

Law Reform Commission

REPORT 28 (1977) - TESTATOR'S FAMILY MAINTENANCE AND GUARDIANSHIP OF INFANTS ACT, 1916

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**REPORT 28 (1977) - TESTATOR'S FAMILY MAINTENANCE AND GUARDIANSHIP OF INFANTS
ACT, 1916**

Preface

The Law Reform Commission is constituted by the Law Reform Commission Act, 1967. The Commissioners are-

Chairman: The Honourable Mr Justice J. H. Wootten.

Deputy Chairman: Mr R. D. Conacher.

Mr J. H. P. Disney.

Mr D. Gressier.

Professor J. D. Heydon.

His Honour Judge T. J. Martin, Q.C.

Mr J. M. Bennett is Executive Member of the Commission.

The Honourable Mr Justice C. L. D. Meares was Chairman of the Commission during most of the time that work was done in relation to this report.

The Honourable Mr Justice J. H. Wootten, Mr J. H. P. Disney and His Honour Judge T. J. Martin, Q.C., joined the Commission after this report was substantially completed.

The offices of the Commission are in the Goodsell Building, 8-12 Chifley Square, Sydney. But letters to the Commission should be addressed to its Secretary, Box 6 G.P.O., Sydney 2001.

This is the twenty-eighth report of the Commission on a reference from the Attorney General. Its short citation is L.R.C. 28.

Part 1 - Introduction and Summary of Recommendations

NEW SOUTH WALES LAW REFORM COMMISSION

To the Honourable F. J. Walker, LL.M., M.L.A.,
Attorney General for New South Wales, Sydney.

PART I.-INTRODUCTION AND SUMMARY OF RECOMMENDATIONS

1.1. Terms of reference. We make this report under our reference-

To review the law relating to cases where the dispositions (if any), made by a deceased person during his life or by will, do not make due provision for dependents and others including, in particular, the provisions of the Testator's Family Maintenance and Guardianship of Infants Act, 1916 (except, save as to incidental matters, the provisions of that Act relating to guardianship) and section 61A of the Wills, Probate and Administration Act, 1898, and incidental matters.

1.2. Abbreviations. In this report, unless a contrary intention appears-

"Act" means the Testator's Family Maintenance and Guardianship of Infants Act, 1916.¹

"administrator" means the administrator of the estate or executor of the will of a deceased person.

"appointment" means an appointment, under a power of appointment created by the new Act, that adequate provision be made for the proper maintenance, education or advancement in life of a person out of the estate or notional estate,² or both, of a deceased person.

"Bill" means the draft bill which is set out in appendix B to this report.

"Court" means the Supreme Court.

The "new Act" means an Act which enacts the bill.

"Working Paper" means the Working Paper on the Act which we published in January, 1975.

1.3 The "new Act". We use the expression "the new Act" only to avoid cluttering this report with conditional words. We know that it is not for us to say whether our recommendations will be implemented, wholly or in part or not at all.

1.4 "Working Paper". The "Working Paper" was distributed to more than 300 persons and organizations in New South Wales and elsewhere. We received written comments on it from the persons and organizations listed in appendix C to this report. The comments were generally penetrating and helpful, and we were grateful for them. Moreover, at our request the Law Foundation of New South Wales commissioned the Department of Social Work and Sample Survey Centre of the University of Sydney to conduct a survey on some aspects of the Act. The survey was not based on a representative sample of respondents nor was it large enough to be a reliable guide to social attitudes. It did, however, provide support for some of the views expressed in the Working Paper. We are indebted to both the Law Foundation and the University of Sydney for their assistance.

1.5 Working Paper and Report. In the Working Paper, we examined and invited comment on many questions.³ With few exceptions, we do not re-examine them in this report unless they are relevant to provisions in the Bill.

1.6 The laws of succession. We note that in Appendix C of the Working Paper we reproduced Parts 4 and 5 of the Working Paper on *Family Property Law* published, in 1971, by the Law Commission in England. Part 4 considered a system under which a surviving spouse would be entitled as of right to a fixed proportion of the estate of the deceased spouse, whether he died with or without a Will:⁴ a system found, for example, in Scotland and in parts of the United States. Part 5 considered how a system of community of property based on the systems in force in Scandinavia and West Germany could be adapted to English law. We reproduced these parts because we hoped that their publication in this State might evoke public debate about the principles on which our laws of succession ought to be based.⁵ The hope was not fulfilled and we think that the time for proposing fundamental changes in those laws has not yet come. For this reason, the bill seeks only to extend existing principles, not to supplant them. We are supported in this approach by the fact that no person has said to us that the policy of the Act is wrong.

1.7 Summary of recommendations. In this paragraph, we state in a general way the substance of our main recommendations. This paragraph must, however, yield to the particular provisions of the new Act and to our later comments on them. Unless otherwise stated, we refer here to proceedings under the new Act, not to proceedings under the Act.

*First.*⁶ We recommend, that the class of persons eligible to apply for provision be enlarged. At present, where a person leaves a will, eligible persons are the widow, widower and children of the deceased person and, where a person does not leave a will, eligible persons are the widow, children and some grandchildren of the deceased person. We recommend, whether the person concerned does, or does not, leave a will, that a person should be an eligible person if he or she is-

- (a) the widower or widow of the deceased person;
- (b) a child of the deceased person; or
- (c) a person-
 - (i) who was, at any time, wholly or partly dependent upon the deceased person;
 - (ii) who was, at any time, a member of a household of which the deceased person was a member; and
 - (iii) who is a person whom the deceased person ought not, in the opinion of the Court, to have left without adequate provision for his proper maintenance, education or advancement in life.

We further recommend that paragraph (c) (ii) above should not apply to a grandchild of the deceased person.

*Secondly.*⁷ We recommend that the classes of property out of which provision may be made for an eligible person be enlarged. At present, in general terms, provision may be made only out of property of a deceased person which passes to his administrator. Our recommendation is that, in addition to that property, the Court be empowered to affect, first, property comprised in some gifts made by the deceased person in his lifetime and, secondly, some property the subject of what in our terms, is a "will substitute". We refer, in particular, to-

- (a) property comprised in a gift made by a deceased person within 3 years before his death with the intention of defeating an application for provision;
- (b) property comprised in a gift made by a deceased person within 1 year before his death where first, at the date of the gift, any moral obligation of the deceased person to make provision for the maintenance, education or advancement in life of an eligible person was substantially greater than any moral obligation of the deceased person to make the provision which he made by the gift and, secondly, -the estate of the deceased person is insufficient to satisfy the provision that the Court should make for an eligible person;
- (c) property over which a deceased person had, immediately before his death, a Power to dispose for his own benefit or for the benefit of an eligible person;

- (d) property comprised in a settlement made by way of gift by a deceased person where, immediately before his death, the property was, by the terms of the settlement, not absolutely vested in a person beneficially;
- (e) property held, immediately before the death of a deceased person, jointly by the deceased person and another person where, on the death of the deceased person, a beneficial interest in the property passes or accrues by survivorship to that other person;
- (f) proceeds of policies of assurance on the life of a deceased person where the premiums were paid by the deceased person and, in his lifetime, he was not reimbursed; and
- (g) subject to an order of the Court, benefits accruing to a person by reason of a deceased person having died while he was holding an office or while he was an employee.

We further recommend that the Courts power to affect property described in paragraphs (a) to (g) above (which, for convenience, we call the notional estate of a deceased person) be not a general power but a power subject to conditions and restrictions.⁸ The conditions and restrictions are complex and technical, and we do not try to summarize them. We do, however, comment on some of them in general terms in paragraphs 2.22.23 to 2.22.26.

*Thirdly.*⁹ We recommend that the rules for determining whether property in an estate has been distributed be varied. At present, there is a rule that once an administrator holds the assets of an estate in the character of a trustee, and not otherwise, there is no longer any estate out of which provision can be made for an eligible person: the estate has been distributed. We recommend that a general exception be made where property will not become absolutely vested in interest except upon a contingency. In that circumstance, we recommend that the property be treated as if it had not been distributed.

*Fourthly.*¹⁰ We recommend that in determining whether a deceased person has left an eligible person without adequate provision for his proper maintenance, education or advancement in life, the Court shall have regard, not, as now, to the circumstances existing at the date of death, but to the circumstances existing up to the time of the determination.

*Fifthly.*¹¹ We recommend that a procedure be adopted which will, contrary to present practice, allow the Court to determine an application for provision on the footing that a deceased person did not leave without adequate provision for his proper maintenance, education or advancement in life a person who has chosen not to apply for provision.

*Sixthly.*¹² We recommend that the Court be given power to affect movables of a deceased person which are situated in New South Wales even though the deceased person was not domiciled in New South Wales.

*Seventhy.*¹³ We recommend that in proceedings under the new Act the Court be given express power, which it does not now have, to direct that interest be paid on any money appointed by way of provision.

*Eighthly.*¹⁴ We recommend that the Court be given power to make immediate provision for an eligible person even though it is not yet possible to determine what final provision, if any, should be made for that person.

*Ninthly.*¹⁵ We recommend that *Schaefer v. Schumann*¹⁶ be overruled: that where, in accordance with a promise made in his lifetime, a deceased person, by his will, provides for property to pass from his estate to another person, the Court may place the burden of any provision made for an eligible person on that property. We further recommend that where, in breach of such a promise, a deceased person does not, by his will, provide for property to pass from his estate to another person, the Court may bar or limit any action arising out of that breach.

*Tenthly.*¹⁷ We recommend that the Court be given power to order that an amount specified in an appointment for provision be set aside out of an estate and be held on trust as a class fund for the benefit of two or more persons specified in the order.

*Eleventhly.*¹⁸ We recommend that proceedings for provision should be commenced within 18 months after the date of the death of a deceased person and not, as now, within 12 months after the date of the grant of administration. We further recommend that any extension of time for the commencement of proceedings shall not affect any property in the notional estate of a deceased person unless the person entitled to the property took it with notice that the deceased person disposed of it with the intention of defeating an application for provision.

*Twelfthly.*¹⁹ We recommend that the Court be given power¹⁹ to shorten the time for the commencement of proceedings for provision.

*Thirteenthly.*²⁰ We recommend that, subject to one restriction, the Court be given power to increase the provision made for a successful applicant. The restriction to which we refer is that the Court should not exercise this power unless the successful applicant is experiencing hardship by reason of an exceptional change in his circumstances since the time the provision was first made for him. We further recommend that property which has not vested in possession in the person entitled to it should be liable to bear the burden of any increased provision.

*Fourteenthly.*²¹ We recommend that the Court be denied any power to place the burden of an appointment for provision on any person interested in the notional estate of a deceased person unless that person is given notice of the proceedings for provision. We further recommend that the Court be directed to give any person interested in the estate or notional estate of a deceased person an opportunity to be heard on the question: "Who shall bear the burden of this appointment for provision?"

*Fifteenthly.*²² We recommend that, in general, any statement made by a deceased person shall be admissible in proceedings for provision out of his estate as evidence of any fact stated in the statement of which direct oral evidence would be admissible.

*Sixteenthly.*²³ We recommend, in effect, that *Lieberman v. Morris*²⁴ be overruled: that, subject to the approval of the Court, a person may agree to release his rights, if any, to apply for an appointment for provision.

*Seventeenthly.*²⁵ We recommend that the new Act should not commence before an "appointed day", being a day not less than 6 months after the date it is assented to. We further recommend that nothing done by a person before the appointed day should have the effect of subjecting property to the statutory trust.

*Eighteenthly.*²⁶ We recommend that the Court be given power to grant administration of an estate whether or not the deceased person left property in New South Wales.

*Nineteenthly.*²⁷ We recommend, in the case of any order for provision made under the Act since its commencement on 7th October, 1915, that, subject to the restriction specified in paragraph thirteenthly above, the Court be given power to increase the provision.

1.8 The bill. We turn now to the sections of the bill, or the new Act as we sometimes refer to it. These sections express our recommendations in legislative form. Unless otherwise stated, the bill takes the law as at 30th June, 1976.²⁸

FOOTNOTES

1. The Act is reproduced in appendix A to this report.
2. Broadly stated, the notional estate of a deceased person comprises a limited class of property which was disposed of by the deceased person in his lifetime. See, generally, paragraphs 2.22.1 to 2.22.25.
3. See, for a summary of them, the Working Paper, pages 11-16.

4. In English law, as in the law of this State, a spouse has fixed rights only where a deceased spouse dies without a will.
5. For recent writings in other places on this and related subjects see, for example, Law Commission in England *Family Provision on Death* (1974) (Law Com. No. 61); Law Reform Commission of Canada *Studies in Family Property Law* (1975); Ontario Law Reform Commission *Family Property Law* (1974) (part IV of *Report on Family Law*); University of Alberta, Institute of Law Research and Reform, Report No. 18, *Matrimonial Property* (1975); and Manitoba Law Reform Commission *Property Disposition* (1976) (part II of *Reports on Family Law*).
6. See, generally, paragraphs 2.6.1 to 2.6.32.
7. See, generally, paragraphs 2.22.1 to 2.22.26.
8. See, generally, part III of the bill and, particularly, sections 23 and 28.
9. See, generally, paragraphs 2.5.5, 2.5.10, 2.5.11, 2.14.1 1 and 2.17.8.
10. See, generally, paragraphs 2.9.3. to 2.9.9.
11. See, generally, paragraphs 2.9.10 to 2.9.12.
12. See, generally, paragraphs 2.9.14 to 2.9.16.
13. See, section 9 (5) (b) (iii) of the bill.
14. See, generally, paragraphs 2.10.1 to 2.10.4.
15. See, generally, paragraphs 2.11.1 to 2.11.10 and paragraphs 2.12.1 to 2.12.2.
16. [1972] A.C. 572.
17. See, generally, paragraphs 2.13.1 to 2.13.6.
18. See, generally, paragraphs 2.14.1 to 2.14.10.
19. See, generally, paragraphs 2.15.1 to 2.15.5.
20. See, generally, paragraphs 2.17.1 to 2.17.8.
21. See, generally, paragraphs 2.19.1 to 2.19.5.
22. See, generally, paragraphs 2.34.1 to 2.34.5.
23. See, generally, paragraphs 2.38.1 to 2.38.4.
24. (1944) 69 C.L. R. 69.
25. See, generally, paragraphs 2.2.2 and 2.23.22.
26. See, generally, paragraphs 2.14.3 and 2.40.2.
27. See, generally, paragraph 2.40.1.
28. See paragraph 2.6.29 in relation to ex-nuptial children.

Part 2 - The Bill (Sections 1 to 6)

Section 1

2.1.1 Short title. Section 1 of the bill provides-

This Act may be cited as the "Family Provision Act, 1977".

2.1.2 Justification. To us, the word "Family" in section 1 is an apt short description of the persons who are, by force of section 6, eligible to apply for provision under the new Act. To the extent that the word is used to describe a person who is not connected to a deceased person by blood or marriage, it has, of course, to be given a wide meaning. There is, however, authority for giving the word such a meaning.¹ We use it to ensure that the new Act has a truly short title.

FOOTNOTES

1. *Brock v. Wollams* [1949] 2 K.B. 388.

2.1.3 "Testator's". We reject any idea of retaining the title "Testator's Family Maintenance ... Act". If our recommendations are implemented, application may be made in relation to the estate of any intestate.²

FOOTNOTES

2. The bill, section 8 (1).

Section 2

2.2.1 Commencement. Section 2 of the bill provides-

(1) This section and section 1 shall commence on the date of assent to this Act.

(2) Except as provided in subsection (1), this Act shall commence on such day, being a day not earlier than 6 months after the date of assent to this Act, as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

2.2.2 Justification. Section 2 is a common provision in Acts. We comment only on the words in subsection (2): "being a day not earlier than 6 months after the date of assent to this Act". We include these words because we think it right that any person who may be affected by the new Act should have not less than 6 months within which to make such adjustments to his affairs of property as he thinks fit.

Section 3

2.3.1 Division of Act. Section 3 of the bill does not call for comment.

Section 4

2.4.1 Application. Section 4 of the bill provides-

(1) Subject to subsection (2), this Act does not apply in relation to the estate of any deceased person who died before the appointed day.

(2) *This Act applies in relation to the estate of a deceased person where it is uncertain whether he died before or after the appointed day.*

2.4.2 “The appointed day”. The references in section 4 to “the appointed day” are references to the day appointed and notified under section 2(2).

2.4.3 Transitional. Proceedings relating to the estates of persons dying after the appointed day will be commenced under the new Act. Proceedings relating to the estates of persons dying before the appointed day will be made as they are now made.¹ Except for applications made out of time, these last-mentioned applications will all be made within 12 months after the appointed day.² Thereafter orders under section 3 of the Act will be made infrequently and, in due course, the provisions of the Act relating to family maintenance can be repealed.

FOOTNOTES

1. The bill, section 40 (which introduces a new section 1A into the Act).

2. The Act, section 5.

Section 5

2.5.1 Interpretation. Section 5 of the Bill provides-

(1) *In this Act, except in so far as the context or subject matter otherwise indicates or requires-*

“administration” means probate, granted in New South Wales, of the will of a deceased person or letters of administration, granted in New South Wales, of the estate of a deceased person, whether with or without a will annexed, and whether granted for general, special or limited purposes and includes an order under section 18 (2) of the Public Trustee Act, 1913, transferring the estate of a deceased person to the Public Trustee for administration, and an election by the Public Trustee under section 18A of that Act.

“administrator”, in relation to the estate of a deceased person, means a person to whom administration has been granted in respect of the estate of the deceased person or who is otherwise entitled to administer any property of the deceased person or who holds any property of the deceased person on a trust which is created by or arises out of the will or on the intestacy of the deceased person.

“appointed day” means the day appointed and notified under section 2 (2).

“consideration” does not include marriage or a promise of marriage.

“Court” means the Supreme Court of New South Wales.

“estate”, in relation to a deceased person, includes-

(a) property over which the deceased person had, at the time of his death, a general power to appoint by will;

(b) property of the deceased person held on a trust which is created by or arises out of the will or on the intestacy of the deceased person; and

(c) property the subject of a donatio mortis causa by the deceased person.

“notional estate”, in relation to a deceased person, means property subject to the statutory trust.

“property” includes real and personal property and any estate or interest in property real or personal, and any debt, and any thing in action, and any other right or interest.

“property subject to the statutory trust”, in relation to a deceased person, means property subject to the statutory trust created by section 28 (1).

“will” includes a codicil.

(2) Where probate of a will, or letters of administration of an estate, granted outside New South Wales are sealed with the seal of the Court in pursuance of section 107 of the Wills, Probate and Administration Act, 1898, the probate as so sealed or the letters of administration as so sealed, as the case requires, shall be, for the purposes of this Act, probate of the will, or letters of administration of the estate, granted in New South Wales.

(3) Where property in the estate of a deceased person is held by an administrator, not as personal representative, but as trustee for a person or for a charitable purpose then, for the purposes of this Act, the property is distributed, unless the property will not become absolutely vested in interest in that person or for that purpose except upon a contingency, in which case, for the purposes of this Act, the property is not distributed.

(4) Where, by or under a disposition (by will or otherwise) made by a deceased person, any part of the estate or notional estate of the deceased person is disposed of for a charitable purpose-

(a) the references in sections 8 (2), 19 (1) and 28 (1) to persons entitled to an interest in the estate or notional estate and the cognate references in section 19 (2) and (3) include references to the charitable purpose;

(b) the references in sections 16 (1), 19 (4) and 20 (1) to any person entitled to an interest in the estate or notional estate and the cognate reference in section 19 (6) include references to-

(i) the trustee, if any, for the charitable purpose; or

(ii) where there is no trustee for the charitable purpose the Attorney General; and

(c) the reference in section 20 (1) to “that person” includes a reference to the charitable purpose.

2.5.2 “Administration” and “administrator”. The definitions of “administration” and “administrator” are based on definitions of those words contained in the Family Provision Ordinance 1969 of the Australian Capital Territory.¹ The definitions may be compared with like definitions in section 3 of the Wills, Probate and Administration Act, 1898. No distinction is drawn in the bill between the estates of testators and the estates of intestates and we use one expression to cover the executor of a will and the administrator of an estate. To us, the word “administrator” more easily includes an executor than does the word “executor” include an administrator. Hence the bill speaks of “administration” and “administrator” and not, as does the Act, of “executor”. Precedent for this approach is found in, amongst other Acts, the Estate Duty Assessment Act 1914 (Cth).

2.5.3 “Consideration”. Marriage is good consideration sufficient to support ante-nuptial promises made not only by the parties but also by third persons. In the case of contracts to marry, the promise by oath to marry the other is sufficient consideration for the promise by the other. But the difficulties of assessing the money value of consideration of this kind are many and obvious. Because, under particular provisions of the bill, the Court is required to assess the money value of consideration, we include in section 5 a provision that, for the purposes of the Bill, consideration does not include marriage or a promise of marriage. The provision is relevant to the operation of section 11 (testamentary promise: promise performed), section 12 (testamentary promise: promise not performed), section 22 (definition of “gift”) and section 27 (assurance for consideration, etc.).

2.5.4 “Estate”: General powers of appointment. In *Re Carter*,² Roper J. held that property appointed by will under a general power of appointment is available to satisfy an order for provision under section 3 of the Act. We see no reason why this decision would not apply to an appointment for provision under section 9 of the bill. The decision does not, however, extend to property subject to a general testamentary power which is not exercised. Paragraph (a) of the definition of “estate” makes this extension. It does so because, as we see it, for the purposes of the bill, the estate of a deceased person should include property over which he had, at the time of his death, a power to appoint by will. This right

of disposition is in many respects the equivalent of property.³ The power enables him to appoint to himself or his executors. It enables him to devise or bequeath the property subject to the power as freely and effectually as if it were his own. The property becomes subject to his debts as if it were his own. And he may release the power instead of exercising it. Moreover he may do all these things for valuable consideration. In short, we believe that property subject to a general testamentary power should be liable to be affected by an appointment for provision.

2.5.5 “Estate”: Property held on trust. In *Easterbrook v. Young*,⁴ Holland J. held that once an administrator has completed his duties as such and it can be said that he holds the assets of the estate in the character of a trustee for the beneficiaries, and not otherwise, there is no longer any estate out of which provision can be made for an applicant under the Act. For the purposes of the bill, this rule is changed by paragraph (b) of the definition of “estate”. The effect of the change is, however, not great. Paragraph (b) is to be read with section 5 (3) and that provision limits the operative effect of the paragraph. We comment on section 5 (3) in paragraph 2.5.10.

2.5.6 “Estate”: Donatio mortis causa. In *Re Beaumont*,⁵ Buckley J. said-

A *donatio mortis causa* is a singular form of gift. It may be said to be of an amphibious nature being a gift which is neither entirely *inter vivos* nor testamentary. It is an act *inter vivos* by which the donee is to have the absolute title to the subject of the gift not at once but if the donor dies. If the donor dies the title becomes absolute not under but as against his executor. In order to make the gift valid it must be made so as to take complete effect on the donor's death. The Court must find that the donor intended it to be absolute if he died, but he need not actually say so.

For the purposes of death duty, any property comprised in a *donatio mortis causa* made by a deceased person forms part of that person's estate.⁶ Paragraph (c) of the definition of “estate” expresses our recommendation that, for the purposes of the bill, the same result should follow. To us, the fact that a *donatio mortis causa* is incomplete and revocable during the donor's life is sufficient justification for the recommendation. We note that a provision to the same effect as paragraph (c) is contained in the Family Protection Act 1955 of New Zealand.⁷

2.5.7 “Notional estate” and “property subject to the statutory trust”. We do not comment here on the definitions of “notional estate” and “property subject to the statutory trust”. We consider the concepts generally in paragraphs 2.22.1 to 2.22.26.

2.5.8 “Property”. The definition of “property” is based on the definition of that word contained in the Conveyancing Act, 1919. Although the Act does not contain a like definition, we include it in the Bill because we see a need for it in the context of part III of the bill (Notional Estate). We place the definition in section 5, and not in part III, only to avoid any argument that the word may have a meaning which varies according to its location in the bill.

2.5.9 Section 5 (2). Section 5 (2) of the bill is based on section 4 (2) of the Family Provision Ordinance 1969 of the Australian Capital Territory. It restates the substance of those parts of section 5 (1) and (2) of the Act which deal with the resealing in this State of grants of probate and letters of administration made elsewhere.

2.5.10 Section 5 (3). Section 5 (3) has particular relevance to the operation of sections 9, 14 and 18 of the bill. The effect of these last-mentioned sections is that the Court may, on an application for provision made within 18 months after the death of a deceased person, appoint property in the estate of that person which has been distributed. But, if an application for provision is made in consequence of an order under section 14 (2) extending the time for the commencement of the proceedings for provision, the Court cannot, by force of section 14 (5), appoint any property which was distributed before the date of the application under section 14 (2). To this extent, the policy of the bill is substantially the same as the policy of the Act. But, by virtue of section 5 (3), the Court may, in proceedings under the new Act, appoint property which, in proceedings under the Act, it cannot affect. This is so because section 5 (3) provides an exception to the rule stated in *Easterbrook v. Young*.⁸ Stated generally, the exception is that where property is held by a trustee and the property will vest in interest in the person for whom it is

held only upon the happening of a contingency, the property is not distributed. Section 5 (3) is consistent with views which we expressed in the Working Paper⁹ -

Property may, for example, be left to A for life with a gift of the remainder to B conditionally upon B surviving A. Until A dies and the question whether B has survived him is determined, the final destination of the property is unknown. In that circumstance, the property should not, in our view, be outside the application of the Act until A dies. Until then, an order for provision out of the interest in remainder in the property would not affect B's reasonable expectations: his interest has not vested.

2.5.11 Section 5 (3): an alternative. In New Zealand, section 2 (4) of the Family Protection Act 1955 provides-

For the purposes of this Act no real or personal property that is held upon trust for any of the beneficiaries in the estate of any deceased person ... shall be deemed to have been distributed or to have ceased to be part of the estate of the deceased by reason of the fact that it is held by the administrator after he has ceased to be administrator in respect of that property and has become trustee thereof, or by reason of the fact that it is held by any other trustee.

Section 5 (3) of the bill is much narrower in its scope than section 2 (4) of the New Zealand Act. We believe, however, that where property is held by a trustee and the property has vested in interest in the person for whom it is held, the property should not, except in special circumstances, be at risk of a late application for provision. To us, the settled expectations of the person concerned are entitled to greater protection from the law than the claims of a person who fails to commence his proceedings within the time fixed by the law.

The special circumstances for which the bill provides are two: first where a late, but successful, applicant is a person under the age of 18 years or a person who, owing to mental illness, is incapable of managing his affairs (section 14 (7)) and, secondly, where a person who has had provision made for him out of an estate applies successfully for increased provision (section 17 (2)). As we see it, it is better to provide specifically for the special claims of a limited class than to put all beneficiaries under trusts at risk of late, and successful, claims for provision.

2.5.12 Section 5 (3): "vested in interest". The use in section 5 (3) of the expression "vested in interest" may give rise to some nice points. The concepts of "vesting in interest" and "vesting in possession" are, however, well known in the law and they should not cause any special difficulty in the context of the new Act.

2.5.13 Section 5 (4). Section 5 (4) is a drafting device to shorten those provisions of the bill which contain expressions to the effect of: "a person entitled to an interest in the estate or notional estate of a deceased person". Without section 5 (4), each of those provisions would need to be expanded to cover cases where a person makes provision, not for a person, but for a charitable purpose.

FOOTNOTES

1. Section 4.
2. (1944) 44 S.R. (N.S.W.) 285.
3. See, generally, Dixon J. in *Grey v. Federal Commissioner of Taxation* (1939) 62 C.L.R. 49, 63, 64.
- 4 [1974] 1 N.S.W.L.R. 676.
5. [1902] 1 Ch. 889, 892.
6. Stanip Duties Act, 1920, section 102 (2) (e).
7. Section 2 (5).
8. See paragraph 2.5.5.
9. Working Paper, paragraph 8.2.

Section 6

2.6.1 "Eligible person". Section 6 of the bill provides-

(1) In this Act, “eligible person”, in relation to the estate or notional estate of a deceased person, means-

- (a) the widow or widower of the deceased person;*
- (b) any child of the deceased person; and*
- (c) subject to subsection (2), any person-*
 - (i) who was, at any time, wholly or partly dependent upon the deceased person;*
 - (ii) who was, at any time, a member of a household of which the deceased person was a member; and*
 - (iii) who is a person whom the deceased person ought not, in the opinion of the Court, to have left without provision for his proper maintenance, education or advancement in life.*

(2) Subsection (1) (c) (ii) does not apply to any person who is a grandchild of the deceased person.

