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Dated 21 July 2020



TASMANIA

ADMINISTRATION AND PROBATE ACT 1935

No. 38 of 1935

CONTENTS

PART I – PRELIMINARY

1. Short title
2. Repeal
3. Interpretation

PART II – DEVOLUTION OF ESTATES

4. Devolution of real estate on personal representative
5. Application to real estate of law affecting chattels real
6. Interpretation in this Part of “real estate”

PART III – EXECUTORS AND ADMINISTRATORS

Division I – General provisions

7. Summons to executor to prove or renounce, &c.
8. When right of executor to prove ceases

9. Withdrawal of renunciation
10. Executor of sole or last surviving executor represents original testator
11. Right of proving executors to exercise powers
12. How property to vest between death of person intestate and grant of representation
13. Discretion of Court as to persons to whom administration is to be granted and limitation of grant
- 13A. Grant of administration to adult
14. Provisions as to the number of personal representatives and where minority or life interest
15. Power to grant representation of real and personal estate separately or together
16. Grant of representation to a trust corporation
17. Grant to agent of executor
18. Executor not to act while administration is in force
19. Grant of administration *pendente lite*
20. Continuance of legal proceedings after revocation of temporary administration
21. Grant of special administration where personal representative is abroad
22. Administration with will annexed
23. Administration during minority of executor
24. Rights and liabilities of administrator
- [25. *Repealed*]

Division II – Duties, rights and obligations

26. Duty of personal representative as to inventory
27. Rights of action by and against personal representatives
28. Protection of persons acting in probate or administration
29. Liability of person fraudulently obtaining or retaining estate of deceased
30. Liability of estate of personal representative
31. Rules for adapting provisions of this Part relating to real estate

PART IV – ADMINISTRATION OF ASSETS

32. Real and personal estate of deceased are assets for payment of debts
33. Trust for sale
34. Administration of assets
35. Charges on property of deceased to be paid primarily out of the property charged
36. Effect of assent or conveyance by personal representative
37. Validity of conveyance not affected by revocation of representation
38. Right to follow property and powers of the Court in relation thereto
39. Powers of management
40. Powers of personal representative as to appropriation
41. Power to appoint trustees of infants' property
42. Obligations of personal representative permitting possession of lands, and powers of the Court
43. Power to postpone distribution: Executor's year

[PART V – *Repealed*

- 44 - 47. *Repealed*]

PART VI – PROBATE AND ADMINISTRATION GRANTED OUTSIDE THE STATE

- 47A. Interpretation
48. Resealing of probate, &c., granted beyond the State in certain cases
49. Procedure: Caveats
50. Seal not to be affixed till duty is paid, &c.
51. Security for payment of debts may be required
52. Person procuring the sealing to be deemed executor or administrator
53. Application of this Part of Act may be extended

PART VII – PROTECTION OF REPRESENTATIVES

- 54. Power of personal representative to advertise for claims
- 55. Power of personal representative to distribute assets
- 56. Filing of accounts
- 57. Rights of claimants
- 58. Proceedings under this Act to be stayed in certain cases
- 59. Release to be in force except as to errors or omissions
- 60. Rights of claimants against legatees and next-of-kin preserved
- 61. Further assets to be disposed of and accounted for in same manner as original assets
- 62. Interpretation

PART VIII – SUPPLEMENTAL

- 62A. Interests as joint tenants, &c., under wills of testators dying before commencement of Act
- [63. *Repealed*]
- 64. Power of Court to make orders for due administration of estate of deceased person
- 65. Concealment, &c., of will actionable
- 66. General saving
- 67. Transitory provisions: Rules of Court
- 68. Savings and transitional provisions

SCHEDULE I

SCHEDULE II

[**SCHEDULE III** – *Repealed*]

SCHEDULE IV



ADMINISTRATION AND PROBATE ACT 1935

No. 38 of 1935

An Act to consolidate and amend the law relating to the administration of the estates of deceased persons and the granting of representation in respect thereof

[Royal Assent 18 October 1935]

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

PART I – PRELIMINARY

1. Short title

This Act may be cited as the *Administration and Probate Act 1935*.

Administration and Probate Act 1935
Act No. 38 of 1935

s. 2

Part I – Preliminary

2. Repeal

- (1) The enactments set forth in Schedule I are hereby repealed to the extent indicated in that schedule.
- (2) No Imperial enactment other than the *Australian Courts Act 1828*, so far as it relates to the administration of the estates of deceased persons, shall apply in respect of the estate of any person dying after the commencement of this Act.

3. Interpretation

- (1) In this Act, unless the contrary intention appears

—

administration means, with reference to the real and personal estate of a deceased person, letters of administration, whether general or limited, or with the will annexed or otherwise; and in Part VI includes exemplification of letters of administration or such other formal evidence of the letters of administration purporting to be under the seal of a court of competent jurisdiction as shall, in the opinion of a judge, be deemed sufficient;

administrator means a person to whom administration is granted;

conveyance includes a mortgage, lease, assent, vesting declaration, vesting instrument, disclaimer, release, and every

Administration and Probate Act 1935
Act No. 38 of 1935

Part I – Preliminary

s. 3

other assurance of property or of an interest therein by any instrument, except a will; and **disposition** includes a “conveyance” and also a devise or bequest and an appointment of property contained in a will;

Court means the Supreme Court;

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;

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 free from which any devise, bequest, or payment is made to take effect;

personal chattels means carriages, horses, stable furniture and effects, motor-cars and accessories, 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

Administration and Probate Act 1935
Act No. 38 of 1935

s. 3

Part I – Preliminary

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, and in Part VI includes exemplification of probate, or such other formal document purporting to be under the seal of a court of competent jurisdiction as shall, in the opinion of a judge, be deemed sufficient;

Probate Rules means rules and orders made by the judges, or a majority of them, for regulating the procedure and practice of the Court in regard to non-contentious or common form probate business;

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;

Administration and Probate Act 1935
Act No. 38 of 1935

Part I – Preliminary

s. 3

real estate means any real estate, including chattels real, which by virtue of Part II devolves on the personal representative of a deceased person;

Registrar means the Registrar of the Supreme Court;

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, and ***rent-charge*** includes a fee-farm rent;

representation means the probate of a will and administration, and the expression "taking out representation" refers to the obtaining of the probate of a will or of the grant of administration;

securities includes stocks, funds, or shares;

the deceased means the testator or intestate to whom the context relates;

tenant for life, land, settled land, settlement, and ***trustees of the settlement*** have the same meanings as in the *Settled Land Act 1884*;

trust corporation means The Public Trustee or a corporation authorized by any Act, or appointed by the Court in any particular case, to be a trustee;

Administration and Probate Act 1935
Act No. 38 of 1935

s. 3

Part I – Preliminary

trust for sale, in relation to land, means an 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.

- (2) References to a child or issue living at the death of any person include a child or issue *en ventre sa mère* at the death.
- (3) References to the estate of a deceased person include property over which the deceased exercises a general power of appointment by his will.
- (4) References to any statutes of distribution in an instrument *inter vivos* made, or in a will coming into operation after the commencement of this Act, shall be construed as references to Part V; and references in such an instrument or will to statutory next-of-kin shall be construed, unless the contrary intention appears, as referring to the persons who would take beneficially on an intestacy under the provisions of Part V.
- (5) Any prescribed Probate Rules continue in force as if duly made under this Act as amended by the *Justice and Related Legislation (Miscellaneous Amendments) Act 2008*.
- (6) For the purposes of subsection (5) –

Administration and Probate Act 1935
Act No. 38 of 1935

Part I – Preliminary

s. 3

prescribed Probate Rules means Probate Rules and any amendment to the Probate Rules –

- (a) made under this Act as in force before the commencement of the *Justice and Related Legislation (Miscellaneous Amendments) Act 2008*; and
- (b) in force immediately before the commencement of that Act.

