

**THIRD SUPPLEMENT TO THE GIBRALTAR
GAZETTE**

No. 3,712 of 14th May, 2009

B. 14/09

WILLS ACT 2009

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BILL

FOR

AN ACT to revise and consolidate the laws relating to wills in Gibraltar.

ENACTED by the Legislature of Gibraltar.

Title and commencement.

1. This Act may be cited as the Wills Act 2009 and comes into operation on the day of publication.

Interpretation.

2.(1) In this Act, unless the context otherwise requires—

“child” means a person who is under the age of eighteen;

“internal law”, in relation to any territory or State, means the law which would apply in a case where no question of the law in force in any other territory or State arose;

“State” means a territory or group of territories having its own law of nationality ;

“will” includes any testamentary instrument or act, and “testator” shall be construed accordingly.

(2) Where under this Act the internal law in force in any territory or State is to be applied in the case of a will, but there are in force in that territory or State two or more systems of internal law relating to the formal validity of wills, the system to be applied shall be ascertained as follow—

- (a) if there is in force throughout the territory or State a rule indicating which of those systems can properly be applied in, the case in question, that rule shall be followed; or
- (b) if there is no such rule, the system shall be that with which the testator was most closely connected at the relevant time, and for this purpose the relevant time is the time of the testator's death where the matter is to be determined by reference to circumstances prevailing at his death, and the time of execution of the will in any other case.

(3) In determining for the purposes of this Act whether or not the execution of a will conformed to a particular law, regard shall be had to the formal requirements of that law at the time of execution, but this shall not prevent account being taken of an alteration of law affecting wills executed at that time if the alteration, enables the will to be treated as properly executed.

All property may be disposed of by will.

3.(1) It shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in the manner required by this Act, all real estate and all personal estate which—

- (a) he shall be entitled to, either at law or in equity, at the time of his death; and
- (b) if not so devised, bequeathed, or disposed of, would devolve upon his executor or administrator.

(2) The power given by the will shall extend to all contingent, executory or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled to it under the instrument by which the same respectively were created, or under any disposition thereof by deed or will.

(3) The power referred to in subsection (2) shall also extend to—

- (a) all rights of entry for conditions broken, and other rights of entry; and

- (b) such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death,

notwithstanding that he may become entitled to the same subsequently to the execution of his will.

No will of a person under age valid.

4. No will made by any person under the age of eighteen years shall be valid.

General rule as to formal validity of wills.

5. A will shall be treated as properly executed if its execution conformed to the internal law in force in the territory or State where it was executed, or in the territory or State where, at the time of its execution or of the testator's death, he was domiciled or had his habitual residence, or in a state of which, at either of those times, he was a national.

Additional rules as to formal validity of wills.

6.(1) Without prejudice to section 5, the following shall be treated as properly executed—

- (a) a will executed on board a vessel or aircraft of any description, if the execution of the will conformed to the internal law in the territory or State with which, having regard to its registration, if any, and other relevant circumstances, the vessel or aircraft may be taken to have been most closely connected;
- (b) a will so far as it disposes of immovable property, if its execution conformed to the internal law in force in the territory or State where the property was situated;
- (c) a will so far as it revokes a will which under this Act would be treated as properly executed or revokes a provision which under this Act would be treated as comprised in a properly executed will, if the execution of the later will conformed to any law by reference to which the revoked will or provision would be so treated; and

- (d) a will so far as it exercises a power of appointment, if the execution of the will conformed to the law governing the essential validity of the power.

(2) A will so far as it exercises a power of appointment shall not be treated as improperly executed by reason only that its execution was not in accordance with any formal requirements contained in the instrument creating the power.

Certain requirements to be treated as formal.

7. Where (whether in pursuance of this Act or not) a law in force outside Gibraltar falls to be applied in relation to a will, any requirement of that law whereby special formalities are to be observed by testators answering a particular description, or witnesses to the execution of a will are to possess certain qualifications, shall be treated, notwithstanding any rule of that law to the contrary, as a formal requirement only.