(3) In applying subsection (1) (c) (iii), the Court shall have regard to the circumstances existing from time to time up to the time when the question arises, whether or not foreseeable at the date of the death of the deceased person.

(4) For the purposes of this section, the widow or widower of a deceased person remains the widow or widower of that person notwithstanding remarriage.

2.6.2 Scheme of notes on section 6. In paragraphs 2.6.3 to 2.6.27, we consider some of the broad policy issues with which section 6 is concerned and, in paragraphs 2.6.28 to 2.6.31, we examine particular provisions of the section.

Policy

2.6.3 The present law. Under the Act, where a person leaves a will, eligible applicants for an order for provision are the widow, widower and children of the deceased.¹ But, where a person dies wholly intestate, the only eligible applicants are the widow and children of the deceased.²

2.6.4 Intestacies. In part 4 of the Working Paper, we said that a widower should be all eligible applicant on the death intestate of his wife and that a grandchild should be no less an eligible applicant where his grandparent leaves a will than where his grandparent dies intestate.³ We have had no opposition to these views and we adhere to them. The bill, in so far as eligibility to apply for an appointment is concerned, does not distinguish between cases where a deceased person leaves a will and cases where he does not.

2.6.5 Working Paper: eligible persons. In part 6 of the Working Paper, we considered who might be included in any enlarged class of eligible applicants. In particular, we considered whether special provision should be made for divorced “spouses remarried “spouses”, parties to de facto “marriages”,⁴ posthumous children, legitimated children, adopted children, stepchildren, illegitimate children, grandchildren, dependents of a deceased person, persons for whom a deceased person had a moral duty to make provision, and persons who had reasonable expectations of a deceased person’s bounty and who had been dependants of the deceased and members of his household.

2.6.6 Working Paper: proposal. Our tentative proposal⁵ was that the new Act should provide not only for the widow, widower and children (including illegitimate children) of a deceased person but also for any person who satisfies the Court-

- (a) that, immediately before the death of the deceased person, it was reasonable to expect that the deceased person, if the deceased person had acted reasonably, would have made provision for his maintenance, education or advancement in life; and*
- (b) that, at any time during the life of the deceased person, he had been, whether or not at the same time, wholly or partly dependent upon the deceased person and a member of the household of which the deceased person was a member.*

2.6.7 Comments. Most of the persons and organizations who commented on this proposal are in general agreement with it. Nonetheless some commentators have doubts about its application to particular persons, namely, de facto spouses, former spouses, stepchildren, grandchildren and adopted children. We consider these doubts in paragraphs 2.6.9 to 2.6.27.

2.6.8 Purpose of our proposal. In proposing a three4imbed eligibility test⁶ for a person who is neither the legal spouse nor a child of a deceased person, we were trying to avoid the inflexibility which would follow the prescription of a class of eligible applicants. We believe still that that inflexibility should be avoided; that circumstances, not status, should control eligibility. Under both our Working Paper proposal and section 6 of the bill a parent, a brother, a sister, a stepchild, a foster child, a grandchild, a nephew, a niece, a spouse of a void marriage, a divorced spouse, a de facto spouse or, indeed, a special friend of the deceased might be an eligible applicant.

2.6.9 The function of the Court. We note, however, that no matter who claims to satisfy the conditions of section 6 (1) (c), the Court will have the final say. In each case before it, the Court will decide the effect to be given to the words “adequate”, “proper”, and “ought not”. A widening of the class of eligible applicants will not change the function of the Court in proceedings for provision: it will only increase the number of people who might benefit from the discharge of that function. Of course, a widening of this kind will constitute a further encroachment upon freedom of testation and it will introduce greater uncertainty in beneficiaries about their entitlement to property which a deceased person may have wished them to have. But, as we see it, the advantage of allowing the Court to intervene in appropriate cases outweighs the disadvantages.

Particular Cases

A De Facto Spouse

2.6.10 A de facto spouse: dependency. One commentator says that in its application to a de facto spouse our proposal is unduly generous in allowing a sometime dependency to satisfy the requirement of dependency. He argues that if the new Act is to give indirect recognition to de facto marriages it should follow the example of the Workers' Compensation Act, 1926. That Act, in section 6, provides, in effect, for a person who for not less than 3 years immediately before the death of the deceased person, although not legally married to him, lived with him as his wife on a permanent and *bona fide* domestic basis. The Inheritance (Provision for Family and Dependants) Act 1975 (U.K.) has a somewhat similar provision: section 1 (1) (e) makes any person who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased” an eligible applicant. Despite these examples, we say that if a dependency subsisting at death is substituted for a sometime dependency, cases of hardship will occur. Just as parties to legal marriages are often deserted and left without support, so too are parties to de facto marriages. In this situation, the deserted party to the legal marriage is an eligible applicant. As we see it, in a like situation, the deserted party to the de facto marriage should also be an eligible applicant. We repeat that we are concerned here only with the question of eligibility. The Court will determine whether an appointment is to be made in favour of the applicant.

2.6.11 De facto marriages and period of dependence. We are also satisfied that no minimum period of dependence should be prescribed. The imposition of a rigid time limit could lead to unfair results. A party to a legal marriage of, say, 6 months duration is eligible to apply for an order no less than a party to a legal marriage of 60 years duration. In this context, we would not distinguish between legal and de facto marriages. The intentions of the parties seem to us to be more relevant than the duration of their cohabitation.

2.6.12 De facto marriages generally. It can be argued, in a wider context, that we should be considering how the law can best be used to help marriage, not how the law can encourage alternatives.⁷ But we cannot ignore the fact that men and women do live together in extra-marital unions. If injustice (in the sense of avoidable hurt) may flow from the new Act not acknowledging that fact, we think it better for the community to remove the cause of the injustice (and in so doing perhaps offend some of its members) than to permit the injustice to continue. And we do not think it right that the

Court can overturn the testamentary provisions of a married person but not those of a person who declines to marry but nonetheless assumes marriage-like obligations. Under the present law, a person determined to preserve his testamentary freedom is better placed to succeed if he does not marry. Public policy should not countenance this situation when public policy, through the Act, recognizes that not all testators are wise and just.

A Former Spouse

2.6.13 A former spouse: Meaning. Where, in the paragraphs which follow, we speak of a former spouse or a divorced spouse, we include a person whose marriage has been annulled. And, for our purposes, “divorced spouse” does not connote that the divorce was granted at the instance of the other spouse.

2.6.14 A former spouse: Present law. In New South Wales, a divorced spouse is not an eligible applicant.”

2.6.15 A former spouse: Working Paper. We said in the Working Paper⁹ that a person should not be an eligible applicant merely because he or she is a former spouse of a deceased person. We added, however, that in our view a former spouse who satisfies the eligibility conditions specified in paragraph 2.6.6 should be an eligible applicant.

2.6.16 A former spouse: Comments on Working Paper. The Committee of the Law Society which considered the Working Paper is divided on the question of the eligibility of a former spouse. Some members of the committee argue that if it is made possible for a former spouse to apply for an order under the new Act, it will be possible for an already settled question to be reopened.. They say that this result should not be allowed because it would be inconsistent with the principle that in proceedings for divorce it is the duty of the court to end the financial relationships between the parties to the marriage.¹⁰ Other members of the committee argue that a former spouse who is dependent upon maintenance payments which cease on the death of the other former spouse should be able to apply for an appointment if he or she can satisfy eligibility conditions of the kind suggested in the Working Paper. Divergent views of this kind are put to us by other commentators and it is clear that no recommendation made by us on this matter will gain general acceptance.

2.6.17 A former spouse: Comparative law. Under sections 1 and 25 of the Inheritance (Provision for Family and Dependents) Act 1975, of the United Kingdom, a former spouse of a deceased person is an eligible applicant if he or she satisfies two conditions: first, the marriage must have been dissolved by a court in England or Wales and, secondly, he or she must not have remarried. But, section 1 of the United Kingdom Act also provides that a former spouse who does not satisfy these conditions is nonetheless an eligible applicant if he or she was wholly or partly dependent on the deceased person at the date of death. Under sections 40 and 41 of the Matrimonial Proceedings Act 1963 of New Zealand, a former wife may apply for an order that the personal representative of her deceased former husband pay her maintenance or a capital sum or both out of the former husband’s estate. In the Australian States and Territories, there are wide variations in the relevant eligibility provisions. In South Australia, a former spouse may, without restriction, apply for an order.¹¹ In Queensland and Tasmania, a former wife may apply but only if she has not remarried and if she was receiving, or was entitled to receive, maintenance from her deceased former husband.¹² In Victoria, the position is the same as in Queensland and Tasmania except that the statute speaks of “maintenance or alimony”.¹³ In the Australian Capital Territory, a former spouse may apply only if maintained by the deceased former spouse immediately before his or her death.¹⁴ And in Western Australia, a former spouse may apply but only if she was receiving, or was entitled to receive, maintenance from the deceased former spouse.¹⁵

2.6.18 A former spouse: Recommendation. In our view, neither the suggestions of our commentators nor the legislative examples of other places provide wholly satisfactory answers to all the questions which arise in relation to the eligibility of a former spouse to apply for an appointment for provision. And we cannot be sure that the adoption of a proposal of the kind made in the Working Paper will lead to a fair result in every case. But, if a proposal of that kind were to be adopted, we think that a fair result

could be produced in most cases. As section 6 of the bill indicates, we recommend that such a proposal be adopted.

2.6.19 A former spouse: Common cases. In its application to a former spouse, section 6, by virtue of its generality, provides for cases where a maintenance order was made in the divorce proceedings between the parties to the former marriage as well as for cases where a maintenance order was not made. If a maintenance order is made, usually it will cease to have effect on the death of the person liable to make payments under it or it will continue in force throughout the life of the person in whose favour it is made. And if a maintenance order is not made, usually it will be because an order was not applied for or, if applied for, the application was refused. Sometimes, however, a person against whom an order might have been made dies after the decree nisi is made absolute and before the application is disposed of. Section 6 is applicable to a former spouse who is in any of these common, or uncommon, situations.

2.6.20 A former spouse: Justification of section 6. Section 6 is likely to be criticised because it enables a former spouse to apply for an appointment for provision even though that person might have the benefit of a maintenance order which is expressed to continue in force throughout his or her life. For the purpose of examining the merits of this anticipated criticism, we assume, first, that the maintenance order is one to which section 82 (3) of the Family Law Act 1975 (Commonwealth) applies¹⁶ and, secondly, that that subsection is a validly enacted law of the Commonwealth.¹⁷ If a former spouse who satisfies the conditions of section 6 applies for an appointment under the new Act, the existence of the maintenance order will be a material factor in deciding whether the appointment for provision should be made and, if so, what the amount and nature of the provision should be. But a maintenance order under the Family Law Act is entirely different from an appointment under the new Act: it is made against a different person, in different circumstances, and by reference to different criteria. In making a maintenance order under the Family Law Act, a court must, for example, take into account the needs of the husband and, to that extent, the wife is in competition with the husband. The new Act, on the other hand, is concerned with the situation at the death of the husband when the relevant circumstances may be different and when the husband no longer has any temporal needs. In short, we say that in relation to an appointment under the new Act, the existence of a maintenance order under the Family Law Act should go only to entitlement to provision and the measure of provision, not to eligibility to apply for the appointment. For like reasons we say that section 6 is an apt provision for enabling any former spouse, no matter what orders were made or refused in the divorce proceedings, to have the merits of his or her claim for provision determined by the Court.

2.6.21 A former spouse: Hardship cases. If section 6 were now part of the Act some injustices might be avoided. We refer to the regrettable position of those persons who are divorced but whose applications for maintenance are not disposed of when the other spouse dies. When this happens the former spouse is without rights under the Act or, it seems, the Family Law Act 1975 (Commonwealth). This cause of injustice calls for urgent remedial action.

2.6.22 A former spouse: Constitutional matters. To this point, we have assumed that there are no constitutional obstacles in the way of implementing a recommendation that a former spouse should be an eligible applicant. At least in the case where a maintenance order was obtained in the divorce proceedings and the order is one to which section 82 (3) of the Family Law Act 1975 (Commonwealth) applies, this assumption may be wrong. If the provisions of that Act were to be construed as “completely, exhaustively, or exclusively”¹⁸ stating the law governing the making of orders for the maintenance of a divorced person out of the estate of his or her deceased former spouse and if the same provisions were to be held as being within the legislative power of the Commonwealth, an appointment under the new Act might, in the case mentioned, be regarded as a variation of an order made by a Commonwealth Court. In this event, it seems that the appointment of the Supreme Court might be challenged.¹⁹ We doubt that a challenge would succeed but the matter will remain less than clear until it receives judicial attention.

2.6.23 A former spouse: Remarriage. Should the remarriage of one of the parties to a divorce destroy the eligibility of that party to apply, on the death of the other party, for an appointment for provision out of his or her estate? Under section 1 (1) (b) of the Inheritance (Provision for Family and Dependents) Act

1975 (U.K.), only a former wife or husband “who has not remarried” may so apply. The reason for this provision, as stated by the Law Commission in England,²⁰ is that where a marriage is ended by a decree of divorce or nullity, the principle is that if one of the parties remarries during their joint lives his claims against the other party come to an end.²¹ If remarriage destroys any claim against a former spouse, it should, it is argued, also destroy any claim against his estate. But in Australia, by force of section 82 (4) of the Family Law Act 1975 (Cth), an order with respect to the maintenance of a party to a marriage ceases to have effect upon the remarriage of the party “unless in special circumstances the court having jurisdiction otherwise orders”. Hence, in this country, the principle is that remarriage does not necessarily destroy all claims against a former spouse. In this circumstance, we say that the remarriage of a party to a divorce should not, of itself, bar a claim under the new Act against the estate of the other party. In saying this we appreciate that in many cases, if not in most cases, the remarriage will be regarded by the Court as an abandonment of all claims against the estate of the other party. But this will not always be so. If, for example, an application under the new Act by a former spouse discloses facts of the kind considered in *O’Regan (formerly Douglass) v. Douglass*²¹ the Court may well make an appointment for provision. In that case, a husband, a wealthy man, deserted his wife and 3 young children. He had established and maintained a high standard of living for his wife during 12 years of marriage and he expected her to bring up his children according to that standard. Neither she nor her second husband had substantial capital or income. In order to maintain the standard to which she was accustomed as the mother of these children, she needed continued and substantial support from the former husband. In that circumstance, in the event of the death of the former husband, we would see justification for an appointment that provision be made for her out of his estate. Hence the new Act does not draw any distinction between a former spouse who has remarried and one who has not: if he or she satisfies the conditions of section 6, he or she is an eligible applicant.

Stepchildren and Grandchildren

2.6.24 Stepchildren and grandchildren. One commentator says that section 6 may apply unfairly to some stepchildren and grandchildren in that it requires them to have been members of a deceased person’s household if they are to satisfy the conditions of the section.

2.6.25 Stepchildren. It is argued, in relation to stepchildren, that an adult child whose parent remarries may never live in the household of his step-parent. And yet, if the parent leaves everything to the step-parent and, in turn, the step-parent leaves everything to a stranger, the stepchild is without rights under the Act. As we see it, in this particular case, any injustice is the result, not of section 6, but of the child’s failure to exercise his right to apply for an order out of his parent’s estate. There may, of course, be cases where this simple answer is inapt; cases where section 6 may operate too restrictively in its application to stepchildren. Nonetheless we are reluctant to propose the encroachment on testamentary freedom which would result from equating, in all cases, stepchildren with children. The relationship of a parent and a child is always a special relationship. The relationship of step-parent and step-child may develop into a special relationship but it will not always do so. If it does do so, the conditions of section 6 may sometimes disadvantage a stepchild. But, in our view, these cases will be far fewer than the cases where the relationship of step-parent and stepchild does not develop into a special relationship of the kind which the new Act seeks to protect.

2.6.26 Grandchildren. It is argued, in relation to grandchildren, that a grandparent may assume financial responsibility for a grandchild and yet the grandchild may never form part of the grandparent’s household; it being recognised, for example, that the home life provided by an ageing grandparent may not be in the best interests of a young child. In this situation, the argument continues, why should the grandchild be denied the status of an eligible applicant? And particularly is this so, when under the existing law, in the case of an intestacy, some grand-children are eligible applicants.²³ We see the force of these objections and hence section 6 (2) of the bill provides, in effect, that a grandchild need not comply with the condition specified in section 6 (1) (c) (ii), namely, that he was, at some time, a member of a household of which his Grandparent was a member.

Adopted Children

2.6.27 Adopted children. We said in the Working Paper that the Adoption of Children Act, 1965, appears to resolve any difficulty touching the eligibility of adopted children to commence proceedings under the Act.²⁴ We adhere to this view and therefore section 6 makes no reference to adopted children. It is put to us, however, that difficulties may arise in the case of a child adopted under the Child Welfare Act, 1939, who applies under the Act for an order for provision out of the estate of a person who died before the commencement of most sections of the Adoption of Children Act, 1965, namely, 7th February, 1967. As we understand it, the suggestion is that the decision in *Re Fogg*²⁵ places this adopted child at a disadvantage in that the effect of the adoption, in relation to the will or intestacy of the deceased person, is governed by section 168 of the Child Welfare Act, 1939, and that section is less extensive in its operation than sections 35 and 36 of the Adoption of Children Act, 1965. We reject this suggestion because we believe that there is nothing in section 168 of the Child Welfare Act, 1939, which precludes a child adopted under that Act from applying for an order for provision under the Act. Moreover, any such application must be many years out of time and only a truly exceptional case would justify an order extending time. In short, we see no need to make special provision in the new Act, by way of amendment of the Act, for persons adopted under the Child Welfare Act, 1939.

The Provisions of Section 6

2.6.28 Section 6 (1) (a). The inclusion of the word “widower” in section 6 (1) (a) gives legislative expression to our recommendation that a man should be an eligible applicant where his wife dies without a will²⁶ and, when read with section 6 (4) (a), section 6 (1) (a) gives legislative recognition to the decision in *Re Claverie*,²⁷ namely, that a spouse who remarries after the death of a former spouse, but before making an application for provision, does not lose the right to make that application.

2.6.29 Ex-nuptial children. We proposed in the Working Paper²⁸ that under the new Act an illegitimate child of a deceased person should be an eligible applicant. The Bill does not so provide. This is not because our thinking has changed but because events have overtaken us. At the time of writing, the Children (Equality of Status) Bill, 1976 (a bill, amongst other things, to remove the legal disabilities of ex-nuptial children) is before Parliament. It is reasonable to expect that that bill will be enacted, and will be proclaimed to commence, before any Act based on our draft bill commences.*

* The bill has since been enacted and proclaimed to commence on 1st July, 1977.

2.6.30 Section 6 (1) (c). Section 6 (1) (c) is different from the provision proposed in the Working Paper.²⁹ The changes of substance are made for two reasons: first, to tighten the necessary connection between section 6 (1) (c) (iii) and section 9 (e) and, secondly, to drop what we now consider to be an unnecessary part of the original proposal: the expression “. . . it was reasonable to expect that the deceased person, if the deceased person had acted reasonably . . .” is cumbersome without compensating utility. The question before the Court should not be whether the deceased person, according to his subjective assessment, ought not to have left the person concerned without adequate provision but whether the Court, according to its objective assessment, is satisfied that the deceased person ought not to have left that person without that provision. Suppose, for the purpose of illustration, that A, a married man, goes through a form of marriage with B; that B believes that she is validly married to A; that they live together for many years but, shortly before his death, A makes a will making no provision for B because he genuinely, though foolishly and mistakenly, believes that B is poisoning him. We would think it wrong that the question of B's eligibility to apply for an appointment for provision should turn on A's, and not on the Court's, assessment of what was a reasonable testamentary act on the part of A. We believe that section 6 (1) (c) (iii) ensures that objective, not subjective, considerations will determine eligibility questions.

2.6.31 Section 6 (1) (c) (i) and (ii). In section 6 (1) (c) (i), we do not attempt to define the word “dependent”. Any difficulties which may arise in determining whether a person is a dependant are evidential and raise questions of fact and not of law.³⁰ The expression, in section 6 (1) (c) (ii), “a member of a household of which the deceased person was a member” is intended to make it clear that the deceased person need not have been the head of the household concerned.³¹

2.6.32 Posthumous children. A special provision relating to post-humous children is, we believe, unnecessary, 32 and we do not include in section 6 a provision such as section 6 (2) (b) (ii) of the draft bin which formed part of the Working Paper.

FOOTNOTES

1. The Act, section 3 (1).
2. The Act, section 3 (1A): children includes children (being under the age of 21 years at the death of the intestate) of any child of the intestate who died before the intestate.
3. Working Paper, paragraph 4.8. For the position of a grandchild under the new Act, see paragraph 2.6.26.
4. In these contexts, the use of the words “spouses” and “marriages” is wrong. But, for the sake of convenience, we use them.
5. See section 6 of the draft bill on pages 173 and 174 of the Working Paper ,and, generally, part 6 of that paper.
6. Reasonable expectation, sometime dependency, and sometime membership of the household.
7. See Delvin, *The Enforcement of Morals* (1965), page 77: “Is then the State according to our ideas of society entirely free to grant or withhold the status of marriage . . .? No. A man and a woman who live together outside marriage are not prosecuted under the law but they are not protected by it. They are outside the law.”
8. See, for example, *Hart v. Hart* [1968] 3 N.S.W.R. 43, 45.
9. Paragraph 6.14.
10. The Family Law Act 1975 (Cth), section 81.
11. Inheritance (Family Provision) Act, 1972 (S.A.), section 6 (b).
12. The Succession Acts, 1867-1968, section 89 (Qld) and Testators Family Maintenance Act 1912 (Tas.) section 3A.
13. Administration and Probate Act 1958, section 91.
14. Family Provision Ordinance 1969 (A.C.T.), section 7 (1) (b), (2) and (7).
15. Inheritance (Family and Dependants Provision) Act, 1972, section 7 (1) (b).
16. The relevant subsections of section 82 are-
 - (2) Subject to subsection (3), an order with respect to the maintenance of a party to a marriage ... ceases to have effect upon the death of the person liable to make payments under the order.
 - (3) Subsection (2) does not apply in relation to an order if the order is expressed to continue in force throughout the life of the person for whose benefit the order was made or for a period that had not expired at the time of the death of the person liable to make payments under the order and, in that case the order is binding upon the legal personal representative of the deceased person.
17. See paragraph 2.6.22.
18. *O’Sullivan v. Noarlunga Meat Ltd* (1956) 95 C.L.R. 177, 186.

19. See *Johnston v. Krakowski* (1965) 113 C.L.R. 552, 560-562, 567-568; *Lake v. Quinton* (1973) 1 N.S.W.L.R. 111; and *Russell v. Russell* (1976) 50 A.L.J.R. 594.
20. Family Provision on Death (1974) (Law Corn. No. 61) paragraph 57.
21. Matrimonial Causes Act 1973 (U.K.) section 28.
22. (1969) 13 F.L.R. 417.
23. The Act, section 3 (1A).
24. Paragraph 6.45.
25. [1972] 1 N.S.W.L.R. 416.
26. See paragraph 6.4 of this part.
27. [1970] 2 N.S.W.R. 380; and see the Working Paper, paragraphs 6.18 to 6.23.
28. Paragraph 6.53.
29. See paragraph 6.6 of this part.
30. *Re Baden's Deed Trusts* (No. 2) [1972] Ch. 607 and see, generally, *Fenton v. Batten* [1948] V.L.R. 422; *Borson v. C. A. Hine & Co. Pty Ltd* [1965] W.A.R. 19 and *Re W. (A Protected Person)* [1966] N.Z.L.R. 380
31. See *English v. Western* [1940] 2 K.B. 156.
32. See Working Paper, paragraph 6.35 and 6.36.

Part 2 - The Bill (Sections 7 to 12)

Section 7

2.7.1 Appointments and orders on terms. Section 7 of the bill provides- Where, under this Act, the Court may make any appointment or order or do any thing, the Court may make the appointment or order or do the thing on such terms and conditions, if any, as the Court thinks fit.

2.7.2 Justification. Section 7 is merely a drafting device for shortening other sections in the bill.

Section 8

2.8.1 Priority, and objects, of appointments under this Act. Section 8 of the bill provides-

(1) The provisions of the will of a deceased person, and the rules relating to the distribution of property on the intestacy of a deceased person, shall have effect subject to the powers of appointment created by this Act.

(2) Where, under this Act, the Court may appoint property in the estate of a deceased person, the Court may, subject to this Act, appoint that property to or for the benefit of such one or more of the following objects, that is to say, eligible persons and persons entitled to an interest in the estate or notional estate of the deceased person, and in such manner and to such extent as the Court thinks fit.

2.8.2 Justification. Section 8 of the bill has no counterpart in the Act. It is open to the criticism that it only emphasises and makes explicit what would be implicit in the bill if it were not there. Nonetheless we recommend its enactment. As we see it, the section earns its place in the bill because it is a clear legislative statement of policy: the operation of testamentary dispositions and the rules of intestacy are defeasible to the extent required to give effect to the purposes of the bill;¹ the Court may interpose and carve out of an estate what amounts to adequate provision for those persons who are not sufficiently provided for.² Moreover the section identifies the means by which the Court is to discharge its function, namely, to exercise a statutory power of appointment for the benefit of a specified class.

Section 9

2.9.1 Appointments for provision. Section 9 of the bill provides-

(1) Where-

(a) the Court finds that a person is an eligible person; and

(b) the Court is satisfied that a deceased person has left the eligible person without adequate provision for his proper maintenance, education or advancement in life,

the Court may, in its discretion and having regard to all the circumstances of the case, but subject to this Act, appoint that such provision for such maintenance, education or advancement in life as the Court thinks fit shall be made for the eligible person out of the estate or notional estate, or both, of the deceased person.

(2) In applying subsection (1) (b), the Court shall have regard to the circumstances existing from time to time up to the time when the question arises, whether or not foreseeable at the date of the death of the deceased person.

(3) Where it appears to the Court that the deceased person has, or may have, left each of two or more eligible persons without adequate provision for his proper maintenance, education or advancement in life, and of those persons one or more apply for provision under this Act within the time allowed by or under this Act but one or more do not so apply, the Court may act under subsection (1) (b) in relation to any applicant on the footing that the deceased person did not leave without adequate provision for his proper maintenance, education or advancement in life any person who has chosen not to apply for provision under this Act.

(4) For the purposes of subsection (3), the Court may determine that a person has chosen not to apply for provision under this Act if the prescribed notice has been served on him and he has not within the time limited by the notice applied for provision under this Act.

(5) In proceedings under this section-

(a) the Court may have regard to whether the character or conduct of an eligible person, either before or after the death of the deceased person, is such as-

- (i) to disentitle him to the benefit of any provision under this Act; or
- (ii) to entitle him only to the benefit of a reduced provision under this Act;

(b) the Court may appoint-

- (i) that provision be made for an eligible person out of the estate or notional estate, or both, of the deceased person which is situated in New South Wales at the time of, or at any time after, the appointment, whether or not the deceased person was, at the time of his death, domiciled in New South Wales;
- (ii) that payment be made of a lump sum, whether in one amount or by instalments;
- (iii) that payment be made of any periodic sum; and
- (iv) where payment of money is appointed, that interest be paid, at such rate as the Court thinks fit, on the whole or any part of the money for the whole or any part of the period between the date of death of the deceased person and the date when the money is paid;

(c) the Court may-

- (i) make an interim appointment or, subject to sections 16 and 17, a permanent appointment, an appointment for a fixed term or for a life or until further appointment; and
- (ii) make any other appointment (whether or not of the same nature as those mentioned in paragraph (b) or subparagraph (i)) which it thinks necessary to make to do justice;

(d) the Court may order-

- (i) that payment of any money payable under an appointment be wholly or partly secured in such manner as the Court directs;
- (ii) that any necessary deed or instrument be executed and that such documents of title be produced or such other things be done as are necessary to enable effect to be given to an appointment or to provide security for the due performance of an appointment or order;
- (iii) that payments be made directly to an eligible person, to a trustee to be appointed by the Court or as the Court directs, or into Court or to a public authority for the benefit of the eligible person;

(e) the Court may make any other order (whether or not of the same nature as those mentioned in paragraph (d)) which it thinks necessary to make to do justice; and

(f) the Court shall not make an appointment for provision out of the notional estate of a deceased person unless the Court is satisfied-

- (i) that the estate of the deceased person is insufficient to satisfy the provision that should be made; or
- (ii) that by reason of the existence of other eligible persons or the existence of special circumstances the provision should not be satisfied wholly out of the estate.