Administration and Probate Act 1935
Act No. 38 of 1935

s. 4

Part II – Devolution of Estates

PART II – DEVOLUTION OF ESTATES

4. Devolution of real estate on personal representative

- (1) Real estate to which a deceased person was entitled for an interest not ceasing on his death shall on his death, and notwithstanding any testamentary disposition thereof, devolve from time to time on the personal representative of the deceased, in like manner as before the commencement of this Act chattels real devolved on the personal representative from time to time of a deceased person.
- (2) The personal representatives for the time being of a deceased person are deemed in law his heirs and assigns within the meaning of all trusts and powers.
- (3) The personal representatives shall be the representative of the deceased in regard to his real estate to which he was entitled for an interest not ceasing on his death as well as in regard to his personal estate.

5. Application to real estate of law affecting chattels real

- (1) Subject to the provisions of this Act, all enactments and rules of law, and all jurisdiction of any court with respect to the appointment of administrators or to probate or letters of administration or to dealings before probate in the case of chattels real, and with respect to costs

Administration and Probate Act 1935
Act No. 38 of 1935

Part II – Devolution of Estates

s. 5

and other matters in the administration of personal estate, in force before the commencement of this Act, and all powers, duties, rights, equities, obligations, and liabilities of a personal representative in force at the commencement of this Act with respect to chattels real, shall apply and attach to the personal representative and shall have effect with respect to real estate vested in him, and in particular all such powers of disposition and dealing as were before the commencement of this Act exercisable as respects chattels real by the survivor or survivors of two or more personal representatives, as well as by a single personal representative, or by all the personal representatives together, shall be exercisable by the personal representatives or representative of the deceased with respect to his real estate.

- (2) Where as respects real estate there are two or more personal representatives, a conveyance of real estate devolving under this Part shall not be made without the concurrence therein of all such representatives or an order of the Court, but where probate is granted to one or some of two or more persons named as executors, whether or not power is reserved to the other or others to prove, any conveyance of the real estate may be made by the proving executor or executors for the time being without an order of the Court, and shall be as effectual as if all the persons named as executors had concurred therein.
- (3) Without prejudice to the rights and powers of a personal representative, the appointment of a

Administration and Probate Act 1935
Act No. 38 of 1935

s. 6

Part II – Devolution of Estates

personal representative in regard to real estate shall not, save as hereinafter provided, affect –

- (a) any rule as to marshalling or as to administration of assets;
- (b) the beneficial interest in real estate under any testamentary disposition;
- (c) any mode of dealing with any beneficial interest in real estate, or the proceeds of sale thereof; or
- (d) the right of any person claiming to be interested in the real estate to take proceedings for the protection or recovery thereof against any person other than the personal representative.

6. Interpretation in this Part of “real estate”

(1) In this Part *real estate* includes –

- (a) chattels real, and land in possession, remainder, or reversion, and every interest in or over land to which a deceased person was entitled at the time of his death; and
- (b) real estate held on trust or by way of mortgage of security, but not money to arise under a trust for sale of land, nor money secured or charged on land.

(2) A testator shall be deemed to have been entitled at his death to any interest in real estate passing under any gift contained in his will which

Administration and Probate Act 1935
Act No. 38 of 1935

Part II – Devolution of Estates

s. 6

operates as an appointment under a general power to appoint by will.

- (3) An entailed interest of a deceased person shall be deemed an interest ceasing on his death, but any further or other interest of the deceased in the same property in remainder or reversion which is capable of being disposed of by his will shall not be deemed to be an interest so ceasing.
- (4) The interest of a deceased person under a joint tenancy where another tenant survives the deceased is an interest ceasing on his death.
- (5) On the death of a corporator sole his interest in the corporation's real and personal estate shall be deemed to be an interest ceasing on his death and shall devolve to his successor.

Administration and Probate Act 1935
Act No. 38 of 1935

s. 7

Part III – Executors and Administrators

PART III – EXECUTORS AND ADMINISTRATORS

Division I – General provisions

7. Summons to executor to prove or renounce, &c.

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.

8. When right of executor to prove ceases

Where a person appointed executor by a will –

- (a) survives the testator but dies without having taken out probate of the will;
- (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 real and personal estate shall devolve and be committed in like manner as if that person had not been appointed executor.

9. Withdrawal of renunciation

Where an executor who has renounced probate has been permitted, whether before or after the commencement of this Act, to withdraw the

Administration and Probate Act 1935
Act No. 38 of 1935

Part III – Executors and Administrators

s. 10

renunciation and prove the will, 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 endorsed on the original probate or letters of administration.

10. Executor of sole or last surviving executor represents original testator

- (1) An executor of a sole or last surviving 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 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 is broken by –
 - (a) an intestacy;
 - (b) the failure of a testator to appoint an executor; or
 - (c) the failure to obtain probate of a will –

Administration and Probate Act 1935
Act No. 38 of 1935

s. 11

Part III – Executors and Administrators

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

- (3A) Where the chain of representation to a testator is broken any beneficiary, or person claiming through a deceased beneficiary, whether at law or in equity, under the will of the testator, may appoint a trust corporation to be executor of the testator, and the acceptance of the appointment constitutes the trust corporation executor of the testator as if the chain of representation had not been broken.
- (3B) A trust corporation is not under any obligation to accept an appointment under subsection (3A).
- (4) Every person in the chain of representation to a testator –
 - (a) has the same rights in respect of the real and personal estate of that testator as the original executor would have had if living; and
 - (b) is, to the extent to which the estate, whether real or personal, of that testator has come to his hands, answerable as if he were an original executor.

11. 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 other or others to prove, all the powers which are by law conferred

Administration and Probate Act 1935
Act No. 38 of 1935

Part III – Executors and Administrators

s. 12

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.

12. How property to vest between death of person intestate and grant of representation

Where a person dies intestate, his real and personal estate, until administration is granted in respect thereof, shall vest in the Chief Justice or in case there may not be a Chief Justice at any time, then in the senior puisne judge, in the same manner and to the same extent as formerly in the case of personal estate it vested in the Ordinary in England.

13. Discretion of Court as to persons to whom administration is to be granted and limitation of grant

In granting letters of administration the Court shall have regard to the rights of all persons interested in the real and personal estate of the deceased person, or the proceeds of sale thereof and, in particular, administration with the will annexed may be granted to a devisee or legatee, and any such administration may be limited in any way the Court thinks fit. Provided that –

- (a) where the deceased died wholly intestate as to his real and personal estate, administration shall, if application is made for that purpose, be granted to

Administration and Probate Act 1935
Act No. 38 of 1935

s. 13A

Part III – Executors and Administrators

some one or more of the persons interested in the residuary estate of the deceased; and

- (b) if, by reason of the insolvency of the estate of the deceased or of any other special circumstances, it appears to the Court to be necessary or expedient to appoint as administrator some person other than the person who, but for this provision, would by law have been entitled to the grant of administration, the Court may, in its discretion, notwithstanding anything contained in section 14, appoint as administrator such person as it thinks expedient, and any administration granted under this provision may be limited in any way the Court thinks fit.

13A. Grant of administration to adult

The Court may grant letters of administration to a person aged 18 years or more, whether or not the person resides in Tasmania.

14. Provisions as to the number of personal representatives and where minority or life interest

- (1) Representation shall not be granted to more than 4 persons in respect of the same property; and administration shall, if any beneficiary is an infant, or a life interest arises under a will, be granted either to a trust corporation, with or without an individual, or to not less than two

Administration and Probate Act 1935
Act No. 38 of 1935

Part III – Executors and Administrators

s. 15

individuals. Provided that the Court in granting administration may act on such *prima facie* evidence, furnished by the applicant or any other person, as to whether or not there is a minority or life interest, as may be prescribed by the Probate Rules.

- (2) If there is only one personal representative, not being a trust corporation, then during the minority of the beneficiary or the subsistence of a life interest, and until the estate is fully administered, the Court may, on the application of any person interested or of the guardian, administrator, or receiver of any such person, appoint, in accordance with the Probate Rules, one or more personal representatives in addition to the original personal representative.
- (3) This section applies to grants of representation made after the commencement of this Act, whether the deceased died before or after such commencement.

