THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 2

The Protection to be given to the Family and Dependants of a Deceased Person

REPORT

AUGUST 1970

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DRAFT FAMILY AND DEPENDANTS PROTECTION BILL (10 Pages)

REPORT ON
THE PROTECTION TO BE GIVEN TO THE
FAMILY AND DEPENDANTS OF A DECEASED PERSON

To: The HON. ARTHUR F. GRIFFITH, M.L.C.
MINISTER FOR JUSTICE

TERMS OF REFERENCE

1. By the terms of reference for Project No.2 of its first programme, the Committee was asked -

"to report on the desirability of amending or enlarging the provisions of the *Testator's Family Maintenance Act 1939-1962*, so as to -

(a) extend the right of application to new categories of persons;
(b) permit applications for provision from estates in respect of which there is a total or partial intestacy;
(c) define more accurately the circumstances in which a distribution of the assets of an estate may be disturbed in order to sustain an order made under the said Act;
(d) permit a variation increasing the provision made under an existing order."

THE PRESENT LAW IN WESTERN AUSTRALIA

2. The law on the subject matter of this report is to be found mainly in the *Testator's Family Maintenance Act 1939 - 1962*. Ancillary provisions are contained in s.65 of the *Trustees Act 1962-1968*.

3. Class of Claimants: The *Testator's Family Maintenance Act* provides that where a widow, widower or child of a testator has been left without "adequate provision for [his or her] proper maintenance, education, or advancement in life", the court may, at its discretion, order that such provision as it thinks fit shall be made out of the estate of the testator.

4. The Act does not confer any right to share in an estate; it simply confers a right to make an application to the court. The court has a wide discretion to grant or to refuse an order. An order may be refused if the applicant's "character or conduct is such as in the opinion of the Court to disentitle him to the benefit of an order, or on any other ground which the Court thinks sufficient" [s.3 (3)].

5. No Application to Intestacy: There is no provision under the present Act for applications where there is an intestacy.

6. Protection Afforded Prior Distributions: There are two sets of circumstances in which protection is given to distributions previously made. In the first, the protection is complete; in the second, it may be only partial -

(a) Under s.9A of the *Testator's Family Maintenance Act*, the court cannot make an order that would disturb a prior distribution if the distribution was properly made by the executor for the purpose of providing for the maintenance, support or education of any person who was totally or partially dependent on the testator immediately before the death of the testator, whether or not the executor had notice at the time of the distribution of an application, or intention to make an application, that would affect the estate.

(b) Distributions not protected under (a) above may still be protected under s.65(8) of the *Trustees Act*. In cases where property has been distributed to a person who received it in good faith and has altered his position in reliance on his having an indefeasible interest, the court will not disturb that distribution or will disturb it only to the extent that it considers it is not inequitable to do so.

Variation of Order:

7. Section 5(4) of the *Testator's Family Maintenance Act* gives the executor or any person beneficially entitled to or interested in any part of the estate the right to apply to the court "at any time and from time to time … to rescind or alter any order." This permits the court to order only a decrease in an original award and does not extend to authorising an increase: *Jenkinson v. Duffield* (1952), 54 W.A.L.R. 22.

8. Under s.8 of the Act, where periodic payments have been ordered or where a lump sum has been ordered to be invested for the benefit of any person, the court has "... power to inquire whether at any subsequent date the party benefited by the order has otherwise become possessed of or entitled to provision for his proper maintenance, education, and advancement and into the adequacy of such provision, and [to] discharge, vary, or suspend the order, or make such other order as is just in the circumstances". This provision too empowers the court to order only a reduction*: Collins v. Public Trustee* [1929] N.Z.L.R. 420.

9. Thus, unless the case falls under s.91 of the *Trustees Act 1962-1968* (see paragraph 44 and Appendix below), a person in whose favour an order is made cannot obtain an increase of the order, even though his circumstances have changed and increased provision would cause no hardship to others.

THE MOVEMENT FOR REFORM IN WESTERN AUSTRALIA

10. By letter to you dated 17th May, 1965, (C.L.D. file 954/65), the President of the Law Society of Western Australia proposed that the *Testator's Family Maintenance Act* be amended to increase the classes of claimants to include the mother or father of the deceased, the children of a deceased child of the deceased, and by extending the scope of the Act to include intestate and partially intestate estates.

11. There was also an indication in that letter that the Society was concerned as to what assets could be taken into account by the court in making an order. However, the Society did not make a specific recommendation.

12. In 1966, at a meeting of the Standing Committee of Commonwealth and State Attorneys-General, the question of giving courts power to permit a variation increasing the provision made under an existing order was raised and discussed. Views for and against the proposal were expressed, but the discussion was inconclusive.

THE LAW IN OTHER JURISDICTIONS

The United Kingdom, Australia and New Zealand:

13. The Committee considered the following statutory provisions -

The United Kingdom:	The *Inheritance (Family Provision) Act 1938*, as amended.
New Zealand:	The *Family Protection Act 1955* and the *Status of Children Act 1969*.
New South Wales:	The *Testator's Family Maintenance and Guardianship of Infants Act 1916-1954*.
Victoria	The *Administration and Probate Act 1958*.
Queensland:	The *Succession Acts, 1867 to 1968*.
South Australia:	The *Testator's Family Maintenance Act 1918-1943*.
Tasmania:	The *Testator's Family Maintenance Act 1912*, as amended.
The Australian Capital Territory:	The *Family Provision Ordinance 1969*.
The Northern Territory:	The *Testator's Family Maintenance Ordinance 1929-1931*.

Relevant details of these enactments are contained in the Committee's working paper published on 18th December 1968. A copy of the paper is attached. This report will draw attention only to their most important aspects.

14. Classes of Claimants: In all of these jurisdictions, just as in Western Australia, spouses and legitimate children may apply. However, as indicated in the next paragraph, in some cases applications may be made by others.