(6) Subsection 5 (b) (i) does not limit any power of the court in relation to any property in the estate of a deceased person which is situated outside New South Wales.

(7) This section has effect subject to sections 10, 11 and 14 (5) and (6) and part III.

FOOTNOTES

1. See Fullagar J. in *Coates v. National Trustees Executors and Agency Co. Ltd.* (1956) 95 C.L.R. 494, 523.
2. See Viscount Simon L.C. in *Dillon v. Public Trustee of New Zealand* [1941] A.C. 294, 301.

2.9.2 Section 9 (1). Section 9 (1) of the bill restates the substance of the first paragraphs of subsections (1) and (1A) of section 3 of the Act. But, by force of the defined expressions “eligible persons” and “notional estate”, the new section 9 is much wider in its application than the old section 3. In our notes on section 6, we examined the concept of “eligible person”, and, in our notes on section 22, we will examine the concept of “notional estate”. For present purposes, it is sufficient to say that under section 9 of the new Act the Court will be able to benefit more persons and to affect more property than it can now do under section 3 of the Act.

2.9.3 Section 9 (2): the present law. The question whether the provision made for an applicant is inadequate for his proper maintenance is to be determined as at the date of death of the testator or the intestate, not as at the date of the application.¹ But, if the question is answered in the affirmative, the Court, in exercising its discretionary power to make such provision as it thinks fit, must take into account the facts as they exist at the time of making the order. As *Kitto J.* Has said²-

It remains only to say explicitly that once an applicant establishes that the case falls within the class in which the Court is given jurisdiction, the circumstances as they then exist may and should receive full consideration by the Court in deciding what provision it thinks fit to make for the proper maintenance and support of the applicant. It is true to say that in the light of all those circumstances the Court will do what it considers wise and just for the purpose. But this has no bearing upon the question which is before the Court at the preliminary stage - the question whether the case is shown to be within the limits which question within the legislature has seen fit to set to the extraordinary jurisdiction it has conferred on the Court. At that stage the Court must be satisfied, before commencing to think what provision it would be wise and just to make in the circumstances as they then exist, that the testator's will did not operate to make such a provision for the applicant's maintenance and support as would have been made if a complete knowledge of the situation and a due sense of moral obligation with respect to those matters had combined to dictate a new will to the testator immediately before he died.

2.9.4 Section 9 (2): *Re Forsaith*. Should we recommend that the material date be changed from the date of death to the date when the Court is dealing with the application? If we recommend this way, we will be proposing a return to the rule stated by Harvey C.J. in *Eq.*, in 1926, in *Re Forsaith*:³ a rule disapproved, in 1956, by a majority of the High Court in *Coates' Case*,⁴ and overruled, in 1959, by the Privy Council in *Dun's Case*.⁵

FOOTNOTES

1. See *Coates v. National Trustees Executors & Agency Ltd* (1956) 95 C.L.R. 494 and *Dun v. Dun* [1959] A.C. 272.
2. *Coates v. National Trustees Executors & Agency Ltd* (1956) 95 C.L.R. 494, 528.
3. (1926) 26 S.R. (N.S.W.) 613.
4. (1956) 95 C.L.R. 494.
5. [1959] A.C. 272.

2.9.5 Section 9 (2): Justification of *Re Forsaith*. Reasons for returning to the *Re Forsaith* rule are to be found in the judgment of Fullagar J. in *Coates' Case*⁶-

The view taken by Harvey C.J. in *Eq. in Re Forsaith Dec'd*⁷ and by Paine A.J. in *In re Wheare*⁸ is, in my opinion, to be preferred to the narrower view. It is more in accord with the general object of the legislation, and allows the Courts a freer hand in the exercise of a discretion which has always been regarded as very wide indeed. It is, moreover-and this is, to my mind, a decisive consideration-much more realistic. It seems to me to be the natural and sensible view. It avoids an unnecessary question, which savours of artificiality, and which often cannot really be satisfactorily answered. For, if it is rejected, then, in any case in which the circumstances of an applicant have

altered for the worse since the testator's death, we have to ask ourselves the question whether the testator ought, as a reasonable armchair-sitter, to have foreseen, and provided for, the contingency which has arisen. This is an unpractical and speculative question. We may suppose the case of a testator who has two adult sons, of whom the one is an able-bodied man with excellent prospects, and the other is a cripple. He leaves a modest but substantial estate to the cripple, and makes no provision for the other son. After his death the other son is crippled in an accident. It seems idle to say that the testator ought to have foreseen and provided for such a contingency, the odds against which were tremendous. It may be, of course, that, when the accident happens, the Court can do nothing because the estate has been distributed. But, if it *can* do something, it seems to me to be contrary to the intendment of the statute ... to say that nothing can be done because the testator could not have foreseen what has happened.

2.9.6 Section 9 (2): criticism of *Re Forsaith*. Arguments against returning to the *Re Forsaith* rule are to be found in the judgment of Myers J. in *Re T. F. Dun*⁹ where his Honour was dealing with an application for extension of time within which to commence proceedings under the Act at a time when he had to follow *Re Forsaith*. He said¹⁰-

Since the question to be determined depends on ascertaining whether the testator has discharged his moral duty as a parent or spouse to the applicant, I have always had and still have difficulty in understanding how one can impute an obligation to him by reference to a state of affairs which did not exist at the time the obligation is said to have been incurred. The object of the statute is not to secure a fair or equitable disposition of the estate; it is only to enable a defect in the beneficial dispositions to be remedied, to supply something which the testator has omitted and which he was morally bound to provide. . .

The extent of the duty thus imposed upon a testator can only depend upon the circumstances which existed at the time the duty attached and it appears quite wrong to me to hold that a testator, whose dispositions may have been unimpeachable when he died, should nevertheless have made more liberal provision for his wife or child because of circumstances supervening after his death and which neither he nor anyone else could have foreseen. If, in this very estate with which I am dealing, the applicant should be permitted to apply for maintenance and if that application should succeed, the award in her favour will not depend upon her circumstances or the circumstances of other objects of the testator's bounty at the time he died, or upon the nature or value of the estate at that time. It will depend upon what has happened since the testator's death and her rights will be determined, not by considering what the testator should have done or whether he made his testamentary dispositions without regard to the moral claims of his wife, but by considering what he ought to have done or what dispositions he ought to have made had he lived 13 years longer than he in fact did. Further, it is almost inevitable that, having regard to the great change in the estate since 1942, any order which the applicant might obtain would be one which she could not have obtained had she made her application within due time.

In 1959, the Privy Council expressed views similar to those of Myers J.¹¹-

. . . their Lordships think that the intention of all the statutes in this field was to enable the Court to vary the provisions of a will in cases where it was satisfied that the testator had not made proper provision for a dependent: it would be contrary to this intention to judge a testator not by the position as it was at the time of his death but by the position as it might be as the result of circumstances which the testator could not reasonably have been expected to foresee. Their Lordships recognize that it may sometimes be difficult to determine what the testator should have foreseen, but the difficulty is no greater than is often incurred in assessing damages in personal injury cases and Parliament has not hesitated to cast this burden on a judge.

2.9.7 Section 9 (2): Working Paper. We said in the Working Paper¹²-

Much can be said for and against a proposal to amend the law to accord with the rule in *Re Forsaith*. We support the proposal. To us, questions touching the clairvoyance of hypothetical testators endowed with wisdom and justice¹³ are less real and less useful than those which are

concerned with the present welfare of living persons. There is, in our view, an artificiality about the rule in *Coates' Case* which contrasts unfavourably with the utility of the rule in *Re Forsaith*.

2.9.8 Section 9 (2): justification. Most commentators agree with the proposal made in the Working Paper. But the question remains: is section 9 (2) a satisfactory way of implementing the proposal? We think it is. In effect, the subsection puts the onus on the Court to obtain, as far as possible, a complete knowledge of the situation before it. Moreover it frees the Court from its present obligation to ask itself the difficult question whether the deceased person ought, as a reasonable armchair-sitter, to have foreseen, and provided for, any contingency which may have arisen. In our view, no reasonable man will object to the Court having power to do for him what it is likely he would have done himself, if he had lived long enough.

2.9.9 Section 9 (2): impact. Section 9 (2) will not have any great impact on most cases heard under the new Act. This is so because most cases will be heard within 2 or 3 years after the death of the person concerned and the facts at the date of the hearing will be little different from the facts at the date of death. But, where delay occurs and a successful application is made for an extension of time for the commencement of proceedings, section 9 (2) may turn what would now be an unsuccessful application into a successful application: the facts at the date of the hearing being more favourable to the applicant than they were at the date of death. Instances of this kind may be few in number but section 9 (2) should enable the Court to balance more evenly than it can now the competing claims of all interested persons.

2.9.10 Section 9 (3) and (4): the problem. The quick determination of most legal proceedings is desirable. It is particularly so in the case of proceedings for family provision. Beneficiaries in estates want to be sure of their entitlements and representatives of deceased persons want to complete their duties. Yet the Court is sometimes faced with the situation that the case for only one of many possible applicants is before it; one or more applicants may commence proceedings at a later date and all claims need not be heard together. In *Re Bourke*,¹⁴ for example, Street, J. said¹⁵-

The duty to the present applicant is not to be considered remote from, or unrelated to, such testamentary duties as the testatrix may be seen to have owed to other members of her family. Whether or not the members of the family to whom such testamentary duties may have been owed come forward to propound their claims is, perhaps, irrelevant. In theory it is possible for the husband or any of the other children in the present case to make a claim under the statute, assuming, of course, he or she is within the period fixed by the Act for bringing of such a claim. The fact that none has presently come forward does not justify the Court in placing aside the necessity of considering the moral duty owed to such other persons, and the prospect, albeit in the present case remote, of such other claims coming forward and having to be met. This prospect is not the ground for the decision I have reached; but it exemplifies the validity of taking into account, when determining the existence of a duty on facts such as those before me, the existence of duties owed to other persons entitled in a moral sense to share in the distribution of the estate of a testator.

If all eligible applicants were parties to particular proceedings, the Court would be better placed to evaluate the testamentary obligations of the deceased person concerned and to determine priorities between competing applicants. Moreover, the Court would be better placed to evaluate the testamentary obligations of a deceased person if a beneficiary of that person were heard to say why the provision made for him by the deceased should not be disturbed by the Court.

2.9.11 Section 9 (3) and (4): the Working Paper. The draft bill which forms part of the Working Paper contains a provision enabling the Court to order that a person be joined as a party to proceedings under the Act if he is a person whose joinder as a party is necessary or desirable to ensure that all matters in dispute are effectually and completely determined and adjudicated upon.¹⁶ The provision is based on part 8 rule 8 of the Supreme Court Rules, 1970. In speaking of the provision, one group of commentators says-

The full effect of the decision in *Re Bourke* [1968] 2 N.S.W.R. 453 has not been dealt with. The effect of this decision is that if a man leaves an estate of \$10,000 to the Home for Homeless Cats and leaves a widow and two needy children and the widow for religious or other reasons declines to

make an application, the children will be unsuccessful in their applications because had the widow made an application she would have obtained the whole estate and so the testator had no moral duty towards the children. The Home for Homeless Cats therefore takes the whole estate. Some inroads to this rule have been made by the proposed new section 30 permitting the widow to be joined as a party, but the section does not go far enough.

2.9.12 Section 9 (3) and (4): the solution. We agree that *Re Bourke* gives rise to some practical difficulties but we believe that section 9 (3) and (4) provide the means for overcoming them. If, in the case mentioned in paragraph 2.9.11, one of the applicant children was to give the prescribed notice to the mother and the mother did not, within the time limited by the notice, apply for provision, the Court could deal with the children's applications on the footing that the mother had not been left without adequate provision. In this way, the competing claims of the children and the charity could be determined without regard to the complicating fact of the mother's failure to apply for provision.

2.9.13 Section 9 (5) (a): character and conduct. The substance of section 9 (5) (a) was included in the draft bill which formed part of the Working Paper.¹⁷ It states what we believe to be the existing law.¹⁸ One commentator suggests, however, that the paragraph should state that the Court *shall* have regard to the character or conduct of an eligible person. He argues that the Court should be directed to refuse an order where the conduct of the eligible person materially damaged the deceased person in his lifetime. In his words: "Why should a worthless son get an order when the whole estate is diminished by his conduct?" The same commentator would overrule the decision in *Re Gilbert*¹⁹ and have the new Act provide, for example, that the Court shall have regard to attempts by an eligible person to deceive the Court about the merits of his application. On the other hand, another commentator says that the character or conduct of an eligible person should never be considered by the Court because, in most cases, evidence of it comes from close relatives and the evidence is unreliable in that it is highly coloured by self-interest. In our view, section 9 (5) (a) is adequate as it stands. We think it right that the Court may look at the character or conduct of an eligible person. But, because this is an area which calls for the making of value judgments, we also think it right that the Court should be able to give effect to its view of contemporary community standards on "conduct disentitling" without statutory direction or restriction.

2.9.14 Section 9 (5) (b) (i): conflict of laws. The Court cannot make an order under the Act affecting, in the case of a person dying domiciled outside New South Wales, the movables of that person, whether they are situated in New South Wales or not.²⁰ We proposed in the Working Paper that the Court should be empowered, in favour of an applicant who is ordinarily resident within New South Wales, to make an order affecting the movables of a deceased person which are situated in this State, whether or not the deceased person was, at the time of his death, domiciled here.²¹ Section 9 (5) (b) (i) of the bill permits the Court to make an order of the kind mentioned, even if the applicant is not ordinarily resident within New South Wales. In relation to assets in this State, we think now that the Court should have jurisdiction without regard to the place of residence of an applicant. As we see it, the Court should not be closed to a person with a moral claim to property which is within the jurisdiction of the Court merely because he does not live within that jurisdiction.

2.9.15 Section 9 (5) (b) (i): Domicile. Section 9 (5) (b) (i) does not effect any change to the proposal made in the Working Paper that, in relation to the movables of a deceased person, the Court should be able to make an order for provision, whether or not the deceased person was domiciled in New South Wales. To us, the situation of the assets is more important than the domicile of the deceased. In making this proposal, we are, of course, suggesting that some longstanding authorities be disregarded.²² There is, however, legislative precedent for this approach. Section 7 (1) (a) of the South Australian Inheritance (Family Provision) Act, 1972, gives the Court jurisdiction over the estate of a person who has died leaving real or personal property in that State. On the other hand, if, upon the enactment of section 9 (5) (b) (i), a person dies domiciled in Victoria leaving movables in New South Wales, it is theoretically possible that those movables might be affected by contradictory orders of the Supreme Courts of Victoria and New South Wales. We doubt, however, that problems of this kind will arise in practice. In proceedings for family provision, the Court is usually well-informed of all relevant facts and, if a possibility of conflict arises, the Court can be expected to refuse to make an order or to adjourn the hearing of the application until the possibility is resolved.

2.9.16 Section 9 (5) (b) (i): Movables. Section 9 (5) (b) (i) does not use the word “movables”, it refers instead to estate or notional estate “which is situated in New South Wales”. We think that in the context of the bill, “estate” must be read as comprehending any form of property. Our purpose in not using the word “movables” is to avoid the debate which might arise if we were to propose a legislative division of property into movable and immovable property rather than into real and personal property:²³ a debate which though relevant in some fields of the law has little relevance in the field of family provision law. To prevent section 9 (5) (b) (i) from being construed as depriving the Court of the power to make an order affecting the movables outside New South Wales of a person dying domiciled in New South Wales, we include section 9 (b).

2.9.17 Section 9 (5) (b) (ii) to (iv) and section 9 (5) (c), (d) and (e). Section 9 (5) (b) (ii) to (iv) and section 9 (5) (c), (d) and (e) not only restate the substance of section 3 (3) of the Act but also clarify and give statutory recognition to some existing practices of the Court. The provisions are in part based on section 80 of the Family Law Act 1975 (Cth). Section 9 (5) (b) (iv), unlike any provision in the Act, deals specifically with the matter of interest on money directed to be paid by way of provision. Section 9 (5) (c), in so far as it speaks of “interim orders”, is intended to settle the debate concerning the power of the Court to make an interim order in proceedings for family provision.²⁴ We note that section 9 (5) (b) and (c) are concerned with “appointments” and that section 9 (5) (d) and (e) are concerned with “orders”. We draw this distinction because the operation and effect of an appointment are governed by section 21 of the Bill but the operation and effect of an order are governed by the general law relating to orders of the Court.

2.9.18 Section 9 (5) (f). Part III of the bill (Notional Estate) enables an appointment for provision to affect property which is not part of the actual estate of a deceased person. An order under part III may override what would otherwise be a valid disposition of property and in so doing it will invade the security of title of a transferee of property. In our notes on section 22 of the bill, we give reasons for our recommendation that the Court should have a power to make appointments having this effect. In section 9 (5) (f), we try to ensure that the Court will make appointments affecting the notional estate of a deceased person only in special circumstances.

Section 10

2.10.1 Appointments for immediate provision. Section 10 of the bill provides-

- (1) *Any person who has commenced proceedings under section 9 may apply to the Court under this section for immediate provision.*
- (2) *Where, in proceedings under this section-*
 - (a) *the Court finds that the applicant is an eligible person; and*
 - (b) *the Court is satisfied-*
 - (i) *that the applicant is in immediate need of provision;*
 - (ii) *that it is not yet possible to determine what final appointment, if any, should be made under section 9 in favour of the applicant; and*
 - (iii) *that part of the estate or notional estate, or both, of the deceased person can be made available to meet the need of the applicant,**the Court may appoint that such provision as the Court thinks fit be made for the applicant out of the estate or notional estate, or both, of the deceased person.*
- (3) *The Court shall not make an appointment under this section unless it is satisfied that the appointment will not adversely affect any creditor.*
- (4) *In determining what appointment, if any, should be made under this section, the Court shall, so far as the urgency of the case admits, take account of the same considerations as would be relevant in determining what final appointment, if any, should be made in the proceedings,*

(5) An appointment under section 9 may provide that provision made for the benefit of an eligible person by virtue of this section shall be treated as having been made on account of the provision made by that appointment.

(6) Section 21 applies in relation to an appointment under this section as it applies to an appointment under section 9.

(7) Where an administrator of the estate of a deceased person gives effect to an appointment made under this section, he shall not be under any liability if, in consequence of his so doing, he is unable to satisfy any lawful claim against the estate, unless, at the time of his so doing, he had reason to believe that by his so doing he would be unable to satisfy the claim.

(8) Subsection (7) does not reflect the operation of section 114 of the Stamp Duties Act, 1920.

(9) In so far as this section applies to the notional estate of a deceased person, it has effect subject to part III.

FOOTNOTES

6. (1956) 95 C.L.R. 494, 520-521.
7. (1926) 26 S.R. (N.S.W.) 613.
8. [1950] S.A.S.R. 61.
9. (1956) 56 S.R. 181.
10. *Id.*, 184.
11. *Dun v. Dun* [1959] A.C. 272, 290.
12. Paragraph 9.7.
13. See *Kitto J. in Coates v. National Trustees Executors & Agency Ltd* (1956) 95 C.L.R. 494, 526, 527.
14. [1968] 2 N.S.W.R. 453.
15. *Id.*, 456.
16. The Working Paper, pages 194 and 195 (section 30).
17. See the Working Paper, page 175.
18. See the Working Paper, part 10.
19. (1946) 46 S.R. (N.S.W.) 318.
20. *Re Paulin* (1950) V.L.R. 462, 465.
21. The Working Paper, page 175 (section 8 (4) of the then draft bill).
22. See, for example, *Re Paulin* [1950] V.L.R. 462, 465.
23. See, for example, Nygh, *Conflict of Laws in Australia* (2nd ed.) (1971) pages 591-598; and Davern Wright, *Testatoos Family Maintenance in Australia and New Zealand* (3rd ed.) (1974) pages 5-6.
24. See the Working Paper, paragraphs 12.13 to 12.18.

2.10.2 Working Paper. With the exception of section 10 (7) and (8) and other minor exceptions, section 10 restates the substance of section 10 of the draft bill which formed part of the Working Paper.¹ In proposing the provision, we said²

We think that the Court should be able to intervene for the purpose of avoiding hardship pending a final decision in proceedings under the Act. Without fault on the part of the applicant or of the Court, it is sometimes many months after the death of a deceased person before the Court is able to determine finally a claim under the Act. In the meantime, the applicant may be without adequate funds for proper maintenance and yet funds may be lying idle in the estate. This situation may not occur frequently but when it does occur the Court should be able to intervene. To us, the possible availability of social services assistance is not a satisfactory answer to the problem.

The proposal . . . is open to the objection that there will be little likelihood of the estate recovering moneys paid to an applicant who is eventually unsuccessful in his claim. This objection is valid and we do not have a complete answer to it. All that can be said is that the times when a person needs immediate assistance are likely to far outnumber the times an applicant is ultimately unsuccessful.

And, the Court can be expected to be wary of making orders for immediate assistance in favour of applicants with very doubtful prospects of success.

FOOTNOTES

1. See the Working Paper, page 177.
2. *Id.*, paragraphs 12.21 and 12.22.

2.10.3 Comment on proposal. The only criticism made to us of the proposal is that it does not go far enough. In the words of one group of commentators: "Consideration should be given to including a provision in the Act that a widow might make an informal *ex parte* application to a Master or Registrar in Chambers to obtain some access to the husband's bank account pending grant on the basis that she would account for the moneys so taken when a grant of probate was made". While much can be said in favour of this idea, we think that the new Act is not an appropriate place for its legislative expression: to us, a provision of this kind would be more appropriately placed in the Wills, Probate and Administration Act, 1898. Moreover, in our work on this reference we are only incidentally concerned with the law relating to death duties. Our commentators' proposal raises policy issues touching death duties which are beyond our terms of reference.

2.10.4 Section 10 (7). We include section 10 (7) because of statements made to us by another commentator to the effect that an administrator may be reluctant to act on an appointment for immediate provision in favour of one beneficiary if, in so acting, he puts himself at risk of an action by another beneficiary. We doubt that an administrator runs any risk in complying with an appointment made by the Court but, for the avoidance of doubt, section 10 (7) gives an administrator an exemption from liability in the circumstances specified in the subsection.

Section 11

2.11.1 Testamentary promise: promise performed. Section 11 of the bill provides-

(1) *Where-*

- (a) *in accordance with a promise made in his lifetime, a deceased person, by will or otherwise, makes provision for property to pass from his estate to a person (in this section called the "donee") on or after his death; and*
- (b) *in proceedings under section 9, the Court is satisfied that an appointment for provision should be made for an eligible person out of the estate of the deceased person,*

the Court may appoint the property, but only to the extent by which, in the opinion of the Court, the value of the property exceeds the value to the deceased person, at the date of the promise, of the consideration, if any, for the promise, increased or decreased, as the case may be, to an amount that bears to that value the same proportion as the value of the property at the date of the appointment bears to the value of the property at the date of the promise.

(2) *In determining whether and in what manner to exercise its powers under this section, the Court shall have regard to all the circumstances of the case, including the circumstances in which the promise was made by the deceased person, the relationship, if any, of the parties to the promise, and the conduct and financial resources of those parties.*

(3) *Where the Court makes an appointment under this section, it may give such consequential directions as it thinks fit for giving effect to the appointment or for securing a fair adjustment of the rights of the persons affected by it.*

(4) *Where an appointment made under this section is inconsistent with any part of the promise made by the deceased person, the right of any person to enforce the promise or to recover damages or to obtain other relief for its breach shall be subject to the appointment and shall survive only to such extent as is consistent with giving effect to the appointment.*

(5) *This section does not apply to any promise made before the appointed day.*

(6) *This section does not apply to any property in the notional estate of a deceased person.*

2.11.2 The existing law. In *Schaefer v. Schuhmann*,¹ the Privy Council said that where a testator had bound himself by an enforceable contract to leave property by will to a certain person, and did so, the Court had no power to throw any part of the burden of an order for provision on the property in question. In a dissenting judgment, Lord Simon of Glaisdale said that the majority decision would countenance the following situation²-

[A] widower is left with two infant children; he proposes marriage to another woman, promising to bequeath her the whole of his estate if she will accept him; she does accept him on these terms; he dies shortly afterwards; the court is powerless to order any provision out of his estate for his infant children.

2.11.3 The Working Paper. In the Working Paper, we considered whether the new Act should reverse the decision in *Schaefer v. Schuhmann*.³ We said⁴-

The question before us may be put in different ways according to the emphasis one wishes to give it: "Should a testator be permitted to render rights under the Act nugatory by covenants to make bequests by will?"⁵ or: "Should contracts made by a testator in good faith and in the normal course of arranging his affairs be liable to be wholly or partial set aside by the Court under the Act?"⁶ But, no matter how it is asked, the question touches a social issue on which different people may reasonably take different views. Our view is that a legislative policy which, through the Act, restricts freedom of testation must, if that policy is to be given full weight, be supported by a restriction on the freedom to enter into contracts to make wills. To us, to argue otherwise is to support the retention of a nineteenth century policy in a twentieth century situation: Just as the nineteenth century freedom of testator was restricted in the twentieth century, so too should a nineteenth century freedom of contract be restricted.

No commentator disagreed with this view and section 11 states it in legislative terms.

2.11.4 Section 11: Comparative law. To some extent, section 11 is based on section 11 of the Inheritance (Provision for Family and Dependents) Act 1975 (U.K.). But this last mentioned provision confers power on the Court to review only some contracts made by deceased persons to leave property by will: contracts made with the intention of defeating an application for family provision. The English section is based on recommendations made by the Law Commission in England.⁷ In that Commission's view, where an intention to defeat an application under the United Kingdom Act is not present, there is no ground for giving the Court power to interfere with contracts made by a deceased person. On the other hand, clause 16 of the Canadian Draft Uniform Family Relief Act,⁸ which is also directed at contracts to leave property by will, has no express reference to an intention on the part of the deceased to defeat an application for an order for provision. In this instance, we recommend that the Canadian example be followed. To us, the words of Lord Simon of Glaisdale quoted in paragraph 2.11.2 are pertinent and they are not hedged by any qualification going to "intent".

2.11.5 Section 11 (1). We make two general comments on section 11 (1). First, although *Schaefer v. Schuhmann*⁹ was concerned only with a contract to leave property by will, there can be an analogous contract under which a person undertakes that his personal representative will pay money or transfer other property out of his estate. Where a contract of this kind exists, we think that the Court should have like powers, exercisable in like circumstances, as in the case of a contract to leave property by will. The words in the subsection "by will or otherwise", are intended to achieve this result. Our second general comment is that section 11 allows the Court to make appointments affecting property within the application of the section only to the extent of any discrepancy between the value of the property and the value to the deceased person of the consideration which was promised to him. If there is no discrepancy, as is the case in many contractual situations, the Court cannot make an order under section 11. As we see it, the Court will not often be called upon to exercise its jurisdiction under this section.

FOOTNOTES

1. [1972] A.C. 572.
2. *Id.*, 594.
3. See the Working Paper, paragraphs 11.49 to 11.58.
4. *Id.*, paragraph 11.54.
5. See Lord Simon of Glaisdale in *Schaefer's Case* [1972] A.C. 572, 599.
6. See Lord Cross in *Schaefer's Case* [1972] A.C. 572, 592.
7. *Family Provision on Death* (1974) (Law Com. No. 61), paragraph 226.
8. See the 1970 Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada, page 119.
9. [1972] A.C. 572.

2.11.6 Section 11 (2). Because an appointment under section 11 may affect contracts made by a person in good faith and in the normal course of arranging his affairs, it should not be made without the fullest investigation of all relevant circumstances. For this reason, section 11 (2) not only allows but directs the Court to have regard to particular matters.

2.11.7 Section 11 (3). In connection with its exercise of the powers conferred by section 11, the Court may need ancillary powers. Where, for example, a person is directed to renounce property which was to be transferred to him in consequence of a contract, the Court may want power to order a payment to be made to him out of the estate of the deceased contracting party. The Court may also want to give specific directions as to how any surviving contractual rights are to be fulfilled. Section 11 (3) seeks to give the Court wide ancillary powers of this kind.

2.11.8 Section 11 (4). Section 11 (4) merely spells out the effect on a contract of an appointment under section 11 (1): where the provisions of the appointment and the contract conflict, the former prevails.

2.11.9 Section 11 (5). We do not believe that legislation which has the effect of permitting the Court to cancel or vary a freely negotiated contract should apply retrospectively. For this reason, section 11 (5) provides that section 11 shall operate prospectively.