Construction of wills.

8. The construction of a will shall not be altered by reason of any change in the testator's domicile after the execution of the will.

Signing and attestation of wills.

9. No will shall be valid unless—

- (a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction;
- (b) it appears that the testator intended by his signature to give effect to the will;
- (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
- (d) each witness either—
 - (i) attests and signs the will; or

- (ii) acknowledges his signature, in the presence of the testator (but not necessarily in the presence of any other witness),

but no form of attestation shall be necessary.

Appointments by will.

10.(1) No appointment made by will, in exercise of any power, shall be valid unless the will is executed in the manner required by this Act.

(2) The execution and attestation of every will executed in the manner required by this Act shall be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

Soldiers and mariners wills excepted.

11.(1) Any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the coming into operation of this Act even if he is under the age of eighteen years.

(2) For the purposes of subsection (1), the expression “soldier” includes a member of the Royal Air Force.

(3) Subsection (1) shall extend to any member of Her Majesty’s naval or marine forces not only when he is at sea but also when he is so circumstanced that if he were a soldier he would be in actual military service within the meaning of that subsection.

(4) A testamentary disposition of any real estate in Gibraltar made by a person to whom subsection (1) applies, shall, notwithstanding that—

- (a) the person making the disposition was at the time of making it under eighteen years of age; or
- (b) the disposition has not been made in such manner or form as was at that date required by law,

be valid in any case where the person making the disposition was of such age and the disposition has been made in such manner and form that if the disposition had been a disposition of personal estate made by such a person domiciled in Gibraltar it would have been valid.

Publication of will not be requisite.

12. Every will executed in the manner required by this Act shall be valid without any other publication of the will.

Incompetency of attesting witness.

13. A will shall not be invalid for the incompetency of the person who attested the execution of the will to be admitted as a witness to prove the execution of that will—

- (a) at the time of the execution of that will; or
- (b) at any time afterwards.

Gifts to an attesting witness is void.

14.(1) No beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than charges and directions for the payment of any debt or debts) is valid if that is given or made to any person who attests the execution of any will or to the wife or husband of that person or any person claiming under such person or wife or husband.

(2) The person referred to in subsection (1) shall be admitted as a witness to prove the execution of the will, or to prove the validity or invalidity of that will, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in the will.

Creditor attesting to be admitted as a witness.

15. Where any real or personal estate is charged with any debt or debts by any will and any creditor, or the wife or husband of any creditor whose debt is so charged, attests the execution of that will, that creditor, notwithstanding such charge, shall be admitted as a witness to prove the execution of the will, or to prove the validity or invalidity of that will.

Executor shall be admitted as a witness.

16. No person shall, on account of his being an executor of a will, be incompetent to be admitted as a witness to prove—

- (a) the execution of the will; or
- (b) the validity or invalidity of that will.

Revocation of wills by marriage, except in certain cases.

17.(1) Subject to subsections (2) to (3), a will shall be revoked by the testator's marriage.

(2) A disposition in a will in exercise of a power of appointment shall take effect notwithstanding the testator's subsequent marriage unless the property so appointed would in default of appointment pass to his personal representatives.

(3) Where it appears from a will that at the time it was made the testator was expecting to be married to a particular person and that he intended that—

- (a) the will should not be revoked by the marriage, the will shall not be revoked by his marriage to that person; and
- (b) a disposition in the will should not be revoked by his marriage to that person—
 - (i) that disposition shall take effect notwithstanding the marriage; and
 - (ii) any other disposition in the will shall take effect also, unless it appears from the will that the testator intended the disposition to be revoked by the marriage.

Effect of dissolution or annulment of marriage on wills.