15. (i) **Grandchildren:** In New Zealand, New South Wales and the Australian Capital Territory orders may be made in favour of grandchildren. In New South Wales, however, the only grandchildren eligible are those who are the offspring of a predeceased child of an intestate (no application may be made by a grandchild where the deceased left a will) .The A.C.T. provision is somewhat wider: eligible grandchildren are either those whose parents predeceased the

deceased, or those who were not maintained by their parents immediately before the death of the deceased.

(ii) **Parents:** Orders in favour of parents may be made in New Zealand, Tasmania and the Australian Capital Territory where there is no surviving spouse or child. However, in New Zealand and the Australian Capital Territory that restriction does not apply if the parent was maintained by the deceased immediately before his death.

(iii) **Illegitimates**: In New Zealand and the Australian Capital Territory orders can be made in favour of children, grandchildren and parents where the relationship is illegitimate. In the United Kingdom, Victoria, Queensland, South Australia, Tasmania and the Australian Capital Territory, orders may be made in favour of illegitimate children; but in Tasmania such orders can be made only against the estates of persons who have never married.

In New Zealand, Victoria, South Australia and the Australian Capital Territory the right of a child born out of wedlock to have an order made in his favour is subject to special stipulations as to proof of relationship. Although these stipulations vary, the general pattern is that the relationship must have been acknowledged by the father either expressly or by implication or have been established against him in his lifetime by the order of a Court.

(iv) **Stepchildren:** Orders in favour of stepchildren may be made in New Zealand, Queensland, Tasmania and the Australian Capital Territory. However, in New Zealand and the Australian Capital Territory they may be made only where the stepchild was being maintained by the deceased immediately before his death.

(v) **Adopted Children**: Only Queensland, South Australia and Tasmania specifically give adopted children the right to make application, but in jurisdictions where the adopted child is decreed by statute to have all the rights of a child born in lawful wedlock - as is the case in all States of Australia except Western Australia - no such specific provision would seem to be necessary.

(vi) **Others not related by blood:** Except in regard to spouses, stepchildren and adopted children, none of the enactments here reviewed give rights to anyone except persons closely related by blood.

16. **Orders under intestacies:** Orders may be made against the estates of intestates in the United Kingdom, New Zealand, Victoria, New South Wales, Queensland, Tasmania and the Australian Capital Territory.

17. **Circumstances in which a distribution of assets already made may be disturbed:** It appears that in all jurisdictions an order may be made for provision out of assets already distributed. In some cases, this is stated specifically. However, there are often important qualifications to this power. One common qualification is that in cases where there has been a "final distribution" no extension of the time within which an application may be made can be granted, and in cases where no final distribution has been made, an extension of time, if granted, is subject to the condition that no prior distribution can be disturbed. Protection of distributions in certain cases is also given in a number of jurisdictions by provisions similar to s.9A of the *Testator's Family Maintenance Act* of Western Australia - see paragraph 6(a) above. New Zealand has a provision similar to s.65(8) of the *Trustees Act* of this State, which latter provision is outlined in paragraph 6(b) above.

18. **Variations increasing the provision made under an existing order:** Of the jurisdictions considered, only in the United Kingdom, New Zealand and Queensland is there express power to increase as well as to reduce the provision previously granted to an applicant. In New Zealand and Queensland, the power relates only to periodical payments, class funds and sums ordered to be invested. In the United Kingdom and Queensland provision for the increase can be made only out of specified parts of the estate.

Canada:

19. Legislation to relieve hardship resulting from shortcomings in a will exists in some form or other in every Canadian Province except Prince Edward Island. It appears that in four Provinces, namely Alberta, Manitoba, Newfoundland and Saskatchewan, provision may be made from the estate of an intestate; and that in four, namely British Columbia, Manitoba,

Nova Scotia and Saskatchewan, illegitimates may apply for an order to be made in their favour.

Civil Law Jurisdictions:

20. Comparisons with civil law jurisdictions on the question of maintenance of dependants out of the deceased's estate are more difficult to draw because of the right of *legitim* (i.e. the statutory right to a share of the deceased's estate). Where for some reason illegitimate children are barred by law from claiming *legitim*, some jurisdictions allow them a right of maintenance out of the estate of their natural parents.

PROPOSALS FOR REFORM IN OTHER PLACES

21. In 1966, in the United Kingdom, the report of the Committee on the Law of Succession in Relation to Illegitimate Persons (the Russell Report) recommended that illegitimate children should have the same right as have legitimate children to apply in the estate of either parent under the *Inheritance (Family Provision) Act 1938*. By s.18 of the *Family Law Reform Act 1969* (U.K.), this recommendation of the Russell Report became law.

22. In a study prepared in 1967 for the Family Law Project of the Ontario Law Reform Commission, recommendations were made to amend relevant legislation of that Province so as to extend its provisions to cover total intestacies. The study also contained a suggestion that dependants of the testator, who need not be related to him, should not be barred from the benefit of the Act. It recommended that "... persons who were being supported by the deceased at the time of his death, whether relatives or not, should be able to apply to the Court to have support continued out of the estate." These suggestions have not, as yet, gone beyond the recommendation stage.

23. In 1965, the Government of South Australia, with the support of the Law Society and the Judges of that State, introduced an Inheritance (Family Provision) Bill to replace its *Testator's Family Maintenance Act*. The main innovations to be made by this measure would have been an extension of the scope of the legislation to cover cases of complete or partial intestacy and the giving to parents of the right to apply in certain cases (illegitimate children already had that right). However, the Bill was eventually allowed to lapse as many

amendments had been made to it in the Legislative Council, not all of which the Government was willing to accept.