2.11.10 Section 11 (6). Although, in its operative provisions, section 11 speaks only of the "estate" of a deceased person, we wish to avoid any possibility of conflict between the operation of section 11 and the operation of part III (Notional Estate). Hence subsection (6) specifically excludes the notional estate of a deceased person from the application of the section.

Section 12

2.12.1 Testamentary promise: promise not performed. Section 12 of the bill provides-

(1) *Where-*

- (a) *a deceased person makes in his lifetime a promise to dispose, by will or otherwise, of property out of his estate;*
- (b) *the deceased person does not perform the promise;*
- (c) *a person (in this section called "the promisee"), or any person claiming under him, has a right to enforce the promise or to recover damages or to obtain other relief for its breach; and*
- (d) *in proceedings under section 9, the Court makes an appointment for provision for an eligible person out of the estate of the deceased person,*

the Court may, subject to subsection (2), order that the right of the promisee, or any person claiming under him, to enforce the promise or to recover damages or to obtain other relief for its breach shall be subject to the appointment and shall survive only to such extent as is consistent with giving effect to the appointment.

(2) *An order under subsection (1) shall bar the right of the promisee, or any person claiming under him, to enforce the promise or to recover damages or to obtain other relief for its breach only to the extent by which, in the opinion of the Court, the value of the property exceeds the value to the deceased person, at the date of the promise, of the consideration, if any, for the promise, increased or decreased, as the case may be, to an amount that bears to that value the same proportion as the*

value of the property at the date of the order bears to the value of the property at the date of the promise.

(3) In determining whether and in what manner to exercise its powers under this section, the Court shall have regard to all the circumstances of the case including the circumstances in which the promise was made by the deceased person, the relationship, if any, of the parties to the promise, and the conduct and financial resources of those parties.

(4) Where the Court makes an order under this section, it may give such consequential directions as it thinks fit for giving effect to the order or for securing a fair adjustment of the rights of the persons affected by the order and the appointment under section 9.

(5) This section does not apply to any promise made before the appointed day.

2.12.2 Justification. The Working Paper did not contain any proposal for a provision such as section 12. Indeed in the course of our work on this reference we have not found a like provision in any family provision statute. Nonetheless we believe that the section is a necessary addition to the bill. It does, of course, complement section 11. That section is concerned with the situation where a deceased person has complied with an agreement made by him to leave property by his will and, subject to conditions, it, in effect, empowers the Court to rescind or vary the agreement. Section 12, on the other hand, is concerned with the situation where a deceased person has not complied with an agreement made by him to leave property by will and, in consequence, proceedings relating to his breach of the agreement may be commenced against his estate. In this circumstance, subject to conditions, the Court may, in effect, bar the commencement of the proceedings or limit any remedy which may be obtained in them. Without section 12, we believe that the *Schaefer v. Schuhmann*¹ problem is only partly solved.

FOOTNOTES

1. [1972] A.C. 572.

Part 2 - The Bill (Sections 13 to 18)

Section 13

2.13.1 Class fund. Section 13 of the bill provides-

(1) In proceedings under section 9, the Court may appoint that specified property be set aside out of the estate or notional estate, or both, of a deceased person and be held on trust as a class fund for the benefit of two or more eligible persons.

(2) Where property is set aside as a class fund, the Court shall appoint a trustee of the fund.

(3) Where property is ordered to be held in trust as a class fund, the trustee, subject to such directions or conditions as the Court gives or imposes, but otherwise as he thinks fit, may, from time to time, apply the whole or any part of the income and capital of the fund for or towards the maintenance, education or advancement in life of the persons for who have benefit the fund is held, or any one or more of them to the exclusion of the other or others of them in such shares and in such manner as the trustee, from time to time, determine.

2.13.2 New Zealand provision. In New Zealand, the Court may, under section 6 of the Family Protection Act 1955, order that an amount specified in an order for provision under that Act be set aside out of the estate and be held on trust as a class fund for the benefit of 2 or more persons specified in the order. The trustees of the fund may apply its capital and income for the maintenance, education, advancement or benefit of those persons or any one or more of them to the exclusion of the other or others of them in such manner as the trustee thinks fit.

2.13.3 Reason for New Zealand provision. We believe that the class fund concept was introduced into the New Zealand Act because of the decision of the New Zealand Court of Appeal in *Re Maxwell*.¹ In that case, the Court said²-

We are impressed by the practical propriety and wisdom of the order of the trial Judge setting aside a fund in the hands of a trustee for the benefit of the grandchildren as a class giving the trustee discretion as to the actual application as between the beneficiaries of the income of the fund and directing the ultimate division of the unexhausted surplus among such of his grandchildren as shall live to attain 21 years, in equal shares. But we regret that we cannot agree with the learned Judge in the Court below as to the authority to make what has been sometimes called "a class order".

2.13.4 Objection to and justification of class fund. An argument against the notion of a class fund is that the Act is concerned with the claims of individuals, not with the claims of persons constituting a special class: that to create a situation where a person may succeed, by accruer, to a greater amount than is adequate for his proper maintenance is to offend the principle of individual consideration. This argument may be sound but, in our view, a provision which enables a trustee to treat, say 4 young children as a group and not as 4 separate persons has merit in that it is both convenient and practical. Few parents try to spend equal sums of money on their children. If the present needs of one child are greater than the needs of another, then, as far as possible, the needs of the first child are satisfied out of family funds. This happens where the parents are living. We think that a trustee of a fund of this kind should be able to act with the same flexibility. And, if one child dies and in consequence more money is available to spend on, and eventually to be divided between, the other children, we do not see that that is a wrong result. If the parents were living, almost certainly the same result would follow.

2.13.5 The Court. Moreover, the Court has, in effect, the power to make a codicil to the deceased's will or to modify, in a particular instance, the law relating to succession on intestacy.³ We do not see why the Court should not frame the codicil or the modification in any way it sees fit, so long as it is for the purpose of making provision for an eligible applicant.

2.13.6 Section 13: utility. We doubt that section 13 will often be used but when an occasion arises for its use, its presence in the new Act will be beneficial.

FOOTNOTES

1. [1954] N.Z.L.R. 720.
2. *Id.*, 736.
3. The new Act, section 21.

Section 14

2.14.1 Time for proceedings for provision. Section 14 of the bill provides-

(1) Subject to subsections (2) and (3) (b) and to any order under section 15, an appointment under section 9 that provision be made for an eligible person out of the estate or notional estate, or both, of a deceased person shall not be made unless the proceedings for the appointment are commenced by the eligible person within 18 months after the date of the death of the deceased person.

(2) Subject to subsections (3) (b) and (4) and to any order under section 15, the Court may, on the application of any person who adduces prima facie evidence that he is an eligible person and who shows sufficient cause, extend the time within which he may commence proceedings for an appointment for provision under section 9.

(3) (a) The Court may extend time under subsection (2) whether or not the time fixed by subsection (1) has expired and whether or not an application for the extension is made before that time has expired,-

(b) The Court may extend time under subsection (2) in proceedings for an appointment for provision under section 9 notwithstanding that the proceedings are commenced after the time fixed by subsection (1) has expired.

(4) Subject to subsection (7), an application under subsection (2) for an order extending time within which to commence proceedings for provision out of the estate of a deceased person shall be made before all the property in the estate is distributed.

(5) Subject to subsection (7), an application for an order under subsection (2), and an appointment under section 9 made in proceedings commenced in pursuance of an order made on the application, shall not affect any property in the estate of the deceased person which was distributed before the date of the application.

(6) An appointment under section 9 made in proceedings commenced in pursuance of an order made under subsection (2) shall not affect any property subject to the statutory trust unless, in the proceedings for the appointment, the Court is satisfied that that property was taken, by the person entitled to it at the date of the appointment, with notice that the deceased person disposed of it with the intention, wholly or in part, of defeating, wholly or in part, an application under section 9.

(7) Subsections (4) and (5) do not apply where the applicant for an order under section (2) is a person who has not attained the age of 18 years or who, owing to mental illness, is incapable of managing his affairs.

2.14.2 Section 14 (1). In recommending that proceedings for provision should be commenced within 18 months after the date of the death of a deceased person, we are recommending a departure from the

Act which we did not foreshadow in the Working Paper. We proposed then¹ that the time for commencing proceedings for provision out of the estate of a deceased person should be the same as that fixed by the Act² but that the time for commencing proceedings for provision out of the notional estate of a deceased person should be not later than 18 months after the date of the death of that person; in each case, subject to a power in the Court to extend time. We thought then that it was necessary to make special provision for the time within which proceedings should be commenced for an appointment of notional estate because the deceased person may have left only notional estate. In that event, there would be no grant of administration and a limitation period fixed by reference to the date of a grant would be inapt. We think now that 2 limitation periods should be, avoided. In practice, there will often be little difference, between a period which expires 18 months after the date of death and one which expires 12 months after the date of the grant of administration. Our present recommendation has the disadvantage that in cases where, an application for administration of the ordinary kind is unduly delayed, an estate person wishing to commence proceedings for provision will need to apply for a grant of letters of administration *ad litem* so that the proceedings can be taken within time against the administrator *ad litem*.³ We anticipate, however, that there will be few occasions on which applications of this nature will have to be made.

2.14.3 Section 14 (1) and grants of administration. By force of section 40 of the Wills, Probate and Administration Act, 1898, the Court has jurisdiction to grant administration of the estate of a deceased person only if that person leaves property, whether real or personal, in New South Wales. If a person dies leaving only notional estate here, cause of that section, commence proceedings for provision under the new Act: there could be no person against whom the proceedings could be taken. To overcome this potential problem, and other problems,⁴ we recommend that section 40 of the Wills, Probate and Administration Act, 1898, be amended to the effect that the Court shall have jurisdiction to grant administration of the estate of a deceased person whether or not that person leaves property in New South Wales. Schedule 1 of the bill so provides. If enacted, this amendment will have the effect that the law here is the same as it has been in England since 1932 and that it is substantially the same as it is in the Australian Capital Territory.⁵ In speaking of the English position, Dicey and Morris say⁶-

Before 1857, grants of representation were made exclusively by the ecclesiastical courts. Their jurisdiction depended upon the presence of movable property which had belonged to the deceased (technically called *bona notabilia*) within the court's diocese or province. In 1857, this jurisdiction was transferred to the Court of Probate and is now vested in the High Court⁷.... Until 1932, the High Court could assume jurisdiction to make a grant only on the same grounds as the ecclesiastical courts would have done so. Although it did not matter where the deceased had been domiciled,⁸ it was necessary to show that there was property to be administered within the jurisdiction of the court. This requirement could be very inconvenient. When an English domiciliary died leaving property abroad, the foreign court would sometimes refuse to make a grant of representation until a grant had been obtained in England. If the deceased had left no property in England the result was an impasse.⁹ In 1932, the jurisdiction of the High Court was therefore extended to allow it to make a grant in respect of any deceased person.¹⁰

In our view, the Court's jurisdiction to make grants of administration should no longer be based on a jurisdictional concept of the ecclesiastical courts. We see no utility in maintaining the connection and, as indicated in this paragraph, we see advantages in severing it.

2.14.4 Section 14 (2): Working Paper. Section 14 (2) of the Bill is different from the provision proposed in the Working Paper: the former gives any eligible person the, right to apply for an extension of time for the commencement of proceedings but the latter restricted this right to the widow, widower and children of a deceased person.¹¹ We said in the Working Paper¹²-

Much can be said for and against giving the right [to apply for an extension of time] to all eligible applicants. It can be argued, for example, that if the circumstances of a case are such that the Court is willing to extend time, the Court should be able to do so without regard to the status, or lack of it, of the applicant; to deny the Court this right is to fetter the Court in an area where it should be free. On the other hand, it can be argued that any widening of the class of eligible applicants will introduce a new uncertainty into the administration of estates which can be justified only if the

uncertainty is strictly limited in time: beneficiaries must, without undue delay, be made secure in the knowledge that an order for provision cannot adversely affect them. We favour the latter view, but we would not apply it to the spouse or children of a deceased person.

To us, the spouse and children of a deceased person have such compelling claims on his bounty that the Court should always be free to allow them to apply under the Act. The same compulsion need not be present in the case of other eligible applicants who may be, for example, a parent, a former spouse or a grandchild of the deceased. If such a person does not make his claim within twelve months, we would deny him the right to make it at all. In this instance, the claims of beneficiaries nominated by a testator or fixed by the law relating to intestacy should, we believe, be dominant. Our view, if adopted, will result in some hardship cases where a claimant is ignorant either of his right to apply for provision or of the time within which he must apply. As we see it, these cases will be fewer than the cases where reasonable expectations may be frustrated by a late, but successful, application being made for provision. Our views will not be supported by everyone. We invite contrary views.

2.14.5 Section 14 (2): Comments on Working Paper. Contrary views are put to us by some members of the Committee of the Law Society which considered the Working Paper. They argue that the fixing of short and inflexible time limits for the commencement of proceedings under any Act leads to injustices and that, in the particular case of the new Act, it is wrong that there should be an inflexible time limit for one group of persons and a flexible limit for other persons. Indeed, the argument continues, a person who is not a surviving spouse or child of a deceased person may often have a stronger case for an extension of time than a spouse or child: facts which influence a decision to commence proceedings under the Act may not be as readily available to that person as they are to the immediate family of the deceased. We see force in these objections and hence section 14 (2) takes its present form.

2.14.6 Section 14 (2): Conditions to be satisfied. A person seeking an extension of time must satisfy two conditions. First, he must adduce *prima facie* evidence that he is an eligible person: a condition that does not call for comment. And second, he must show a "sufficient cause". Although the Act does not specify, the inclusion of the words will not, in our view, effect change in the Court's attitude to granting extensions of the second condition merely because we think it right that some criterion, even though an imprecise one, should be stated. In the context of section 30 (2) (b) (ii) of the Motor Vehicles (Third Party Insurance) Act, 1942, the expression "sufficient cause" has received much judicial attention.¹³

2.14.7 *Spies v. Baker*. In an application for leave to commence proceedings out of time, the likelihood of success or failure of the proceedings, if permitted to be commenced, is a relevant factor.¹⁴ In section 12 (4) of the draft bill which formed part of the Working Paper, we proposed that in an application of this kind, the Court should have regard only to the circumstances existing at the expiration of 12 months after the date of the relevant grant of administration.¹⁵ In making this proposal, we were influenced by the possible case of a person who had no chance of making a successful claim for provision at the date of the deceased's death but who, years later, suffers a catastrophic misfortune. We thought that if, because of the misfortune, that person could, by applying successfully for both an extension of time and an appointment for provision, frustrate the reasonable expectations of a beneficiary in the estate, chance would be playing too important a role in succession law.¹⁶ Although this proposal was not criticized by any of our commentators, we have abandoned it. We do so because we believe now that its retention would lead to inconsistency within the new Act. In section 9 (2) of the bill, we recommend a return to the rule in *Re Forsaith*¹⁷ because, in our view, the Court, in determining whether an appointment for provision will be made, should be concerned with the then circumstances of the applicant.¹⁸ If the new Act were to provide that on an application for leave to commence proceedings out of time, the Court should look, not at the then circumstances, but at circumstances as they existed at another time, perhaps years before, the Court would be engaged in an irrelevant exercise. In our view, in both applications for provision and applications for extensions of time, the Court should be concerned with the present welfare of living persons, whether they be applicants or persons liable to be adversely affected by an order of the Court.

2.14.8 Section 14 (4). Section 14 (4) of the bill restates the substance of that part of section 5 (2A) (a) of the Act which says that "every application for extension shall be made before the final distribution of the estate". Section 14 (4) is, however, to be read with section 5 (3) of the bill.¹⁹

2.14.9 Section 14 (5). Under section 11 (3) of the Act the Court may order that provision be made for a person out of assets which an administrator has lawfully distributed. Section 5 (2A) (a) of the Act provides one exception to this general rule: neither an application for extension of time to commence proceedings nor an order for provision made in the proceedings is to disturb any distribution of the estate which was made before the application. Section 14 (5) retains this exception but, again, the subsection must be read with section 5 (3).

2.14.10 Section 14 (6). Section 14 (6) provides the only basis upon which the time for commencing proceedings for provision out of the notional estate of a deceased person can be extended. If notice of the deceased person's intent to defeat an application for provision cannot be successfully asserted against the owner of the notional estate, that owner is free from attack under the new Act at the end of 18 months after the date of death. In adopting this approach, we considered, first, the necessity of preserving security of titles and, secondly, the necessity of protecting an eligible person from what is, in effect, a fraud on the Act. Our proposal does not aid the beneficiary of the fraudulent (using that word in a non-technical sense) but it does limit the time within which the rights of an innocent owner can be disturbed by the Court. It may be argued that a short limitation period would be fairer to this innocent owner than the proposed 18 months period. We are tempted to agree but we do not want the new Act to contain more than one limitation period.

2.14.11 Section 14 (7). In paragraph 2.5.1 1, we noted that section 14 (7) constitutes one of two exceptions to the rule stated in section 5 (3) that where property is held by a trustee and the property has vested in interest in the person for whom it is held, the property is not at risk of a late, and successful, claim for provision. In our view, this rule should, yield to the claims of persons under legal disabilities. We consider the special problems of these persons in more detail in paragraphs 3.4 to 3.10. For present purposes, we think it sufficient to say that most branches of the law are zealous to protect persons under legal disabilities²⁰ and that section 14 (7) is another expression of that zeal. We add that the question whether an appointment for the benefit of a minor or a mentally ill person will affect distributed property is one which the Court will decide, under section 9 only after regard is had to all the circumstances of the particular case.

FOOTNOTES

1. See sections 12 and 13 of the draft bill which formed part of the Working Paper.
2. Twelve months from the date of grant or resealing in New South Wales of the probate of the will, or letters of administration of the estate, of the deceased person (section 5).
3. See Practice Note (9th April, 1962) 79 W.N. (N.S.W.) 371.
4. "Difficult problems arise out of the rule that property is essential to a grant of probate or letters of administration." (Hutley, Woodman and Wood, *Cases and Materials on Succession* (2nd ed.) (1975) page 26).
5. Administration and Probate Ordinance 1929, section 9 (2).
6. *The Conflict of Laws* (8th ed.) (1967) page 570.
7. Supreme Court of Judicature (Consolidation) Act 1925, section 20.
8. *Robinson v. Palmer* [1901] 2 Ir.R. 489.
9. *In the Goods of Fittock* (1863) 32 L.J.P.M. & A. 157; *In the Goods of Turner* (1864) 3 Sw. & Tr. 476; *In the Goods of Tucker* (1864) 3 Sw. & Tr. 585; *in the Goods of Tamplin* [1894] page 39.
10. Administration of Justice Act 1932 section 2 (1).
11. See the Working Paper, page 179.
12. *Id.*, paragraph 7.5 and 7.6.
13. See, for example, *Sophon v. The Nominal Defendant* (1957) 96 C.L.R. 469, 475.
14. *Spies v. Baker* [1970] 3 N.S.W.R. 39.
15. See the Working Paper, page 179.
16. *Id.*, paragraphs 7.7 and 7.8.
17. (1926) 26 S.R. (N.S.W.) 613.
18. See paragraphs 2.9.4 to 2.9.8.
19. See paragraph 2.5.10.
20. See, for example, the Limitation Act, 1969, section 52.

Section 15

2.15.1 Shortening of time for proceedings for provision. Section 15 of the bill provides-

(1) *Where, on application made to the Court by an administrator of the estate of a deceased person, or by a person interested in the estate or notional estate of a deceased person, the Court is satisfied-*

- (a) (i) that the time fixed by section 14 (1) has more than 3 months to run before it expires and that the applicant has cause to apprehend that a person may commence proceedings under section 9 for an appointment for provision out of the estate of the deceased person; or*
- (ii) that the time fixed by section 14 (1) has expired and that the applicant has cause to apprehend that a person may commence proceedings under section 14 (2) for an order extending the time within which he may commence proceedings under section 9 for an appointment for provision out of the estate of the deceased person; and*
- (b) that, having regard to all the circumstances of the case, it is reasonable to make an order under this section.*

The Court may-

- (c) in a case to which paragraph (a) (i) applies, order that the time fixed by section 14 (1) be shortened so as to expire at a time not sooner than 28 days after the time when the order takes effect; and*
- (d) in a case to which paragraph (a) (ii) applies, order that any proceedings for an order under section 14 (2) be commenced within a time not later than 28 days after the time when the order takes effect,*

and, thereupon, for the purpose of any proceedings under section 9 or section 14 (2) commenced by the person concerned, the time is altered accordingly.

(2) An application under this section is not an admission for any purpose by an administrator.

(3) An administrator is not under any liability by reason of not making an application under this section.

2.15.2 Policy. The Working Paper did not contain any proposal for a provision such a section 15. The section is included in the bill because some commentators have drawn our attention to what one of them describes as: “. . . the not uncommon frustration of administration by vague threats of action by aggrieved kin . . . which remain unpursued with the result that the executor cannot prudently distribute until after 12 months have expired, sometimes to the detriment of needy beneficiaries . . .”. A procedure which enables administrators to get rid of obstacles which delay their work will clearly be welcomed unless, of course, it gives rise to new problems. As we see it, section 15 does not suffer from this defect. Administrators, for fear of costs, will be reluctant to use the section unless they have good reason for asking the Court to shorten the section 14 limitation period. And the section does not extinguish any right of a person to apply for provision. It merely shortens the period within which that person must act if he is to pursue whatever rights he may have. In these circumstances, we do not see that the section does any harm. On the other hand, as our commentators indicate and as our own experience tells us, threatened, but unpursued claims for provision can cause delays, uncertainties and anxieties. Section 15 is intended to provide a means of avoiding some of these ills.

2.15.3 Section 15 (1). In considering section 15, we gave considerable attention to the question whether the administrator of the estate of a deceased person should be the only Person entitled to apply to the Court under the section. The view was put that if other persons interested in the estate were to be so entitled, there would be a proliferation of applications. In the event, we recommend that standing to apply be given freely. We are led to this result because we believe that under the general law of trusts, a person interested in the estate could compel the trustee to make an application under section 15 for the purpose of protecting that person's interest.¹ In this event, we see no reason why the new Act should not expressly confer the right. We note that section 15 applies only to the time limit fixed for the commencement of proceedings for provision out of the estate of a deceased person. We consider that a

person interested in the notional estate of a deceased person is able to have his position adequately clarified by an application under section 25 (exclusion: confirmed disposition).

2.15.4 Section 15 (2). Section 15 (2) is included in the bill to avoid any argument that by using section 15 (1) an administrator makes an admission that the person against whom the order is sought is an eligible person. Whether or not a person is an ineligible person is, of course, a question for the Court to determine under section 9 (1) (a) of the new Act. If a person claims to be an eligible person, an administrator may wish to deny the claim. The denial should not be made more difficult because the administrator seeks an early commencement of the proceedings in which the question is to be determined.

2.15.5 Section 15 (3). Where a beneficiary in an estate suffers as the result of an appointment for provision being made in favour of an eligible person, he may be tempted to complain that his suffering would be less if the administrator has made a successful application under section 15 (1). In some cases, a complaint of this kind may be justified. If, for example, the eligible person had been a wealthy man on 30th June, 1977, but, through no fault of his own, had become a poor man by 31st December, 1977, the provision made for him might have been increased accordingly. If it is possible to argue that an administrator is at fault in not making an application under section 15, applications will be made as a matter of course. This would be an unintended and unwanted effect of our recommendation and section 15 (3) is intended to eliminate it.

FOOTNOTES

1. See, generally, *Jacobs' Law of Trusts in New South Wales* (3rd ed.), pages 630-631.

Section 16

2.16.1 Revocation or alteration of provision. Section 16 of the bill provides-

(1) The Court may, at any time and from time to time, upon application made by an administrator of the estate of a deceased person or by any person entitled to an interest in the estate or notional estate of the deceased person, revoke or alter any provision made under this Act.

(2) Subsection (1) does not affect the operation of section 17.

2.16.2 Former section. Except in one particular, section 16 of the bill reproduces the substance of section 6 (4) of the Act. The exception is that section 16 does not specify the persons who must be given notice of an application under the section. In our view, matters of this kind are better specified in rules of court than in Acts.

2.16.3 Re Molloy. Section 6 (4) of the Act has been construed as not enabling the Court to increase the amount of the provision originally allowed to the applicant.¹ Because, in section 17 of the bill, we recommend that the Court be empowered, in some cases, to increase an order for provision, section 16 (2) refers indirectly to the matter of increased provision.

FOOTNOTES

1. *Re Molloy* (1928) 45 W.N. (N.S.W.) 142; *Re Scott* (1964) 82 W.N. (N.S.W.) (pt 1) 313; *Re Strom* (1966) 84 W.N. (N.S.W.) (pt 1) 306.

Section 17

2.17.1 Increased provision. Section 17 of the bill provides-

(1) Where the Court is satisfied that a person in whose favour an appointment for provision has been made under this Act is experiencing hardship by reason of an exceptional change in his circumstances since the date of the appointment, the Court may, at any time and from time to time, upon application made by that person, appoint that the provision be increased.

(2) Notwithstanding section 5 (3), an appointment may be made under subsection (1) of property in the estate of the deceased person concerned which has been distributed, except property to which any person is entitled in possession.

(3) An appointment under subsection (1) shall not affect any property subject to the statutory trust.

2.17.2 Working Paper. As noted in paragraph 2.16.3, the Court, having made an order for provision in favour of an eligible person, cannot vary the order by increasing the provision. In the Working Paper, we considered whether the Court should be given this power. In the 2 paragraphs which follow we repeat some of the comments we then made.

2.17.3 Arguments against change. Arguments against allowing the Court to vary an order upwards include-

(1) If an order is final, the beneficiaries whose interests are affected by the proceedings may plan their affairs knowing that the will or intestacy will have effect subject only to the modifications made by the order. If an order is not final, uncertainty exists except in those cases where distribution of the estate can be made. The beneficiaries cannot estimate the extent of their interests and they cannot plan their affairs accordingly.

(2) It is wrong that undistributed property should be exposed to a risk of which distributed property has been freed. To bring about this situation is to allow rights in property to turn on chance.

(3) If a power is given to vary an order upwards because changed circumstances show that the original order was inadequate, does it not follow that an unsuccessful applicant should have the right to recommence proceedings because of his changed circumstances? In that situation, time limits for the commencement of proceedings would become meaningless. And, indeed, the policy that real power to dispose of an estate is not with the Court but with the deceased¹ would be abandoned.

(4) Arguments in favour of giving the Court a power to vary an order upwards turn largely on the effects of inflation on annuities or other fixed periodical payments. But this is only an argument against the manner in which the Court sometimes exercises its power to make an order. If the Court avoided making annuity-type orders, there would be little need for a power of variation. Support for this view is gained from the New Zealand experience. There, the Court has the power but few applications are made for its use. Reasons given for this result include, first, that annuities are generally avoided because of the known fact of inflation, and, secondly, that leave to apply for review is commonly included in any order where there is continuing provision.² And, in Queensland where, since 1968, the Court has had the power to vary an order upwards, application for its use is seldom made.³ In short, any problem that might occasionally arise results from the Court's failure to deal with it at the proper time, the time of the making of the original order.

2.17.4 Arguments for change. Arguments in favour of allowing the Court to vary an order upwards include-

(1) The Court is required to make adequate provision for the proper maintenance, education or advancement in life of specified persons. Experience demonstrates that in many cases income provisions become inadequate. The Court cannot be free from error. Rates of inflation can be misjudged or factors other than inflation can be overlooked and sometimes relevant facts are not put to the Court. The Act contemplates that provision made for a successful applicant may continue for the remainder of the applicant's life. The Act should provide machinery by which an order for continuing provision can be reviewed from time to time. If it does not do so the policy of the Act is frustrated.

(2) It is not sufficient to give the Court the power to make an interim order. Widows often survive their husbands for many years and what, in 1977, may appear to be generous final order may prove, in 1997, to have been grossly inadequate final order. If there is then undistributed property in

a husband's estate and the widow is in need, the Court should be able to order that she be provided for. Cases of this kind are not uncommon. We know of one instance where a final order made in 1933 in favour of a widow proved adequate until 1970. The estate was then substantial, the other beneficiaries in the estate were the deceased's nephews and nieces and none of them was in need. But the widow was without rights under the Act.

(3) The Act applies to the estate of a husband who dies intestate. In that situation the claims of persons who become beneficiaries in the estate only by the combined operation of chance and the laws of intestacy should not weigh against the need of a successful applicant for increased provision.

