No. 27/2001 s. 3(Sch. 1 item 1.10(b)).**

*(e) If the intestate leaves a father but no partner or issue or mother the father shall be entitled to such estate;*

**S. 52(1)(ea) inserted by No. 7597**

**s. 3(b)(iii), amended by No. 27/2001 s. 3(Sch. 1 item 1.10(b)).**

*(ea) If the intestate leaves a mother but no partner or issue or father the mother shall be entitled to such estate;*

(f) Subject to the above-mentioned rights such estate or the portion thereof to which these rights do not extend shall be distributed in equal shares among the children of the intestate living at his or her decease and the representatives then living of any children who predeceased the intestate or if there are no such children or representatives among the next of kin of the intestate who are in equal degree and their representatives: Provided as follows:

(i) Where a child has any property real or personal or any estate or interest therein by settlement of the intestate or was advanced by the intestate in his or her lifetime that child or his or her representative shall bring such property estate interest or advance into account in estimating the share (if any) to be taken by him, her or them in the distribution; (ii) Except as hereinafter provided the children of any person who died before the intestate shall take only the share which that person would have taken if living at the death of the intestate and if more than one shall take the same in equal shares;

(iii) No representation shall be admitted among collaterals after brothers' and sisters' children;

*S. 52(1)(f)(iv) repealed by No. 7597*

*s. 3(b)(iv).*

\* \* \* \* \*

(v) Brothers or sisters or when they take as representatives brothers' or sisters' children shall take in priority to grandparents;

(vi) Where brothers' or sisters' children are entitled and all the brothers or sisters of the intestate have died before him or her such children shall not take as representatives and all such children shall take in equal shares;

(vii) There shall be no difference between males and females or between relationship of the whole blood and of the half blood;

(viii) A husband and wife shall for all purposes of distribution and division be treated as two persons.

*S. 52(2) amended by No. 7597*

*s. 4(a)-(c), repealed by No. 8602 s. 12.*

\* \* \* \* \*

*No. 3632 s. 48.*

**53. *Application to cases of partial intestacy***Where any person dies leaving a will effectively disposing of part of his property, this Division shall have effect as respects the part of his property not so disposed of subject to the provisions contained in the will and subject to the following modifications:

(a) In cases under section fifty-two the requirements as to bringing property into account shall apply to any beneficial interests acquired by any issue of the deceased under the will of the deceased;

(b) The personal representative shall, subject to his rights and powers for the purposes of administration, be a trustee for the persons entitled under this Division in respect of the part of the estate not expressly disposed of unless it appears by the will that the personal representative is intended to take such part beneficially.

*Nos 5277*

*s. 3(1), 5757*

*s. 2(2).*

*S. 54 amended by Nos 7597*

*s. 2(3)(a)(b), 27/2001 s. 3(Sch. 1 item 1.11(a)*

*(b)).*



**54. *Payment of distributive shares of infant children*** When the estate of any intestate in respect of which administration has been granted does not exceed \$1000 after payment of debts and such intestate has left no partner but a child or children under age, the administrator may pay or cause to be paid the distributive share or shares to which the said child or children is or are entitled in such estate, after payment of the debts of such intestate, to any person having the care and control of such child or children without seeing to the application thereof and without incurring any liability in respect of such payment.

*No. 3632 s. 49.*

**55. *If no next of kin etc. Crown to take***

With regard to the estate of any person escheat to the Crown for want of heirs shall be abolished and in default of any person taking under the foregoing provisions the residuary estate shall belong to the Crown as bona vacantia and in lieu of any right of escheat which might formerly have existed.

*No. 3632 s. 50.*

**56. *Reference to Statutes of Distributions***

References to the Statutes of Distributions or to the provisions relating to distribution or references to the **Imperial Acts Application Act 1922** Part III Division two or references to the like effect in an instrument inter vivos made or in a will coming into operation after the eighteenth day of December One thousand nine hundred and twenty-nine shall unless the contrary intention appears be construed as references to this Division and references in such an instrument or will to the statutory next of kin or to the like effect shall be construed unless the context otherwise requires as referring to the persons who would take beneficially on an intestacy under the foregoing provisions of this Division.

**Division 7--Practice Procedure Offences etc.  
Subdivision 1--Administration Bonds**

*S. 57 amended by No. 7663*

*s. 3(a)-(c), substituted by No. 9041*

*s. 4(1).*

**57. *Administration guarantees***

*S. 57(1) amended by No. 57/1989*

*s. 3(Sch. item 4.4).*

(1) As a condition of granting administration to any person the Court or the registrar may require one or more sureties to guarantee that they will make good, in an amount not exceeding the amount at which the property of the deceased is sworn, any loss which any person interested in the administration

of the estate of a deceased may suffer in consequence of a breach by the administrator of his duties as such.

(2) A guarantee shall enure for the benefit of every person interested in the administration of the estate of the deceased as if contained in a contract under seal made by the surety or sureties with every such person and, where there are two or more sureties, as if they had bound themselves jointly and severally.

*S. 57(3) amended by Nos 110/1986 s. 140(2), 10/1994*

*s. 13(f).*

(3) No proceeding shall be brought on any such guarantee without the leave of the Court.

*S. 57(4) amended by Nos 55/1987*

*s. 57(3)(Sch. 5 item 6), 10/1994*

*s. 13(g), 15/1998 s. 5(f).*

(4) This section does not apply where administration is granted to a person for the use or benefit of Her Majesty or to the State Trustees or to any person body corporate or holder of an office specially exempted by any Act.

#### ***Subdivision 2--Caveats***

*No. 3632 s. 52.*

*S. 58 amended by No. 9041 s. 5, substituted by No. 10/1994*

*s. 10.*

**58. Caveat may be lodged?**[\[15\]](#)Any person may lodge with the registrar in accordance with the Rules of the Supreme Court a caveat against the making of a grant.

*Ss 59-63 repealed by No. 10/1994*

*s. 11.*

\* \* \* \* \*

*S. 64 amended by No. 55/1987*

*s. 57(3)(Sch. 5 items 7, 8), repealed by No. 10/1994*

*s. 11.*

\* \* \* \* \*

#### ***Subdivision 3--Commission to Executors Administrators and Trustees of Deceased Persons***

s. 59, 5277

s. 5, 5329

s. 11(2).

S. 65 amended by No. 57/1989

s. 3(Sch. item 4.5).

**65. Executors' etc. commission**

It shall be lawful for the Court to allow out of the assets of any deceased person to his executor administrator or trustee for the time being such commission or percentage not exceeding Five per centum for his pains and trouble as is just and reasonable.

In this section "**executor**" includes the executor of an executor becoming by representation the executor of the original estate.