WORKING PAPER

24. The attached working paper summarised the law in Western Australia and elsewhere and contained suggestions for reform. Copies of this paper were sent to the Chief Justice, the Judges and the Registrar of the Supreme Court, to the Law School, the Law Society of Western Australia, the Public Trustee, the Perpetual Executors Trustees & Agency Co. (WA) Ltd. and the West Australian Trustee Executor and Agency Co. Ltd. Copies were also sent to other Law Reform Commissions and Committees.

25. Comments were received from the Law Society and the Perpetual Executors Trustees & Agency Co. (W.A.) Ltd. These were generally favourable to the reforms mooted in the working paper.

RECOMMENDATIONS

26. A draft Bill incorporating the Committee's recommendations is attached. As in the case of other reports, the Committee emphasises that the draft is not meant to be in final form but to provide a basis for instructions to the Parliamentary Draftsman in the event of this report being accepted. The changes contemplated by the draft Bill are set out below.

New Claimants:

27. The Committee considers that the aim of any reforming legislation should be to permit applications for provision out of the estate of a deceased person from those who, in the normal course of human affairs, might be expected to have had such a close personal relationship with the deceased as to possibly leave the latter, at the time of his death, under some moral obligation to make provision for their maintenance, education or advancement in life, irrespective of whether or not a blood tie exists. It must be stressed that all that is contemplated is the conferring of a right to apply. An order will be made in favour of the applicant only if he can satisfy the court, in the particular circumstances of the case, that the deceased was under a moral obligation to make provision for him out of his estate.

28. If the right to apply to the court for relief in the past has been restricted to very limited classes of claimants, this probably has been due, in part at least, to the high regard accorded to the right of a man to dispose of his property as he thought fit, even beyond death. The Committee considers that society's attitude on this matter has changed. Generally speaking, more weight is now given to the rights of those to whom the deceased had a moral responsibility. The Committee therefore recommends that legislation be introduced along the lines set out below to extend the categories of possible applicants.

Grandchildren and Parents:

29. The Committee recommends that grandchildren and parents, whether their relationship is legitimate or illegitimate, be given the right to claim - see draft Bill, cl.6(c) and (d).

30. In its comments on the working paper, the Law Society expresses the view that a parent should not be able to claim unless the deceased left no nearer kin, and a grandchild only if his relating parent had predeceased the deceased. The Society did not give reasons, but the Committee assumes that the Society felt either that a testator has no moral duty to make provision for these classes, except in the circumstances it mentions, or, although there may be a moral duty in other circumstances, that to entertain such claims would add unduly to the uncertainties and delays involved in winding up estates.

31. The Committee considers that to limit in this way the circumstances in which parents or grandchildren can apply may cause injustice, and that any increase in uncertainty or delay - which would in any case be small - should not be allowed to outweigh this consideration.

32. However, the Committee is of the opinion that the class of grandchildren should be restricted to those born or already conceived at the time of the death of the deceased. Not to impose such a limitation would permit claims to arise from grandchildren born years after the death of their grandparents.

Illegitimates:

33. The arguments for improving the position of illegitimates have been discussed, within a broader context, as part of the Committee's report to you on Project No.3 (*Illegitimate*

Succession) – see paragraph 20 to 25 of that report. These arguments apply equally to the legislation with which this report is concerned. Indeed, the justification for entitling illegitimates is stronger in the present instance, inasmuch as Testator's Family Maintenance type legislation confers the power on the court to discriminate between applicants on the basis of their moral entitlement. As the Russell Committee emphasised, it seems a manifest injustice that a child in respect of whom the requirements of the legislation can be established, should be excluded from its benefits by an accident of status beyond his control.

Furthermore, it should be remembered that the granting of rights of succession on intestacy, or the reversing of the present rule of construction in wills, does not remove all need to extend rights under this legislation to illegitimates. There will still be the same need to protect illegitimates not properly provided for under a will or on intestacy, as there is to protect legitimates.

The Committee therefore recommends that the legislation should not exclude illegitimates – see draft Bill, cl.6(b), (c) and (d). Protection against possible claims of illegitimates of whose existence the administrator is unaware is given in cl.16(4) of the draft Bill.

34. **Establishment of Paternity:** As in paragraphs 33 and 34 of the Committee's report on Project No.3, the Committee considers that an illegitimate's right to claim from or through his father should not be conditional on paternity having been established against or acknowledged by the father during his lifetime. The Law Society takes a contrary view. The Committee considers that any apprehension about the possibility of false claims of paternity succeeding will be overcome by the general requirement of cl.4(2) of the Bill, that matters of fact must be established to the "reasonable satisfaction" of the court. This is the same standard as is adopted by the *Commonwealth Matrimonial Causes Act 1959* (s.96) and the Western Australian *Married Persons and Children (Summary Relief) Act 1965-1967* (s.91). This standard was laid down by Dixon J. in *Briginshaw v. Briginshaw* (1938), 60 C.L.R. 336, a matrimonial proceeding. The following quotation at page 362 explains how the standard applies:-

> "... reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a

> given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal."

Although the requirement of "reasonable satisfaction" is general, it can be expected to assume special importance in cases where proof of paternity is in issue. It should further be noted that in the case of claims against deceased estates corroboration is, as a matter of practice, normally required by the court – see 15 *Halsbury's Laws* (3rd ed) p.450; *Phipson on Evidence* (11th ed.), p.676; and *Copland v. Bourke* [1963] P. and N.G.L.R. 45, in which this rule was applied.

Other Dependants:

35. Bearing in mind that the legislation would confer a mere right to apply, the Committee believes it reasonable to admit the claim of a person who at the time of the death of the deceased, was ordinarily a member of his household and was being wholly or partly maintained by him and for whose maintenance he had a special moral responsibility. The Law Society holds similar views. The Committee has in mind an application by a de facto wife or a step-child, but there could be other cases – see draft Bill, cl.6(e). The requirement "ordinarily a member of the household" is that used in s.6 of the Commonwealth *Matrimonial Causes Act 1959* to impose liability for the maintenance of stepchildren.