(4) The legislatures of New Zealand,⁴ Queensland,⁵ Western Australia⁶ and Tasmania⁷ have seen fit to make the change now being considered. In Victoria, informed opinion is divided on the question.⁸ The fact that the power may seldom be used is not important. If use of the power is justified in any one instance, the existence of the power is justified.

2.17.5 Proposal. In the event, we proposed that where part of an estate is undistributed and a person for whom an order for provision is made is, after the date of the order and because of an exceptional change in his circumstances, without adequate provision for his proper maintenance, the Court might order that additional provision be made for him.⁹ We noted that no proposal in this area could hope to achieve a fair result in every conceivable case.¹⁰

2.17.6 Comment on proposal. Few of our commentators disagree with the proposal. Of these, one says, "To subject the estate to the possibility of further applications based upon inflation or changing circumstances, e.g., accident and the like, would encourage the making of orders which will tend to keep the estate intact. It also must be borne in mind that the cost of administering estates under inflationary conditions becomes a grave burden and diminishes the income available to beneficiaries. The attempt to ensure complete protection for the family through the Testator's Family Maintenance Act in my opinion is bound to fail." But representatives of professional trustees generally support the proposal. The report of a Committee of the Law Society says: "The Committee felt rather hesitant about a power to vary an order [upwards] . . . however, no-one felt strongly enough about this to register any firm objection about the proposed provision."

2.17.7 Recommendation. As section 17 of the bill indicates, we recommend that the proposal made in the Working Paper be adopted.

2.17.8 Section 17 (2). In section 17 (2) we are confronted again with the problem of how best to reconcile the claims of eligible persons with those of persons interested in the estate of the deceased person. As section 5 (3) indicates, our general view is that when property in an estate vests in interest in the person entitled to it, and 18 months have elapsed since the death of the deceased person, it should then be free from the risk of an appointment for provision. Section 17 (2) introduces an exception to this general view. Where a person satisfies the conditions of section 17 (1), we would empower the Court to say that the increased provision shall be borne by particular property even though it has vested in interest in the -person entitled to it. In a section 17 (1) case we would free the property from the risk of an appointment only when it has vested in possession. If we do not so recommend, the utility of section 17 (1) will be much reduced: many applications for increased provision will fail because there is no longer any property which can be appointed. It may be thought that section 17 (2) gives the Court powers that are too wide. But, in our view, if the special conditions of section 17 (1) can be satisfied, the Court must be in a position to give special relief. If it cannot do so, the policy of section 17 (1) will be frustrated. We say that if property is ever at risk of an appointment for provision it should remain at risk of an appointment for increased provision until such time as the person interested in it has its present enjoyment, not merely the right to its future enjoyment.

FOOTNOTES

1. See Working Paper paragraph 3.5.

2. See the report of a subcommittee of the Chief Justice's Law Reform Committee in Victoria *Testator's Family Maintenance-Variation of Orders* (1972) page 3.

3. *Id.*, page 4.
4. Family Protection Act 1955 (N.Z.), section, 12 (1).
5. The Succession Acts, 1867-1968 (Qld), section 91.
6. Inheritance (Family and Dependants Provision,) Act, 1972 (W.A.), section 16.
7. Testator's Family Maintenance Act 1912 (Tas.), section, 9 (5) (b).
8. See the report of a sub-committee of the Chief Justice's law Reform Committee in Victoria *Testator's Family Maintenance-Variation of Orders*, pages 1, 2, 5, 6.
9. The Working Paper, paragraph 13.10.
10. *Id.*, paragraph 13.14.

Section 18

2.18.1 Property distributed. Section 18 of the bill provides-

- (1) *The Court may appointment that provision be made under this Act out of any property in the estate of a deceased person which has been distributed by an administrator.*
- (2) *This section applies notwithstanding that the distribution may have been made before the administrator had notice of the commencement of any proceedings under this Act.*
- (3) *This section does not affect the operation of section 14 (5) and section 17 (2).*

2.18.2 Former section. Section 18 is based upon section 11 (3) of the Act which says, in effect, that the Court may make orders for provision out of assets which formerly formed part of an estate but which have been lawfully distributed by its administrator. We see no reason why the new Act should not include a like provision. Administrators of estates and potential applicants under the Act are often antagonistic to each other. In an attempt to defeat a possible claim, an administrator may distribute an estate earlier than he would otherwise do so. In such circumstances, the Court should, in our view, have power to make orders affecting the distributed property. On the other hand, beneficiaries in estates are entitled to know, as soon as possible, whether they may keep that which appears to be theirs. Where is a reasonable dividing line? In our view, the period of 18 months after death fixed by section 14 (1) is reasonable. If a person does not commence proceedings within that time, whether for good or bad reasons, persons interested in the distributed estate should be able to deal with that property without fear that an order under the Act may affect it. When read with section 14 (5), section 18 produces this general result. For like reasons, section 18 (1) should not operate to put distributed property at the risk of a successful application under section 17 to vary an order for provision by increasing it. In effect, section 18 (3) so provides.

2.18.3 Comparable provision. Section 18 of the Bill may be compared with sections 8 (1) and 11 of the Inheritance (Family and Dependants Provision) Act, 1972, of Western Australia and sections 20 (1) and (2) of the Family Provision Ordinance 1969 of the Australian Capital Territory. These last-mentioned provisions operate to prevent the courts from making orders affecting property which has been distributed for the purpose of providing for the maintenance, education or advancement in life of a person who was totally or partially dependent on the deceased person immediately before his death. Section 18 of the bill does not incorporate a provision of this type. As we see it, the Court can take account of distributions made for this purpose when discharging its duty under section 9 (1) to have "regard to all the circumstances of the case".

Part 2 - The Bill (Sections 19 to 24)

Section 19

2.19.1 Burden of provision. Section 19 of the Bill provides-

(1) *The burden of an appointment under this Act that provision be made for an eligible person out of any property in the estate of a deceased person or out of any property subject to the statutory trust shall, subject to this Act, be borne by such of the persons entitled to an interest in the estate or notional estate of the deceased person, and in such proportions, as the Court thinks fit.*

(2) *For the purposes of subsection (1), the Court may appoint that such contribution or adjustment as the Court thinks fit shall be made by or between the persons entitled as mentioned in that subsection.*

(3) *Where persons are successively entitled to interests in any property in the estate of a deceased person or in any property subject to the statutory trust, those interests shall not, unless the Court otherwise orders, be valued separately but the proportion of any provision to be borne by those persons out of those interests shall be raised or charged against the corpus of the property.*

(4) *Subject to subsection (5), the Court shall not make an order under subsection (1) or (2) in relation to any person interested in the notional estate of a deceased person unless that person has, in the time and manner prescribed, been served with the prescribed notice of the proceedings for provision.*

(5) *Where, under subsection (4), a prescribed notice of proceedings is served on a person interested in the notional estate, then, unless the Court otherwise orders-*

(a) if the person served is so interested as trustee under a trust, it shall not be necessary to serve notice on any person by reason of his interest under the trust; and

(b) if the person served is so interested as personal representative of the estate of a deceased person, it shall not be necessary to serve notice on any person by reason of his interest in the last-mentioned estate.

(6) *The Court shall, on application made in the time and manner prescribed by any person entitled as mentioned in subsection (1), give that person an opportunity to be heard on the question whether any provision for the eligible person should be made-*

(a) out of any property in the estate of the deceased person, to the exclusion of any other property in the estate and any property subject to the statutory trust; or

(b) out of any property subject to the statutory trust, to the exclusion of any other property subject to the statutory trust and any property in the estate of the deceased person.

(7) *Subsection (6) does not affect the operation of section 9 (5) (t).*

2.19.2 Former section. With modifications which flow from our recommendations relating to notional estate,¹ section 19 of the bill states the substance of section 6 (2) of the Act. The latter provision is still in the form in which it was enacted in 1916 and we see no reason for proposing any major change. In most cases, an appointment for provision will specify that the burden of the provision is to be borne

rateably in proportion to the value of the beneficiaries' interests. But the power to apportion the burden of the provision other than rateably is a necessary power if, in special cases, the Court is to avoid causing unnecessary loss to a person.²

2.19.3 The Court's discretion. Section 19 does not indicate how the Court's discretion is to be exercised. We do not think that the omission detracts from the efficiency of the section. Section 6 of the Act shares a like deficiency, but the Court applies the section without apparent difficulty. The words of Street C.J. in *Eq.* are pertinent³-

Apart from discarding considerations entirely extraneous I do not consider that the Court's discretion under section 6 (2) is to be confined by attempting precise definition. Weight may undoubtedly be given to what i hypothetical wise and just testator would have done; weight may also be given to what the instant testator would have wished; neither is exclusive of the other. The discretion is to be exercised "according to the rules of reason and justice" (*Sharp v. Wakefield*, [1891] A.C. 173; [1886-90] All E.R. Rep. 992, per Lord Halsbury at page 179), with due regard to the whole of the surrounding circumstances.

A party seeking a departure from the statutory rule in section 6 (2) bears the onus of demonstrating that the case is one appropriate for the exercise by the Court of its discretion.

2.19.4 Sections 19 (4) and (5). In our view, the Court should not be able to make an appointment for provision out of the notional estate of a deceased person unless the persons interested in the estate have been given notice of the proceedings for provision. The Court's powers in relation to notional estate are not only wide but exceptional. Section 19 (4) is intended. to ensure that they are exercised only if the persons who may be adversely affected by their exercise are given adequate warning that they are at risk. Subsection (5) merely supplements subsection (4). The subsections are not directed to persons interested in the actual estate of a deceased person. We consider the matter of notice of proceedings to these persons in paragraphs 3.3 to 3.10.

2.19.5 Section 19 (6). We are reluctant to make any recommendation that may have the effect of adding to the costs of proceedings for provision. But in relation to the question who is to bear the burden of an appointment for provision we make an exception. As section 19 (6) indicates, we think it right that on this question the Court should give an opportunity to be heard to any person who is interested in the estate or notional estate of the deceased person. In this instance, costs are less important than natural justice. And, of course, the Court, through its power to award costs, is well able to exercise a proper measure of control over applications made under section 19 (6).

FOOTNOTES

1. See, generally, the notes on section 21.
2. See, for example, *Re Horwitz* (1917) 34 W.N. (N.S.W.) 73; *Re Gray* (1958) 76 W.N. (N.S.W.) 415; and *Re Mayo* [1968] 2 N.S.W.R. 709.
3. *Re Seery* [1969] 2 N.S.W.R. 290, 296.

Section 20

2.20.1 Exoneration of property from provision. Section 20 of the bill provides-

(1) *Where, under this Act, the Court makes an appointment for provision, the Court may, at any time, on application by any person entitled to an interest in the estate or notional estate out of which the provision is to be made, order that upon payment, or upon giving security approved by the Court for payment, of a lump sum or a periodical payment or both to represent, or in commutation of, such proportion of the provision as falls upon that person, the interest or a specified part of the interest to which that person is entitled shall be exonerated from further liability in respect of the provision.*

(2) *Where the Court makes an order under this section, the Court may direct-*

(a) *in what manner, if any, the lump sum or periodical payment is to be secured;*

(b) the person to whom the lump sum is to be paid or the periodical payment is to be made;
(c) in what manner, if any, the lump sum or periodical payment is to be invested for the benefit of the eligible person in whose favour the appointment for provision was made; and
(d) that interest be paid, at such rate as the Court thinks fit, on the whole or any part of the lump sum or periodical payment for the whole or any part of the period between the date of the order and the date when the order is satisfied.

(3) *This section has effect subject to part III.*

2.20.2 Former section. Section 20 of the bill seeks only to restate the substance of section 7 of the Act. We do not question the need for a provision of this kind. The Court must be able to free property from the consequences of appointments for provision. Without this power the alienability of property might be unreasonably restricted during the currency of an appointment made under the Act.

Section 21

2.21.1 Operation of appointment for provision. Section 21 of the bill provides-

(1) Subject to this section, an appointment under this Act for provision for an eligible person operates and takes effect, for all purposes-

(a) in so far as it affects the estate of a deceased person, as if the provisions of the appointment had been part of a will made by the deceased person immediately before his death; and

(b) in so far as it affects the notional estate of a deceased person, according to the provisions of part III.

(2) Where an appointment for provision under this Act provides for the payment of money and an appointment is not made under section 9 (5) (b) (iv) for the payment of interest on that money, interest is not payable.

2.21.2 Former section. Section 21 (1) (a) of the bill is intended to be a substitute for section 4 (t) and (2) of the Act. Although the Privy Council has said that section 4 (1) “only emphasizes and makes explicit what would be implicit in the Act if it were not there”,¹ section 21 (1) (a) not only retains the substance of section 4 (1) but also restates the provision in an expanded form. This is done because of the comments on the Working Paper which are mentioned in paragraph 2.21.3. We omit section 4 (2) of the Act because we do not see that it serves any useful purpose. In omitting the subsection, we follow section 10 of the Act where, in a death duty context, an order for provision is equated with a will and no mention is made of intestate succession.

2.21.3 Comments. One group of commentators says: “It is debatable whether the new section re-enacting former section 4 equating the terms of an order to a provision made in a will is of any real use. The authorities on the previous section led Helsham J. to remark that he could not read the section literally. See *Union-Fidelity Trustee Co. Ltd v. Montgomery*, 5th March, 1976, as yet unreported. That case throws up the very real problem that this type of section gives rise to, namely, whether interest runs on a T.F.M. order and whether a lump sum order abates *pro rata* with legacies given by the will. The opportunity should be taken to put these matters beyond doubt in the amending legislation.”

2.21.4 *Union-Fidelity Trustee Co. of Australia Ltd v. Montgomery.*² In this case, Helsham J. was concerned with problems which had arisen in relation to the administration of an estate. The widow of a deceased person had obtained an order under the Act which provided that she should receive, amongst other things, an annuity. After the date of the order, the value of the estate fell considerably and the estate was unable to provide the annuity and to pay legacies which the deceased had given in his will. The question was whether the annuity abated *pro tanto* with the legacies or whether it was to be satisfied in priority to them and, as far as possible, out of the assets remaining in the estate. It was ruled that the annuity did not abate *pro tanto* with the legacies because the provision made by the order under the Act should be treated as being something different from a provision made by a will, even though in

some respects a provision made by an order is to be treated as being a testamentary provision.³ In so ruling, Helsham J. considered English, Victorian and New South Wales authorities on the operation and effect of an order made under family provision legislation, and concluded that he should pay more regard to the Australian authorities than to English authorities.

2.21.5 Policy. In *Re Pointer*,⁵ Wynn-Parry J. said⁶-

In my judgment the scheme of the Act [Inheritance (Family Provision) 938 (U.K.)] involves first, that, assuming the necessary conditions obtain, the court may by order make provision for the dependent applying to it; secondly, if it makes such an order the provision made thereby is to be treated for all purposes as a legacy; and thirdly, the will is for all purposes to have effect as if that legacy had been contained in it when it was made.

In our view, section 4 of the Act was intended to bring about the results of which Wynn-Parry J. speaks and we see no reason why section 21 of the new Act should not have the same intention. The words in section 21 (1) (a): “for all purposes” seek to make it abundantly clear how an order for provision is to operate and take effect. There is, it is admitted, some artificiality in section 21 (1) (a) when it is read with section 21 (2). On the one hand, an appointment for provision is, in effect, equated with a legacy but, on the other hand, section 21 (2) provides, contrary to the general law, that interest shall not be payable on the legacy unless the Court so orders. And, moreover, the Court may, under sections 16 and 17, interfere with a legacy which stems from its appointment but it cannot do the same with a legacy given by will. As section 21 indicates, these results are not, to us, so objectionable that they demand a new approach being taken to the effect of an appointment for provision.

2.21.6 Section 21 (1) (b). We consider section 21 (1) (b) in our notes on section 30.

2.21.7 Section 21 (2). Section 21 (2) indicates the circumstances in which an appointment for provision will carry interest: if the Court says that the appointment is to carry interest, it will do so; if the Court is silent on the matter, the appointment will not carry interest. We think that this provision will work well in practice. The Court, having all the facts before it, is well placed to determine, without delay or additional expense to the parties, whether or not the circumstances of the case are such that interest should be paid.

FOOTNOTES

1. *Schaefer v. Schuhmann* [1972] A.C. 572, 592.

2. [1976] 1 N.S.W.L.R. 134.

3. *Id.*, 141.

4. *Re Pointer*- [1946] Ch. 324; *Re Jetinery* [1967] Ch. 280 (C.A.); *Re Else* [1948] V.L.R. 468 *Re Bishop* [1952] V.L.R 543, and *Brown v Brown* (1921) 22 S.R. (N.S.W.) 106.

5. [1946] Ch. 324.

6. *Id.*, 326.

Section 22

2.22.1 Notional estate: General comments. Section 22 is the first section of part III of the bill; a part which, if enacted, will introduce new and far-reaching rules into the law of succession. Hence, before examining section 22, we comment generally on the whole of part III. Many of the comments which follow are taken from the Working Paper. We repeat them here because they touch upon some of the policy questions which part III highlights. These questions ask whether the Court, in proceedings under the new Act, should be able to make orders affecting property which a deceased person had disposed of in his lifetime; orders which, under the Act, the Court cannot make.

2.22.2 The problem. If the new Act can be evaded, its effectiveness will be limited. If it does not contain provisions directed at some common arrangements of property, it will not concern those with the means and the determination to attain and follow expert advice; only the poor or the inert will be affected by it. The Act can be evaded.¹ Property can be put outside its application in a variety of ways and often without difficulty. In some circumstances, opening a joint bank account or taking out a policy of life

assurance is sufficient. Indeed one volume of English precedents contains a form for a *Settlement upon Mistress and Illegitimate Child for Purpose of Evading the Inheritance (Family Provision) Act 1938*.² This form can be adapted for use in New South Wales and to situations not involving mistresses or illegitimate children. Moreover, the use of death and estate duty avoidance schemes is widespread. Many solicitors in this State have experience and expertise in estate planning. A disposition of property which has the effect of avoiding death and estate duty will mostly operate to defeat the Act, whether or not the person making the disposition intended that result.

2.22.3 Objections to solving the problem. But should the new Act be buttressed by anti-evasion provisions? Should the Courts have power to override what would otherwise be valid dispositions of property? The interests involved are fundamental: on the one hand, the interest of a person in arranging his affairs in his way and the interest of a transferee of property in securing his title and, on the other hand, the interest of a family in not being disinherited. In trying to answer these questions, any reformer faces a dilemma. If all dispositions of property made by a person in his lifetime are valid against the surviving members of his family, the new Act will give incomplete protection to the family. And if the surviving members can claim against property disposed of by, say, their deceased father, the new Act will be recognizing a potential interest in that property which must clog its alienability and adversely affect its utility and value.

2.22.4 The disponent. The problem is particularly difficult when it is looked at from the viewpoint of the person whose property transactions might become the subject of proceedings under the new Act. He can say with truth that if he were a spendthrift the law would not control his extravagance in his own interests or in the interests of his family.³ In that circumstance, why should a new Act allow the Court to interfere with what he has chosen to do with his own? Indeed, he can say that although the law obliges him to provide for the present maintenance of his wife and children, it does not oblige him to conduct his affairs on the basis that their future maintenance will be secured. Why then in proceedings under the new Act should the Court be permitted to scrutinize property transactions carried out by him in his lifetime?

2.22.5 The Working Paper proposals. For the reasons stated in paragraphs 2.22.10 to 2.22.18, we proposed in the Working Paper⁴ that the new Act should empower the Court to make orders affecting some property which a deceased person had disposed of in his lifetime. Broadly stated, the proposal related, first, the property which the deceased had disposed of within 3 years before his death wholly or partly by way of gift and with the intention of evading the Act and, secondly, to property which the deceased had disposed of at any time by a will substitute.⁵ In making these proposals (which, for convenience, we call "the notional estate proposals"), we were influenced by the approach taken to like problems in other places, notably in Canada and the United States of America.⁶ We were influenced too by the case law of the seventeenth and eighteenth centuries on the Custom of London under which a surviving wife received a Customary Share of one-third of her deceased husband's goods.⁷ This old law lost its importance, not because it was wrong in principle, but because it fell into desuetude when testamentary freedom became a tenet of English law. Now that family provision statutes have limited that freedom, the old law is again pertinent. North American experience shows that it provides guidelines for modern legislators.⁸

2.22.6 Comments on Working Paper proposals. Somewhat to our surprise, the notional estate proposals evoked little opposition from our commentators. Indeed some of them suggest that the proposals were not wide enough in that they would not catch property which was the subject of a sophisticated tax-planning scheme. Subject to that qualification, we are confident that the proposals were widely accepted as being right in principle.

2.22.7 The English Act. The Inheritance (Provision for Family and Dependents) Act 1975 (U.K.) contains a section extending the property available for family provision and other sections enabling the Court to review some dispositions of property made by a deceased person in his lifetime. Section 9 of that Act gives the Court power to include in the estate of the deceased person the deceased's severable share of property which he owned jointly with others, provided that the application for provision is made within the 6 months limitation period prescribed by section 4 of the Act. Sections 10, 12 and 13 give the courts powers (comparable with those already existing in English matrimonial proceedings) to review

certain transactions effected by the deceased, otherwise than for full valuable consideration, with the intention of defeating claims under the Act and to make the property comprised in those transactions available for family provision. Section 10 relates to property disposed of or settled by the deceased within 6 years of his death. Sections 12 and 13 contain supplementary provisions, including provision as to the standard of proof which is required of the deceased's intentions. We mention these provisions of the English Act, not, at this point, for the purpose of comparing them with the provisions of part III of the bill, but for the purpose of showing that a policy somewhat similar to that which underlies our notional estate proposals has been adopted in England as recently as 1975.

2.22.8 An objection to notional estate proposals. Part III of the bill has not counterpart in any other State of the Commonwealth of Australia. If a person is determined to prevent an order being made under part III in relation to his notional estate, he may arrange for property in that estate, or its proceeds, to be moved to another State. His efforts will succeed.⁹ If many persons have a like determination, substantial sums might leave the State. We doubt, however, that many persons will have this determination. We mention the matter only because it is a factor which policy makers may wish to take into account when examining these recommendations.

2.22.9 Property subject to Part III. Shortly stated, property subject to part III is, first, property which a deceased person disposed of within 3 years before his death by way of gift and with the intention of defeating a claim for provision, secondly, property which a deceased person disposed of within one year before his death by way of an unjust gift, irrespective of his intentions concerning a claim for provision and, thirdly, property which a deceased person disposed of at any time by way of a will substitute.¹⁰ The first and third categories are substantially the same as those mentioned in paragraph 2.22.5 as being the subject of the Working Paper proposals. The second category is new. Our reasons for singling out property which fits these 3 descriptions follow.

2.22.10 Intention to evade the new Act. A desire to evade the new Act may be blameless or blameworthy. It may, for example, be prompted by benevolence towards a child, or malice towards a wife, or both. And, until a court rules on the question of intent, uncertainty must be present. A person making a disposition of property cannot know in his lifetime whether the disposition is legally effective and any transferee from him cannot know whether he is free from attack under the new Act. These are factors which weigh heavily against any recommendation, related to intention, for bringing dispositions of 'property made before death within the application of the new Act. On the other hand, a recommendation of this kind is, to us, right in principle. There is little value in a family provision statute if it is inefficient because it can be deliberately, and easily, evaded. In proceedings following the end of a marriage by breakdown, any disposition of property can be set aside because of an intention to defeat a claim under the Family Law Act 1975 (Cth).¹¹ In proceedings following the end of a marriage by death, can it be said that a like rule is wrong? We think not.

2.22.11 Evasion situations. We have in mind situations where a father seeks, in favour of the children of his first marriage, to defeat the claims of his second wife or, in favour of his second wife, to defeat the claims of the children of his first marriage or, in favour of his mistress, to defeat the claims of both his wife and his children. Family relationships can give rise to endless instances where well-based, or ill-based, motives prompt attempts to evade the law. In our view, we should try to defeat these attempts when they are directed at the new Act.

2.22.12 The unjust gift. On the other hand, experience tells us that gifts made by a person shortly before his death, and made without undue influence or for the purpose of defeating a claim for provision, can cause hardship to a family or to one or more of its members. An elderly person suffering from, say, loneliness, depression or a terminal illness may lose his sense of values and duty. His reaction to a new friendship an act of compassion or a concern for his spiritual wants may be an over-reaction which vents itself in a generosity which heeds the present to the neglect of the past: a few months of institutional care is sometimes rewarded at the expense of many years of family devotion. We cannot say how often cases of this kind occur but we believe that their incidence is such that legislation is called for. In our view, the Court should be empowered to make an appointment for provision out of property comprised in an unjust gift. And, in our terms, a gift is unjust where it is made to a person who has substantially

smaller claims to the donor's bounty than has an eligible person and has the result that adequate provision cannot be made for an eligible person.

2.22.13 Security of title. We believe, however, that the new Act should be closely confined so far as concerns the upsetting of gifts made by a deceased person in his lifetime. The confinements we, recommend are, in the case of gifts made with an intention of defeating a claim for provision, the time limit of 3 years and, in the case of an unjust gift, the time limit of 1 year. We are concerned to so confine the operation of the new Act because of the social evils of insecure titles. If, for example ' A gives land to B and the gift remains liable to attack until some time after A's death, which may not happen for many years, B has a clear disincentive to make the best use of the land. He cannot spend money, or do work, on its improvement except at the risk that the benefit of the improvement, or some of the benefit, will go to a stranger. Nor is a statutory scheme for an allowance for improvements an adequate counter: a person will not make the best use of land if he knows that he may have to rely on a discretionary judgment as to the value of improvements made by him. In fixing the time limits of 3 years and 1 year, we are, of course, making arbitrary choices. The 3 years limit is chosen because it is, in a death duty context, a well-known limit. The 1 year limit is chosen because in the cases in which it is relevant there will be no intention of defeating a claim for provision. In this circumstance, the argument for a shorter time limit is strong.

2.22.14 Will substitute. In our view, some other property disposed of by a deceased person in his lifetime should be within the application of the new Act whatever the intention was that led to its disposition. Shortly and imprecisely stated, the test we adopt is: was the property disposed of by a will substitute?

2.22.15 Will substitute: settlement or contract. In our terms, a will substitute may take many forms. There is, for example, the arrangement under which a person retains the enjoyment and disposal of property until his death, but controls its enjoyment and disposal after his death by settlement or contract, not by will. Where such an arrangement has in it an element of bounty towards those taking on or after his death, there is to that extent a will substitute. It does not matter how long before his death the arrangement is made because, until his death, it is open to him to withdraw property from the arrangement: no one's well-founded expectations are defeated.

2.22.16 Will substitute: joint bank account. There is also the arrangement typified by those joint bank accounts on which any account holder may draw. Although the effect of death is fixed by contract, a person may at any time before his death reduce the asset of his own exclusive ownership. If he does so he has it in his power to consume the property or to dispose of it by will. The arrangement is a will substitute so far as the asset represents his own property. Again, it does not matter how long before his death the arrangement is made.

2.22.17 Will substitute: another example. And again there is the arrangement typified by a settlement of property made by a deceased person by which he puts the future enjoyment and disposal of the property outside his power, but the enjoyment and disposal after his death are not absolutely vested on the eve of his death. If there is an element of bounty, it is a will substitute. The deceased has used his property towards satisfaction of what he regards as claims on his bounty. Again, it does not matter how long before his death the arrangement is made, because the post-obit rights are still contingent and there are no well-founded expectations to be disappointed.

2.22.18 Time of disposition. We have made some particular references in paragraphs 2.22.15 to 2.22.17 to the relevance of the time before the death of the deceased when he makes some arrangement relating to his property. In general, where, on the eve of the death of the deceased, the amount of property, or its destination, is not firmly fixed, a person expecting to benefit under the arrangement should not reasonably have a firmer expectation than a beneficiary by will. At all events he ought not to have spent money or otherwise ordered his affairs on the assumption that the property will be his. In such a case we think that the property ought to be available under the Act however long before the death of the deceased the arrangement was made.

2.22.19 Other considerations. But where a deceased person has disposed of an interest in property in such a way that the interest is absolutely vested in some person before the death of the deceased,

different considerations apply and we would exclude it from the operation of part III.¹² As stated in paragraph 2.22.13, it is much to the public advantage that the title to property should not be uncertain.

