

MARKS & SANDS

L a w y e r s

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The Wills Act 1970 was amended by the Wills Amendment Act 2007. The amendments came into effect on 9 February 2008.

One major change in the Act was the insertion of section 14A which states that a Will shall be revoked upon the ending of a Testator's marriage unless, pursuant to subsection 2 of that section, a contrary intention appears in the Will or there is other evidence establishing that intention.

A marriage is taken to have ended, according to section 14A(3):

- (a) when a divorce order terminating the marriage takes effect under the Family Law Act;
- (b) on the granting of a decree of nullity in respect of the marriage by the Family Court of Australia or the Family Court of Western Australia; or
- (c) on the dissolution or annulment of the marriage in accordance with the law of a place outside Australia, but only if that dissolution or annulment is recognised in Australia under the Family Law Act.

It is not only divorce that revokes a Will, but "the ending of a marriage".

Section 14A(2) will only revoke a Will where the relevant marriage ended on or after 9 February 2008 so the Will of anyone whose marriage ended, as defined in section 14A(3) before that date will remain unrevoked.

Another major change is the introduction of section 24, which allows the Supreme Court to authorise the making, alteration and revocation of Wills for persons who lack testamentary capacity as long as that person is living and is over the age of eighteen years.

The Applicant applying to the Supreme Court must produce the information listed in section 41 of the Wills Act, which includes a written statement of the nature of the application and the reasons for it (s 40(a)), an estimate of the nature and value of the assets and liabilities of the person concerned (s 40(b)), any evidence available to the applicant as to the wishes of the person concerned (s 40(d)) and evidence as to the likelihood of the person concerned having testamentary capacity at a later time (s 40(e)).

The Court is able to refuse an application if it is not satisfied of the factors in section 42(1) of the Wills Act (including that the person concerned is incapable of making a valid Will or revoking that person's Will). The discretion of the Court remains broad under section 42(2) which states that the Court may refuse an application for any reason not listed in section 42(1).