*Pt 1 Div. 7 Subdiv. 4 (Heading) amended by No. 6505 s. 2.*

***Subdivision 4--Concealment of Wills***

**No. 3632 s. 64.**

*S. 66 amended by No. 9576*

s. 11(1).

**66. Concealment of will a misdemeanour**

***S. 66(1) amended by Nos 9945***

s. 3(1)(Sch. 1 item 1),

s. 3(3)(Sch. 2 item 2), 10/1994

s. 13(h).

(1) Every person who retains or conceals or endeavours to retain or conceal any will or codicil or aids or abets any person in such retention or concealment with intent to defraud any person interested under such will or codicil, shall be guilty of an indictable offence; and shall be liable to a fine of not more than 100 penalty units or to imprisonment for a term of not more than two years or to both fine and imprisonment; and shall also be liable to a proceeding for damages at the suit of the persons defrauded or those claiming under them for any loss sustained by them or any of them in consequence of such retention or concealment.

(2) No prosecution for any such offence shall be commenced without the sanction of a law officer; and no such sanction shall be given unless such

previous notice of the application for leave to prosecute as the law officer directs has been given to the person for whose prosecution such sanction is sought.

#### ***Subdivision 5--General Practice Rules***

*No. 3632 s. 66.*

**67. *Practice in probate jurisdiction*** The practice of the Court in its probate jurisdiction shall except where otherwise expressly provided in 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 in its ecclesiastical jurisdiction in force previously to the first day of January One thousand eight hundred and seventy-three.

*S. 68*

*repealed by No. 110/1986*

*s. 140(2).*

\* \* \* \* \*

#### **Division 8--General Saving Provisions**

*No. 3632 s. 69.*

#### **69. *Act not to affect certain cases***

Nothing in this Part shall--

- (a) derogate from the powers of the Court which exist independently of this Act;
- (b) affect any enactment in force dispensing with probate or administration;
- (c) affect any enactment in force expressly regulating the distribution of money or other property of a deceased person.

*No. 3632 s. 70.*

#### **70. *Right to take action by purchase***

Nothing in this Part shall affect the right of any person to take beneficially by purchase as heir either general or special.

### **PART II--SMALL ESTATES**

#### **71. *Aid of registrar or clerk in procuring grant of probate etc.***

*S. 71(1) substituted by No. 7168*

*s. 2(a), amended by Nos 9041*

*s. 6, 57/1989*

*s. 3(Sch. item 4.6(b)), 10/1994*

*s. 12(a)(i)(ii), 27/2001 s. 3(Sch. 1 item 1.12).*

(1) Save as hereinafter provided, if a person dies leaving property not exceeding \$25 000 or (if the only person or persons entitled to take the property of the deceased person under the will or to share in the distribution of the surplus of the estate of such person is or are the children only or the partner only or the partner and children only or the sole surviving parent of such person) not exceeding \$50 000 in value the person entitled to probate of the will or to letters of administration of the estate of such deceased person may apply--

*S. 71(1)(a) amended by No. 10/1994*

*s. 12(b).*

*(a) to the registrar; or*

*S. 71(1)(b) amended by Nos 8181*

*s. 2(1)(Sch. item 4), 57/1989*

*s. 3(Sch. item 4.6(a)).*

*(b) to a registrar of the Magistrates' Court whose office is nearest to the fixed place of abode of the applicant at the time of the making of the application--*

for the aid of the registrar in procuring the grant of probate or letters of administration.

*S. 71(2) amended by No. 6640 s. 2(c), substituted by No. 7168*

*s. 2(a), amended by Nos 8181*

*s. 2(1)(Sch. item 5), 57/1989*

*s. 3(Sch. item 4.7(a)(b)).*

(2) The registrar shall--

(a) cause to be completed the advertisement affidavit and documents required by the Court in its probate jurisdiction to lead to such grant;

*S. 71(2)(b) repealed by No. 74/2000 s. 3(Sch. 1 item 3.4).*

\* \* \* \* \*

*S. 71(2)(c) repealed by No. 9041*

*s. 4(2).*

\* \* \* \* \*

(d) obtain the proper fees payable from or on behalf of the applicant on all such affidavits and documents as well as any further material or fees which may be required under this Part--  
and where such action is taken by a registrar of the Magistrates' Court, that registrar shall transmit all such affidavits documents material and fees to the office of the registrar.

*S. 71(3) inserted by No. 7168*

*s. 2(b), amended by Nos 8181*

*s. 2(1)(Sch. item 6), 57/1989*

*s. 3(Sch. item 4.8).*

(3) In this Part unless the contrary intention appears, "registrar of the Magistrates' Court" includes a deputy registrar of the Magistrates' Court.

*No. 3632 s. 72.*

***72. Registrar of probates may issue grant to County Court registrar for applicant***

*S. 72(1) amended by No. 10/1994*

*s. 12(b)(c).*

(1) No affidavit as to caveats or searches in the office of the registrar on an application under this Part shall be required; and the registrar if and when satisfied that the affidavits are sufficient and that no caveat exists against the application and that no will is deposited in the office of the registrar shall issue probate or administration to the applicant pursuant to section twelve of this Act.

*S. 72(2) repealed by No. 7168 s. 3.*

\* \* \* \* \*

*No. 3632 s. 73.*

*S. 73 amended by Nos 7168 s. 4, 8181*

*s. 2(1)(Sch. item 7), 57/1989*

*s. 3(Sch. item 4.9), 10/1994*

*s. 12(b).*

***73. Registrar may require proof of identity***The registrar or registrar of the Magistrates' Court may require such proof as he thinks sufficient to establish the identity and right or relationship of the applicant.

**No. 3632 s. 74.**

*S. 74 amended by Nos 7168 s. 5, 7332 s. 2*

*(Sch. 1 item 5), 8181 s. 2(1)*

*(Sch. item 7), 57/1989*

*s. 3(Sch. item 4.10) (as amended by No. 34/1990*

*s. 5(Sch. 4 item 3)), 10/1994*

*s. 12(b)(d)(i)(ii).*

#### **74. Satisfaction as to value**

If the registrar or registrar of the Magistrates' Court has reason to believe that the whole real and personal property of the deceased person exceeds in value \$25 000 or (if the case so requires) \$50 000 he shall refuse to proceed with the application until he is satisfied as to the real value thereof.

**No. 3632 s. 75.**

#### **75. Registrars may exercise certain powers**

*S. 75(1) amended by Nos 7168*

*s. 6(a), 8181*

*s. 2(1)(Sch. item 8), 57/1989*

*s. 3(Sch. item 4.11(a)(b)).*

(1) All registrars of the Magistrates' Courts may for the purposes of this Part administer oaths and take declarations and affirmations.