Extension to cases of intestacy:

36. Injustice may result when a person is permitted to dispose of his property by will. It is perhaps not so obvious that injustice may also result from the application of the rules of distribution on intestacy. These rules are, of their nature, general in their application and cannot be expected to provide for individual cases where hardship results because of unusual circumstances. Suppose a wife has deserted her husband and children and the estate of her intestate husband has a net value of $10,000. Under the laws of distribution the wife is entitled to the first $10,000 and the children therefore get nothing. That the same access to redress should be given to deserving claimants in an intestacy as is given to claimants under a will is, in the opinion of the Committee, but a just and desirable extension of a principle already well

accepted. It accordingly recommends that the legislation be extended to permit claims against intestate estates - see draft Bill, cl.5(1) .

Power to increase provision under previous order:

37. Under the present *Testator's Family Maintenance Act*, the powers of the court to vary orders previously made are found in ss.5(4) and 8. Section 8, which is restricted to cases where the previous order was for periodic payments or a lump sum to be invested for the benefit of the claimant, appears to add nothing to the powers of the court under s.5(4). As noted above (paragraph 7) the Supreme Court has ruled that the jurisdiction conferred by s.5(4) "to rescind or alter any order" does not confer power to increase the provision made by an existing order.

38. The Committee gave long and anxious consideration to the question of variation, but was unable to reach a unanimous conclusion. One member (Mr. Rowland) is of the opinion that there should be no power to vary an order at all, either by increasing or reducing the provision made under it, and that ss.5(4) and 8 of the existing legislation should be repealed. The other two members consider that the existing power of the courts to vary an order should be retained and expanded to ensure that they have power not only to reduce but also to increase any provision made, if the justice of the case demands (subject of course to the protective provisions referred to in paragraph 6 above being retained).

39. Mr. Rowland considers that the existence of a power to vary is inconsistent with the principles and purposes of the legislation. These were stated by the Privy Council in *Dun v. Dun* [1959] A.C. 272 (adopting the words of Salmond J., in *Allen v. Manchester* [1922] N.Z.L.R. 218) to be -

> "The provision which the court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his [dependants] had he been fully aware of all the relevant circumstances."

The Privy Council concluded that this necessarily involved looking at the facts as at the date of the testator's death, including the reasonable probabilities as to future changes of

circumstances. The implication is that if, having regard to the facts at the date of death, the testator has fulfilled his whole duty to his family, no order under the Act can be made then or at any time thereafter, but if on the contrary, having regard to these facts, the testator has failed in his duty, the claimant is there and then entitled to a final order in his favour. The order may of course be a provision taking effect in the future and providing for contingencies.

40. Consistently with this position Salmond J. described the existence of a power to reduce or cancel an order as "perhaps illogical" *(Welsh v. Mulcock* [1924] N.Z.L.R. 673 at p.688).

41. In spite of Salmond J.'s strictures, the New Zealand courts continued to make suspensory and interim orders, which are devices to permit the court to make provision or increased provision if and when it is needed. The New Zealand Legislature in 1955 included an express power to make increased provision, and the courts must take into account the applicant's needs as at the date of application.

42. In Australia the courts have held that they had no power to make suspensory or interim orders *(Re Breen* [1933] V.L.R. 455; *Re McGregor* [1956] St.R.Q. 596; *Re Piper* [1960] S.R. (N.S.W.) 328).

43. Mr. Rowland is also of the view that the existence of the power to vary introduces undesirable uncertainties: the parties can never be sure when a court may be asked to deprive them of their entitlement as beneficiaries or awardees; nor, if so asked, on what basis it will exercise its discretion to vary.

44. The majority of the Committee, while accepting that the arguments against permitting variation of orders have some force, take the view that the principle of power to vary, however "illogical" it may be, has been incorporated in Testator's Family Maintenance legislation since its inception. Their view finds support in the fact that since 1955 the court has had a wide power to vary the amount of periodical payments under a trust - see s.91 of the *Trustees Act*, applied in the recent case of *Viveash* v. *W.A. Trustee Executor* & *Agency Co. Ltd.* (V. No. 16/69, as yet unreported), in which the Chief Justice, Sir Lawrence Jackson, doubled the annuity payable to a widow under a trust set up by the will of her husband, twenty one years earlier. A copy of the judgment is appended.

The majority of the Committee consider that the ultimate aim of the legislation should be to do justice to dependants, that the courts should be equipped with sufficient powers to do this, and that too rigid adherence to the notion that the adequacy of the provision made can only be judged as at the date of the death may work unnecessary hardship. Some orders under Testator's Family Maintenance legislation set up trusts, and periodical payments under such trusts are taken care of by s.91 of the *Trustees Act*. To give the courts a general power of variation, as the majority suggests, is simply to extend to all orders what is now available to some.

45. The existing power to vary by reducing any provision made has been rarely used, and the majority is of the view that a power to increase any provision made would also be used very rarely, since the courts already have power to make orders in the first instance in whatever form would best take account of matters within reasonable contemplation. The courts have held that the existing statutory power to reduce must be exercised with great caution, and only when clearly called for by a radical alteration in the circumstances - see *Preston v. Public Trustee* [1933] N.Z.G.L.R. 868; *Re Parr* [1936] N.Z.G.L.R. 283; *Re Edwards* [1960] Tas. S.R. 146. The new power would be similarly exercised and clause 9 of the draft Bill, which reflects the majority view, has been drafted to provide proper safeguards.

46. If the Government decides that any power to vary is to be retained in the statute, Mr. Rowland agrees that it should take the form set out in clause 9 of the Bill.

