

Testator's Family Maintenance Act

Terms of Reference

In 1968, the Committee was asked to report on the desirability of amending or expanding the provisions of the *Testator's Family Maintenance Act 1939–1962*, ("the Act") 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 Act;
- (d) permit a variation increasing the provision made under an existing order.

Background of Reference

In 1965, the President of the Law Society of Western Australia approached the Attorney-General with a proposal that the Act be amended to extend the classes of claimants to include the mother or father of the deceased and the children of a deceased child of the deceased. The President also suggested that the scope of the Act be extended to include intestate and partially intestate estates. A concern was also raised as to what particular assets could be taken into account by a court in making an order under the Act. The matter was subsequently referred to the Committee for consideration.

In December 1968 the Committee released a working paper which summarised the law in Western Australia and other jurisdictions and contained suggestions for reform.

Nature and Extent of Consultation

The working paper was forwarded for comment to the Chief Justice, judges and registrar of the Supreme Court, the Law Society of Western Australia, the Public Trustee and law reform agencies. Comments were received from the Law Society and the Perpetual Executors Trustees and Agency Co (WA) Ltd. These responses were generally favourable to the reforms mooted in the working paper. The Committee released its final report in August 1970.¹

Recommendations

Following extensive consideration of the law in Australia and other jurisdictions, and the responses to the working paper, the Committee recommended that the Act be repealed and a new legislative regime be established with the following features:

- The classes of possible applicants under the existing Act be widened in the new legislation to include:
 - (a) grandchildren in existence at the time of death of the deceased, including those already conceived;
 - (b) parents;
 - (c) illegitimates (ie, illegitimate children of the deceased and persons in (a) and (b) above, where the relationship is adoptive); and
 - (d) members of the household for whom the deceased had a special moral responsibility.
- The new legislation apply to intestacies.
- Courts be empowered by the new legislation to increase provision under a previous order.

¹ Law Reform Committee of Western Australia, *The Protection to be Given to the Family and Dependents of a Deceased Person*, Project No 2 (1970). This report is more commonly known as the *Testator's Family Maintenance Act*.

◀ Testator's Family Maintenance Act

- The absolute protection given to a distribution made prior to the determination of claims under the new legislation, for the maintenance, education and support of dependants, be restricted to payments immediately necessary for those purposes.
- The following miscellaneous provisions be included:
 - (a) the new legislation apply also to estates of persons dying before commencement of the legislation, but prior distributions to be safeguarded;
 - (b) the definition of "widow" include women whose marriages have been annulled, with a wider concept for the qualifying maintenance;
 - (c) the courts be empowered to treat an application by one person as an application by all who might apply;
 - (d) the courts be empowered to set up a class fund where appropriate to deal with applicants as a class; and
 - (e) protection be given to the administrator against claims by illegitimates of whose existence the administrator is unaware.

A comprehensive discussion of the issues and the recommendations of the Committee may be found at paragraphs 29–50 of its final report.

Legislative or Other Action Undertaken

The *Inheritance (Family and Dependants Provision) Act 1972* gave full effect to the Committee's recommendations.²

² Western Australia, *Government Gazette*, 17 November 1972, 4379; Western Australia, *Parliamentary Debates*, Legislative Assembly, 23 March 1972, 272–273 (Mr TD Evans, Attorney-General).