*S. 75(2) amended by Nos 7168*

*s. 6(b), 8181*

*s. 2(1)(Sch. item 7), 57/1989*

*s. 3(Sch item 4.12(a)(b)) (as amended by No. 34/1990*

*s. 5(Sch. 4 item 4)), 10/1994*

*s. 13(i).*

(2) In the absence of a registrar of the Magistrates' Court applicants under this Part may be sworn and execute any necessary documents before any person authorised under the **Evidence Act 1958**.

*S. 76 amended by No. 6640 s. 2(d), substituted by No. 7168 s. 7, amended by No. 8181*

s. 2(1)(Sch. item 5), S.R. No. 369/1973 cl. 2,

Nos 57/1989

s. 3(Sch. item 4.13), 10/1994 s. 12(b).

**76. Applicants residing within 32 kilometres of Melbourne** Where at the time of making his application the fixed place of abode of an applicant seeking aid pursuant to section seventy-one of this Act is within a radius of 32 kilometres from the post office at the corner of Bourke and Elizabeth streets, Melbourne, such applicant shall not apply to a registrar of the Magistrates' Court but may apply to the registrar.

**No. 3632 s. 77.**

*S. 77 amended by Nos 6640*

s. 2(e), 7168

s. 8 (as amended by No. 7332

s. 2(Sch 1 item 139)), 8181

s. 2(1)(Sch. item 4), 57/1989

s. 3(Sch. item 4.14), 10/1994 s. 12(b).

**77. Registrar of probates may require further materials**

In any case where the registrar is not satisfied with the materials placed before him or the amount of the fee paid, he shall state the matters on which he is not satisfied either to the applicant or to the registrar of the Magistrates' Court transmitting the application, who shall then inform the applicant accordingly and shall take such further steps as may be proper to enable the applicant to satisfy the registrar in respect of such matters.

**No. 3632s. 78.**

*S. 78 amended by Nos 6640*

s. 2(f), 10/1994 s. 12(b), 35/1996

s. 453(Sch. 1 item 3.3).

**78. Registrar of probates need not proceed in difficult cases** In no case shall the registrar be under any obligation by reason of this Part to consider further any application which he may think proper to be considered by the Court or to be placed in the hands of a legal practitioner.

**S. 79 amended by Nos 7168**

s. 9(a)(b), 8181 s. 2(1)(Sch. item 9), repealed by No. 57/1989

s. 3(Sch. item 4.15),



*new s. 79 inserted by No. 45/1994*

*s. 41.*

**79. Administration of small estates**

- (1) This section applies if--
  - (a) an estate is a small estate; and
  - (b) State Trustees could apply under section 5 of the **State Trustees (State Owned Company) Act 1994** or section 9, 10, 10A or 11 of the **Trustee Companies Act 1984** for a grant of probate or administration of the estate or elect under section 11A of the **Trustee Companies Act 1984** to administer the estate.
- (2) State Trustees must give a notice of intention to administer the estate under this section in a daily newspaper circulating generally throughout Victoria.
- (3) State Trustees is to be taken to have been granted probate of the will or administration of the estate at the expiry of 14 days after the publication of the notice.
- (4) This section does not affect the right of any person to recover the whole or any part of any payment made or property delivered under this section from any person who received it from State Trustees.

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**PART III--RECOGNITION OF FOREIGN GRANTS**

*No. 3632 s. 80.*

**80. Definitions**In this Part unless inconsistent with the context or subject-matter--

**"Australasian States"** includes all the States of the Commonwealth of Australia other than Victoria, and includes also the Northern Territory, the Dominion of New Zealand, the Colony of Fiji, and any other British colony or possession in Australasia now existing or hereafter to be created which the Governor in Council may declare to be an Australasian State within the meaning of this Part;

**"executor or administrator therein named"** includes the executor of an executor becoming by representation the executor of the original estate;

**"letters of administration"** includes **"exemplification of letters of administration"**;

**"probate"** includes **"exemplification of probate"**;

**"United Kingdom"** includes the Channel Islands.

*No. 3632 s. 81.*

**81. Probates and administrations granted in United Kingdom**

*S. 81(1) amended by No. 7874*

*s. 2(a)(i).*

(1) When probate of the will or administration of the estate of any deceased person who has left any property whether real or personal within Victoria has been granted by any court of competent jurisdiction in the United Kingdom or in any of the Australasian States or, subject to the provisions of section eighty-eight of this Act when probate of the will or administration of the estate of any deceased person or a grant or order appointing a person executor of the will or giving a person authority to administer the estate of any deceased person has been issued by a court of competent jurisdiction in a country specified in a proclamation in force under section eighty-eight--

***S. 81(1)(a) amended by Nos 7874***

***s. 2(a)(ii), 35/1996***

***s. 453(Sch. 1 item 3.4).***

*(a) the executor or administrator therein named whether he is within the jurisdiction of the Supreme Court of Victoria or not may either personally or by a legal practitioner on his behalf produce the same (and in the case of an executor of an executor any later probate or grant or order also) to the registrar and file a verified copy or verified copies thereof in his office; or*

***S. 81(1)(b) amended by Nos 7874***

***s. 2(a)(iii), 35/1996***

***s. 453(Sch. 1 item 3.4).***

*(b) any person duly authorized by power of attorney under the hand and seal of such executor or administrator may either personally or by a legal practitioner on his behalf produce such probate or probates or letters of administration or grant or order and power of attorney accompanied by an affidavit that such power of attorney has not been revoked to the registrar and may file verified copies thereof in his office.*

***S. 81(2) amended by No. 7874***

***s. 2(b).***

(2) When such documents have been produced and verified copies thereof deposited as aforesaid by or on behalf of such executor or administrator or person so authorized by power of attorney, such probate of the estate of such deceased person or such letters of administration or such grant or order shall be sealed with the seal of the Supreme Court of Victoria, and shall have the like force and effect and the same operation in Victoria as if it or they had been originally granted in Victoria.

***S. 81(3) amended by No. 7874***

***s. 2(c).***

(3) Every such executor of any such will and administrator of any such estate and person authorized by power of attorney as aforesaid shall perform the same duties and shall have the same rights, and every such executor and administrator and person authorized by power of attorney as aforesaid and the estate of every such deceased person shall be subject to the same liabilities and

obligations as if such probate or letters of administration or grant or order had been originally granted by the Supreme Court of Victoria.

*No. 3632 s. 82.*

*S. 82 amended by No. 7874*

*s. 2(d).*

**82. *Caveat may be lodged*** Any person may lodge with the registrar a caveat against the sealing of any such probate or letters of administration or grant or order, and such caveat shall have the same effect and shall be dealt with in the same manner as if it were a caveat against the granting of probate or of letters of administration.