15. Power to grant representation of real and personal estate separately or together

Representation may be granted in respect of the real estate of a deceased person or any part thereof, and either separately or together with his personal estate, 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 letters of administration to any real estate may be limited in any way the Court thinks proper. Provided that, where the

Administration and Probate Act 1935
Act No. 38 of 1935

s. 16

Part III – Executors and Administrators

estate of a deceased person 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.

16. Grant of representation to a trust corporation

- (1) Where a trust corporation is appointed an executor in a will, either alone or jointly with another person, the Court may grant probate to such corporation, either solely or jointly with another person, as the case may require, and the corporation may act as executor accordingly.
- (2) Administration may be granted to any trust corporation either solely or jointly with another person, and the corporation may act as administrator accordingly.
- (3) Representation shall not be granted to a syndic or nominee on behalf of any trust corporation.
- (4) Any officer authorized for the purpose by any such corporation or by the directors or governing body thereof may swear affidavits, give security, and do any other act or thing which the Court may require on behalf of the trust corporation with a view to the grant of representation to the corporation, and the acts of such officer shall be binding on the corporation, and he shall be entitled to be kept indemnified by the corporation in regard to matters so authorized as aforesaid.
- (5) Where at the commencement of this Act any interest in real or personal estate is vested in a

Administration and Probate Act 1935
Act No. 38 of 1935

Part III – Executors and Administrators

s. 17

syndic on behalf of any trust corporation acting as the personal representatives of a deceased person, the same shall, by virtue of this Act, vest in the corporation, and the syndic shall be kept indemnified by the corporation in regard to the interest so vested. This subsection does not apply to securities registered in the name of a syndic, or to land, or to a mortgage or charge of which the syndic is registered proprietor under the *Land Titles Act 1980*, but any such securities, land, mortgage, or charge shall be transferred by the syndic to the corporation, or as the corporation may direct.

- (6) This section has effect whether the deceased died before or after the commencement of this Act; and no such vesting or transfer as aforesaid shall operate as a breach of a covenant or condition against alienation or give rise to a forfeiture.

17. Grant to agent of executor

Where any person resident in Tasmania has been, or hereafter may be, appointed to act in the affairs of a testator by an executor not resident in Tasmania, administration of the real and personal estate and effects of such testator, with an exemplification or other authenticated copy of the will or probate annexed, shall be granted to the person so appointed, upon such person giving his own bond to administer without any sureties.

Administration and Probate Act 1935
Act No. 38 of 1935

s. 18

Part III – Executors and Administrators

18. Executor not to act while administration is in force

Where administration has been granted in respect of any real or personal estate of a deceased person, no person shall have power to bring any action 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.

19. Grant of administration *pendente lite*

- (1) While any legal proceeding touching the validity of the will of a deceased person, or for obtaining, recalling, or revoking any representation, is pending, the Court may grant administration of the real and personal 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 real and personal estate, but shall be subject to the immediate control of the Court and shall act under its direction.
- (2) The Court may assign to any administrator appointed under this section reasonable remuneration out of the real and personal estate of the deceased or the income thereof.

20. 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 and Probate Act 1935
Act No. 38 of 1935

Part III – Executors and Administrators

s. 21

administration is revoked, that court may order that the proceeding be continued by or against the new personal representative in like manner as if the same had been originally commenced by or against him, but subject to such conditions and variations, if any, as that court directs.

21. Grant of special administration where personal representative is abroad

- (1) If, at the expiration of 12 months from the death of a person, any personal representative of the deceased to whom representation has been granted 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 him special administration in the prescribed form of the real and personal estate of the deceased.
- (2) The Court may, for the purpose of any legal proceeding 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 proceeding to which a special administrator is a party is pending, such representative shall be made a party to the legal proceeding, and the costs of and incidental to the special administration and such legal proceeding shall

Administration and Probate Act 1935
Act No. 38 of 1935

s. 22

Part III – Executors and Administrators

be paid by such person and out of such fund as the Court in which the proceeding is pending directs.

22. Administration with will annexed

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

23. Administration during minority of executor

- (1) Where an infant is appointed or becomes 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 infant attains the age of 18 years; at which time, and not before, probate of the will may be granted to him.
- (2) The appointment in a will by a testator of an infant to be an executor shall not operate to transfer any interest in the property of the deceased to the infant, or to constitute him a personal representative for any purpose, unless and until probate is granted to him after he has attained full age.

24. Rights and liabilities of administrator

Every person to whom administration of the real and personal estate of a deceased person is

Administration and Probate Act 1935
Act No. 38 of 1935

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.

25.

Division II – Duties, rights and obligations

26. Duty of personal representative as to inventory

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.

27. Rights of action by and against personal representatives

- (1) Subject to the provisions of this section on the death of any person after the commencement of this section all causes of action—
 - (a) subsisting against him shall survive against his estate; and
 - (b) vested in him shall survive for the benefit of his estate.

(2)

Administration and Probate Act 1935
Act No. 38 of 1935

s. 27

Part III – Executors and Administrators

- (3) Where a cause of action survives under this section for the benefit of the estate of a deceased person, the damages recoverable for the benefit of that estate –
- (a) shall not include exemplary damages;
 - (b) in the case of a breach of promise to marry, shall be limited to such damage (if any) to that estate as flows from the breach of promise to marry; and
 - (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 that estate consequent on his death, except that a sum in respect of funeral expenses may be included;
 - (ii) shall not include damages for pain or suffering, for any bodily or mental harm suffered by him or for the curtailment of his expectation of life; and
 - (iii) shall be calculated without reference to the future probable earnings of the deceased if he had survived the consequences of the act or omission and without any allowance being made for the loss of his earning capacity that relates to a period after his death.

Administration and Probate Act 1935
Act No. 38 of 1935

Part III – Executors and Administrators

s. 27

- (3A) Notwithstanding subsection (3)(c), damages for pain and suffering, for any bodily or mental harm or for curtailment of expectation of life, may be recovered if –
- (a) the cause of action related to a dust-related condition; and
 - (b) the deceased person commenced a proceeding in relation to the cause of action before the deceased person died; and
 - (c) the deceased person died as a result of the dust-related condition or the dust-related condition was a contributing factor to the deceased person’s death.

(3B) For the purposes of subsection (3A) –

dust-related condition means –

- (a) any of the following diseases:
 - (i) aluminosis;
 - (ii) asbestosis;
 - (iii) asbestos-induced carcinoma;
 - (iv) asbestos-related pleural diseases;
 - (v) bagassosis;
 - (vi) berylliosis;

Administration and Probate Act 1935
Act No. 38 of 1935

s. 27

Part III – Executors and Administrators

- (vii) byssinosis;
 - (viii) coal dust pneumoconiosis;
 - (ix) farmers' lung;
 - (x) hard metal pneumoconiosis;
 - (xi) mesothelioma;
 - (xii) silicosis;
 - (xiii) silico-tuberculosis;
 - (xiv) talcosis; or
- (b) any other pathological condition of the lung, pleura or peritoneum that is attributable to dust.
- (3C) Subsection (3A) applies in relation to a proceeding, in respect of an action that survives for the benefit of the estate of a deceased person, whether the proceeding commenced before or after the commencement of that subsection unless –
- (a) judgment has been given in relation to the proceeding; or
 - (b) the proceeding has been settled or withdrawn.
- (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

Administration and Probate Act 1935
Act No. 38 of 1935

Part III – Executors and Administrators

s. 27

the same time as, the damage was suffered, the cause of action which would have subsisted against him if he had died after the damage was suffered, shall be deemed to have subsisted against him before he died.