47. The Committee emphasises that the other recommendations in this report can be implemented whether or not the court is given a power to vary an order, and that the practical effect of the existence or otherwise of a power of variation will be small, since occasions when the power could be used will be exceptional.

Circumstances in which distribution may be disturbed:

48. The law is that as a rule distributions may be disturbed, unless a statute specifically prohibits it. The administrator is often faced with the necessity of using part of the estate to support the dependants of the deceased pending the determination of applications for provision under the *Testator's Family Maintenance Act*. Expenditure of this nature should be

absolutely protected and s.9A of the present Act is designed to achieve this. However, the Committee considers that the section is too widely drafted and could be used by an administrator to defeat the hopes of intending claimants by his spending or making over to trustees in accordance with the terms of the will unnecessarily large sums for the maintenance, support or education of dependants. The Committee recommends therefore that the section be amended to make it plain that absolute protection will be afforded only to sums expended for those purposes as the immediate necessity of the case required - see draft Bill, cl. 16(3).

49. The Committee regards s.65(8) of the *Trustees Act 1962-1968*, summarized in paragraph 6(b) of this report, as giving adequate protection to the distribution in other cases and recommends no change.

50. **Miscellaneous:**

(1) **Jurisdiction:** The provisions of the draft Bill have been made to apply in all cases, whether the deceased person died before or after the commencement of its operation. However, distributions made under the existing legislation are expressly protected - see draft Bill, cl.4(3). In this connection it is important to bear in mind the provisions of cl.8 of the draft Bill.

(2) **Definition of "Widow":** The present legislation includes in the definition of "widow" a divorced wife who is entitled to maintenance under an order of the Supreme Court. The draft Bill extends the definition to include women whose marriages have been annulled. Following Victoria, it also extends the maintenance requirement to maintenance received or entitled to be received otherwise than by a Supreme Court order. The reason for this extension is that a deceased's duty to maintain may in some cases be based on a settlement and not on a court order.

(3) **Adoptive relationships:** Because the ambit of s.7 of the *Adoption of Children Act* is doubtful (see paragraphs 38 to 41 of the report on Project No.3), the proviso to cl.6 of the draft Bill expressly includes adoptive relationships.

(4) **Procedural:** For the smoother working of the legislation, the Committee recommends that the following provisions should be included in the proposed statute -

(a) Where an application has been filed on behalf of any person, power to be given to the court to treat that application as an application on behalf of all persons that might apply. This would help to avoid multiple proceedings and thus save time and costs - draft Bill, cl.5(2). New Zealand and Queensland have a similar provision.

(b) Power to be given to the court to order that an amount be set aside as a class fund for the benefit of applicants of a class whose future individual needs cannot at the time be assessed accurately. A trustee appointed by the court to have power, under the court's guidance, to use the money in whatever proportion appears reasonable for the benefit of the beneficiaries - see draft Bill, cl. 7. New Zealand, Tasmania and the A.C.T. have a similar provision.

SUMMARY OF RECOMMENDATIONS

51. The following is a summary of the Committee's recommendations -

(a) The classes of possible applicants to be widened to include -
  (i) grandchildren in existence at the time of death of the deceased, including those already conceived (paras. 29-32);
  (ii) parents (paras. 29-31);
  (iii) illegitimates, i.e. illegitimate children of the deceased and persons in (i) and (ii) above where the relationship is illegitimate (paras. 33-34);
  (iv) adoptive kin, i.e. adopted children of the deceased and persons in (i) and (ii) above where the relationship is adoptive (para. 50(3));
  (v) members of his household for whom the deceased had a special moral responsibility (para. 35).

(b) The legislation to apply to intestacies (para. 36).

(c) The court to be empowered to increase provision under a previous order (paras. 37-47).

(d) The absolute protection given to a distribution made prior to the determination of claims under the Act, for the maintenance, education and support of dependants, to be restricted to payments immediately necessary for those purposes (para.48).

(e) The following miscellaneous provisions to be included as follows -

(i) the Bill to apply also to estates of persons dying before the commencement of the Act, but prior distributions to be safeguarded (para.50(1));

(ii) the definition of "widow" to include women whose marriages have been annulled, with a wider concept for the qualifying maintenance (para. 50 (2)) ;

(iii) the courts to be empowered to treat an application by one person as an application by all who might apply (para. 50 (4)(a));

(iv) the courts to be empowered to set up a class fund where appropriate to deal with applicants as a class (para. 50(4) (b));

(v) protection to be given to the administrator against claims by illegitimates of whose existence he is unaware (para. 33) .

CHAIRMAN: B.W. Rowland

MEMBER: E.J. Edwards

MEMBER: C. le B. Langoulant

11th August 1970.

APPENDIX

IN THE SUPREME COURT)
)
OF WESTERN AUSTRALIA)

Heard: 10 November 1969
24 April 1970

Delivered: 12 May 1970.

IN CHAMBERS

V. No. 16 of 1969

IN THE MATTER of the Will of HAROLD GUY VIVEASH late of Jimba Jimba Station Carnarvon and of Nundah Near Northam, Pastoralist deceased

- and -

IN THE MATTER of the *Trustees Act 1900* and *Rules of the Supreme Court*

BETWEEN:

JEAN HUME VIVEASH

Plaintiff

- and -

THE WEST AUSTRALIAN TRUSTEE EXECUTOR AND AGENCY COMPANY LIMITED (as Executor of the Will of HAROLD GUY VIVEASH deceased)

First Defendants

- and -

DONOVAN GUY VIVEASH, ROBERT HUME VIVEASH, BARBARA MARY VIVEASH, DIANE FLORENCE SMITH and ROSEMARY JEAN THUNDER

Second Defendants

Mr. P.D. Durack (instructed by Dwyer, Durack & Dunphy) appeared for the plaintiff:

Mr. H.A. Solomon (instructed by Morris Crowcour & Solomon) appeared for the second defendants.