*No. 3632 s. 83.*

*S. 83 amended by Nos 7874*

*s. 2(e), 35/1996 s. 453(Sch. 1 item 3.5).*

**83. *Intention to apply for seal of Court to be advertised***

The seal of the Court shall not be affixed to any such probate or letters of administration or grant or order until after the publication of an advertisement by such executor administrator or person authorized by power of attorney or by a legal practitioner on his behalf in one of the Melbourne daily newspapers of the intention of such executor administrator or person to apply for the same to be duly affixed, nor until an affidavit has been filed stating that such advertisement was duly published at least fourteen days before the making of such affidavit and that no caveat has been lodged up to the morning of the application.

*S. 84 amended by Nos 6890*

*s. 29(3), 7874 s. 2(f)(g), substituted by No. 9041 s. 7.*

**84. *Re-sealing of foreign grants***

(1) As a condition of sealing any letters of administration or grant or order giving a person authority to administer the estate of a deceased person under this Part, the Court or the registrar may, subject to the following provisions of this section and subject to and in accordance with the rules, require one or more sureties in such amount as the Court or the registrar thinks fit to guarantee that they will make good, within any limit imposed by the Court or the registrar on the total liability of the surety or sureties, any loss which any person interested in the administration of the estate of the deceased in Victoria may suffer in consequence of a breach by the administrator of his duties in administering it in Victoria.

(2) A guarantee given in pursuance of any such requirement shall enure for the benefit of every person interested in the administration of the estate in Victoria as if contained in a contract under seal made by the surety or sureties with

every such person and where there are two or more sureties as if they had bound themselves jointly and severally.

*S. 84(3) amended by No. 110/1986 s. 140(2).*

(3) No action shall be brought on any such guarantee without the leave of the Court.

*S. 84(4) amended by No. 10/1994*

*s. 13(j).*

(4) This section does not apply where the letters of administration or grant or order were granted to a person for the use or benefit of Her Majesty or to any person body corporate or holder of an office in any place outside Victoria specially exempted by any Act.

*No. 3632 s. 85.*

*S. 85 amended by No. 7874*

*s. 2(h).*

**85. *Executor or administrator of estate of deceased person*** Upon the sealing of any such probate or letters of administration to the estate of any deceased person as aforesaid or grant or order appointing a person executor of a will or giving a person authority to administer the estate of a deceased person, every such executor or administrator therein named or person by such executor or administrator duly authorized by power of attorney under his hand and seal (as the case may be) shall be and be deemed to be for every purpose the executor or administrator of the estate of such deceased person within the jurisdiction of the Supreme Court of Victoria.

*No. 3632 s. 86.*

*S. 86 substituted by No. 6866 s. 2.*

#### **86. *Administrator under power of attorney***

Notwithstanding anything contained in this Act a person duly authorized by power of attorney under the provisions of this Part who--

*S. 86(a) amended by No. 7874*

*s. 2(i).*

*(a) has obtained the seal of the Court to any probate or letters of administration or grant or order;*

*S. 86(b) amended by No. 7332*

*s. 2(Sch. 1 item 6), repealed by No. 74/2000 s. 3(Sch. 1 item 3.5).*

\* \* \* \* \*

(c) has satisfied or provided for the debts and claims of all persons resident in Victoria of whose debts or claims he has had notice (whether before or after notice given by him as required by the **Trustee Act 1958**)--  
may pay over or transfer to or as directed by the executor or administrator of the estate in the country in which the deceased was domiciled at the date of his death or to or as directed by the donor of the power of attorney the balance of the estate without seeing to the application thereof and without incurring any liability in regard to such payment or transfer and shall duly account to such executor or administrator or donor (as the case may require) for his administration.

*No. 3632 s. 87.*

**87. Scots confirmation** Any reference in this Part to probate or letters of administration shall be deemed to include a confirmation of the executor of any person granted in any sheriff court in Scotland.

*No. 3632 s. 88.*

**88. Application of this Part to certain other countries**

*S. 88(1) substituted by No. 7874*

*s. 2(j).*

(1) The Governor in Council on being satisfied that a grant of probate or of letters of administration issued by a court of competent jurisdiction in a country other than an Australasian State or the United Kingdom or that a grant or order issued by such a court appointing a person executor of a will or giving a person authority to administer the estate of a deceased person corresponds to a grant of probate or of letters of administration issued by the Supreme Court of Victoria, may by proclamation declare that country to be a country to which this Part applies.

(2) The Governor in Council may from time to time by further proclamation revoke or alter any proclamation made under this section.

(3) Every proclamation made under this section shall be published in the Government Gazette and a copy thereof shall be laid before both Houses of Parliament so soon as may be after it is made.

*S. 88(4) amended by No. 7874*

*s. 2(k)(i)(ii).*

(4) This Part when declared by proclamation to apply to a country shall subject to any exceptions and modifications specified in the proclamation apply to probates and grants and orders appointing persons executors of wills or giving persons authority to administer the estates of deceased persons granted or made in that country whether before or after the commencement of this Act.

*S. 89*

*repealed by No. 110/1986*

*s. 140(2) .*

\* \* \* \* \*

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*Pt 4*

*(Heading) substituted by No. 6920 s. 3.*

## **PART IV--FAMILY PROVISION**

*Nos 3632*

*s. 138, 4483*

*s. 2.*

**90. Definitions**In this Part unless inconsistent with the context or subject-matter--

*S. 90 def. of "Court" amended by Nos 16/1986*

*s. 17(a), 110/1986*

*s. 140(2), 19/1989*

*s. 16(Sch.*

*item 2).*

**"Court"** means the Supreme Court and, in relation to an estate the value of which does not exceed the jurisdictional limit of the County Court, means the Supreme Court or the County Court;

*S. 90 def. of "personal represent-ative"*

*inserted by No. 6920*

*s. 4.*

**"personal representative"** means the executor original or by representation or administrator for the time being of a deceased person;

**"will"** includes codicil and every other testamentary instrument.

*Nos 3632*

*s. 139, 4483*

*s. 3.*

*s. 5, amended by Nos 8602*

*s. 12, 9041*

*s. 8, substituted by No. 88/1997*

*s. 55.*

**91. *Power of the Court to make maintenance order***

(1) Despite anything in this Act to the contrary, the Court may order that provision be made out of the estate of a deceased person for the proper maintenance and support of a person for whom the deceased had responsibility to make provision.

(2) The Court must not make an order under sub-section (1) in favour of a person unless--

(a) that person has applied for the order; or

(b) another person has applied for the order on behalf of that person.