2.22.20 Outline of Part III. At this point, we outline the scheme of part III. Central to it is the creation, by section 28, of a statutory trust. This trust is a trust for, amongst others, such persons as the Court may appoint from a class comprising the persons who are eligible persons in relation to the estate of a deceased person and the persons who are interested in the estate or notional estate of that deceased person.¹³ Under the statutory trust, the Court may appoint for the purpose, amongst others, of making an appointment for provision under section 9.¹⁴

2.22.21 Time statutory trust imposed. In the case of property which was disposed of for the purpose of defeating a claim for provision or which was the subject of an unjust gift, the statutory trust is imposed on the property from a time immediately before the disposition:¹⁵ the object is to let in equitable rules such as those which relate to the tracing of trust property and to *bona fide* purchasers for value without notice of a trust. In the case of other property to which part III applies, the property is subject to the statutory trust only from and after the death of the deceased.¹⁶

2.22.22 Exclusion of property. Property may be excluded from the notional estate of a deceased person by order of the Court.¹⁷ Broadly stated, the ground for exclusion is that the disposition of the property is not unreasonable having regard, first, to the interests of the person who takes the property and, secondly, to the interests of eligible persons and persons who might be called upon to bear the burden of an appointment for provision. Proceedings for exclusion may be commenced either before or after the death of the person concerned and by either the person disposing of the property or the person taking the property.

2.22.23 Inadequate consideration. It will sometimes happen that a person will give less than full consideration for property and the Court will say that the property was disposed of partly by way of gift. The bill provides that the Court must make a just allowance for this situation.¹⁸ Under this provision the Court might say, for example, that property valued at \$50,000 when it was disposed of for one-half of its value in 1964 is valued at \$100,000 in 1977 and that any order under the new Act affecting the property made in 1977 should be limited to one-half of the then value of the property.

2.22.24 Improvements to property. It will also happen that the owner of property in the notional estate of the deceased person will have improved the property or otherwise expended money on it. In these events, the Court must, in making an order for provision out of the notional estate, make just allowances to the owner.¹⁹

2.22.25 Proceedings against owner. The statutory trust is not intended to allow an eligible person to harass the owner of property which is in the notional estate of a person: the bill provides that the statutory trust does not enable any person claiming a beneficial interest under the statutory trust to commence proceedings in any court against a person bound by the statutory trust:²⁰ the only exceptions relate to an order for provision under the Act.²¹

2.22.26 Personal liability of owner. Subject to limited exceptions, the statutory trust does not impose any personal liability on any person bound by it except liability for anything done or left undone by him after he has notice of proceedings against him for an order for provision.²²

2.22.27 Section 22: Interpretation. We return now to section 22 of the bill which provides-

In this Part, except in so far as the context or subject matter otherwise indicates or requires-

“deceased person” means a person in relation to whose notional estate an order is sought under Part II.

“disposition of property” includes-

- (a) any conveyance, transfer, assignment, appointment, settlement, mortgage, delivery, payment, lease, bailment, reconveyance, discharge of mortgage or other alienation of property;
- (b) the creation of a trust;
- (c) the release, surrender, or abandonment of any property; and
- (d) the grant or exercise of a power in relation to property,

whether having effect at law or in equity and whether effected with or without an instrument in writing.

“gift” means any disposition of property made otherwise than by will without full consideration.

“settlement”, in relation to a deceased person, includes any disposition of property, or agreement for a disposition of property, under which any trust or provision relating to property is to take effect, or the possession or enjoyment of property is to change, on or after the death of the deceased person.

2.22.28 The Working Paper. We said in the Working Paper that, for the purposes of the bill, we would not define “gift”, “property” or “disposition of property”.²³ We are now satisfied that each of these words should be defined. Although they are ordinary words of wide meaning, they are commonly defined in revenue statutes. Judicial comments show that when so defined even this wide meaning of the words can be extended. In, for example, *Ord Forrest Pty Ltd v. The Commissioner of Taxation*,²⁴ it is said that the expression “disposition of property”, as defined in the Gift Duty Assessment Act 1941 (Cth), extends to transactions which are not dispositions in any ordinary sense.²⁵ Because we want our recommendations relating to notional estate to be of broad application, we define these particular words in the new Act. We base the definitions, in the case of “disposition of property” and “gift”, on the definitions in section 100 of the Stamp Duties Act, 1920. The definition of “property” is contained in section 5 of the bill.

2.22.29 “Settlement”. The purpose of defining “settlement” is to aid the construction of section 23 (2). That subsection applies only to settlements which are made by way of gift. In its practical effect, the width of the definition is narrowed by the context in which it is relevant.

FOOTNOTES

1. See, for example, Stephens, *Family Protection in New Zealand* (2nd ed.), Wellington (1957); Tyler, *Family Provision* London (1971).
2. (1944-45) *The Conveyancer and Property Lawyer*, Vol. 9, page 282.
3. Perhaps in an exceptional case the management of his property may be taken from him under the Mental Health Act, 1958.
4. Paragraphs 11.34 and 11.39.
5. We consider the concept of a will substitute in paragraphs 2.22.14 to 2.22.17.
6. See the Working Paper, paragraphs 11.12 to 11.15 and 11.22 to 11.25.
7. *Id.*, paragraphs 11.17 to 11.21.
8. *Id.*, paragraph 11.25.
9. See section 33.
10. For the detailed specification of the property to which part III applies, see section 23.
11. Family Law Act 1975 (Cth), section 85.
12. Section 23 (2) give,; effect to this view.
13. Section 28 (1).
14. Section 29 (a).
15. Section 23 (6), (7) and (9).
16. Section 23 (1), (2), (3), (4) and (5).
17. Section 25.
18. Section 27 (1) (a).
19. Section 27 (1) (b), (c).
20. Section 31 (1).
21. Section 31 (2).

22. Section 31 (3) and (4).
23. Paragraph 21.60.
24. (1973) 130 C.L.R. 124.
25. *Id.*, 127, 148.

Section 23

2.23.1 Property subject to the statutory trust. Section 23 of the bill provides-

(1) *Where, immediately before his death, under a disposition of property or an agreement made on or after the appointed day, a deceased person had power to dispose of any property for his own benefit or had power to dispose of any property for the benefit of an eligible person, that property is, from and after the death of the deceased person, subject to the statutory trust.*

(2) *Where, on or after the appointed day, a deceased person made a settlement by way of gift and, immediately before his death, any property comprised in the settlement was, by the terms of the settlement, not absolutely vested-*

- (a) *in a person beneficially; or*
- (b) *for a charitable purpose,*

that property is, from and after the death of the deceased person, subject to the statutory trust.

(3) *Where-*

- (a) *under a disposition of property or an agreement made on or after the appointed day, a deceased person and another person are, immediately before the death of the deceased person, jointly entitled to any property; and*
- (b) *a beneficial interest in that property passes or accrues by survivorship to that other person on the death of the deceased person,*

that property is, from and after the death of the deceased person, subject to the statutory trust.

(4) (a) *This subsection applies where-*

- (i) *a policy of assurance on the life of a deceased person is made on or after the appointed day;*
- (ii) *the premium on the policy, or part of the premium, is paid, directly or indirectly, by the deceased person;*
- (iii) *immediately before his death, the deceased person had power to surrender or otherwise deal with the policy or its proceeds for his own benefit or had power to surrender or otherwise deal with the policy or its proceeds for the benefit of an eligible person; and*
- (iv) *money (in this section called "the proceeds") is payable under the policy in consequence of his death.*

(b) *Where the deceased person contributed to a scheme, fund or plan and a premium is paid, or part of a premium is paid, out of the assets of the scheme, fund or plan, the payment, to the extent to which its amount does not exceed the amount of his contributions, is, for the purposes of this subsection, a payment by the deceased person.*

(c) *For the purposes of paragraph (a) (iii), the deceased person had power to deal with the policy or its proceeds as mentioned in paragraph (a) (iii) notwithstanding that he may not do so except with the consent of the insurer or of some other person, being a person not having any beneficial interest in the policy or its proceeds.*

(d) *For the purposes of paragraphs (e) and (f), the nett payment by the deceased person is the amount of the premium paid by the deceased person, less the amount of any reimbursement in money or money's worth made in his lifetime, directly or indirectly, to him, or to any scheme, fund or plan to which he contributed, for the premiums paid by him.*

(e) *Where the nett payment by the deceased person is equal to the whole of the premium, the whole of the proceeds is, from and after the death of the deceased person, subject to the statutory trust.*

(f) Where the nett payment by the deceased person is equal to a part of the premium, a like part of the proceeds is, from and after the death of the deceased person, subject to the statutory trust.

(5) Where-

(a) by virtue or in pursuance of-

(i) a disposition of property or agreement made on or after the appointed day by a deceased person; or

(ii) the memorandum, articles or rules (whether or not comprised in an Act or made under an Act) of any body (corporate or unincorporate), association, scheme, fund or plan of or in which a deceased person became a member or participant on or after the appointed day, a benefit accrues to any person or money is paid or payable to any person by reason of the deceased person having died while he was holding an office or while he was an employee; and

(b) that person, in the opinion of the Court, is an eligible person, whether or not he is an applicant under this Act for an appointment for provision,

the benefit or the money is, if the Court so orders, from and after the death of the deceased person, subject to the statutory trust, whether or not the benefit or payment is enforceable and whether or not that person was ascertained on the death of the deceased person and whether or not the benefit accrues or the payment is made pursuant to the exercise of a discretion by any person.

(6) Where, within 3 years before his death and on or after the appointed day, a deceased person made a gift with the intention, wholly or in part, of defeating, wholly or in part, an application under section 9, the gift shall take effect, and the rights and interests of all persons shall be, as if the property comprised in the gift was, immediately before the gift, subject to the statutory trust.

(7) Where-

(a) a deceased person had power to make a disposition of property for his own benefit or had power to make a disposition of property for the benefit of an eligible person; and

(b) within 3 years before his death and on or after the appointed day, the deceased person, in exercise of the power, disposed of the property with the intention, wholly or in part, of defeating, wholly or in part, an application under section 9,

the disposition shall take effect, and the rights and interests of all persons shall be, as if the property was, immediately before the disposition, subject to the statutory trust.

(8) Where, at the time of any disposition of property by a deceased person, the deceased person would have had power to dispose of the property to a person if that person had been born or had attained some age or if some other event had happened, then,

for the purposes of subsection (7), if before the death of the deceased person that other person is born or attains that age or that other event happens, the deceased person had the power at the time of the disposition.

(9) Where, within 12 months before his death and on or after the appointed day, a deceased person made an unjust gift, the gift shall take effect, and the rights and interests of all persons shall be, as if the property comprised in the gift was, immediately before the gift, subject to the statutory trust.

(10) For the purposes of subsection (9), a gift is unjust if, in the opinion of the Court-

(a) at the date of the gift, any moral obligation of the deceased person to make provision, by will or otherwise, for the maintenance, education or advancement in life of an eligible person was substantially greater than any moral obligation of the deceased person to make the provision which he made by the gift; and

(b) the estate of the deceased person is insufficient to satisfy the provision that should be made under this Act for an eligible person.

(11) This section has effect subject to sections 24, 25 and 27.

2.23.2 Limitations of section 23. Before considering what section 23 tries to do, we mention some things that it does not try to do. In short, the section does not attempt to catch property which is disposed of by every will substitute.¹ It does not, for example, extend to property which is the subject of a "Gorton scheme".² Although we believe that in principle the sections should extend to property that is disposed of by every will substitute, we have not attempted the exceedingly difficult task of drafting a provision which will achieve this result. Work of a like kind is being done by other agencies of government in relation to Part IV (Death Duty) of the Stamp Duties Act, 1920.³ We have therefore limited our attention to what we consider to be the most commonly used will substitutes: powers of appointments, settlements by way of gift, ordinary gifts, joint tenancies, and arrangements made for the disposition of the proceeds of life assurance policies and for the payment of death benefits under superannuation and pension schemes. We think that if section 23 is enacted, it should be reviewed in the light of the results of the work being done in relation to the Stamp Duties Act, 1920. If amendments of that Act prevent, or reduce, evasions of death duties, the same amendments may provide a guide for extending the scope of section 23. In saying this, we do not mean that property which forms part of the notional estate of a deceased person for the purposes of the Stamp Duties Act, 1920, should necessarily form part of the notional estate of that person for the purposes of the new Act. In, for example, the case of a gift made with the intention of evading both Acts, we think it right that property comprised in the gift should be notional estate for the purposes of both Acts. But in other cases the answer is less clear. Each provision of any amended Part IV of the Stamp Duties Act, 1920, will need to be examined for the purpose of determining whether or not it is directed to a will substitute situation. If it is so directed, it may be that a like provision should be included in section 23 by an amendment of the new Act.

2.23.3 Section 23 (1). Section 23 (1) is primarily concerned with property which a person has power to dispose of for his own benefit or for the benefit of persons who, on his death, will be eligible persons in relation to his estate and which, if he does not dispose of it, will pass on his death otherwise than in accordance with his will or the rules of intestacy. A power of this kind will commonly arise under a settlement or will made by a stranger or under a joint bank account on which all the owners of the account may operate. Less commonly, it may arise in relation to some superannuation schemes with death benefits. If the person concerned does not dispose of the property, or disposes of only part of it, the Court should, as we see it, be able, in proceedings under the new Act, to make appointments affecting the property or the undisposed part of it. This person should not, by his inaction, be able to extinguish the claims of eligible persons to property which, if he had acted, might have been theirs. If, in consequence of an appointment by the Court, some other person is denied the property, he is denied only that which the deceased person could have denied him at any time up to the date of death. The real effect of the subsection is to extend the time during which this other person's expectations are uncertain.

2.23.4 Section 23 (1): joint accounts. Different views can be held about the fairness of section 23 (1) in its application to a joint account on which any party may operate. Thus, if A and B set up, and contribute equally to, a joint account, and A dies first, the whole balance of the account will be in the notional estate of A. It can be said in favour of this result that B took the risk that A would draw the whole balance on or before the eve of his death. On the other hand, it can be said that it is fairer that the notional estate be limited to the nett contributions made to the account by A. Subject to one qualification, our view is that the whole balance of the account should form part of the notional estate. Either A or B might at any time deal with the account as though he were the absolute owner of it. To us, this unfettered power of disposition gives the arrangement the character of a will substitute. The qualification to which we refer is expressed in section 28 (6). That subsection gives the Court a wide discretion in relation to the appointment of money in a joint account. This discretion is given to the Court because of the wide variety of circumstances that can lead to the opening of a joint account. In some circumstances, it may be right for the Court not to make any appointment. We note that the statutory trust does not impose any personal liability on any person bound by it except liability for matters arising after notice to him of proceedings under the new Act.⁴ For this reason, only few surviving owners of joint accounts will be hindered in their use of those accounts.

2.23.5 Section 23 (1) and section 28 (4). Section 28 of the bill limits the Court's freedom of action in exercising the power of appointment created by that section. In relation to property which is subject to the statutory trust by force of section 23 (1), section 28 (4) provides, in effect, that the Court, in exercising its power of appointment, is bound by the same constraints as the deceased person was bound: the Court may make orders affecting the property in favour only of those persons to whom the deceased may have passed the property. If the position were otherwise, the Court would have power to vary the effect of some dispositions of property made by a stranger to the proceedings. As we see it, the Court should not have this power.

2.23.6 Section 23 (2). Where a person makes a settlement of property by way of gift and on his death the property is not absolutely vested in a person beneficially, we would include the property in the notional estate of the deceased. Section 23 (2) gives legislative expression to this view. We referred to property fitting this description in paragraph 2.22.17. We repeat here that we believe that a person who does not have a vested interest in property which is comprised in a settlement made by way of gift should not be better off than a beneficiary named in the will of a living person, whatever his expectations may be. In the latter case, the beneficiary's expectations can be destroyed by the testator changing his will. In the former case, the beneficiary's expectations can be destroyed by his not satisfying a condition of the settlement or, as we recommend, by the Court intervening and saying, in effect: "Your need of this property is not as great as the need of another". As we see it, reasonable expectations are not thereby frustrated,. But where the deceased person has disposed of property in such a way that it is absolutely vested in some person before the death of the deceased, different considerations apply. As noted in paragraph 2.22.19, in such cases we exclude the property from the notional estate.

2.23.7 Section 23 (2) and section 27 (1) (a). Section 23 (2) is concerned with settlements made by way of gift. The definition of "gift" in section 22 speaks of dispositions of property made "without full consideration". If a person provides some consideration for the settlement, justice requires that regard be had to the consideration which is received. Section 102 (2) (f) of the Stamp Duties Act, 1920, provides, in effect, that where, for consideration, a deceased person caused property to be vested in himself and another person jointly, the property is liable to death duty to the extent of the total value of the property at the date of death less the proportion of the total value that the consideration received bears to the value of the property at the date of vesting. Hence if Blackacre was worth \$20,000 at the date of vesting and \$40,000 at the date of death and the consideration received was \$10,000, the amount to be included in the dutiable estate by virtue of section 102 (2) (f) will be \$24,000. We considered whether the operation of section 23 (2) should be controlled by a device of this kind. We are concerned, however, not with the precise calculations demanded of a death duty assessment, but with the discharge by a superior court of a duty to have regard to all the circumstances of a case. We think it sufficient that the Court be directed to make a just allowance for any consideration received for a settlement to which section 23 (2) applies. Section 27 (1) so provides.

2.23.8 Section 23 (3): Joint tenancies. On the death of one joint tenant his interest passes to the surviving joint tenant or tenants automatically and notwithstanding any disposition of the interest which the deceased person may have attempted to make by his will. Hence, for the purposes of the Act, an order for provision cannot be made in relation to property which a deceased person held under a joint tenancy: the property does not form part of his estate. Section 23 (3) of the bill is intended to change this situation. If the new Act does not contain such a provision it will be so easily avoided as to be seriously limited in its utility.

2.23.9 Section 23 (3): Working Paper. No commentator objected in principle to the joint tenancy provision of the draft Bill which formed part of the Working Paper.⁵ It is put to us, however, that the Court should be enabled to make appointments affecting property held under a joint tenancy only to the extent of the interest in the property which accrues to the other joint tenant on the death of the deceased person. For the reason to be stated in the following paragraph, we agree.

2.23.10 Section 23 (3): The whole interest or the interest accruing by survivorship. Section 28 (5) provides that in the case of property which is subject to the statutory trust by virtue of section 23 (3) the Court may make orders affecting the property only to the extent of the beneficial interest in it which accrued by survivorship to any person on the death of the deceased person. Section 28 (5) is so limited because, in his lifetime, the deceased person could not deal with the property as though he were the

absolute owner of it; he did not have an unfettered power of disposition in relation to it; he could not, for example, dispose of it for his own benefit. To this extent, the holder of property under a joint tenancy is in a position different from that of the owner of a joint account on which either party may operate. In the latter case, the parties have, by a contract made between the financial institution and themselves, determined that both parties have an unfettered power of disposition in relation to the account. For this reason, in the case of a joint account to which section 23 (1) applies, the whole balance of the account will be in the notional estate of a deceased joint owner. For a like reason, in the case of a joint tenancy to which section 23 (3) applies, only the interest accruing by survivorship will be in the notional estate of a deceased joint tenant: the interest in the property which the surviving joint tenant had immediately before the death of the deceased joint tenant is free from attack under the Act.

2.23.11 Section 23 (3): The English Act. In consequence of recommendations made by the Law Commission in England,⁶ section 9 of the Inheritance (Provision for Family and Dependants) Act 1975 (U.K.) gives the Court a discretionary power to order that a deceased persons severable share of property held on a joint tenancy should, to such extent as it appears to the Court to be just in all the circumstances of the case, be treated, for the purposes of that Act, as part of the nett estate of the deceased person. Section 9 of the English Act applies to property held on a joint tenancy whether or not the joint tenancy was created by virtue or in consequence of a gift made by the deceased person. So too does section 23 (3) of the new Act.

2.23.12 Section 23 (4): Proceeds of life policies. The proceeds of a policy of assurance on the life of a deceased person may, or may not, form part of his actual estate: the terms of the policy will determine the question. If the proceeds are not in the estate, the Court cannot, under the Act, make provision for an eligible person out of them. Where, for example, a man pays substantial premiums on a policy on his life for the purpose of providing his mistress with money on his death and so arranges the policy that the money does not form part of his estate, the Court cannot order that provision be made for his wife out of that money. Section 23 (4) seeks to change this position. It does so not only because of examples of the kind just given but also because in a great many instances a person plans the disposition of property after his death by reference to the policies of assurance which he has on his life. To the extent that the new Act does not give full recognition to this fact, it will, in our view, be defective. The policies with which section 23 (4) is concerned are those where the deceased person had paid the premiums, in whole or in part, and had not been reimbursed in his lifetime. In these situations there is an element of bounty to the person benefiting from the policy which, as we see it, attracts to the actions of the deceased person the idea of the will substitute to which we referred in paragraphs 2.22.14 to 2.22.17.

2.23.13 Section 23 (4) (a) (iii). Section 23 (4) (a) (iii) limits the generality of the comment just made. A policyholder may enter into an arrangement touching the policy which deprives him of any right to surrender, assign or otherwise deal with it. He may, for example, assign the policy to the trustees of a settlement and thus put the policy beyond the reach of any further dealing by him. To us, an arrangement of this kind is an instance of an absolute disposition of property which is not within our idea of a will substitute. For this reason, section 23 (4) (a) (iii) limits the application of section 23 (4) (e) and (f) to cases where, immediately before, his death, the deceased person had power to surrender or otherwise deal with the policy or its proceeds for his own benefit or for the benefit of an eligible person, or both.

2.23.14 Section 23 (4): Working Paper. No commentator objected to any aspect of the proposal made in the Working Paper⁷ in relation to the proceeds of life policies and section 23 (4) is substantially in accordance with the proposal.

2.23.15 Section 23 (4): Precedent. In drafting section 23 (4) we have had regard to the provisions of section 102 (2) (h) of the Stamp Duties Act, 1920, and to some decided cases on that paragraph.⁸

2.23.16 Section 23 (5): Superannuation schemes. Many persons plan the disposition of property after death by reference to the benefits available from pension, retirement or superannuation schemes of which they are members. These benefits are often substantial and form a major part of the property which passes in consequence of the death of the person concerned. If the Court is unable to make appointments under the new Act affecting the benefits, the Court will sometimes be hindered in its

efforts to make adequate provision for the proper maintenance of an eligible person. Section 23 (5) is intended to ensure that the Court will not be so hindered.

2.23.17 Section 23 (5): Working Paper. No commentator objected to any aspect of the proposal made in the Working Paper⁹ in relation to pension, retirement and superannuation schemes.

2.23.18 Section 23 (5): Precedent. In drafting section 23 (5), we have had regard to the provisions of section 102 (2) (m) of the Stamp Duties Act, 1920.

2.23.19 Section 23 (5): Comment. Schemes of the kind now being considered may take many forms. They may, for example, be voluntary or compulsory, contributory or non-contributory, or they may give or not give a right to the member or participant to choose the recipient of their benefits. And the benefits do not always come solely from dispositions made by the member or participant. In many cases, the member's or participant's employer will have made contributions which add to the value of the benefits. For these reasons, actions taken by a person in relation to joining or participating in a superannuation scheme cannot be said to constitute, in our terms, a will substitute. Yet, as stated in paragraph 2.23.16, if the Court is unable to make appointments under the new Act affecting the benefits payable under a superannuation scheme, the Court will be hindered in its efforts to make adequate provision for an eligible person. In the event, we compromise. Section 23 (5), unlike the other subsections of the section, leaves to the discretion of the Court the question whether the property to which it applies will be subject to the statutory trust. The variety of superannuation schemes is such that we do not attempt to specify the criteria by reference to which the Court shall exercise its discretion. We do, however, limit the operation of the subsection in one respect. Paragraph (b) is the limitation. Where, for example, the trust deed of a superannuation scheme provides for the benefits of the scheme to be paid to the wife and children of the member in such proportions as the trustees of the scheme may determine, the Court may make an appointment of the benefits which differs from the determination of the trustees. But where the benefits of the scheme accrue to a person who is not an eligible person, the Court cannot interfere. We recommend this way for two reasons, first, because we think that the Court, with all relevant information before it, will generally be better placed to evaluate the competing claims of eligible persons than the trustees of a scheme who will often be without experience in this field and, secondly, because the details of the scheme will generally be settled by the employer and if, unlikely though it may be, the scheme allows a benefit to accrue to a person who is not an eligible person, this is a result of a decision of the employer, not the deceased employee, and the new Act should not intrude into the relationship of employer and employee.

2.23.20 Section 23 (6) and (7): Evasion of Act. The policy embodied in section 23 (6) and (7) was discussed in paragraphs 2.22.10 and 2.22.11. And in paragraph 2.22.21 we noted that our object in imposing the statutory trust on the property comprised in the gift from "immediately before the gift" is to let in equitable rules such as those which relate to the tracing of trust property and to *bona fide* purchasers for value without notice. In this paragraph we are concerned only with those parts of section 23 (6) and (7) which refer to the "intention" of defeating an application for provision. We considered whether these provisions should be supplemented by a further provision creating a presumption as to the intentions of the deceased person which would place a burden of proof on the donee of the property. We rejected the notion. Section 85 of the Family Law Act (Cth) is directed at transactions which are made to defeat claims for maintenance but the section does not create any presumptions as to intention. If the antagonisms and bitterness, and the attempts to evade obligations, that are common consequences of divorce proceedings do not justify the creation of presumptions touching intentions, we do not think that like presumptions have a place in the new Act.

2.23.21 Section 23: tracing. The word "property" is used many times in section 23. We considered, and rejected, the idea of using instead the expression "property, and property from time to time representing that property". The basis of the idea was to ensure that the equitable doctrine of tracing applies to property subject to the statutory trust. We are satisfied, however, that that doctrine will apply to that property notwithstanding the absence of an express reference to it in the new Act. If a person takes property with notice of an evasive intention, strict rules of tracing will be applied; if he takes in good faith without notice, much less strict rules will be applied.¹⁰ We note, incidentally, that the rules of tracing will not provide solutions to all the problems that might arise. The authors of the American *Restatement on*

Restitution appear to have foreseen and solved most, if not all, of these problems but our work on this reference is not the occasion for proposing general reforms in the field of tracing. Despite their shortcomings, only the existing tracing rules will apply to property which is within the application of part III.

2.23.22 “On or after the appointed day”. In effect, the several subsections of section 23 provide that property becomes subject to the statutory trust only as a result of something happening “on or after the appointed day”. They so provide because we would think it wrong to apply the notional estate provisions of the new Act to, for example, property disposed of before the appointed day, even though the person disposing of it died after that day. Part III introduces far-reaching changes into the law of succession and, in our view, those changes should have no retrospective operation whatever.

FOOTNOTES

1. For “will substitute” see paragraphs 21.13 to 21.17 of this part.
2. See *Gorton v. The Commissioner of Taxation* (1965) 113 C.L.R. 604.
3. See press release dated 3 1st August, 1976, by the Premier, The Honourable Neville Wran, Q.C., M.L.A.
4. Section 29 (3).
5. Section 21 (4), page 185 of the Working Paper.
6. *Family Provision on Death* (1974) (Law Com. No. 61), paragraphs 137 to 142.
7. See paragraph 11.47.5, and section 21 (5) of the then draft bill (pages 185 and 186 of the Working Paper).
8. *Wayne v. The Commissioner of Stamp Duties* [1966] 2 N.S.W.R. 309; *Commissioner of Stamp Duties v. Jones* (1971) 46 A.L.J.R. 50.
9. See paragraph 11.47.6, and section 21 (6) of the then draft bill (page 186 of the Working Paper).
10. *Re Diplack* [1948] Ch. 465.

Section 24

2.24.1 Exclusion: actual estate. Section 24 of the bill provides-

Property in the estate of a deceased person is not subject to the statutory trust.

2.24.2 Justification. Section 24 is included in the bill because property which forms part of the actual estate of a deceased person may sometimes satisfy the conditions of a subsection of section 23 and therefore, were it not for section 24, it would also form part of the notional estate of that person. The proceeds of a policy of assurance on the life of a deceased person may, for example, be payable to the administrator of his estate and because they are so payable they will form part of his actual estate. And yet, in some cases, the same proceeds may, by virtue of section 23 (4), be said to form part of his notional estate. Section 24 ensures that the provisions of part III do not apply to any property that forms part of a deceased person’s actual estate.