Case cited by the plaintiff -

Worladge v. Doddrirge, 97 C.L.R. 1 at pp.16-17

V. No. L6 of 1969

JACKSON C.J.

The plaintiff who is now 70 years of age is the widow of the testator who died in September 1947 leaving a will dated the 17th December 1946, probate of which was granted to the first defendant. The second defendants are the two sons and three daughters of the testator and the plaintiff and are now all adults. By his will he bequeathed to the plaintiff a legacy of $6,000 which was increased in 1948 by a further $2,000 by an order made under the *Testator's Family Maintenance Act*. He also bequeathed to the plaintiff an annuity of $1,400 to be paid out of the income of his residuary estate (with recourse if necessary to the corpus) so long as she should remain his widow. She has not remarried. From and after the death of his wife, the testator directed that the remainder of his residuary estate should be held in trust for his sons and daughters in equal shares. By the same order under the *Testator's Family Maintenance Act*, the annuity to the plaintiff was declared to be free of death duties; and by a subsequent order she was allowed an annual sum for each of her daughters while under 21 years. By a later order made to settle certain questions arising in the administration of the estate, the order in which the trustee should resort to the income and capital of the residuary estate for payment of the annuity was determined.

The plaintiff now applies by originating summons under s.91 of the *Trustees Act 1962-1968* for an order increasing her annuity to $2,800. This section, which so far as I am aware is unique to this State, provides as follows: .

> "without limiting any other powers of the Court , it is hereby declared that the Court may, on the application of any trustee or of any person beneficially interested under the trust, by order, vary from time to time the amount of any payment (whether by way of annuity or otherwise) being made periodically to any beneficiary, if the Court it is of opinion, having regard to all the circumstances of the case, that it is just and equitable that the amount be varied."

Its legislative history is short. A provision in very similar terms was made by an amendment in 1955 to the then *Trustees Act 1900*, as para. (vii) of sub-s. (1) of s.45, the only material difference being that an application could then only be made by a trustee, and not (as now) either by a trustee or by any person beneficially interested. The power conferred is to vary the amount of any annuity or periodic payment from time to time, so that the s.91 contemplates not merely an application once and for all, but further applications in relation to the same

annuity in changing circumstances. A wide discretion is conferred on the Court to make an order if it is just and equitable that, in all the circumstances, the amount should be varied. Without attempting in any way to prescribe or define the circumstances which might justify such an order, it is reasonable to conclude both from the words used and from the time at which the provision was first made, that Parliament intended to provide a means whereby the effect of inflation and the consequent depreciation in the value of money could be adjusted in favour of an annuitant, who might otherwise suffer a severe reduction in real income, as has happened over the past two decades to many people who depend upon fixed money incomes.

It was in fact upon this basis that counsel for the plaintiff largely rested her case. It is notorious that since the testator's death in 1947 the cost of living has increased very considerably, certainly by more than double. The residuary estate is a large one with assets valued at over $155,000, and with an income from which the increased annuity sought could readily be paid. Since March 1962, the annuity has been in fact increased to $1700 with the consent and by the authority of the second defendants. The plaintiff has a one-half interest with one of her daughters in the house in which she lives, some oil shares worth about $800, moneys in bank accounts totalling about $2,400 after allowing for current debts, and an interest worth $3,000 in a station property (against which is set off a loan of $1,000) which produces no income. In her affidavits in support of her claim, she said that, although she had not kept details of her expenses, it was costing her more to live than her annuity and she was compelled to draw on her savings for ordinary living expenses. At various times over the years her two sons have made fairly substantial contributions towards her cost of living.

The application is unopposed by the first defendant as trustee of the estate, and is expressly consented to by four of the five second defendants, one daughter not consenting. On her behalf it was submitted that there was no sufficient evidence of any real need on the part of the plaintiff to entitle her to the increased annuity sought: In my view, however, while it may often be appropriate in applications under s.91 of the *Trustees Act* to consider the question of the needs of an annuitant for the ordinary necessities of life, this is by no means the only or an essential matter to be considered. In a case such as this, where the estate is substantial and there is no suggestion that the second defendants would be seriously affected by an order such as the plaintiff seeks, the primary consideration, it seems to me, is to make some reasonable adjustment to an annuity which has lost so much of its real value over a period of more than twenty years. It can hardly be thought that a testator leaving an estate of such value would wish his widow to live at bare subsistence level, rather than to be able, within reason, to

maintain the standard of life and comfort to which her late husband's original dispositions would have entitled her.

In my view, the circumstances here are such that it is just and equitable that the plaintiff's annuity should be increased from $1,400 to $2,800 and I order accordingly.

In the form of consent signed by four of the five second defendants, there is also a consent to a specified order of the application of the income and capital of the estate for payment of the annuity. This order appears to differ from that set out in the administration order made on 8th April 1952. If so, it would require the consent of all parties beneficially interested and can form no part of my present order.

Costs of all parties as between solicitor and client should be taxed and paid out of the residuary estate of the testator.

THE FAMILY AND DEPENDANTS PROTECTION ACT, 1970

BE it enacted etc. …….

Short title. s.1*

1. This Act may be cited as the *Family and Dependants Protection Act 1970.*

Commencement

2. This Act shall come into operation on a date to be fixed by proclamation.

Repeal.

3. The *Testator's Family Maintenance Act 1939 -1962* is hereby repealed.

Interpretation. s.2; No. 109 of 1965, s.91 (1).