(3) The Court must not make an order under sub-section (1) in favour of a person unless the Court is of the opinion that the distribution of the estate of the deceased person effected by--

(a) his or her will (if any); or

(b) the operation of the provisions of Part I, Division 6; or

(c) both the will and the operation of the provisions--

does not make adequate provision for the proper maintenance and support of the person.

(4) The Court in determining--

(a) whether or not the deceased had responsibility to make provision for a person; and

(b) whether or not the distribution of the estate of the deceased person as effected by--

(i) the deceased's will; or

(ii) the operation of the provisions of Part I, Division 6; or

(iii) both the will and the operation of the provisions--

makes adequate provision for the proper maintenance and support of the person; and

(c) the amount of provision (if any) which the Court may order for the person; and

(d) any other matter related to an application for an order under sub-section (1)--

must have regard to--

(e) any family or other relationship between the deceased person and the applicant, including the nature of the relationship and, where relevant, the length of the relationship;

(f) any obligations or responsibilities of the deceased person to the applicant, any other applicant and the beneficiaries of the estate;

- (g) the size and nature of the estate of the deceased person and any charges and liabilities to which the estate is subject;
- (h) the financial resources (including earning capacity) and the financial needs of the applicant, of any other applicant and of any beneficiary of the estate at the time of the hearing and for the foreseeable future;
- (i) any physical, mental or intellectual disability of any applicant or any beneficiary of the estate; (j) the age of the applicant;
- (k) any contribution (not for adequate consideration) of the applicant to building up the estate or to the welfare of the deceased or the family of the deceased;
- (l) any benefits previously given by the deceased person to any applicant or to any beneficiary;
- (m) whether the applicant was being maintained by the deceased person before that person's death either wholly or partly and, where the Court considers it relevant, the extent to which and the basis upon which the deceased had assumed that responsibility;
- (n) the liability of any other person to maintain the applicant;
- (o) the character and conduct of the applicant or any other person;
- (p) any other matter the Court considers relevant.

*S. 92 amended by No. 6920*

*s. 6(a)(b), repealed by No. 110/1986 s. 140(2).*

\* \* \* \* \*

*No. 3632*

*s. 141.*

*S. 93 substituted by No. 110/1986 s. 140(2).*

**93. *Service of notice of application*** Notice of an application under section 91 must be served on the personal representative of the deceased and on such other persons as the Court orders.

*Nos 3632*

*s. 142, 4483*

*s. 7.*

*S. 94 amended by No. 6920 s. 7.*

#### **94. *Powers of Court***

At the hearing of such application the Court shall inquire fully into the estate of the deceased, and for that purpose may--

- (a) summon and examine such witnesses as may be necessary; and

*S. 94(b) amended by No. 88/1997*



s. 56.

*(b) require the executor or administrator to furnish full particulars of the estate of the deceased; and*

***S. 94(c) inserted by No. 88/1997***

s. 56.

*(c) accept any evidence of the deceased person's reasons for making the dispositions in his or her will (if any) and for not making proper provision for the applicant, whether or not the evidence is in writing.*

***S. 95 amended by No. 6920 s. 8, repealed by No. 88/1997***

s. 57.

\* \* \* \* \*

*Nos 3632*

***s. 144, 4483***

***s. 4.***

#### ***96. Powers of Court in making orders***

***S. 96(1) repealed by No. 88/1997***

s. 58.

\* \* \* \* \*

(2) The Court may in making any order under this Part impose such conditions restrictions and limitations whether to prevent restrict or defeat any alienation or charge of or upon the benefit of any provision made under such order or otherwise as it thinks fit.

(3) The Court may in making any order under this Part order that the provision may consist of a lump sum or a periodical or other payment.

*Nos 3632*

***s. 145, 4483***

***ss 5, 7.***

#### ***97. Contents of order***

***S. 97(1) amended by No. 88/1997***

***s. 59(1).***

(1) Every order under this Part making provision for any person shall specify (inter alia)--

(a) the amount and nature of the provision;

***S. 97(1)(b) amended by No. 6920 s. 9.***

*(b) the manner in which the provision shall be raised or paid out of some and what part or parts of the estate of the deceased; and*

*(c) any conditions restrictions or limitations imposed by the Court.*

***S. 97(2) amended by No. 6920***

***s. 9(a).***

(2) Unless the Court otherwise orders the burden of any such provision shall as between the person beneficially entitled to the estate of the deceased be borne by those persons in proportion to the values of their respective estates and interests in such estate:

Provided that the estates and interests of persons successively entitled to any property which is settled by such will shall not for the purposes of this sub-section be separately valued but the proportion of the provision made under this Part to be borne by such property shall be raised out of or charged against the corpus of such property.

***S. 97(3) amended by Nos 6920***

***s. 9(b), 10/1994***

***s. 4(4)(a)(i)(ii).***

(3) The Court shall in every case in which provision is made under this Part direct that a certified copy of such order be attached to the probate of the will or letters of administration and for that purpose shall retain in its custody such probate or letters of administration until such copy is attached.

***S. 97(4) substituted by No. 6920***

***s 9(c).***

(4) Every order made by the Court under this Part shall subject to the provisions of this Part operate and take effect--

(a) where the deceased dies leaving a will disposing of the whole or any part of his estate--as if the provision made by the order had been made by the deceased by executing a codicil to his will immediately before his death; or

(b) where the deceased dies without leaving a will--as a modification of the provisions of Division 6 of Part I of this Act in respect of so much of the estate of the deceased as is affected by the order.

***S. 97(5) amended by Nos 10/1994***

***s. 4(4)(b)(i)(ii), 88/1997***

***s. 59(2).***

(5) The Court may at any time and from time to time on the application of the executor or administrator of the testator's estate or of any person beneficially entitled to or interested in any part of the estate of the testator rescind or alter

any order making provision for any person. Notice of the application shall be served on all persons taking any benefit under the order sought to be rescinded or altered.

*S. 97(6) substituted by No. 88/1997*

*s. 59(3).*

(6) Subject to sub-section (7), the Court may make any order as to the costs of an application under section 91 that is, in the Court's opinion, just.

*S. 97(7) inserted by No. 88/1997*

*s. 59(3).*

(7) If the Court is satisfied that an application for an order under section 91 has been made frivolously, vexatiously or with no reasonable prospect of success, the Court may order the costs of the application to be made against the applicant.

*Nos 3632*

*s. 146, 4483*

*s. 7.*

*S. 98 substituted by No. 6920 s. 10.*

**98. *Adjustment of probate duty***For the purpose of apportioning the duty payable on the estate of any deceased person any provision made under this Part shall be deemed to have been made--

- (a) where the deceased dies leaving a will disposing of the whole or part of his estate--by a codicil to the will of the testator executed immediately before his death; or
- (b) where the deceased dies without leaving a will--by a will executed immediately before his death.