- (5) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person unless –
- (a) proceedings against him in respect of that cause of action were pending at the date of his death; or
 - (b) the cause of action arose not earlier than 12 months before the date of his death and proceedings are taken not later than 6 months, or such extended time as a judge may allow, after the date of the grant of probate of his will, or letters of administration, to his personal representative.
- (6) A judge, on application, may extend the period of 6 months prescribed by paragraph (b) of subsection (5) for such further period as the justice of the case may require, and such application may be made although the said period of 6 months has expired.
- (7) A personal representative may distrain for arrears of a rent-charge due or accruing to the deceased in his lifetime on the land affected or charged therewith, so long as the land remains in the possession of the person liable to pay the

Administration and Probate Act 1935
Act No. 38 of 1935

s. 27

Part III – Executors and Administrators

rent-charge or of the persons deriving title under him, and in like manner as the deceased might have done had he been living.

- (8) A personal representative may distrain upon land for arrears of rent due or accruing to the deceased in like manner as the deceased might have done had he been living, and such arrears may be distrained for after the termination of the lease or tenancy as if the term or interest had not determined, if the distress is made –
- (a) within 6 months after the termination of the lease or tenancy; and
 - (b) during the continuance of the possession of the lessee or tenant from whom the arrears were due –

and the statutory enactments relating to distress for rent shall apply to any distress made pursuant to this subsection.

- (9) The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the *Fatal Accidents Act 1934*, and so much of this Act as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under the said Act as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1).

Administration and Probate Act 1935
Act No. 38 of 1935

Part III – Executors and Administrators

s. 28

28. Protection of persons acting in 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 are a valid discharge of 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.

29. Liability of person fraudulently obtaining or retaining estate of deceased

If any person, to the defrauding of creditors or without full valuable consideration, obtains, receives, or holds any real or personal 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 real and personal estate received or coming into his hands, or the debt or liability released, after deducting –

- (a) any debt for valuable consideration and without fraud due to him from the

Administration and Probate Act 1935
Act No. 38 of 1935

s. 30

Part III – Executors and Administrators

deceased person at the time of his death;
and

- (b) any payment made by him which might properly be made by a personal representative.

30. Liability of estate of personal representative

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 real or personal estate of the deceased, and dies, his personal representative shall be, to the extent of the available assets of the defaulter, liable and chargeable in respect of such waste or conversion in the same manner as the defaulter would have been if living.

31. Rules for adapting provisions of this Part relating to real estate

Provision may be made by Rules of Court for giving effect to the provisions of this Part so far as relates to real estate, and in particular for adapting the procedure and practice on the grant of letters of administration to the case of real estate.

Administration and Probate Act 1935
Act No. 38 of 1935

Part IV – Administration of Assets

s. 32

PART IV – ADMINISTRATION OF ASSETS

32. Real and personal estate of deceased are assets for payment of debts

- (1) 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 disposes by his will, are assets for payment of his debts, whether by specialty or simple contract, and 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 subsection takes effect without prejudice to the rights of encumbrancers.
- (2) If any person to whom any such beneficial interest devolves or is given, or in whom any such interest vests, disposes thereof in good faith before an action is brought or process is sued out against him, he shall be personally liable for the value of the interest so disposed of by him, but that interest shall not be liable to be taken in execution in the action or under the process.

33. Trust for sale

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

Administration and Probate Act 1935
Act No. 38 of 1935

s. 33

Part IV – Administration of Assets

- (a) as to the real estate 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, may think proper, and so that any reversionary interest be not 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 be not 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 Part, 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) During the minority of any beneficiary or the subsistence of any life interest, and pending the distribution of the whole or any part of the estate of the deceased, the personal representatives

Administration and Probate Act 1935
Act No. 38 of 1935

Part IV – Administration of Assets

s. 33

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 law 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 this Act referred to as “the residuary estate of the intestate”.
- (5) The income (including net rents and profits of real estate and chattels real after payment of rates, taxes, rent, costs of insurance, repairs, and other outgoings properly attributable to income) of so much of the real and personal estate of the deceased as may not be disposed of by his will, if any, or may not be 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, and for that purpose any necessary apportionment may be made between life tenant and remainderman.
- (6) Nothing in this section affects the rights of any creditor of the deceased, or the rights of the Crown in respect of any duty payable under the *Deceased Persons’ Estates Duties Act 1931*.

Administration and Probate Act 1935
Act No. 38 of 1935

s. 34

Part IV – Administration of Assets

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

34. Administration of assets

- (1) Where the estate of a deceased person is insolvent, his real and personal estate shall be administered in accordance with the rules set out in Part I of Schedule II.
- (2) The right of retainer of a personal representative and his right to prefer creditors may be exercised in respect of all assets of the deceased, but the right of retainer shall only apply to debts owing to the personal representative in his own right, whether solely or jointly with another person. Subject as aforesaid, nothing in this Act affects the right of retainer of a personal representative, or his right to prefer creditors.
- (3) Where the estate of a deceased person is solvent, his real and personal estate shall, subject to the 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 Schedule II.

Administration and Probate Act 1935
Act No. 38 of 1935

Part IV – Administration of Assets

s. 35

35. 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 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, equitable 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 by –
 - (a) 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) 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 affects the right of a person entitled to the charge to obtain payment

Administration and Probate Act 1935
Act No. 38 of 1935

s. 36

Part IV – Administration of Assets

or satisfaction thereof either out of the other assets of the deceased or otherwise.

36. Effect of assent or conveyance by personal representative

(1) A personal representative may –

- (a) in relation to real estate that is not subject to the *Land Titles Act 1980*, assent in the form set out in Schedule IV; and
- (b) in relation to real estate that is subject to that Act, assent in the prescribed form –

to the vesting in any person who, whether by devise, bequest, devolution, or appropriation, may be entitled thereto, either beneficially or as a trustee or personal representative, of any estate or interest in real estate to which the testator or intestate was entitled or over which he exercised a general power of appointment by his will, 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 statement in an assent that a person assents as personal representative shall have the like effect as regards implied covenants as would follow from the like statement in a deed of conveyance.

Administration and Probate Act 1935
Act No. 38 of 1935

Part IV – Administration of Assets

s. 36

- (4) An assent to the vesting of any estate or interest 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 estate to which it relates.
- (5) An assent to the vesting in a named person of a partial interest in property shall operate as an assent in favour of the remaindermen.
- (5A) An assent by a personal representative in respect of a legal estate shall, in favour of a purchaser from the person in whose favour the assent is made or his successor in title, be taken as sufficient evidence that that person is entitled to have the legal estate vested in him, and upon the proper trusts, if any, but shall not otherwise prejudicially affect the claim of any person rightfully entitled to the estate vested or any charge thereon.
- (5B) Subsection (5A) applies whether the assent was made before or after the commencement of that subsection.
- (5C) Nothing in subsection (5A) prejudices the rights of any person under the *Registration of Deeds Act 1935* in priority to the conveyance to a purchaser.
- (6) A conveyance of an estate or interest 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

Administration and Probate Act 1935
Act No. 38 of 1935

s. 36

Part IV – Administration of Assets

expenses, duties, and legacies of the deceased have been discharged or provided for.

- (7) An assent or conveyance given or made by a personal representative shall not, except in favour of a purchaser of an estate or interest, 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 duty, debt, or liability to which such estate or interest would have been subject if there had not been any assent or conveyance.
- (8) A personal representative may, as a condition of giving an assent or making a conveyance, require security for the discharge of any such duty, debt, or liability, but shall not be entitled to postpone the giving of an assent merely by reason of the subsistence of any such duty, debt, or liability, if reasonable arrangements can be made for discharging the same; and an assent may be given subject to any estate or charge by way of mortgage.
- (9) In this section

purchaser means a purchaser for money or money's worth.
- (10)

Administration and Probate Act 1935
Act No. 38 of 1935

Part IV – Administration of Assets

s. 37

37. 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.
- (2) This section takes effect without prejudice to any order of the Court made before the commencement of this Act, and applies whether the deceased died before or after such commencement.

38. Right to follow property and powers of the Court in relation thereto

- (1) An assent or conveyance by a personal representative to a person other than a purchaser does 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 –

Administration and Probate Act 1935
Act No. 38 of 1935

s. 39

Part IV – Administration of Assets

- (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; and
 - (d) make any vesting order or appoint a person to convey in accordance with the provisions of the *Trustee Act 1898*.
- (3) This section does not prejudice the rights of a purchaser or a person deriving title under him, but applies whether the deceased died before or after the commencement of this Act.