4.(1) In this Act, unless some other meaning is clearly intended –

"Administration" means probate of the will of a deceased person, and includes letters of administration of the estate of a deceased person, granted with or without the will annexed, for general, special, or limited purposes, and in the case of the Public Trustee includes an order to administer and an election to administer;

"Administrator" means any person to whom administration is granted; and includes the Public Trustee in any case where he is deemed to be an administrator by reason of having filed an election to administer;

"Court" means the Supreme Court or a Judge thereof;

"Widow" includes any woman whose marriage to any person has been dissolved or annulled and who, at the date of death of that person was receiving or entitled to receive permanent maintenance whether pursuant to an order of any court, or to an agreement or other arrangement.

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* The sectional references in the marginal notes are, except where otherwise indicated, references to a comparative section of the *Testator's Family Maintenance Act" 1939-1962.*

(2) For the purposes of this Act, a matter of fact shall be taken to be proved if it is established to the reasonable satisfaction of the Court.

(3) This Act shall apply in all cases, whether the deceased person died before or after the commencement of this Act:

Provided that no distribution of any part of the estate of a deceased person that has been made before the commencement of this Act shall be disturbed in favour of any person by reason of any application or order made under this Act if it could not have been disturbed in favour of that person by reason of any application or order made under the enactment repealed by this Act.

Claims against estate of deceased person for maintenance, etc. s.3(1).

5.(1) If any person (in this Act referred to as the deceased) dies, whether testate or intestate, and in terms of his will or as a result of his intestacy, adequate provision is not available from his estate for the proper maintenance, education or advancement in life of any of the persons, mentioned in section 6 of this Act, as being those by whom or on whose behalf application may be made under this Act, the Court may, at its discretion on application so made, order that such provision as the Court thinks fit shall be made out of the estate of the deceased for the maintenance, education and advancement in life of such persons.

(2) Where an application has been filed by or on behalf of any person, it may be treated by the Court as an application on behalf of all persons who might apply, and as regards the question of limitation it shall be deemed to be an application on behalf of all persons on whom the application is served and all persons whom the Court has directed shall be represented by persons on whom the application is served.

(3) Notice of such application shall be served by the applicant on the administrator and on such other persons as the Court may direct.

(4) The Court may attach such conditions to the order as it thinks fit, or may refuse to make an order in favour of any person on the ground that his character or conduct is such as in the opinion of the

Court to disentitle him to the benefit of an order, or on any other ground which the Court thinks sufficient.

(5) The Court may order that the provisions shall consist of a lump sum or periodic or other payments.

(6) Subsection one of this section shall take effect notwithstanding anything to the contrary in the *Administration Act 1903-1969,* but subject to the provisions of section sixteen of this Act and subsection eight of section sixty-five of the *Trustees Act 1962-1968*.

Persons entitled to claim. S.3(1).

6. An application for provision out of the estate of any deceased person may be made under this Act by or on behalf of all or any of the following persons -

(a) the widow or widower of the deceased;

(b) the children of the deceased, whether legitimate or illegitimate;

(c) the grandchildren of the deceased living (which includes a child en ventre sa mere) at his death, being children (whether legitimate or illegitimate) of any child (whether legitimate or illegitimate) of the deceased;

(d) the parents of the deceased, whether their relationship to the deceased is legitimate or illegitimate;

(e) any other person who, at the time of the death of the deceased, was ordinarily a member of the household of the deceased and was being wholly or partly maintained by him and for whose maintenance he had some special moral responsibility:

In this section "children" and "parents" include those whose relationship arises through adoption, and "grandchildren" includes adopted children whether adopted by natural or adopted parents.

Provision for class fund. N.Z. No 88 of 1955 s.6.

7.(1) Without in any way restricting the powers of the Court under this Act, it is hereby declared that the Court may order that any amount specified in an order shall be set aside out of the estate and

held on trust as a class fund for the benefit of two or more persons specified in the order, being persons for whom provision may be made under this Act.

(2) Where any amount is ordered to be held on trust as a class fund for any persons under subsection one of this section, that amount shall be invested and the trustee may at his discretion, but subject to such directions and conditions as the Court may give or impose, apply the income and capital of that amount or so much thereof as the trustee from time to time thinks fit for or towards the maintenance or education (including past maintenance or education provided after the death of the deceased) or the advancement or benefit of those persons or anyone or more of them to the exclusion of the other or others of them in such shares and proportions and generally in such manner as the trustee from time to time thinks fit, and may so apply the income and capital of that amount notwithstanding that only one of those persons remains alive.

(3) For the purposes of this section the term "trustee" means the administrator, unless the Court appoints any other trustee, whether by the order creating the class fund subsequently, in which case it means the trustee so appointed.

(4) If the trustee is not the administrator, then the Court may give such directions as it thinks fit relating to the payment to the trustee of the amount which is to be held on trust as a class fund and may exercise any power under section eighty-nine of the *Trustees Act 1962-1968*, either on the creation of the class fund or from time to time during the continuance of the trusts thereof.

Original application to be made within six months. S.4.

8. No application under section five of this Act shall be heard by the Court unless the application is made within six months from the date on which the administrator becomes entitled to administer the estate of the deceased in Western Australia:

Provided that the Court may extend the time for making an application as the justice of the case may require and although the

application for such extension is not made until after the expiration of the time appointed.

Variation of order.
Ss.5(4) & 8.

9. (1) The Court may on the application by motion of -

(a) the administrator:

(b) any person beneficially entitled to or interested in the estate of the deceased;

(c) any applicant for an order under subsection one of section five of this Act:

(d) any applicant for further provision under subsection two of this section,

rescind or suspend any order, or reduce the provisions made under it. In considering whether to grant the application the Court shall have regard to the hardship that would be caused to any person taking benefit under the order, and to all the circumstances of the case. Notice of the application shall be served on all persons taking any benefit under the order sought to be rescinded, suspended or reduced and on such other persons as the Court may direct.