*Nos 3632*

*s. 147, 4483*

*s. 6.*

*S. 99 amended by Nos 6920*

*s. 11, 9044*

*s. 3(c), 110/1986*

*s. 140(2).*

**99. *Time within which application may be made***

No application shall be heard by the Court at the instance of a party claiming the benefit of this Part unless the application is made within six months after the date of the grant of probate of the will or of letters of administration (as the case may be):

Provided that the time for making an application may be extended for a further period by the Court after hearing such of the parties affected as the Court thinks necessary, and this power shall extend to cases where the time for applying has already expired but in all such cases the application for extension shall be made before the final distribution of the estate and no distribution of any part of the estate made prior to the application shall be disturbed by reason of the application or of any order made thereon.

Provided further that the time for making an application under this Part shall be extended by a period equal to the period between the commencement of proceedings in an application under Part V and the making of an order by the Court granting or dismissing the application.

*S. 99A inserted by No. 6920 s. 12.*

**99A. *Protection of personal representative against certain claims***

*S. 99A(1) amended by No. 27/2001 s. 3(Sch. 1 item 1.13).*

(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 support or education of the partner or any child of the deceased totally or partially dependent on the deceased immediately before the death of the deceased, 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.

*S. 99A(2) amended by No. 10/1994*

*s. 13(k).*

(2) No person who may have made or may be entitled to make an application under this Part shall be entitled to bring a proceeding 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 after the grant

of probate of the will or of letters of administration (as the case may be) and without notice of any application or intended application under this Part in respect of the estate.

*S. 99A(4) amended by No. 35/1996*

*s. 453(Sch. 1 item 3.6).*

(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 legal practitioner 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:

Provided that nothing in this sub-section shall prevent the subsequent making of an application within any other period allowed by this Act.

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*Pt 4A (Heading and ss 99AA, 99AB)*

*inserted by No. 88/1997*

*s. 60 (as amended by No. 43/1998*

*s. 58).*

#### **PART IVA--TRANSITIONAL**

*S. 99AA inserted by No. 88/1997*

*s. 60 (as amended by No. 43/1998*

*s. 58).*

**99AA. Transitional provision--Wills Act 1997** Despite the amendment of this Act by Part 7 of the **Wills Act 1997**, Part IV of this Act, as in force immediately before the commencement of Part 7 of the **Wills Act 1997**, continues to apply to the estate of a person who has died before that commencement.

*S. 99AB inserted by No. 88/1997*

*s. 60 (as amended by No. 43/1998*

*s. 58).*

**99AB. Further transitional provision--Wills Act 1997**

Despite the amendment of this Act by section 61 of the **Wills Act 1997**, Part V of this Act, as in force immediately before the commencement of that section, continues to apply to wills made before the commencement of Part 2 of the **Wills Act 1997**.

*S. 99AC inserted by No. 15/2000 s. 5.*

**99AC. Transitional provision--Administration and Probate (Dust Diseases) Act 2000**

Section 29(2A) does not apply to a cause of action, proceedings in respect of which commenced before the commencement of section 4 of the **Administration and Probate (Dust Diseases) Act 2000**, if the plaintiff has died before the commencement of section 4 of that Act.

*S. 100 inserted by No. 27/2001 s. 3(Sch. 1 item 1.14).*

**100. Transitional provision--Statute Law Amendment (Relationships) Act 2001** Despite the amendment of Part 1 by item 1 of Schedule 1 to the **Statute Law Amendment (Relationships) Act 2001**, Part 1 as in force immediately before that commencement continues to apply with respect to the estate of an intestate who has died before that commencement.

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*Pt 5*

*(Heading and*

*ss 100-137) amended by No. 6640 s. 2(g)-(i), repealed by No. 6890*

*s. 3(1).*[\[16\]](#)

*New Pt 5 (Heading and ss 100,101) inserted by No. 9044*

*s. 3(b), amended by Nos 16/1986*

*s. 17(b), 110/1986*

*s. 140(2), repealed by No. 88/1997*

*s. 61 (as amended by No. 43/1998*

*s. 58).*

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**SCHEDULES**

*Sch. 1 repealed by No. 10/1994*

*s. 13(a).*[\[17\]](#)

*new Sch. 1 inserted by No. 15/2000 s. 6.*

**FIRST SCHEDULE  
DUST-RELATED CONDITIONS**

Aluminosis

Asbestosis

Asbestos induced carcinoma

Asbestos related pleural diseases

Bagossosis

Berylliosis

Byssinosis

Coal dust pneumoconiosis

Farmers' lung

Hard metal pneumoconiosis

Mesothelioma

Silicosis

Silico-tuberculosis

Talcosis

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*Section 39.*

**SECOND SCHEDULE  
PART I--RULES AS TO PAYMENT OF DEBTS WHERE THE ESTATE IS  
NOT SOLVENT**

1. The funeral, testamentary, and administration expenses have priority.
2. Subject as aforesaid, 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 any law of the Commonwealth relating to bankruptcy with respect to the assets of persons adjudged bankrupt.

## **PART II--ORDER OF APPLICATION OF ASSETS WHERE THE ESTATE IS SOLVENT**

1. Property of the deceased undisposed of by will, subject to the retention thereof of a fund sufficient to meet any pecuniary legacies.
2. Property of the deceased specifically appropriated or devised or bequeathed or directed to be sold (either by a specific or general description), for the payment of debts.
3. Property of the deceased charged with, or devised or bequeathed (either by a specific or general description) subject to a charge for the payment of debts.
4. Property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid.
5. The fund, if any, retained to meet pecuniary legacies.
6. Property specifically devised or bequeathed, rateably accordingly to value.
7. Property appointed by will under a general power, including the statutory power to dispose of entailed interests, rateably according to value.
8. The following provisions shall also apply:
  - (a) The order of application may be varied by the will of the deceased.
  - (b) This part of this Schedule does not affect the liability of any property to answer any duty by Statute imposed thereon in exoneration of other assets.

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*Sch. 3 substituted by No. 6478 s. 5 (as amended by No. 6489 s. 4(Sch. item 31(e))), repealed by No. 6890 s. 3(1).*

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### **IIIIIIIIIIIIIIIIIIII ENDNOTES**

**1. General Information** The **Administration and Probate Act 1958** was assented to on 30 September 1958 and came into operation on 1 April 1959: Government Gazette 18 March 1959 page 892.

**Table of Amendments** This Version incorporates amendments made to the **Administration and Probate Act 1958** by Acts and subordinate instruments.