39. Powers of management

- (1) In dealing with the real and personal estate of the deceased, his personal representatives shall, for the purposes of administration, and until the period of distribution arrives, have –
 - (a) the same powers and discretions, including power to raise money by mortgage or charge, whether or not by

Administration and Probate Act 1935
Act No. 38 of 1935

Part IV – Administration of Assets

s. 40

deposit of documents, as a personal representative had before the commencement of this Act with respect to personal estate vested in him; and

- (b) all the powers, discretions, and duties conferred or imposed by law 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 his 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.
- (3) This section applies whether the deceased died before or after the commencement of this Act.

40. Powers of personal representative as to appropriation

- (1) The personal representative may appropriate any part of the real or personal 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

Administration and Probate Act 1935
Act No. 38 of 1935

s. 40

Part IV – Administration of Assets

representative may seem 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;
- (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 a 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 for the time being may be entitled to the income;

If the person whose consent is so required as aforesaid is an infant or an involuntary patient within the meaning of the *Mental Health Act 2013*, the consent shall be given on his behalf by his

Administration and Probate Act 1935
Act No. 38 of 1935

Part IV – Administration of Assets

s. 40

parents or parent, testamentary or other guardian, or the administrator, or if, in the case of an infant, 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) where a person is, by reason of mental disorder, incapable of managing his property and affairs and no administrator has been appointed, then, if the appropriation is of an investment authorized by law or by the will, if any, of the deceased for the investment of money subject to the trust, no consent shall be required on behalf of that person; and
 - (e) 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

Administration and Probate Act 1935
Act No. 38 of 1935

s. 40

Part IV – Administration of Assets

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 may think fit, and shall for that purpose employ a 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 the appropriation, and of any other person whose consent is not required by this section.
- (6) This section does not prejudice any other power of appropriation conferred by law or by the will, if any, of the deceased, and takes 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

Administration and Probate Act 1935
Act No. 38 of 1935

Part IV – Administration of Assets

s. 40

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 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 applies whether the deceased died intestate or not, and whether before or after the commencement of this Act, and extends to property over which a testator exercises a general power of appointment, and authorizes the setting apart of a fund to answer an annuity by means of the income of that fund or otherwise.

Administration and Probate Act 1935
Act No. 38 of 1935

s. 41

Part IV – Administration of Assets

41. Power to appoint trustees of infants' property

- (1) Where an infant is absolutely entitled under the will or on the intestacy of a person dying before or after the commencement of this Act 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 infant, the personal representatives of the deceased may appoint a trust corporation or two or more individuals not exceeding 4 (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 infant, 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 1884*, 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.
- (2) 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.

Administration and Probate Act 1935
Act No. 38 of 1935

Part IV – Administration of Assets

s. 42

- (3) Where a personal representative has, before the commencement of this Act, retained or sold any such devise, legacy, residue, or share, and invested the same or the proceeds thereof in any investments in which he was authorized to invest money subject to the trust, then, subject to any order of the Court made before such commencement, he shall not be deemed to have incurred any liability on that account, or by reason of not having paid or transferred the money or property into Court.

42. Obligations of personal representative permitting possession of lands, and powers of the Court

- (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, or the appointment of a receiver thereof, or a conveyance thereof, or an assent to the vesting thereof, or to be registered as the proprietor thereof under the *Land Titles Act 1980*, 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

Administration and Probate Act 1935
Act No. 38 of 1935

s. 43

Part IV – Administration of Assets

provisions of the *Trustee Act 1898*, relating to vesting orders and to the appointment of a person to convey, shall apply in respect thereof.

- (3) This section applies whether the deceased died before or after the commencement of this Act.

43. Power to postpone distribution: Executor's year

- (1) 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.
- (2) Upon application as prescribed, a judge may, if he thinks it expedient and prudent so to do, empower the personal representative to –
- (a) postpone, for such period as the judge may think expedient, the realization of the estate of the deceased or any part thereof;
 - (b) carry on, for such period as the judge may think expedient, the business or affairs of the deceased, and for that purpose use his estate or such part thereof as the judge directs.
- (3) A personal representative acting in pursuance of leave given under this section shall not be answerable for consequent loss, except in case of breach of trust, negligence, or wilful default.

Administration and Probate Act 1935
Act No. 38 of 1935

Part V –

s. 44

PART V –

44 - 47.

Administration and Probate Act 1935
Act No. 38 of 1935

s. 47A

Part VI – Probate and Administration Granted Outside the State

**PART VI – PROBATE AND ADMINISTRATION
GRANTED OUTSIDE THE STATE**

47A. Interpretation

(1) In this Part, unless the contrary intention appears, the expression *executor or administrator therein named* includes the executor of an executor becoming, by representation, the executor of the original estate.

(2) In this Part references to a reciprocating country shall be construed as references to the United Kingdom, the Dominion of New Zealand, Fiji, or, subject to the terms of any proclamation made under section 53, to any other country declared under that section to be a country to which this Part applies; and for the purposes of this Part

country includes any territory or other jurisdiction.

48. Resealing of probate, &c., granted beyond the State in certain cases

(1) When probate of the will or letters of administration to the estate of any deceased person who has left any property, whether real or personal, within the State, has or have been at any time granted by any court of competent jurisdiction in a State or Territory of the Commonwealth or a reciprocating country –

Administration and Probate Act 1935
Act No. 38 of 1935

- (a) the executor or administrator therein named, whether he be within the jurisdiction of the Court or not, may, either personally or by some proctor on his behalf, produce the same, and in the case of an executor of an executor the probate of the will of the deceased executor, to the Registrar, and deposit a verified copy, or verified copies, thereof in his office; or
 - (b) any person duly authorized by power of attorney under the hand and seal of such executor or administrator may, either personally or by some proctor on his behalf, produce such probate or letters of administration and power of attorney, accompanied by an affidavit that such power of attorney has not been revoked, to the Registrar, and may deposit verified copies thereof in his office.
- (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 or letters of administration shall be sealed with the seal of the Court, and shall have the like force and effect and the same operation in this State as if it or they had been originally granted in this State; and 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

Administration and Probate Act 1935
Act No. 38 of 1935

s. 49

Part VI – Probate and Administration Granted Outside the State

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 had been originally granted by the Court.

49. Procedure: Caveats

- (1) Before the seal of the Court is affixed to any such probate or letters of administration, the person applying therefor, or some proctor on his behalf, shall give public notice in the *Gazette* and two newspapers published in different parts of the State of his intention to apply for such seal to be affixed, and an affidavit shall be filed stating that such advertisement was duly published at least 14 days before the making of such affidavit, and that no caveat has been lodged up to the morning of making the application.
- (2) Any person may lodge with the Registrar a caveat against the sealing of any such probate or letters of administration, 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.

50. Seal not to be affixed till duty is paid, &c.

- (1) The seal of the Court shall not be affixed to any such probate of the will or letters of administration until the prescribed statements of

Administration and Probate Act 1935
Act No. 38 of 1935

the estate of such deceased person are filed, and until all such stamp and other duties (other than probate duties), if any, have been paid as would have been payable if such probate or letters of administration had been originally granted by the Court.

- (2) No such letters of administration shall be so sealed until such affidavits have been filed and such bond has been entered into as would have been required if such letters had been originally granted by the Court.
- (3) Any such statement may be made and verified by the executor or administrator, as the case may be, or by some person on his behalf, and any such bond may be entered into by such administrator outside Tasmania before any commissioner of the Court for taking affidavits.

51. Security for payment of debts may be required

The Court or a judge, on the application of any creditor of the estate of any deceased person, may require that adequate security be given for the payment of debts due from such estate to creditors residing in this State, before the seal of the Court is affixed to the probate of the will or letters of administration of the estate of such deceased person under this Part.