18.(1) Where, after a testator has made a will, a decree of a court dissolves or annuls his marriage or declares it void—

(a) the will shall take effect as if any appointment of the former spouse as an executor or as the executor or trustee of the will were omitted;

(b) any devise or bequest to the former spouse shall lapse,

except in so far as a contrary intention appears by the will.

(2) Where—

(a) by the terms of a will an interest in remainder is subject to a life interest; and

(b) the life interest lapses by virtue of subsection (1)(b),

the interest in the remainder shall be treated as if it had not been subject to the life interest and, if it was contingent upon the termination of the life interest, as if it had not been so contingent.

Revocation of will.

19.(1) No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

(2) No will or codicil, or any part thereof, shall be revoked otherwise than—

(a) as provided for in this Act;

(b) by another will or codicil executed in the manner required by this Act;

(c) by some writing declaring an intention to revoke the will and executed in the manner in which a will is required to be executed under this Act;

(d) by the burning, tearing, or otherwise destroying the will by the testator, or by some person in his presence and by his direction, with the intention of revoking the will.

Alteration in a will after execution.

20.(1) No obliteration, interlineations, or other alteration made in any will after the execution of the will shall be valid or have any effect unless—

- (a) the words or effect of the will before such alteration is apparent; and
- (b) such alteration is executed in like manner as is required by this Act for the execution of the will.

(2) The will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end of some other part of the will.

Revival of a revoked will.

21.(1) No will or codicil, or any part of such will or codicil, that is revoked in any manner shall be revived otherwise than—

- (a) by the re-execution of such will or codicil; or
- (b) by a codicil executed in the manner required by this Act and showing an intention to revive the will.

(2) When any will or codicil that is partly revoked, and afterwards wholly revoked, is revived, that revival shall not extend to so much of it as shall have been revoked before the revocation of the whole of it, unless an intention to the contrary is shown.

Subsequent conveyance or other act not to prevent operation of will.

22. Except an act by which a will may be revoked under this Act, no other act or conveyance done or made subsequently to the execution of a will of or relating to any real or personal estate comprised in the will, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

Wills shall be construed, as to the estate comprised, to speak from the death of the testator.

23.(1) Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will.

(2) Subsection (1) shall apply to the will of a married woman made during covertures whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband.

Residuary devises shall include estates comprised in lapsed and void devises.

24. Unless a contrary intention appears by the will, such real estate or interest as is comprised or intended to be comprised in any devise contained in the will, that fails or is void by reason of—

- (a) the death of the devisee in the lifetime of the testator; or
- (b) the devise being contrary to law or otherwise incapable of taking effect,

shall be included in the residuary devise, if any, contained in the will.

General devise of any testator's lands.

25. Unless a contrary intention appears by the will, the following shall be construed to include the leasehold estates of the testator and his freehold estates, if any—

- (a) a devise of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner; and
- (b) any other general devise which would describe a leasehold estate if the testator had no freehold estate which could be described by it.

General gift of realty or personalty includes property over which the testator has a general power of appointment.

26. Unless a contrary intention appears by the will—

- (a) a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner shall—
 - (i) be construed to include any real estate, or any real estate to which such description extends, which he may have power to appoint in any manner he thinks proper; and
 - (ii) operate as an execution of such power; and
- (b) a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner shall—
 - (i) be construed to include any personal estate, or any personal estate to which such description extends, which he may have power to appoint in any manner he thinks proper; and
 - (ii) operate as an execution of such power.

A devise of real estate without any words of limitation shall pass the fee.

27. Unless a contrary intention appears by the will, where any real estate devised to any person without any words of limitation that devise shall be construed to pass the fee simple.

Want or failure of issue in lifetime.

28.(1) Unless a contrary intention appears by the will, in any devise or bequest of real or personal estate the words “die without issue” or “die without leaving issue,” or “have no issue,” or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, shall be construed to mean—

- (a) a want or failure of issue in the lifetime or at the time of the death of that person; and
- (b) not an indefinite failure of his issue.