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**Statute Law Revision Act 1959, No. 6505/1959**

*Assent Date:* 5.5.59

*Commencement Date:* 1.4.59: s. 1(2)

*Current State:* All of Act in operation

**Administration and Probate (Offices) Act 1960, No. 6640/1960**

*Assent Date:* 7.6.60

*Commencement Date:* 7.6.60

*Current State:* All of Act in operation

**Statute Law Revision Act 1960, No. 6716/1960**

*Assent Date:* 21.12.60

*Commencement Date:* 21.12.60: subject to ss 3, 4

*Current State:* All of Act in operation

**Administration and Probate (Amendment) Act 1962, No. 6866/1962**

*Assent Date:* 16.4.62

*Commencement Date:* 16.4.62

*Current State:* All of Act in operation

**Probate Duty Act 1962, No. 6890/1962**

*Assent Date:* 15.5.62

*Commencement Date:* 1.7.62: Government Gazette 13.6.62 p. 1990

*Current State:* All of Act in operation

**Administration and Probate (Family Provision) Act 1962, No. 6920/1962**

*Assent Date:* 20.11.62

*Commencement Date:* 20.11.62

*Current State:* All of Act in operation

**Administration and Probate (Small Estates) Act 1964, No. 7168/1964** (as amended by Act No. 7332)

*Assent Date:* 10.11.64

*Commencement Date:* 1.6.65: Government Gazette 12.5.65 p. 1555

*Current State:* All of Act in operation

**Administration and Probate (Surviving Actions) Act 1965, No. 7296/1965**

*Assent Date:* 12.10.65

*Commencement Date:* 12.10.65

*Current State:* All of Act in operation

**Statute Law Revision Act 1965, No. 7332/1965**

*Assent Date:* 14.12.65

*Commencement Date:* 14.12.65: subject to s. 3

*Current State:* All of Act in operation

**Administration and Probate (Amendment) Act 1967, No. 7597/1967**

*Assent Date:* 5.12.67

*Commencement Date:* 5.12.67

*Current State:* All of Act in operation

**Administration and Probate (Amendment) Act 1968, No. 7663/1968**

*Assent Date:* 2.4.68

*Commencement Date:* 1.5.68: Government Gazette 24.4.68 p. 1259

*Current State:* All of Act in operation

**Administration and Probate (Foreign Grants) Act 1969, No. 7874/1969**

*Assent Date:* 18.11.69

*Commencement Date:* 18.11.69

*Current State:* All of Act in operation

**Statute Law Revision Act 1971, No. 8181/1971**

*Assent Date:* 23.11.71

*Commencement Date:* 23.11.71

*Current State:* All of Act in operation

**Status of Children Act 1974, No. 8602/1974**

*Assent Date:* 26.11.74

*Commencement Date:* 1.3.75: Government Gazette 5.2.75 p. 228

*Current State:* All of Act in operation

**Supreme Court Act 1976, No. 8951/1976**

*Assent Date:* 16.12.76

*Commencement Date:* 1.1.77: Government Gazette 22.12.76 p. 3739

*Current State:* All of Act in operation

**Administration and Probate (Amendment) Act 1977, No. 9041/1977**

*Assent Date:* 22.11.77

*Commencement Date:* Ss 4, 7 on 1.12.78: Government Gazette 25.10.78 p. 3344; rest of Act on 22.11.77: s. 1(3)

*Current State:* All of Act in operation

**Wills (Interested Witnesses) Act 1977, No. 9044/1977**

*Assent Date:* 22.11.77

*Commencement Date:* 22.11.77

*Current State:* All of Act in operation

**Age of Majority Act 1977, No. 9075/1977**

*Assent Date:* 6.12.77

*Commencement Date:* 1.2.78: Government Gazette 11.1.78 p. 97

*Current State:* All of Act in operation

**Statute Law Revision Act 1980, No. 9427/1980**

*Assent Date:* 27.5.80

*Commencement Date:* 27.5.80: s. 6(2)

*Current State:* All of Act in operation

**Crimes (Classification of Offences) Act 1981, No. 9576/1981**

*Assent Date:* 26.5.81

*Commencement Date:* 1.9.81: Government Gazette 26.8.81 p. 2799

*Current State:* All of Act in operation

**Administration and Probate (Survival of Actions) Act 1982, No. 9847/1982**

*Assent Date:* 21.12.82

*Commencement Date:* 21.12.82

*Current State:* All of Act in operation

**Limitation of Actions (Personal Injury Claims) Act 1983, No. 9884/1983**

*Assent Date:* 10.5.83

*Commencement Date:* 11.5.83: Government Gazette 11.5.83 p. 1145

*Current State:* All of Act in operation

**Penalties and Sentences (Amendment) Act 1983, No. 9945/1983**

*Assent Date:* 20.9.83

*Commencement Date:* S. 2 on 1.9.81: s. 1(4); rest of Act on 20.12.83: Government Gazette 14.12.83 p. 4035; s. 8 repealed by No. 10096 s. 4(4)

*Current State:* All of Act in operation

**Trustee Companies Act 1984, No. 10168/1984**

*Assent Date:* 20.11.84



*Commencement Date:* 5.12.84: Government Gazette 5.12.84 p. 4329

*Current State:* All of Act in operation

**Courts Amendment Act 1986, No. 16/1986**

*Assent Date:* 22.4.86

*Commencement Date:* Ss 1-11, 13-27, 29-34 on 1.7.86: Government Gazette 25.6.86 p. 2180; s. 28 on 1.9.86: Government Gazette 27.8.86 p. 3201; s. 12 on 1.1.88: Government Gazette 7.10.87 p. 2701

*Current State:* All of Act in operation

**Mental Health Act 1986, No. 59/1986**

*Assent Date:* 3.6.86

*Commencement Date:* Ss 1-3, 21, 23, Sch 1 on 19.6.87: Government Gazette 17.6.87 p. 1538; rest of Act on 1.10.87: Government Gazette 30.9.87 p. 2585

*Current State:* All of Act in operation

**Supreme Court Act 1986, No. 110/1986**

*Assent Date:* 16.12.86

*Commencement Date:* 1.1.87: s. 2

*Current State:* All of Act in operation

**State Trust Corporation of Victoria Act 1987, No. 55/1987**

*Assent Date:* 20.10.87

*Commencement Date:* 2.11.87: Government Gazette 28.10.87 p. 2925

*Current State:* All of Act in operation

**County Court (Amendment) Act 1989, No. 19/1989**

*Assent Date:* 16.5.89

*Commencement Date:* 1.8.89: Government Gazette 26.7.89 p. 1858

*Current State:* All of Act in operation

**Magistrates' Court (Consequential Amendments) Act 1989, No. 57/1989**  
(as amended by No. 34/1990)

*Assent Date:* 14.6.89

*Commencement Date:* S. 4(1)(a)-(e)(2) on 1.9.89: Government Gazette 30.8.89 p. 2210;  
rest of Act on 1.9.90: Government Gazette 25.7.90 p. 2217