Administration and Probate Act 1935
Act No. 38 of 1935

s. 52

Part VI – Probate and Administration Granted Outside the State

52. Person procuring the sealing to be deemed executor or administrator

Upon the sealing as aforesaid of any such probate or letters of administration to the estate of any deceased person, every such executor or administrator therein named, or person by such executor or administrator duly authorized as aforesaid by power of attorney, as the case may be, shall be deemed to be for every purpose the executor or administrator of the estate of such deceased person within the jurisdiction of the Court.

53. Application of this Part of Act may be extended

- (1) The Governor, on being satisfied that the laws of any country make adequate provision for the recognition in that country of probates and letters of administration, granted by the Court, may, by proclamation, declare that this Part shall, subject to any exceptions and modifications specified in the proclamation, apply to that country, and thereupon, while such proclamation is in force, this Part shall apply accordingly.
- (2)

PART VII – PROTECTION OF REPRESENTATIVES

54. Power of personal representative to advertise for claims

- (1) Any personal representative may, at any time after representation has been granted to him, advertise for claims against the estate of the testator or intestate as provided by this Act.
- (2) Every such advertisement shall contain the name of the testator or intestate and the names and additions of the executor or administrator, and shall require all claims against the estate of the testator or intestate to be sent to the Registrar in writing on or before a day to be specified in the advertisement as hereinafter provided.
- (3) All such advertisements shall be published in the *Gazette* and in one newspaper published in Hobart and one published in Launceston; if the testator or intestate resided elsewhere in this State than either of those cities, one of such advertisements may be published in a newspaper, if any, published at any place which is nearer than the nearer of the said cities to the place where he so resided.
- (4) If the personal representative has reason to believe that any person having any claim against the estate of the testator or intestate is resident in any other State or in New Zealand, he shall publish an advertisement in a newspaper published in the city or district in that State or in New Zealand, as the case may be, where he believes such person to have been resident at the

Administration and Probate Act 1935
Act No. 38 of 1935

s. 54

Part VII – Protection of Representatives

date of the death of the testator or intestate; or, if the personal representative has reason to believe that any person having any claim against the estate is resident outside Australia and New Zealand, he shall cause an advertisement to be published in the *London Gazette*.

- (5) The executor or administrator shall have regard to the business carried on by the testator or intestate in his lifetime in determining the places at which advertisements should be published.
- (6) The day specified as that on or before which claims against the estate are to be sent to the Registrar shall be the same in every such advertisement relating to such estate.
- (7) The day to be specified as aforesaid shall, if the advertisements are published –
 - (a) only in this State, be not less than one nor more than two;
 - (b) in any other State or New Zealand, be not less than two nor more than 4;
 - (c) in London, be not less than 4 nor more than 8 –

months after the last of such publications.

- (8) The personal representative shall file with the Registrar an affidavit stating what advertisements have been published as aforesaid, and the gazettes and newspapers in which the advertisements are so published, and the same when so filed shall be *prima facie* evidence of

Administration and Probate Act 1935
Act No. 38 of 1935

Part VII – Protection of Representatives

s. 55

the publication of the advertisements and of the dates of publication.

- (9) All claims against the estate of any testator or intestate which shall be sent to the Registrar as directed by any such advertisement shall be recorded by the Registrar in a book to be called “The Claims Book”, and within one week after the receipt thereof by the Registrar shall be transmitted by him to the personal representative.
- (10) Subsections (4) and (8) do not apply to an estate if the net value of the estate does not exceed the prescribed amount for the purpose of section 20A(1) of the *Public Trustee Act 1930*.

55. Power of personal representative to distribute assets

After the day specified in the advertisement for claims to be sent in, the personal representative shall be at liberty to pay and distribute the assets of the testator or intestate in his hands, in due course of administration, so far as respects the claims of which he then has notice, whether as a result of such claims being filed as provided by this Act or otherwise; and, if after satisfying, or retaining sufficient to satisfy, the claims of which he has notice as aforesaid there is any residue or surplus of assets, he may pay or distribute the same amongst the legatees or next-of-kin entitled thereto.

Administration and Probate Act 1935
Act No. 38 of 1935

s. 56

Part VII – Protection of Representatives

56. Filing of accounts

- (1) After the day specified in the advertisement for claims to be sent in, the personal representative shall file with the Registrar an account in writing, under the hand of such representative, of all the assets of the testator or intestate which have come to his hands, possession, or knowledge, or to the hands or possession of any other person for him; and of the payment and distribution, or retainer, of so much of the same assets as have been paid, distributed, or retained, and of the assets, if any, then remaining in his hands, and with the names and additions of the legatees or next-of-kin to whom any of the assets have been paid or delivered.
- (2) In such account the personal representative shall be entitled to have credit for payments made by him before the day specified in the advertisement for claims to be sent in, except as against claimants of whose claims he has notice and who are prejudiced by such payments.
- (3) Upon such account being filed, the executor or administrator shall be deemed to have duly administered the assets so accounted for, so far as the same have been paid or distributed, and shall be released from all claims and demands on him as executor or administrator in respect of the assets so paid or distributed, except at the suit or on the behalf of persons who have filed claims on or before the day specified for that purpose, or of whose claims the executor or administrator has otherwise then had notice, and except also at the suit or on behalf of persons having claims

Administration and Probate Act 1935
Act No. 38 of 1935

Part VII – Protection of Representatives

s. 57

against the estate who are resident in any other State or New Zealand, where the advertisement has not been published as aforesaid, and any such person resident elsewhere than in any other State or New Zealand where the advertisement has not been published in London as provided by section 54.

57. Rights of claimants

Save as respects such release, nothing herein contained shall prevent any legatee, next-of-kin, or other person, having any claim against the estate, from taking such proceedings as he might have taken if this Act had not been passed; and nothing herein contained shall prevent an executor or administrator from declaring the estate in his hands insolvent.

58. Proceedings under this Act to be stayed in certain cases

If any proceeding in the Court shall be instituted for the administration of the estate of a testator or intestate, the personal representative shall stay all proceedings under this Act from the time he receives notice of such proceeding; but he shall be allowed his costs of any proceedings he may have taken under this Act up to that time.

Administration and Probate Act 1935
Act No. 38 of 1935

s. 59

Part VII – Protection of Representatives

59. Release to be in force except as to errors or omissions

If after such account as aforesaid, or any account of future assets, as hereinafter mentioned, has been filed, it is made to appear that any claim entered therein was erroneously allowed or satisfied, or that any payment entered therein was erroneously made or charged, or that any part of the assets had been omitted in such account, the release to the personal representative hereinbefore mentioned shall nevertheless be and remain in force, save only as respects such error or omission.

60. Rights of claimants against legatees and next-of-kin preserved

Nothing contained in this Part shall prejudice or affect any right or remedy which a person having any claim against the estate of a testator or intestate has against any legatee or next-of-kin who has received assets of the testator or intestate; and an executor or administrator having or retaining assets as a legatee or next-of-kin shall be responsible to any such person in the same way as any other legatee or next-of-kin.

61. Further assets to be disposed of and accounted for in same manner as original assets

If, after filing such account as provided by this Part, any further assets shall come to the hands, possession, or knowledge of the personal representative, or to the hands or possession of

Administration and Probate Act 1935
Act No. 38 of 1935

Part VII – Protection of Representatives

s. 62

any other person for him, he shall be at liberty to dispose of and account for, and shall be deemed to have duly administered, and shall be released from the same, in the same manner, and to the same extent, as is hereinbefore provided with respect to the original assets; save only that persons of whose claims he has notice at the time of the payment or distribution of such future assets shall have the same rights and remedies as respects those assets which persons of whose claims the executor or administrator had notice at the time of the payment or distribution of the original assets had with respect to such original assets.

62. Interpretation

In this Part *State* means State of the Commonwealth and includes any territory of the Commonwealth, and *claim* includes any debt due by a testator or intestate, and also any matter or thing for which an executor or administrator is in that character liable or responsible at law or in equity.