(2) Any person in whose favour an order has been made may apply to the Court by motion for further, provision to be made in his favour on the ground that, since the order was made, his circumstances have so deteriorated that he will suffer undue hardship if an order for increased provision is not made. In considering whether to grant the application the Court shall have regard to the hardship that would be caused to any other person if further provision, were made, and to all the circumstances of the case. Notice of the application shall be served on the administrator and such other persons as the Court may direct.

(3) Subsection two of this section shall take effect subject to section sixteen of this Act and sub-section eight of section sixty-five of the *Trustees Act 1962-1968.*

Terms of the order.

10. (1) Every order in which provision is made shall specify the part

S.5.

or parts of the estate of the deceased or, where applicable, the part or parts of the distributed estate out of which such provision shall be raised or paid, and prescribe the manner of raising and paying such provision.

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

Provided that the estates and interests of persons successively entitled to any property which is settled by the will of a testator shall not, for the purposes of this subsection, be separately valued, but the proportion of the provision to be borne by such property shall be raised or charged against the corpus of such property.

(3) The Court shall, in every case in which an order is made or altered, direct that a certified copy of the order or alteration be made upon the probate of the will or the letters of administration of the estate of the deceased, as the case may be, and for that purpose may require the production of the probate or letters of administration.

(4) Upon any order being made, the portion of the estate comprised therein or affected thereby shall be held subject to the provisions of the order.

Order to take effect as codicil or as a devolution on intestacy. S.6.

11. Every provision made by an order shall, subject to this Act, operate and take effect either as if the same had been made by a codicil to the will of the deceased person executed immediately before his death or, in the case of intestacy, as a modification of the applicable rules of distribution.

Order computable into periodic or lump sum payments. S.7.

12. The Court shall have power at any time to fix a periodic payment or a lump sum to be paid by any legatee or devisee, or person entitled under intestacy, as the case may be, to represent or be in commutation of the burden of any provision ordered to be made as

falls upon the portion of the estate to which he is entitled under the will or on intestacy, and to exonerate such portion from further liability, and to direct in what manner such periodic payment shall be secured, and to whom such lump sum shall be paid, and in what manner it shall be invested for the benefit of the person to whom the commuted payment was payable.

Orders after distribution of estate. S.8A.

13.(1) On any application for an order under this Act, where the estate of the deceased, or part thereof, has been distributed among the persons entitled under the will or on intestacy, as the case may be, and the distribution is not one protected by subsection three of section sixteen of this Act, the Court may make an order under section sixty-five of the *Trustees Act 1962-1968*, in lieu of an order under this Act.

(2) Where the Court, in exercise of the power conferred by subsection one of this section, makes an order under section sixty-five of the *Trustees Act 1962-1968*, it shall have the same powers, in respect of that order as it has under sections five, seven and nine of this Act in respect of an order made under this Act.

Orders of the Court in case of abuse of office by administrator. S.3(5)

14. On an original application under section five or on a subsequent application under section nine of this Act, the Court may, if it is proved that an administrator has been guilty of abuse of his office or other dereliction of duty, direct that one or more persons be appointed as administrator or joint administrator either in substitution for or in addition to the person so proved guilty. In this event the Court shall make such order as may be necessary to carry out its directions. Thereupon, the property, rights, powers, authorities, functions and discretions vested in the original administrator and the liabilities properly incurred by him in the due administration of the estate shall become and be vested in and transferred to the administrator so appointed (either jointly or severally as the case may be) without any conveyance, transfer or assignment.

Affect of mortgaging etc., provision. S.9.

15. No mortgage, charge, or assignment of any kind whatsoever of or over the provision made by an order, and made before the making of the order, shall be of any force, validity, or effect; and no such mortgage, charge, or assignment made after the making of the order shall be of any force, validity, or effect unless made with the permission of the Court.

Protection of administrator. S.9A.

16. (1) An administrator may distribute the whole or any part of the estate to the persons entitled thereto without having ascertained that there is no person who is or may be entitled to any interest in the estate by virtue of the provisions of this Act and no such person may bring an action against the administrator in respect of such distribution provided that it was made after the expiration of six months from the date on which the administrator became entitled to administer the estate of the deceased in Western Australia and without notice of any application under this Act that would affect the estate .

(2) A person who has made or may be entitled to make an application under this Act, shall not bring an action against the administrator by reason of his having distributed the whole or any part of the estate to the persons entitled thereto if, prior to such distribution , that person (being of full legal capacity) has advised the administrator in writing that he -

(a) consents to the distribution; or

(b) does not intend to make any application that would affect the proposed distribution.

(3) Where for the purpose of providing those things immediately necessary for the maintenance, support or education (including past maintenance, support or education provided after the death of the deceased) of any person who was totally or partially dependent on the deceased at the time of his death, an administrator distributes the

whole or any part of the estate to any such person, being a person entitled thereto, an action shall not lie against him in respect of such distribution and no order made under this Act or under section sixty-five of the *Trustees Act 1962-1968*, shall disturb such distribution, whether or not the administrator had notice at the time of the distribution of any application under this Act, or intention to make such application, that would affect the estate.

(4) Without limiting the foregoing provisions of this section, no action by any person whose relationship to the deceased is in any degree not traced through lawful wedlock or adoption shall lie against the administrator by reason of his having distributed the whole or part of the estate to the persons entitled thereto, provided that the distribution was made without notice of any application or intention to make an application by that person under this Act, that would affect the estate.

Application of the Act to orders made under previous enactment. S.11.

17. Section nine and section twelve of this Act shall apply to orders heretofore made under section eleven of the *Guardianship of Infants Act 1920* or under the provisions of the *Testator's Family Maintenance Act 1939-1962*.

Rules. S.13.

18. The powers to make, alter, and annul rules conferred by Part X of the *Supreme Court Act, 1935-1964*, shall be read as including power to make such rules as may be necessary or convenient for regulating the practice and procedure of the Supreme Court to be adopted for the purposes of this Act, and to alter and annul any such rules.