Part 2 - The Bill (Sections 25 to 30)

Section 25

2.25.1 Exclusion: confirmed transaction. Section 25 of the bill provides-

(1) *In this section, "transaction" means in relation to property which, but for this section, is or may become subject to the statutory trust by virtue of the respective enactments mentioned in any of the paragraphs below in this subsection, the transaction specified in the paragraph, namely-*

- (a) the disposition of property or agreement mentioned in section 23 (1);*
- (b) the settlement mentioned in section 23 (2);*
- (c) the disposition of property or agreement mentioned in section 23 (3);*
- (d) the making of the policy of assurance mentioned in section 23 (4);*
- (e) the disposition of property or agreement mentioned in section 23 (5) (a) (i);*
- (f) the transaction by which the deceased person became a member or participant as mentioned in section 23 (5) (a) (ii);*
- (g) the gift mentioned in section 23 (6);*
- (h) the disposition mentioned in section 23 (7); or*
- (i) the gift mentioned in section 23 (8).*

(2) *In this section, "person concerned", in relation to any transaction, means a person in respect of whose notional estate in case of his death property would or might become subject to the statutory trust by virtue of section 23 and in consequence of the transaction.*

- (3) *For the purposes of this section, a person is interested under this Act if-*
- (a) where the Court hears proceedings under this section before the death of the person concerned he is a person who, had the person concerned died immediately before the hearing, would be an eligible person or a person who might be made liable to all or any of the burden of an order for provision under Part II; or*
 - (b) where the Court hears proceedings under this section after the death of the person concerned he is an eligible person or a person who might be made liable to the burden of an order for provision under Part II.*

(4) *Where it appears to the Court that any transaction is, at the time when the transaction is made, not unreasonable having regard to the interests of the persons who are or may become entitled to any interest under the transaction and to the interests of all or any of the persons interested under this Act, the Court may confirm the transaction as mentioned in this section.*

(5) *An application for confirmation under this section may be made by the person concerned or (before or after the death of the person concerned) by a person who is or may become entitled under the transaction.*

(6) *The Court may confirm the transaction, wholly or in part, as against all or any persons interested under this Act.*

(7) *Where the Court confirms the transaction, wholly or in part, as against all persons interested under this Act, property affected by the transaction is, to the extent of the order of confirmation, but subject to the terms of the order, not subject to the statutory trust.*

(8) Where the Court confirms the transaction, wholly or in part, as against some one or more but not all persons interested under this Act, property affected by the transaction is, to the extent of the order of confirmation, but subject to the terms of the order, and as between persons who are or may become entitled to any interest in the property under the transaction and persons interested under this Act as against whom the transaction is confirmed, not subject to the statutory trust.

2.25.2 General. Section 25 provides a means for securing the approval of the Court to a transaction in order that it might not be impugned in proceedings for provision. If the Court approves the transaction, it orders that the property be excluded from the statutory trust. Approval turns on whether the disposition is not unreasonable having regard, on the one hand to the interests of the persons taking under the disposition and, on the other hand, to the interests of the persons who might benefit or suffer from an order for provision under the Act. We leave at large the question of what is “not unreasonable”. The Court will look at the whole of the circumstances surrounding a particular transaction and will make its order accordingly.

2.25.3 Proceedings under section 25. We expect that proceedings under section 25 will mostly relate to transactions affecting property of a substantial value. Suppose, for the purposes of illustration, that A has a wife, a son B and two daughters, and that A has a large family business from which he wishes to retire and which B has made his life’s work. A wishes to transfer the business to B but in a way which will attract to the business the provisions of part III. A or B, or both, may ask the Court for an order under section 25 in relation to the business.

2.25.4 Working Paper. A provision to the effect of section 25 was included in the draft bill which formed part of the Working Paper.¹ No commentator expressed to us either agreement or disagreement with the provision.

FOOTNOTES

1. Section 23 of that draft.

Section 26

2.26.1 Exoneration of notional estate. Section 26 of the bill provides-

The Court may order or declare that the whole or any part of the notional estate of a deceased person shall not be the subject of an appointment or further appointment under this Act.

2.26.2 Purpose. Section 26 allows the Court to say that property in the notional estate is henceforth free from claims under the statutory trust. An order under section 25 (exclusion: confirmed transaction) has the effect of taking property outside the statutory trust. Section 26 operates differently. It recognizes that property may still be subject to the statutory trust but there may be good reasons why an appointment will not be made of the property. The section is intended to add to the discretionary powers of the Court and to allow it to make orders appropriate to every possible circumstance. The section may be useful in cases where, for example, the owner of the property suffers some misfortune and it is unreasonable to expect that an appointment would ever be made under the new Act detrimental to his interests. In this situation, we see no good reason why property of that person should not be freed from the risk of its being appointed under the statutory trust.

Section 27

2.27.1 Allowance for consideration, etc. Section 27 of the bill provides-

(1) In proceedings under Part H, the Court shall make a just allowance for-

- (a) any consideration for a settlement or other disposition by the deceased person of property in the notional estate;*
- (b) any improvement made to property in the notional estate by a person taking the property under a settlement or other disposition by the deceased person or taking the property in default of disposition of the property by the deceased person; and*

(c) any expenditure or liability incurred in respect of pro-perty in the notional estate by a person so taking.

(2) Where the Court makes an allowance under subsection (1) in respect of property in the notional estate, and two or more persons hold or have interests in the property, the Court shall make a just apportionment of the allowance amongst those persons.

(3) A person to whom an allowance is made under this section in respect of property in the notional estate shall be entitled to a charge on the property for the amount of the allowance together with interest, in priority to the interests of persons claiming under the statutory trust,

(4) For the purposes of subsection (3), the Court shall fix the time from which interest on an allowance under this section is to run, having regard to the time when the consideration was given, improvement was made, or expenditure or liability was incurred, as the case requires.

(5) Interest on an allowance under this section shall run from the time fixed under subsection (4) until payment of the allowance.

(6) Interest under this section shall be at the rate pre-scribed or, subject to rules of court, at such rate as the Court may fix.

(7) The Court may make orders for raising the amount of a charge under this section and for payment to the persons entitled.

2.27.2 Just allowance. In paragraphs 2.22.23 and 2.22.24, we indicated the purpose of section 27. Here we comment on the operative words of the section: “The Court shall make a just allowance”. The expression “just allowance” has a long history in the law relating to constructive trusts. Where a person has been fixed with a constructive trust, his right to reimbursement of expenses and remuneration for his time and trouble is clearly recognized.¹ In section 27, we seek merely to attach old authorities to the statutory trust created by the new Act.

2.27.3 Ancillary matters. Subsections (2) to (7) of section 27 are ancillary provisions which do not call for comment.

FOOTNOTES

1. See, generally, Godefroi, *Trusts and Trustees* (5th ed.) (1927), page 155; *Jacobs’ Law of Trusts in New South Wales* (3rd ed.) (1971), page 352; and *Phipps v. Boardman* [1967] 2 A.C. 46, 104, 112.

Section 28

2.28.1 Statutory trust. Section 28 of the bill provides-

(1) *The statutory trust is a trust for such one or more of the following objects, that is to say, all persons who are eligible persons in relation to the estate or notional estate of the deceased person and all persons entitled to an interest in the estate or notional estate of the deceased person, and in such manner and to such extent as the Court may from time to time appoint.*

(2) *The Court may, under the power of appointment in subsection (1), appoint that property subject to the statutory trust or such estate, charge, lien or other interest in property subject to the statutory trust as the Court may direct-*

(a) be the property of an object of the power;

(b) be held on trust for an object of the power by a person appointed by or under direction of the Court, the trust to be in such terms and to contain such conditions, powers and provisions as the Court may direct.

(3) *Subsection (2) does not limit the generality of subsection (1).*

(4) *Where property is subject to the statutory trust by virtue of section 23 (1), subsection (1) does not authorize an appointment of the property except in a manner in which the deceased person might lawfully and without any fraud on a power have disposed of the property immediately before his death.*

(5) *Where property is subject to the statutory trust by virtue of section 23 (3), subsection (1) authorizes an appointment of the property to the extent of the beneficial interest in the property passing or accruing by survivorship on the death of the deceased person.*

(6) *Where money to the credit of a deceased person and another person in an account with a financial institution is subject to the statutory trust by virtue of section 23 (1) or (3), the Court may, under subsection (1), appoint only so much of the money as, in the opinion of the Court, is reasonable having regard to the circumstances in which the account was opened and to the deposits to the credit of the account, and the withdrawals from the account, made by the deceased person and the other person.*

(7) *In subsection (6), “financial institution” means a bank or a building society or any other person receiving money on current account or on deposit.*

(8) *A bank or other person holding any property subject to the statutory trust and acting in the ordinary course of business is not affected by the statutory trust notwithstanding notice of the facts by which the property is subject to the statutory trust, except where notice in writing of the statutory trust has been given to the bank by an administrator or by a person interested in the estate or notional estate of a deceased person.*

(9) *Where property is subject to the statutory trust by virtue of section 23 (7), subsection (1) does not authorize an appointment of the property except in a manner in which the deceased might lawfully and without any fraud on a power have disposed of the property immediately before his death, if he had not made the disposition mentioned in section 23 (7).*

(10) *Section 23 (8) has effect for the purpose of subsection (9) as it has effect for the purposes of section 23 (7).*

2.28.2 Section 28 (1) and (2). Subsections (1) and (2) of section 28 are the key provisions of part III: they create the statutory trust, specify its objects and indicate the nature of the appointments that may be made under it. The subsections give the Court great flexibility in the orders that it may make. This flexibility is, we believe, essential if the Court is to have proper regard to the competing and often complex interests of the persons who may be involved in the proceedings under the new Act.

2.28.3 Section 27 (4) to (10). In our comments on the subsections of section 23, we mentioned a number of limitations on the Court's power of appointment under section 28.¹ The same limitations are found in subsections (4) to (10) of section 28.

FOOTNOTES

1. See paragraphs 2.2:3.5, 2.23.10, 2.23.13 and 2.23.19.

Section 29

2.29.1 Appointment under the statutory trust. Section 29 of the bill provides-

The Court may make an appointment under the statutory trust for the following purposes but, subject to section 35, no other-

- (a) for the purpose of making an appointment for provision under section 9;*
- (b) for the purpose of making an appointment for immediate provision under section 10;*
- (c) for the purpose of giving effect to the terms on which appointments for provision are made under sections 9 and 10;*

(d) for the purpose of providing for the manner in which the burden of any provision made under this Act is to be borne ;

(e) for the purpose of giving effect to an order under section 16 revoking or altering any provision made under this Act for an eligible person;

(f) for the purpose of giving effect to an appointment under section 17 increasing any provision made under this Act for an eligible person.

2.29.2 Purpose. Section 29 is intended to make it clear that part III is included in the bill only for the purpose of supplementing part II: in general, no appointment can be made under the statutory trust unless it will aid the Court in making adequate provision for the proper maintenance of an eligible person. The section does not call for further comment.

Section 30

2.30.1 Operation of appointment under the statutory trust. Section 30 of the bill provides-

(1) Where, under section 28, property subject to the statutory trust or an estate, charge, lien or other interest in property subject to the statutory trust is appointed, the Court may, to enable effect to be given to the appointment, make an order vesting the property or the estate, charge, lien or other interest in the property in the appointee.

(2) Sections 78 and 79 of the Trustee Act, 1925, apply to an order under subsection (1).

(3) Section 78 (2) of the Trustee Act, 1925, applies to an order under subsection (1) as if this section were included in the provisions of Part III of that Act.

2.30.2 The Working Paper. The draft bill which formed part of the Working Paper did not contain any provision such as section 30. It is included in the bill because of a comment made to us that section 21 (1) (b) is inadequate and that the operation and effect of an appointment under the statutory trust should be plainly stated in part III itself.

2.30.3 Land titles. One commentator is particularly concerned with the practical effect of an appointment under the statutory trust on the law relating to the registration of land titles. He suggests that any scheme that we recommend must take account of that law and be compatible with it. He further suggests that a person in whose favour an appointment is made under the statutory trust should be able, by some form of notification or registration, to give public notice of the appointment and that the Registrar-General should have legislative warrant to note the appointment on lands records.

2.30.4 Vesting orders. Section 30 uses the device of treating an appointment under the statutory trust as a vesting order of the Court to which part III of the Trustee Act, 1925, applies. In this way, well-known law and practice is made to apply to appointments under part III of the new Act. Precedent for this approach is found in section 37 of the Minors (Property and Contracts) Act, 1970.

Part 2 - The Bill (Sections 31 to 36)

Section 31

2.31.1 Restrictions on the statutory trust. Section 31 of the bill provides-

(1) *Subject to subsections (2) and (4), the statutory trust does not enable any person claiming a beneficial interest under it to commence proceedings in a court against any person bound by it.*

(2) *Subsection (1) does not apply to-*

- (a) proceedings for an order for provision under part II; or*
- (b) proceedings commenced by leave of the Court given in proceedings for an order for provision under part II.*

(3) *Subject to subsections (4) and (5), the statutory trust does not impose any personal liability on any person bound by it except liability for anything done or left undone by him after notice to him of proceedings against him, being proceedings mentioned in subsection (2).*

(4) *Subsection (1) does not apply to, and subsection (3) does not affect, any proceedings so far as the proceedings are for or relate to the identification, preservation, disposal or recovery of property subject to the statutory trust.*

(5) *Where-*

- (a) notice is given as mentioned in subsection (3) to a person bound by the statutory trust;*
- (b) that person becomes liable by reason trust for anything done or left undone notice is given; and*
- (c) afterwards that liability devolves on whether on the personal representative bound in case of his death, or on his bankruptcy in case of his bankruptcy, or*

that liability may be enforced against that other standing that notice has not been given to that mentioned in subsection (3).

(6) *Notwithstanding any of the provisions of the Real Property Act, 1900, the statutory trust does not enable any person to lodge a caveat under that Act-*

- (a) before the death of the deceased person; or*
- (b) after the death of the deceased person, except by leave of the Court.*

2.31.2 Purpose. As noted in paragraphs 2.22.25 and 2.22.26, our general intention is that the statutory trust should not enable an eligible person to harass the owner of property which is in the notional estate of a person, nor should it impose any personal liability on any person bound by it. Section 31 (1) gives legislative expression to the first limb of this general intention and section 31 (3) does the same thing in relation to the second limb. Section 31 (2) provides for a necessary exception to section 31 (1). Without section 31 (2), the purpose of introducing notional estate provisions into the new Act would be frustrated by section 31 (1). Section 31 (3) provides, in effect, that a person will not be liable for anything he does, or does not do, in relation to property subject to the statutory trust until he is given notice that another person is asking the Court to say that he is so liable. We think that section 31 (3) is right in principle. It accords with the general notion that a person should not be liable as a trustee until he knows that he is a

trustee. Section 31 (4) is not only another exception to section 31 (1) but also a qualification of section 31 (3). If, for example, in consequence of a gift, a person holds property subject to the statutory trust and, in fear of an appointment for provision affecting the property, begins to dissipate it, the Court should, in our view, be able to intervene. Section 31 (4) is intended to provide means for intervention. The provision is based on Part 28 (Interim Preservation, Etc.) of the Supreme Court Rules, 1970. Section 31 (5) provides an exception to section 31 (3). It is directed to the rare cases where a person who satisfies the conditions of paragraphs (a) and (b) of subsection (5) dies or becomes bankrupt. In such cases, we think it right that a person claiming under the statutory trust should not have to give a second notice of proceedings. Section 31 (6) seeks to answer a question which, if the subsection were omitted, would be a matter of conjecture: does a person interested in property subject to the statutory trust have a right to lodge a caveat under the Real Property Act, 1900, to protect his interests? The recommended answer is “no”: an answer which is consistent with our intention of preventing the statutory trust from being a source of harassment.

Section 32

2.32.1 Effect of this Part on the Real Property Act, 1900. Section 32 of the bill provides-

Subject to section 31 (6), nothing in this Part affects any of the provisions of the Real Property Act, 1900, or any regulation made under that Act.

2.32.2 Working Paper. Section 32 is included in the bill because of comments on the Working Paper made by the Registrar-General. In a report made by officers of the Registrar-General's Department to the Registrar-General, and supported by him, it is said:

In our opinion, enactment of legislation along the lines proposed in the draft bill would not create any special problems so far as the administration or practice of the Registrar-General's Office is concerned.

From a broader viewpoint, however, to the extent that under the provisions of the suggested bill the Court would be empowered in certain circumstances to make an order, the effect of which could be to divest a registered proprietor of land under the Real Property Act of his interest in that land, we consider that there should be a reconciliation of the implications arising out of this and the general concept of indefeasibility of title enunciated in such cases as *Frazer v. Walker*, *Breskvar v. Wall*, etc.

We consider further that it would be more appropriate to provide for this reconciliation in the Commission's draft legislation than by amendment of the Real Property Act.

2.32.3 Purpose. When read with section 30, section 32 should remove any possibility of it being successfully argued that the new Act affects any “indefeasibility of title” doctrine.

Section 33

2.33.1 Notional estate outside the State. Section 33 of the bill provides-

Property which is situated outside New South Wales is not subject to the statutory trust.

2.33.2 Assumption. Section 33 may be otiose. It assumes that if the legislature of New South Wales were so minded it would have the legislative competence to impose the statutory trust upon property which is situated outside New South Wales. Because we recommend that the legislature should not be so minded, we do not examine this assumption which, in the case of immovables, is almost certainly false and, in the case of movables, may be false.

2.33.3 Immovables. In proceedings under the Act the Court cannot make orders affecting immovables in the estate of a deceased person which are situated outside New South Wales. The new Act, in its application to immovables in the actual estate of a deceased person, does not seek to change this rule; a rule which accords with general principles of private international law.¹ And, if foreign immovables could form part of the notional estate of the deceased person, section 33, in its application to them, is

consistent with the same rule. We think it right that this should be so. If it were otherwise, some anomalous results could follow: if, for example, X, possessed of an estate in New South Wales, acquired Whiteacre and Blackacre in Victoria and then, in a transaction to which section 23 applies, disposed of Blackacre to Y, the Court could, in proceedings under the new Act, make an order affecting Blackacre but not Whiteacre. As we see it, results of this kind should not be countenanced. Of course, an order might be made affecting Whiteacre in proceedings commenced under the family provision laws of Victoria. In this circumstance, it might not be so anomalous if an order were to be made by the New South Wales Court affecting Blackacre. But we do not think that a New South Wales law should be enacted which requires its faults to be rectified by the use of a foreign law.

2.33.4 Movables. As noted in paragraph 2.9.14, in proceedings under the Act the Court may make orders affecting movables which are situated outside New South Wales if the deceased person was, at the time of his death, domiciled in New South Wales. The new Act, in its application to movables in the actual estate of a deceased person, does not seek to change this rule; again a rule which accords with general principles of private international law.² But, if foreign movables could form part of the notional estate of a deceased person, section 33, in its application to them, does not accord with the same rule. This is deliberately so because in the case of property owned by a person other than the deceased person (property which may have been owned by that person for some time before the death of the deceased person), we do not see that the domicile of the deceased at the time of his death has any relevance or connection with the property. To seek to apply the rule to notional estate would, to us, be so artificial as to be ludicrous.

2.33.5 Effects of section 33. The practical effect of section 33 is that part III of the bill will be avoided if property to which the part otherwise applies is removed outside New South Wales. For the purpose of foiling some exercises of this kind, we considered whether we should recommend that section 33 be expressed to the effect of the following-

- (1) Subject to subsection (2), part III does not apply to property which is situated outside New South Wales.
- (2) Subsection (1) does not affect the power of the Court to apply the rule in *Penn v. Lord Baltimore*.

2.33.6 *Penn v. Lord Baltimore.* In *Penn v. Lord Baltimore*,³ the Court of Chancery established that it had jurisdiction to enforce an agreement settling boundaries of land situated outside England, since the defendant was properly served with the originating process in England. Objection was taken that because the matter in issue was the title to foreign land, the proceedings were *in rem* and therefore the Court lacked jurisdiction, but Lord Hardwicke said "the conscience of the party was bound by this agreement; and being within the jurisdiction of this court, which acts *in personam*, the court may properly decree it as an agreement." The principle of *Penn v. Lord Baltimore* was summarized in 1883 by Lord Selborne L.C.⁴ as follows-

The Courts of Equity in England are, and always have been, Courts of conscience, operating *in personam*, and not *in rem*; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction. They have done so as. to land, in Scotland, in Ireland, in the Colonies, in foreign countries ...

The rule is not limited to land⁵ and it would seem to apply to all forms of property, whether movable or immovable.⁶

2.33.7 Policy. In the event, we recommend that section 33 be drawn in the way that it is now drawn. If we were to recommend the application of the rule in *Penn v. Lord Baltimore* to proceedings under the new Act involving notional estate outside the State, we would be seeking to achieve indirectly that which we have said should not be sought directly.⁷

FOOTNOTES

1. See J. H. C. Morris, "Choice of Law Clause in Statutes" (1946) 62 *Law Quarterly Review* 170, 178-179.

2. *Ibid.*
3. (1750) 1 Ves. Sen. 444; 27 E.R. 1132.
4. *Ewing v. Orr Ewing* (1883) 9 App.Cas. 34, 40; see also *Deschamps v. Miller* [1908] 1 Ch. 856, 863.
5. *Potter v. Broken Hill Pty Co. Ltd* (1905) 3 C.L.R. 479.
6. Meagher, Gummow and Lehane, *Equity Doctrines and Remedies* (1975)
7. See paragraphs 2.3 3.2 and 2.33.3.

Section 34

2.34.1 Evidence. Section 34 of the bill provides-

(1) *In any proceedings under this Act for an order for provision out of the estate or notional estate, or both, of a deceased person, a statement made, whether orally or in a document or otherwise, by the deceased person shall, subject to this section, be admissible as evidence of any fact stated therein of which direct oral evidence by the deceased person would be admissible.*

(2) *Subject to subsections (3) and (13) and unless the Court otherwise orders, where a statement which was made otherwise than in a document is admissible under this section in any proceedings, no evidence other than direct testimony by a person who heard or otherwise perceived the statement being made shall be admissible for the purpose of proving it.*

(3) *Where a statement made by the deceased person while giving oral evidence in a legal proceeding is admissible under this section, the statement may be proved in any manner authorised by the Court.*

(4) *Where a statement contained in a document is proposed to be tendered, or is tendered, in evidence under this section, it may be proved by the production of the document or, whether or not the document is still in existence, by leave of the Court, by the production of a copy of the document, or of the material part of the document, authenticated in such manner as the Court may approve.*

(5) *Where, under this section, a person proposes to tender, or tenders, a statement contained in a document, the Court may, subject to subsection (1), require that any other document related to the statement be produced and, in default, may reject the statement or, if it has been received, exclude it.*

(6) *For the purpose of determining questions of admissibility under this section the Court may draw any reasonable inference from the circumstances in which the statement was made or from any other circumstance, including, in the case of a statement contained in a document, the form or content of the document.*

(7) *In estimating the weight, if any, to be attached to a statement tendered for admission or admitted under this section, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, including the recency or otherwise at the time when the deceased person made the statement of any relevant matter dealt with in the statement and the presence or absence of any incentive for the deceased person to conceal or misrepresent any relevant matter in the statement.*

(8) *Subject to subsection (10), where a statement of a deceased person is tendered for admission or is admitted in evidence under this section, evidence is admissible for the purpose of destroying or supporting the credibility of the deceased person.*

(9) *Subject to subsection (10), where a statement of a deceased person is tendered for admission or is admitted under this section, evidence is admissible for the purpose of showing that the statement is inconsistent with another statement made at any time by the deceased person.*

(10) *Subsections (8) and (9) do not make admissible evidence of any matter of which, if the deceased person had been called as a witness and had denied the matter in cross-examination, evidence would not be admissible if adduced by the cross-examining party.*

(11) *This section makes a statement of a deceased person admissible notwithstanding-*
(a) *the rules against hearsay; or*
(b) *the rules against secondary evidence of the contents of a document,*

and notwithstanding that the statement is in such a form that it would not be admissible if given as oral testimony, but does not make admissible a statement of a deceased person which is otherwise inadmissible.

(12) *This section does not apply to a statement to which Part IIc of the Evidence Act, 1898, applies.*

(13) *In subsection (2), “testimony” includes oral evidence and evidence by affidavit and evidence taken before a commissioner or other person authorised to receive evidence for the purpose of the proceedings.*

(14) *In subsection (3), “legal proceeding” means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration.*

(15) *In this section, “document” includes any record of information.*

2.34.2 The present law.¹ In proceedings under the Act, a statement made by the deceased person about the applicant is usually inadmissible as evidence of its truth. This is so because of the rule against hearsay. We say “usually inadmissible” because one of the recognized exceptions to that rule may apply in a particular case. If, for example, the statement of the deceased person was made in a document which satisfies the conditions of section 14B of the Evidence Act, 1898, or in a business record which satisfies section 14CE of that Act, it will be admissible as evidence of its truth. And, in Victoria, the statement may be admissible under the admissions exception to the hearsay rule. Sholl J. has said-²

[T]he only way in which a testator’s allegations or reasons become evidence is this, that they may call on the applicant for an explanation, and if the explanation is unsatisfactory, that failure to explain may (with or without the aid of other proved facts) amount to an admission, express or implied, of facts negating moral claim, or establishing character and conduct discrediting.

In this State, there is, however, authority for the view that a statement of the deceased person about the applicant is admissible independently of any exception to the hearsay rule. In 1921, Harvey J. said:³ “The statements of the testator are perhaps not evidence of the truth of the facts, but the Court is entitled to know why the testator has made the dispositions he has made”. But, to us, it is difficult to see why the testator’s reasons are relevant unless they are soundly based; if they are not evidence of the truth of the facts asserted they should not be admitted. We think a more general approach to the problem is needed.

2.34.3 The Working Paper. We said in the Working Paper that it is desirable that any relevant statement made by the deceased, whether made orally or in writing, be available to the Court.⁴ The applicant is alive and has the opportunity of refuting the truth of statements made by the deceased. But the deceased cannot refute what the applicant says. The contest would be fairer if evidence of the deceased’s statements were admissible generally and hence we proposed that they be made so admissible.⁵ No commentator objected to the proposal. If, by the enactment of section 34, it is adopted, the law on this subject will be substantially the same as it is in England.

2.34.4 The comparable United Kingdom provision. Section 21 of the Inheritance (Provision for Family and Dependents) Act 1975 (U.K.) implements the recommendation of the Law Commission in England that that Act should expressly provide that any statement by a deceased person on any matter which is relevant to proceedings for provision should be admissible in accordance with the Civil Evidence Act 1968 (U.K.).⁶ Section 34 of the Bill is based, in part, on this last-mentioned Act.

2.34.5 The Evidence (Amendment) Act, 1976. Although based, in part, on sections 2, 6 and 7 of the Civil Evidence Act 1968 (U.K.), section 34 draws also on provisions contained in the Evidence (Amendment) Act, 1976. Those provisions were the subject of our report *Evidence (Business Records)*⁷ and we do not repeat here the comments we then made. We note, however, that by virtue of section 34 (2) second-hand oral hearsay is admissible only with the leave of the Court. The likelihood of error in transmitting oral statements is such that evidence of an oral statement made by a deceased person should, except in special cases of which the Court is an appropriate judge, be given only by a person who heard or perceived the statement being made. We note too that, by virtue of section 34 (12), the admissibility in proceedings under the Act of a statement made by a deceased person in a business record to which the Evidence Act, 1898, applies is governed by that Act, not by section 34.

FOOTNOTES

1. See, generally, H. T. Gibbs, "Admissibility of Statements by a Testator in Testator's Family Maintenance Proceedings" (1953) 2 *University of Queensland Law Journal* 150.
2. *Re Paulin* [19501 V.L.R. 462, 473.
3. *Re Jones* (1921) 21 S.R. (N.S.W.) 693, 695; see also *Re Hall* (1930) 30 S.R. (N.S.W.) 165.
4. Paragraph 15.2.
5. The Working Paper, paragraph 15.4.
6. *Report on Family Provision on Death* (Law Com. No. 61), paragraphs 105-108.
7. LRC 17.

Section 35

2.35.1 Costs, charges and expenses. Section 35 of the bill provides-

(1) Without limiting any power of the Court, the Court may order that the costs, charges and expenses of or incident to proceedings under this Act be paid out of the estate or notional estate, or both, of the deceased person concerned in such manner as the Court thinks fit.

(2) The Court shall not make an order under subsection (1) against any person entitled to an interest in any notional estate of a deceased person except in proceedings of which notice has been given to that person in accordance with section 19.