Administration and Probate Act 1935
Act No. 38 of 1935

s. 62A

Part VIII – Supplemental

PART VIII – SUPPLEMENTAL

62A. Interests as joint tenants, &c., under wills of testators dying before commencement of Act

- (1) Where, under the will of a person who died before the commencement of this Act, a person (in this section called “the beneficiary”) is beneficially entitled to an estate in land as a joint tenant, or to an undivided share of an estate in land, and the legal estate in the land is not vested in the personal representative, or in a trustee of the estate, of the testator, or The Public Trustee certifies that it is doubtful whether the legal estate is so vested, the following provisions apply:
 - (a) If there is no personal representative of the testator the beneficiary may appoint a trust corporation as personal representative and on its acceptance of the appointment that trust corporation becomes the personal representative of the testator;
 - (b) The beneficiary and the personal representative of the testator (whether appointed under paragraph (a) or otherwise) may execute a vesting declaration declaring the legal estate in the land to be vested in the personal representative;
 - (c) A vesting declaration under this section has effect on its registration as mentioned in subsection (2) or subsection (3), and

Administration and Probate Act 1935
Act No. 38 of 1935

when such a declaration so has effect the legal estate to which it relates vests in the personal representative upon the trusts of the will as if it had so vested by virtue of the will.

- (2) Where the land referred to in subsection (1) is under the *Land Titles Act 1980* the Recorder shall upon application of the personal representative and on being satisfied that the beneficiary is entitled to the share or interest he claims register the personal representative as proprietor of the entirety of the estate in that land of the deceased as if he had been entitled to be so registered under section 98 of that Act.
- (3) If the land referred to in subsection (1) is not under the *Land Titles Act 1980* any instrument of appointment or declaration under this section shall be deemed to be an instrument within the meaning of the *Registration of Deeds Act 1935* and may be registered accordingly.
- (4) A trust corporation is under no obligation to accept an appointment under subsection (1)(a).

63.

64. Power of Court to make orders for due administration of estate of deceased person

The Court may make all such orders as may be necessary for the due administration of the real and personal estate and effects of any deceased

Administration and Probate Act 1935
Act No. 38 of 1935

s. 65

Part VIII – Supplemental

person, and also for the payment out of such real and personal estate and effects to the persons administering the same of any costs, charges, and expenses which may have been lawfully incurred by them, and also such commission or percentage, not exceeding 5 per cent, for their pains and trouble therein as shall be just and reasonable; and if any executor or administrator shall neglect to pass his accounts, or dispose of the real and personal estate and effects of any deceased person, at the time and in the manner directed, it shall be lawful for the Court, on the application of any person aggrieved by such neglect, to order and direct that such executor or administrator shall pay interest at a rate not exceeding 8 per cent per annum for such sums of money as from time to time shall have been in his hands, and the costs occasioned by the application.

65. Concealment, &c., of will actionable

If any person retains or conceals, or is privy to the retention or concealment of, a will with intent to defraud any person, the person defrauded and any person claiming under him, shall have an action for damages against such first-mentioned person for any loss sustained by reason of such retention or concealment.

66. General saving

- (1) Nothing in this Act shall derogate from the powers of the Court which exist independently of this Act.

Administration and Probate Act 1935
Act No. 38 of 1935

Part VIII – Supplemental

s. 67

- (2) Nothing in this Act shall affect the operation of the *Deceased Persons' Estates Duties Act 1931*.
- (3) Save as otherwise expressly provided, this Act does not apply in any case where the death occurred before the commencement of this Act, but except as aforesaid the provisions of Division I of Part III shall apply whether the death occurred before or after such commencement.

67. Transitory provisions: Rules of Court

- (1) The provisions set forth in Schedule III shall, until otherwise prescribed as hereinafter provided, apply to proceedings in respect of the estates of persons dying before or after the commencement of this Act.
- (2) The judges, in the exercise of their powers under the *Supreme Court Civil Procedure Act 1932*, may make Rules of Court for the purposes of this Act.
- (3) Any such rules may modify, alter, or repeal all or any of the provisions in Schedule III.

68. Savings and transitional provisions

The *Administration and Probate Act 1978* does not affect the continued operation of a proclamation made under section 53 before the commencement of that Act and any such proclamation continues to have effect as if it

Administration and Probate Act 1935
Act No. 38 of 1935

s. 68

Part VIII – Supplemental

were made under that section as amended by that Act.

Administration and Probate Act 1935
Act No. 38 of 1935

sch. I

SCHEDULE I

Section 2(1)

Regal year and number	Title of Act	Extent of repeal
4 Wm. IV No. 12	An Act for extending to Van Diemen's Land certain Statutes passed in England in the Ninth year of His late and the First year of His present Majesty for the Amendment of the Law	Sections 3 and 4
18 Vict. No. 9	<i>Common Law Procedure Act 1854</i>	Sections 137 to 140
21 Vict. No. 4	An Act for the Relief of Executors and Administrators	The whole Act
33 Vict. No. 13	<i>Escheat Act 1869</i>	The whole Act
38 Vict. No. 1	<i>Deceased Persons' Estates Act 1874</i>	The whole Act
45 Vict. No. 12	<i>Deceased Persons' Estates Act 1881</i>	The whole Act
49 Vict. No. 20	<i>Deceased Persons' Estates Act 1885</i>	The whole Act
57 Vict. No. 4	<i>Probate (Foreign) Act 1893</i>	The whole Act
57 Vict. No. 14	<i>Probate Act 1893</i>	The whole Act

Administration and Probate Act 1935
Act No. 38 of 1935

sch. I

Regal year and number	Title of Act	Extent of repeal
62 Vict. No. 35	<i>Executors and Administrators Relief Act 1898</i>	The whole Act
6 Edw. VII No. 17	<i>Distribution of Intestates' Property Act 1906</i>	The whole Act
4 Geo. V No. 7	<i>Deceased Persons' Estates Act 1913</i>	The whole Act
23 Geo. V No. 58	<i>Supreme Court Civil Procedure Act 1932</i>	Subsection (1) of section 11

SCHEDULE II

Section 34(1), (3)

**PART I – RULES AS TO PAYMENT OF DEBTS AND
LIABILITIES WHERE THE ESTATE IS INSOLVENT**

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 are in force at the death of the deceased person under the law of 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 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

Administration and Probate Act 1935
Act No. 38 of 1935

sch. II

sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid.

3. Property of the deceased specifically appropriated or devised or bequeathed (either by a specific or general description) for the payment of debts.
4. 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.
5. The fund, if any, retained to meet pecuniary legacies.
6. Property specifically devised or bequeathed, ratably according to value.
7. Property appointed by will under a general power, ratably according to value.
8. The order of application may be varied by the will of the deceased.

Administration and Probate Act 1935
Act No. 38 of 1935

sch. III

SCHEDULE III –

Administration and Probate Act 1935
Act No. 38 of 1935

sch. IV

NOTES

The foregoing text of the *Administration and Probate Act 1935* comprises those instruments as indicated in the following table. Any reprint changes made under any Act, in force before the commencement of the *Legislation Publication Act 1996*, authorising the reprint of Acts and statutory rules or permitted under the *Legislation Publication Act 1996* and made before 8 November 2017 are not specifically referred to in the following table of amendments.