*Current State:* All of Act in operation

**Administration and Probate (Amendment) Act 1994, No. 10/1994** (as amended by  
No. 9/1995)

*Assent Date:* 3.5.94

*Commencement Date:* Ss 1, 2 on 3.5.94: s. 2(1); ss 3, 4, 7-15 on 27.4.95: Government  
Gazette 27.4.95 p. 973; rest of Act on 1.7.95: s. 2(3)

*Current State:* All of Act in operation

**State Trustees (State Owned Company) Act 1994, No. 45/1994**

*Assent Date:* 7.6.94

*Commencement Date:* Pt 1 (ss 1-3), s. 27 on 7.6.94: s. 2(1); rest of Act on 1.7.94:  
Special Gazette (No. 36) 23.6.94 p. 1

*Current State:* All of Act in operation

**Valuation of Land (Amendment) Act 1994, No. 91/1994**

*Assent Date:* 6.12.94

*Commencement Date:* S. 36(1) on 1.1.95: s. 2(2)

*Current State:* This information relates only to the provision/s amending the  
**Administration and Probate Act 1958**

**Legal Practice Act 1996, No. 35/1996**

*Assent Date:* 6.11.96

*Commencement Date:* S. 453(Sch. 1 item 3) on 1.1.97: s. 2(3)

*Current State:* This information relates only to the provision/s amending the  
**Administration and Probate Act 1958**

**Wills Act 1997, No. 88/1997 (as amended by No. 43/1998)**

*Assent Date:* 2.12.97

*Commencement Date:* Ss 53-61 on 20.7.98: Government Gazette 16.7.98 p. 1924

*Current State:* This information relates only to the provision/s amending the **Administration and Probate Act 1958**

**State Trustees (Amendment) Act 1998, No. 15/1998**

*Assent Date:* 28.4.98

*Commencement Date:* Ss 5-7 on 1.8.98: s. 2(3)

*Current State:* This information relates only to the provision/s amending the **Administration and Probate Act 1958**

**Administration and Probate (Dust Diseases) Act 2000, No. 15/2000**

*Assent Date:* 9.5.00

*Commencement Date:* 10.5.00: s. 2

*Current State:* All of Act in operation

**Statute Law Revision Act 2000, No. 74/2000**

*Assent Date:* 21.11.00

*Commencement Date:* S. 3(Sch. 1 item 3) on 22.11.00: s. 2(1)

*Current State:* This information relates only to the provision/s amending the  
**Administration and Probate Act 1958**

**Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000,  
No. 78/2000**

*Assent Date:* 28.11.00

*Commencement Date:* Ss 3, 4 on 28.11.00: s. 2(1)

*Current State:* This information relates only to the provision/s amending the  
**Administration and Probate Act 1958**

**Statute Law Amendment (Relationships) Act 2001, No. 27/2001**

*Assent Date:* 12.6.01

*Commencement Date:* S. 3(Sch. 1 item 1) on 8.11.01: Government Gazette 8.11.01 p. 2797

*Current State:* This information relates only to the provision/s amending the  
**Administration and Probate Act 1958**

**Corporations (Consequential Amendments) Act 2001, No. 44/2001**

*Assent Date:* 27.6.01

*Commencement Date:* S. 3(Sch. item 2) on 15.7.01: s. 2

*Current State:* This information relates only to the provision/s amending the  
**Administration and Probate Act 1958**

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Metric Conversion (Administration and Probate Act) Regulations 1973,  
S.R. No. 369/1973

*Date of Making:* 18.12.73

*Date of Commencement:* 1.2.74: reg 1

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**Explanatory Details**

S. 2 (*repealed*): Section 15(1) of the **Administration and Probate (Amendment) Act 1994**, No. 10/1994 reads as follows:

**15. Cases to which certain amendments do not apply**

(1) The provisions of the Principal Act as amended by section 7, 8, 9, 10, 13(a) or 13(d) do not apply to a case where a person dies before the commencement of that section.[\[2\]](#)

S. 7(3) (*repealed*): See note 1.

[\[3\]](#) S. 8(f) (*repealed*): See note 1.

[\[4\]](#) S. 9(3) (*repealed*): See note 1.

[\[5\]](#) S. 10(e) (*repealed*): See note 1.

[\[6\]](#) S. 29(6) (*repealed*): See note 1.

[\[7\]](#) S. 32(1): See note 1.

[\[8\]](#) S. 35(1)(a): See note 1.

[\[9\]](#) S. 37: Section 251 of the **Property Law Act 1958**, No. 6344 reads as follows:

**251. Power to tenants in tail in possession to dispose of land by specific devise or bequest**

(1) A tenant in tail of full age shall have power to dispose by will by means of a devise or bequest referring specifically either to the property or to the instrument under which it was acquired or to entailed property generally--  
(a) of lands of which he is tenant in tail in possession at his death; and  
(b) of lands to be sold where the money arising from the sale is subject to be invested in the purchase of lands to be settled so that if purchased he would at his death have been tenant in tail in possession thereof; and  
(c) of money subject to be invested in the purchase of lands of which if it had been so invested he would have been tenant in tail in possession at his death--

in like manner as if, after barring the entail, he had (either at law or in equity as the case may be) been tenant in fee-simple or absolute owner thereof at his death; but subject to and in default of any such disposition by will such lands or money shall devolve in the same manner as if this section or any corresponding previous enactment had not been passed.

(2) This section shall not extend to a tenant in tail after possibility of issue extinct and shall not render any interest which is not disposed of by the will of the tenant in tail liable for his debts or other liabilities.

(3) This section shall apply only to wills executed after the thirty-first day of December One thousand nine hundred and eighteen, or confirmed or republished after such date.[\[10\]](#)



S. 37A: See note 1.

[\[11\]](#) S. 42(2) (*repealed*): See note 1.

[\[12\]](#) S. 47(2) (*repealed*): See note 1.

[\[13\]](#) Part 1, Div. 6: For the meaning of the expression "Residuary Estate" in this Division see section 38(4). As to saving as to persons dying before the commencement of the **Administration and Probate Act 1928** see section 50 of that Act and section 4 of this Act.

[\[14\]](#) S. 50: See note 1.

[\[15\]](#) S. 58: See note 1.

[\[16\]](#) Pt 5 (*repealed*): See **Probate Duty Act 1962**.

[\[17\]](#) Sch. 1 (*repealed*): See note 1.