(2) Where the person has a prior estate tail, or preceding gift having the implications arising from the use of such words (“die without issue” or “die without leaving issue,” or “have no issue”) that imports either a want or failure of issue of any person in his lifetime or at the time of his death, a limitation of an estate tail to that person or issue, shall be construed in accordance with subsection (1).

(3) This section shall not extend to cases where such words (“die without issue” or “die without leaving issue,” or “have no issue”) import if no issue described in a preceding gift is born, or if there is no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

Devise of realty to trustees or executors.

29. Where any real estate (other than a presentation to a church) is devised to any trustee or executor, that devise shall be construed to pass the fee simple, unless—

- (a) a definite term of years, absolute or determinable; or
- (b) an estate of freehold,

is thereby given to him expressly or by implication.

Trustees under an unlimited devise.

30.(1) Where any real estate is devised to a trustee without any express limitation of the estate to be taken by that trustee—

- (a) the beneficial interest in that real estate; and
- (b) the beneficial interest in the surplus rents and profits of that real estate,

shall not be given to any person for life.

(2) Notwithstanding subsection (1) the purposes of the trust may continue beyond the life of the person and the devise referred to in that subsection shall be construed to vest in the trustee the fee simple, and not an estate determinable when the purposes of the trust is satisfied.

Devises of estates tail shall not lapse where inheritable issue survives.

31. Unless a contrary intention appears by the will, where a person, to whom any real estate is devised for an estate tail or an estate in quasi entail, dies in the lifetime of the testator leaving any issue who—

- (a) inherits under such entail; and
- (b) lives at the time of the death of the testator,

that devise shall not lapse, but shall take effect as if the death of that person had happened immediately after the death of the testator.

Gifts to children or other issue who leave issue living at the testator's death shall not lapse.

32.(1) Where—

- (a) a will contains a devise or bequest to a child or remoter descendant of the testator;
- (b) the intended beneficiary dies before the testator, leaving issue; and
- (c) the issue of the intended beneficiary are living at the testator's death,

then, unless a contrary intention appears by the will, the devise or bequest shall take effect as a devise or bequest to the issue living at the testator's death.

(2) Where—

- (a) a will contains a devise or bequest to a class of person consisting of children or remoter descendants of the testator;

- (b) a member of the class dies before the testator, leaving any issue; and
- (c) the issue of that member is living at the testator's death,

then, unless a contrary intention appears by the will, the devise or bequest shall take effect as if the class included the issue of its deceased member living at the testator's death.

(3) The issues shall take under this section through all degrees, according to their stock, in equal shares if more than one, any gift or share which their parent would have taken and so that no issue shall take whose parent is living at the testator's death and so capable of taking.

(4) For the purposes of this section—

- (a) the illegitimacy of any person is to be disregarded; and
- (b) a person conceived before the testator's death and born living thereafter is to be taken to have been living at the testator's death.

Power to appoint testamentary guardians.

33. Where any person dies after having made a will which is, or which, if it had been a disposition of property, would have been rendered valid by section 11, any appointment contained in that will of any person as guardian of the child of the testator shall be of full force and effect.

Power of revocation.

34. A will which has been made by a person under the age of eighteen years and which is valid by virtue of section 11, may be revoked by that person notwithstanding that he is still under that age, whether or not the circumstances are then such that he would be entitled to make a valid will under those provisions.

Amendments to the English Law (Application) Act.

35. The English Law (Application) Act is amended in PART I of the Schedule by deleting item No. 50 and all entries against it.

Repeal.

36. The Wills Act is repealed.

EXPLANATORY MEMORANDUM

This Bill is a revised and consolidated version of the Wills Act of Gibraltar and sections 1, 3-11 and 13-33 of the Wills Act 1837 of the UK as applied by virtue of item No. 50 of the Schedule to the English Law (Application) Act 1962. The new Bill takes on board almost every provisions of the Wills Act of Gibraltar.

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