Act	Number and year	Date of commencement
<i>Statute Law Revision Act 1934 and proclamations thereunder</i>	No. 78 of 1934	13.12.1934
<i>Administration and Probate Act 1935</i>	No. 38 of 1935	18.10.1935
<i>Administration and Probate Act (No. 2) 1935</i>	No. 66 of 1935	20.12.1935
<i>Administration and Probate Act 1941</i>	No. 7 of 1941	17.6.1941
<i>Administration and Probate Act 1943</i>	No. 33 of 1943	19.10.1943
<i>Administration and Probate Act 1947</i>	No. 41 of 1947	11.11.1947
<i>Administration and Probate Act 1951</i>	No. 50 of 1951	12.10.1951
<i>Administration and Probate Act 1958</i>	No. 72 of 1958	19.12.1958
<i>Mental Health Act 1963</i>	No. 63 of 1963	1.12.1964
<i>Decimal Currency Act 1965</i>	No. 55 of 1965	14.2.1966
<i>Probate Rules 1966</i>	S.R. 1966, No. 211	7.12.1966
<i>Administration and Probate Act 1967</i>	No. 47 of 1967	24.11.1967
<i>Age of Majority Act 1973</i>	No. 21 of 1973	1.8.1973
<i>Administration and Probate Act 1973</i>	No. 116 of 1973	31.3.1974
<i>Metric Conversion Act 1973</i>	No. 75 of 1973	1.4.1975
<i>Statute Law Revision Order 1977</i>	S.R. 1977, No. 100	25.5.1977
<i>Administration and Probate Act 1977</i>	No. 54 of 1977	13.8.1977
<i>Administration and Probate Act 1978</i>	No. 4 of 1978	18.5.1978
<i>Land Titles Act 1980</i>	No. 19 of 1980	1.10.1981
<i>Administration and Probate Amendment Act 1983</i>	No. 26 of 1983	13.7.1983
<i>Statute Law Revision Act 1994</i>	No. 68 of 1994	25.11.1994
<i>Government Business Enterprises (Consequential Amendments) Act 1995</i>	No. 20 of 1995	1.7.1995
<i>Mental Health (Consequential Amendments) Act 1996</i>	No. 32 of 1996	1.11.1999
<i>Administration and Probate Amendment Act 1999</i>	No. 99 of 1999	1.6.2000
<i>Duties Act 2001</i>	No. 15 of 2001	1.7.2001

Administration and Probate Act 1935
Act No. 38 of 1935

sch. IV

Act	Number and year	Date of commencement
<i>Relationships (Consequential Amendments) Act 2003</i>	No. 45 of 2003	1.1.2004 On the day on which the Relationships Act 2003 commenced
<i>Administration and Probate Amendment Act 2005</i>	No. 76 of 2005	15.12.2005
<i>Justice and Related Legislation (Further Miscellaneous Amendments) Act 2006</i>	No. 43 of 2006	18.12.2006
<i>Justice and Related Legislation (Miscellaneous Amendments) Act 2008</i>	No. 18 of 2008	26.6.2008
<i>Justice and Related Legislation (Miscellaneous Amendments) Act 2009</i>	No. 23 of 2009	16.6.2009
<i>Intestacy Act 2010</i>	No. 19 of 2010	1.1.2011
<i>Trustee Companies Amendment Act 2010</i>	No. 49 of 2010	1.1.2011
<i>Mental Health (Transitional and Consequential Provisions) Act 2013</i>	No. 69 of 2013	17.2.2014
<i>Justice and Related Legislation (Miscellaneous Amendments) Act 2015</i>	No. 38 of 2015	13.10.2015
<i>Probate Rules 2017</i>	S.R. 2017, No. 69	8.11.2017

TABLE OF AMENDMENTS

Provision affected	How affected
Section 2	Amended by S.R. 1977, No. 100
Section 3	Amended by No. 4 of 1978, s. 2, No. 20 of 1995, s. 5 and Sched. 3 and No. 18 of 2008, s. 4
Section 10	Amended by No. 4 of 1978, s. 3
Section 12	Amended by 25 Geo. V No. 78
Section 13	Amended by No. 50 of 1951, s. 2
Section 13A	Inserted by No. 38 of 2015, s. 6
Section 14	Amended by No. 38 of 2015, s. 7
Section 16	Amended by No. 19 of 1980, s. 171 and Sched. 1
Section 23	Amended by No. 21 of 1973, s. 5 and Sched. 1
Section 25	Amended by No. 20 of 1995, s. 5 and Sched. 3, No. 49 of 2010, s. 27 Subsection (8) inserted by No. 49 of 2010, s. 27 Repealed by No. 38 of 2015, s. 8
Section 27	Substituted by 7 Geo. VI No. 33, s. 2 Amended by S.R. 1977, No. 100, No. 26 of 1983, s. 4, No.

Administration and Probate Act 1935
Act No. 38 of 1935

sch. IV

Provision affected	How affected
	68 of 1994, s. 3 and Sched. 1, No. 76 of 2005, s. 4 and No. 43 of 2006, s. 4
Section 34	Amended by S.R. 1977, No. 100
Section 36	Amended by 26 Geo. V No. 66, s. 2, S.R. 1977, No. 100, No. 4 of 1978, s. 4, No. 19 of 1980, s. 171 and Sched. 1 and No. 15 of 2001, Sched. 2
Section 39	Amended by 25 Geo. V No. 78
Section 40	Amended by No. 63 of 1963, s. 2 and Sched. II, No. 32 of 1996, Sched. 1, No. 18 of 2008, s. 5, No. 69 of 2013, Sched. 1 and No. 38 of 2015, s. 9
Section 42	Amended by No. 19 of 1980, s. 171 and Sched. 1
Section 43	Amended by 26 Geo. V No. 66, s. 2
Part V	Repealed by No. 19 of 2010, s. 48
Section 44	Amended by 26 Geo. V No. 66, s. 2, No. 72 of 1958, s. 2, 25. Geo. V No. 78, No. 55 of 1965, s. 5, No. 55 of 1965, s. 3 and s. 5 and Sched. 1, No. 47 of 1967, s. 2, No. 54 of 1977, s. 2, S.R. 1977, No. 100 Subsection (3A) inserted by No. 99 of 1999, s. 4 Subsection (3B) inserted by No. 99 of 1999, s. 4 Amended by No. 99 of 1999, s. 4 Subsection (8) substituted by No. 99 of 1999, s. 4 Subsection (9) inserted by No. 99 of 1999, s. 4 Amended by No. 45 of 2003, Sched. 1 Repealed by No. 19 of 2010, s. 48
Section 45	Repealed by No. 19 of 2010, s. 48
Section 46	Amended by 26 Geo. V No. 66, s. 2, 25 Geo. V No. 78, No. 21 of 1973, s. 5 and Sched. 1 Repealed by No. 19 of 2010, s. 48
Section 47	Repealed by No. 19 of 2010, s. 48
Part VI, Heading	Amended by No. 4 of 1978, s. 5
Section 47A	Inserted by No. 50 of 1951, s. 3 Amended by No. 4 of 1978, s. 6
Section 48	Amended by No. 50 of 1951, s. 4 and No. 4 of 1978, s. 7
Section 50	Amended by No. 116 of 1973, s. 2
Section 53	Amended by 5 Geo. VI No. 7, s. 2 and No. 4 of 1978, s. 8
Section 54	Amended by No. 23 of 2009, s. 4
Section 58	Amended by 25 Geo. V No. 78
Section 62A	Inserted by No. 4 of 1978, s. 9 Amended by No. 19 of 1980, s. 171 and Sched. 1 and No. 20 of 1995, s. 5 and Sched. 3
Section 63	Subsection (3) omitted by 11 Geo. VI No. 41, s. 2 Repealed by No. 19 of 1980, s. 171 and Sched. 1
Section 64	Amended by No. 55 of 1965, s. 3 and Sched. 1
Section 67	Amended by S.R. 1977, No. 100
Schedule I	Amended by 26 Geo. V No. 66, s. 2, S.R. 1977, No. 100
Schedule II	Amended by S.R. 1977, No. 100
Schedule III	Amended by 25 Geo. V No. 78, No. 55 of 1965, s. 5 Clause 5 repealed by S.R. 1966 No. 211

Administration and Probate Act 1935
Act No. 38 of 1935

sch. IV

Provision affected	How affected
Schedule IV	Amended by S.R. 1977, No. 100 Repealed by S.R. 2017, No. 69 Amended by 26 Geo. V No. 66, s. 2, No. 55 of 1965, s. 5, No. 75 of 1973, s. 2 and Sched. 1, S.R. 1977, No. 100, No. 4 of 1978, s. 10 Form 2 omitted by No. 4 of 1978, s. 10 Amended by No. 19 of 1980, s. 171 and Sched. 1