2.35.2 Justification. Although section 76 of the Supreme Court Act, 1970, and part 52 of the Supreme Court Rules, 1970, deal generally with the matter of costs, we include a costs, charges and expenses provision in the bill. We do so only to make it clear that the Court may, subject to section 35 (2), make orders for costs in relation to both the estate and the notional estate of a deceased person.

Section 36

2.36.1 Death Duty. Section 36 of the bill provides-

(1) Where any duty is payable under Part IV of the Stamp Duties Act, 1920, in respect of property which is appointed under this Act, the duty shall be computed as if the deceased person concerned had power to make, and had made, a will containing the provisions of the appointment immediately before his death.

(2) Subsection (1) shall not make any property liable to duty under Part IV of the Stamp Duties Act, 1920, which, if this Act had not been enacted, would not be liable to that duty.

(3) Where any duty is paid in excess of the amount required to be paid under subsection (1), the excess duty shall, on application, and without further appropriation than this Act, be returned by the Treasurer to the personal representative of the deceased person and by him remitted to the person entitled to receive it.

(4) Where, under this Act, any property in the estate of a deceased person, or any property subject to the statutory trust, is appointed, the Court may, by order, direct that such contribution to, or

adjustment of, the death duty, if any, payable under Part IV of the Stamp Duties Act, 1920, in respect of the property be made by or between such persons, and in such proportions, as the Court thinks fit.

(5) The Court shall not make an order under subsection (4) against any person entitled to an interest in the notional estate of a deceased person except in proceedings of which notice has been given to that person in accordance with section 19.

(6) Subsection (4) does not affect the operation of any provision of the Stamp Duties Act, 1920, as between the Commissioner of Stamp Duties and any other person.

2.36.2 Section 36 (1) and (2). Section 36 (1) and (2) of the bill are restatements of section 10 of the Act. The new subsections are intended, however, to apply to two situations which could not arise under the Act. The first is where an appointment for increased provision is made under section 17 of the new Act. Where, for example, a widow obtains an appointment under that section which has to be satisfied out of funds which have been set aside for a charity, we think it right that the death duty assessment should be adjusted accordingly. The subsections have this effect. The subsections are also intended to apply where property the subject of an appointment for provision is, for the purposes of both the new Act and the Stamp Duties Act, 1920, within the notional estate of a deceased person. Where, for example, a deceased person, with the intention of evading the Act, gave Blackacre to his mistress within 2 years of his death, the death duty payable in respect of the property will be more than if it had passed, by will, to the deceased person's wife. If an appointment under the new Act affecting Blackacre is made in favour of the wife, we would also think it right that the death duty assessment should be adjusted accordingly. Again, the subsections have this effect.

2.36.3 Section 36 (3) and (4). Where a death duty assessment is varied in consequence of an appointment for provision, re-apportioning the duty between the persons who bear it and effecting the necessary cash adjustments are often difficult tasks for an administrator. An association of trustee companies suggests to us that the Court should be empowered to give directions in respect of any death duty adjustments which may flow from an appointment for provision. Section 36 (3) seeks to adopt this suggestion. Section 36 (4) makes it clear, however, that orders under section 36 (3) are not to affect the operation of those sections of the Stamp Duties Act, 1920, which provide for the recovery of death duty by the Crown.¹

FOOTNOTES

1. See, for example, section 5.

Part 2 - The Bill (Sections 37 to 40)

Section 37

2.37.1 Protection of administrator. Section 37 of the bill provides-

An action does not lie against an administrator of the estate of a deceased ' person by reason of his having distributed the whole or any part of that estate if-

- (a) the distribution was made before the administrator had notice of the commencement of proceedings under this Act or of an application to extend the time within which such proceedings may be commenced and, before making the distribution, the administrator had given the prescribed notices and the time specified in the notice or in the last of the notices had expired; or*
- (b) the distribution was made in pursuance of an interim appointment made under section 9.*

2.37.2 Former section. Section 37 of the bill departs from section 11 (1) and (2) of the Act in 2 ways: first, it takes account of interim appointments made under section 9 and appointments for immediate provision made under section 10 and, secondly, it allows the form of the notice to be given by administrators to be changed by rule of the Court and without the need for legislation.

Section 38

2.38.1 Release of right to apply for appointment for provision.

Section 38 of the bill provides-

- (1) Subject to this section, this Act has effect notwithstanding any agreement or release.*
- (2) This section applies to an agreement in writing made after the commencement of this Act under which a person (in this section called "the releasing party") agrees to release his rights, if any, to apply under this Act for an appointment for provision out of the estate or notional estate, or both, of another person.*
- (3) The agreement does not have any effect unless it is approved by the Court.*
- (4) Proceedings for the approval of the agreement may be commenced before or after the death of the person whose estate or notional estate, or both, is the subject of the agreement.*
- (5) In proceedings for the approval of the agreement, the Court shall have regard to all the circumstances of the case, including whether, at the time the agreement was made-*
 - (a) it was to the advantage, financially or otherwise, of the releasing party to make the agreement;*
 - (b) it was prudent for the releasing party to make the agreement;*
 - (c) the provisions of the agreement were fair and reasonable; and*
 - (d) the releasing party had taken independent advice in relation to the agreement and, if so, had given due consideration to that advice.*
- (6) The Court may revoke its approval of the agreement if, and only if, it is satisfied-*
 - (a) that its approval was obtained by fraud,-*

(b) that the concurrence of the releasing party was obtained by fraud or undue influence; or
(c) that the parties to the agreement desire the revocation of the approval.

(7) Where, under subsection (5), an approval is revoked, the agreement ceases to be in force.

2.38.2 Working Paper. We noted in the Working Paper that a person is not precluded from obtaining provision out of the estate of a deceased person even though he contracted with the deceased not to apply for provision: public policy, as settled by the High Court in 1944, overrides the contract.¹ We asked whether that policy should be overridden by statute and we pointed out that courts can now approve agreements for maintenance made in substitution for rights under Matrimonial Causes Acts.² We said-³

If, subject to conditions, a person may now preclude himself from making an application for maintenance following divorce, might not a person preclude himself from making an application for provision following death? In each case, similar uncertainties exist. The person who bargains away a right cannot know whether the fortunes of the other party, or of the estate, will rise or fall and he cannot know whether his need for money will increase or decrease. Indeed he cannot know whether what now seems to him to be a good bargain will turn out to be a bad bargain. But this is a condition of everyday life. As we see it, a person runs no greater risk in waiving a right to family provision under the Act than he does in waiving a right to maintenance under the Matrimonial Causes Act 1959-1973 (Cth). If public policy permits the latter, we cannot see why it should forbid the former. We would, of course, impose a condition that any agreement to waive rights under the Act should be sanctioned by the Court.

2.38.3 Comments. Although our commentators generally agree with the proposal, two of them have misgivings about it. One says: "Though I consider there should be power in a person to contract out of the Act, care should be taken to ensure that he or she is fully conscious of what is being done. This requires something equivalent to what used to be done in the old days when women executed deeds giving up their rights. They had to be examined separately and apart to be sure that there was full comprehension of what was involved and that the surrender of rights was free and voluntary. This responsibility could profitably be thrown on judges of the District Court." The other commentator points out that in the case of maintenance agreements made between spouses who are already estranged, and who may be bitterly hostile to each other, each party is likely to be determined to obtain the best possible financial provision. But, on the other hand, during an existing marriage there may be an overbearing husband or an over affectionate wife and the wife may be induced to consent to an agreement which will be to her ultimate disadvantage. The same commentator adds that in the case of an agreement to forego rights under the Act made after the death of a testator, a widow may be induced to make an agreement which is unduly generous to one or more of her children. And, he continues, the Court may not find it easy to discover the full facts when the person whose interests are imperilled by the agreement is making every effort to persuade the Court to approve it.

2.38.4 Section 38. Because of these comments, the force of which we see, section 38 specifies some of the criteria by reference to which the Court must give or refuse approval. We believe that these specifications ensure that agreements to which the section applies will be given the closest scrutiny by the Court. Indeed the same specifications are likely to lead to the result that agreements to which the section applies will not be made unless they can be expected to survive that scrutiny. But, where special circumstances call for them, we think it right that it be made lawful for persons to enter into agreements of this kind.

FOOTNOTES

1. See, generally the Working Paper, Part 17 and *Lieberman v. Morris* (1944) 69 C.L.R. 69.
2. Working Paper, paragraph 17.4 and see the Family Law Act 1975 (Cth) section 87.
3. Paragraph 17-6.

Section 39

2.39.1 Rules of Court, Section 39 does not call for comment.

Section 40

2.40.1 Amendments. By force of section 40 of the bill, some statutes are amended to the extent specified in schedule I of the Act. We are concerned in this paragraph only with the amendments made to sections 3 and 6 of the Act. These amendments give the Court, in proceedings still to be determined under the Act, the power to make interim orders and, in relation to orders for provision already made or to be made under the Act, the power to vary the provision by increasing it. Comparable provisions in the new Act are sections 9 (5) (c) (i) and 17. The interim order provision is included merely to settle the debate concerning the power of the Court to make such orders.¹ The power to vary an order upwards is a more debatable inclusion. But, consistently with the proposal mentioned in paragraph 2.17.5, we believe that if there are undistributed assets in an estate and a person who has an order for provision is experiencing hardship by reason of an exceptional change in his circumstances since the date of the order, he should be able to apply for increased provision out of the undistributed assets.

2.40.2 The Wills, Probate and Administration Act, 1898. The amendment of section 40 of the Wills, Probate and Administration Act, 1898, specified in schedule 1 expresses the recommendation made in paragraph 2.14.3, namely, that the Court should have jurisdiction to grant administration of the estate of a deceased person, whether or not that person leaves property in this State.

FOOTNOTES

1. See the Working Paper, paragraphs 12.13 to 12.18.

Part 3 - Rules of Court

3.1 Procedural matters. We turn now to some procedural matters for which no provision is made in the bill but for which provision may be made by rules of court. We refer, in particular, to "notice of proceedings" and "persons under legal disability". We recommend that if Parliament should legislate in the manner indicated by the bill, the Rule Committee under the Supreme Court Act, 1970, should be invited to consider making rules in relation to these matters. If the committee accepts any such invitation, the comments made in this part may be of assistance in that they outline what we see as being some areas of difficulty and they point to some possible solutions.

3.2 Notice of proceedings. The bill, unlike the Act,^{1*} does not require that notice of proceedings for provision out of the estate of a deceased person be given to any particular person or persons. In some jurisdictions, a requirement of this kind is specified by rule or statute or it arises out of the practice of a court. In England, for example, the Court may direct that notice of proceedings be served on any person.² In New Zealand, section 4 of the Family Protection Act 1955 provides, amongst other things-

(3) It shall not be necessary to serve any application [for provision] on any person, or to make provision for the representation of any person on any application, by reason only of the person being entitled to apply, unless-

- (a) The person is the wife or husband or a child of a marriage of the deceased, or a child of a marriage of any such child; or
- (b) The Court in its discretion considers that there are special circumstances which render it desirable that the person be served or represented.

And a Queensland commentator says-

In Queensland, the originating summons for provision generally is served in the first instance on the personal representative only, and on its return date it is treated as, in effect, a summons for directions; but, in addition to limiting the times within which affidavits of the various parties are to be filed, the chamber judge determines what persons should be given notice of the application. There is material before him either in the applicant's affidavit or in an affidavit by the personal representative deposing to the existence of persons other than the beneficiary in the will who may be entitled to join in the proceedings as applicants, and, as a matter of course, service is ordered to be effected on them so that they may, if they wish, make application also.

3.3 Notice of proceedings: eligible persons. We proposed in the Working Paper³ that Part 77 of the Supreme Court Rules, 1970, be amended so as to provide that notice of proceedings for provision must be given by the administrator of the estate of a deceased person to any surviving spouse and children of the deceased and to any person who is entitled to share in his estate. Many of our commentators would widen this proposal by requiring notice to be given to every person who is an eligible person within the meaning of section 6 (1) of the bill. While agreeing that it is desirable that all interested persons should get notice, there is a difficulty in the case of eligible persons. By force of section 9 (1) (a) of the bill, a person cannot be said to be an eligible person until the Court, in the proceedings for provision, makes a finding to that effect. Hence a requirement that notice be given to every eligible person could not be complied with. A requirement of this kind may need to refer to "a person who, in the opinion of the person giving the notice, may be an eligible person". If such a requirement were to be imposed, it would, we think, work well in most cases. This is so because most cases are concerned with the surviving spouse or a child of the deceased person and his status as such is usually a matter of common knowledge. An opinion that a person may be an eligible person would often be inescapable. On the other hand, an opinion that a person may be an eligible person because he satisfies the provisions of

section 6 (1) (c) of the bill would not, in many cases, be easily formed. For this reason, we would require the administrator to give notice of proceedings for provision to a surviving spouse and a child of the deceased person and to any person, not being that spouse or child, who is entitled to share in the estate of the deceased and also to any other person who, in the opinion of the administrator, may be an eligible person. But, in addition, we would require every applicant for provision to give notice of his proceedings to any person, not being a surviving spouse or child of the deceased or a person entitled to share in the estate of the deceased, who, in the opinion of the applicant, may be an eligible person. If requirements of this kind were imposed, some person may get more than one notice of proceedings. This result is, however, better than the person concerned not getting any notice. We recognize, of course, that no procedure can guarantee that every eligible person will get a notice of proceedings in every case. Nonetheless, we think it desirable that an attempt be made, by rules of court, to improve the present position.

3.4 Persons under legal disability. Where, for example, a person dies leaving a child who is a minor, or a spouse or a child suffering from mental illness, who is to decide whether proceedings under the Act should be commenced on behalf of the legally incapacitated person? This question is not relevant in the case of a mentally ill person to whom particular provisions of the Mental Health Act, 1958, apply.⁴ In other cases, the problem is a real one. We realize, of course, that the Court treats with sympathy applications by persons under legal disability for extensions of time for the commencement of proceedings. But, if the estate has been finally distributed at the time of the application, sympathy is little solace for the person concerned. As noted in paragraph 2.14.11, section 14 (6) seeks to improve the present position. That provision is, however, only a partial solution of the problem.

3.5 Persons under legal disability: the law here and elsewhere. Part 63 of the Supreme Court Rules, 1970, deals generally with proceedings in the Court by minors or mentally disable persons. But neither the rules nor the bill aids the determination of the preliminary question whether proceedings should be commenced at all. In New Zealand⁵-

An administrator of the estate of the deceased may apply on behalf of any person who is not of full age or mental capacity in any case where the person might apply, or may apply to the Court for advice or directions as to whether he ought so to apply; and, in the latter case, the Court may treat the application as an application on behalf of the person for the purpose of avoiding the effect of limitation.

And in Queensland⁶-

The personal representative or the Public Curator of Queensland or the Director of Children's Services, or any person acting as the next friend of any infant or any mentally ill person, may apply on behalf of any person being an infant, or being mentally ill in any case where such person might apply, or may apply to the Court for advice or directions as to whether he ought so to apply; and, in the latter case, the Court may treat such application as an application on behalf of such person for the purpose of avoiding the effect of limitation.

Provisions of the kind mentioned above do not completely solve the problem we are now considering. If advice or direction is not sought, the interests of the minor or mentally disable person may be neglected. What is needed is a procedure whereby the Court is put on notice that there are persons whose interests may need to be protected by an application under the new Act.

3.6 One approach. As noted in the Working Paper⁷ we have considered a proposal to the effect that every applicant for probate or administration be required to name every potential applicant for provision known to him who is under legal disability and that it be made a duty of a Master to determine whether proceedings for provision should be commenced on behalf of that person. But not all wills are proved nor are all intestate estates made the subject of an application for administration. In any event, to require an administrator to depose to the mental health of another person may be to impose an unreasonable responsibility upon him. Questions touching mental health are delicate to inquire into and difficult to determine; and a wrong answer is potentially dangerous in its consequences.

3.7 Another approach. The Working Paper also mentioned a possible variation of this last mentioned proposal,⁸ namely, that the solicitor for every applicant for probate or administration be required to certify to the Court that he has inquired about potential applicants for provision who may be under legal disability and to disclose the result of his inquiries. Apart from difficulties of the kind adverted to in paragraph 3.6, the adoption of any such proposal would, we believe, give rise to conflict of interest problems. In effect, a solicitor would be required to nominate the persons who might have a claim against his own client, the executor of the estate. As we see it, solicitors would object strongly to having this duty put upon them.

3.8 Working Paper: conclusion. We admitted in the Working Paper⁹ that we were then unable to propose any procedure which is neither ponderous nor expensive for protecting the interests under the Act of persons who were under a legal disability.

3.9 Comments on Working Paper. Our commentators generally agree that special procedures are needed if a right of a legally incapacitated person to apply for provision is to be of any value. But no commentator suggests a simple and cheap way of achieving this result.

3.10 Conclusion. We think now that any procedure which calls for additional information to be supplied with applications for administration and for that information to be screened by court officials may be too costly to implement. We are told that 21 276 grants of administration were made in the year which ended on the 30th June, 1976. If this volume of applications were to be effectively screened, delays in administration, increased costs of administration and the employment of additional court officers would seem to be inevitable results. We say this because, in our estimation, further information would need to be called for in a great many cases, and raising and satisfying requisitions is mostly a slow and costly exercise. As we see it, the problem might be partly solved by a rule of court which requires, in proceedings for provision, both the applicant for provision and the administrator of the estate to depose to his knowledge of potential applicants who are under legal disability. With this information before it, the Court may make orders for the joinder of parties.¹⁰ Although affording only incomplete protection to a person under legal disability, a rule of the kind mentioned would be an improvement on the present position. It may be argued, however, that to give the administrator of an estate the task of seeking out potential applicants is to direct him away from his proper role, namely, to uphold the will. But it will also be the duty of the administrator to give the Court every possible assistance in the discharge of its duties under the new Act.¹¹ In the context of the present question, we believe that the latter duty should be paramount.

3.11 “Assessments” and “default Judgments”. We mention here 2 proposals put to us by one of our commentators which, if implemented, would call for new rules of court. The proposals read-

There are many occasions when an application under the Act is made and then the parties come to some agreement as to the order that should be made. As at present framed, the parties must take up to twenty minutes of a judge's time “going through the formalities”. There would seem to be no reason why there should not be provision for an executor to file an admission of liability so that the matter could then proceed like an assessment does in the Common Law Division or if the parties agree as to quantum the matter could be dealt with as a consent order by the Master. It would seem that there is an excellent case for including a provision that if the nett estate as sworn for death duty purposes does not exceed, say \$20,000, a widow who has at least one dependent child should be able to get a default judgment for the whole of the estate by filing a summons and affidavit and serving the same on the executor if the executor does not file a document indicating his intention to defend within one month. There would have to be a complementary provision making it clear that it would not be a breach of duty on the part of the executor to fail to file a defence. There may well be problems where the beneficiaries under the will are infants, but something has to be done to keep costs down in small estates where the obvious result of an application is that the widow will take the whole of the estate.

3.12 Objection to “Assessments”. Experience tells us that some administrators of estates are perfunctory in their defence of proceedings under the Act. And although the new Act does not specify the duties of administrators in proceedings under it, it can be expected that the Court will follow the

authorities.¹² and say that administrators must either compromise the claim or contest it and seek to uphold the provisions of the will in question. To us, the first proposal mentioned in paragraph 3.11 is open to the objection that, if it is implemented, the Court will not be as well placed as it now is to see if administrators are, without justification, compromising claims for provision. For this reason, beneficiaries under wills may be reluctant to have the proposal implemented. We would agree with them.

3.13 Objection to “default judgments”. While agreeing that costs should be reduced in cases where it is obvious that an order will be made in favour of an applicant, we would, for the reason given in paragraph 3.12, be reluctant to make any suggestion that might limit the Court’s power to supervise administrators.

FOOTNOTES

1*. **Section 3 (1).**

2. Rules of the Supreme Court, Ord. 99 r. 2.

3. Paragraph 12.12.

4. For example, a patient for whom the Master in the Protective Jurisdiction has responsibilities (section 101); a protected person where a committee of his estate is appointed (section 38); or an incapable person where a manager of his estate is appointed (section 39).

5. Family Protection Act 1955, section 4 (4).

6. The Succession Acts, 1867 to 1968, section 90 (7).

7. Paragraph 12.34.

8. Paragraph 12.35.

9. Paragraph 12.3 6.

10. Under Pt 8 r. 8 of the Supreme Court Rules, 1970.

11. See, for example, *Re Hall* (1959) 59 S.R. (N.S.W.) 219, 226.

12. See, for example, *Re Hall* (1959) 59 S.R. (N.S.W.) 219, 226.

REPORT 28 (1977) - TESTATOR'S FAMILY MAINTENANCE AND GUARDIANSHIP OF INFANTS ACT, 1916

Part 4 - Miscellaneous

4.1 The Act and the bill. The bill does not contain provisions of the kind which are found in section 5 (2A) (b) and (c), section 5 (3), section 6 (1), section 6 (3), section 9 and section 12 of the Act.

4.2 Section 5 (2A) (b) and (c) of the Act. If our recommendations concerning eligible persons are adopted,¹ provisions such as section 5 (2A) (b) and (c) of the Act will cease to have practical significance: it will often be impossible to identify all the persons who are eligible persons for the purpose of securing their agreement. Moreover, the effect of the provisions is merely to preclude an application being made after the date of the agreement. In 1916, this was considered to be a desirable effect in that it might encourage an administrator to distribute the estate before the expiration of "the executor's year".² Nowadays, in our experience, even an administrator with excellent intentions is seldom able to distribute within a year. We doubt that the omission of these provisions will do any harm.

4.3 Section 5 (3) of the Act. Section 5 (3) of the Act ("an application shall be deemed to be made on the day upon which the notice of motion or other process originating the application is filed") is made unnecessary by Part 7 rule 6 (1) of the Supreme Court Rules, 1970. That rule says that "proceedings shall be commenced by the filing of the originating process".

4.4 Section 6 (1) of the Act. We believe that a provision to the effect of section 6 (1) of the Act (contents of orders) is not needed in the Bill. As a matter of course, and under its general powers, the Court will specify all such matters as need to be specified in its orders.

4.5 Section 6 (3) of the Act. Section 6 (3) of the Act provides that a certified copy of an order for provision shall be made on the probate or letters of administration in question. Part 77 rule 30 of the Supreme Court Rules, 1970, has, in effect, prescribed the procedures to be followed in relation to certified copies of orders for provision. And, as we see it, matters of this kind arising under the new Act are better dealt with by rules of court than by the new Act itself.

4.6 Section 9 of the Act. Section 9 of the Act provides, in effect, that a person's expectations of provision under the Act shall not be the subject of a mortgage or charge unless the permission of the Court is first obtained. The worth of this section was debated in Parliament in 1916.³ It was supported on the ground that something was needed which "would at once prevent the unscrupulous solicitor or money-lender, if they exist, from getting a charge over the expectant share of persons coming to them and asking for assistance to make an application".⁴ It was said:-⁵ "in England they allow penniless claimants to make a bargain with a solicitor for the purpose of advancing claims; but there such a bargain is made under conditions approved by the prothonotary of the court." Reasons of this kind do not persuade us that an equivalent of section 9 is needed in the bill. In our view, Acts such as the Legal Practitioners Act, 1898, the Money-lenders and Infants Loans Act, 1941, the Legal Assistance Act, 1943, the Legal Practitioners (Legal Aid) Act, 1970, obviate any need for obtaining the Court's sanction to a mortgage over a potential interest in an estate. And, we see no reason why the Court should have to sanction a mortgage over an interest in property arising out of an order of the Court. The Court does not now have to approve a mortgage over an interest in property which arises out of a will or an intestacy.

4.7 Section 12 of the Act. Section 12 of the Act provides that an executor is not liable to any person claiming under the Act in respect of assets which the executor lawfully distributed before the passing of the Act. A provision equivalent to section 12 is not needed in the bill because the bill is expressed not to

apply in relation to the estate of a deceased person who died before the day appointed for its commencement.⁶

4.8 Proposal for reform. We turn now to a proposal for reform which is put to us by one of our commentators.

4.9 “Consent jurisdiction”. The proposal reads-

There seems [to be] a case for extending the jurisdiction of the Court by consent of all interested parties. There seems to be no reason why if everybody submits to the jurisdiction an in *personam* order cannot be made affecting the testator's real and personal property wheresoever situate. This would solve the problem where a deceased leaves property in three or four States and the disputants are a limited class of people so that they could agree that an application in one State would decide the whole of the T.F.M. applications.

4.10 Objection to “consent jurisdiction”. As we see it, few persons are likely to agree that an application to the New South Wales Court will decide family provision issues touching property in other States. This is so because the agreement, if made, could be dangerous in its consequences to the parties to it. In proceedings in the Court commenced in pursuance of the agreement, the Court might make an order which the courts of other States could not make. The Court may, for example, order a person to be joined as a party to the proceedings who could not be a party to like proceedings in another State. This situation might arise in 2 ways. First, where the person joined as a party is an eligible person under section 6 (1) (c) of the new Act but is not an eligible person elsewhere, or, secondly, where the person is out of time for commencing proceedings elsewhere but is within time for commencing proceedings in New South Wales.⁷ Moreover, in proceedings in New South Wales, the Court might, under section 9 of the new Act, make an order affecting property in the notional estate of the deceased person which property is beneficially owned by one of the parties to the agreement which gave jurisdiction to the Court. For these reasons, we think that a consent jurisdiction of the kind suggested in paragraph 4.9 would be rarely, if ever, invoked. We do not recommend that the proposal be implemented.

4.11 Intestacies. In this State, where a person dies without a will and is survived by a spouse and children, the spouse receives one-third of the estate of the deceased person if there are 2 or more children and one-half of the estate if there is only one child.⁸ We said in the Working Paper⁹ that we are satisfied that the entitlement of the surviving spouse is inadequate. We are still of this view but we do not make any recommendation for change: the Premier, the Honourable Neville Wran, Q.C., M.L.A., has announced that amending legislation will soon be introduced. As we see it, the proposed legislation, when enacted, will cure the inadequacy.

4.12 The matrimonial home. We referred in the Working Paper¹⁰ to cases where the estate of a person who dies intestate includes an interest in a dwelling-house in which the surviving spouse was resident at the time of the death of the intestate. We asked whether the surviving spouse should be given the right to appropriate the interest in the dwelling in or towards satisfaction of his or her interest in the estate. We referred to the Second Schedule of the Intestate's Estates Act 1952 of the United Kingdom where such a right is given.¹¹ Few commentators expressed views on the matter but those who did favoured an affirmative answer to our question. Because, as noted in paragraph 4.12, the intestacy rules are now being reviewed by Government, we do not make any specific recommendations in relation to the matrimonial home in cases of intestacy. We believe, however, that the United Kingdom provision has much to commend it.

4.13 Uniform laws. In paragraphs 2.9.14 to 2.9.16 and 2.33.3 to 2.33.7, we refer to conflict of law problems which arise in relation to the Act and which will continue to arise in relation to the new Act. In concluding this report, we say that there is a strong case for some uniform provisions in the family provisions statutes of the Australian States and Territories which would obviate these problems. We refer, in particular, to proposals for change made in 1967 by Mr D. St L. Kelly.¹² The proposals were put in the alternative. As adapted by us, they are: first, that each legislature within Australia might enact legislation providing that the jurisdiction of the Court in that place shall depend solely upon the presence

there of assets forming part of the deceased person's estate and that the Court in that place shall apply the legislation of the *situs* to any immovables, and the legislation of the domicile of the deceased to any movables: secondly, that each legislature within Australia might enact legislation providing that the Court of the domicile of the deceased person shall have sole jurisdiction over the whole of his estate, both movable and immovable, wherever situated, and that only the family provision legislation of the domicile of the deceased person is applicable. We do not comment on the advantages and disadvantages of these proposals. We mention them only for the purpose of expressing the view that proposals of this kind may well be fit subjects for examination by the Standing Committee of Attorneys-General.

J. H. WOOTTEN,
Chairman.

D. GRESSIER,
Commissioner.

30th June, 1977.

FOOTNOTES

1. See section 6 of the bill.
2. See *N.S.W. Parliamentary Debates*, Session 1916, Vol. 64, page 742.
3. *N.S.W. Parliamentary Debates*, Session 1916, Vol. 65 pages 1305-1308.
4. *Id.*, page 1307.
5. *Ibid.*
6. The bill, section 4.
7. The limitation period of 18 months after death fixed by s. 14 of the Bill may, in practice, sometimes be longer than the limitation period fixed by the Acts of the other States (see Davern Wright *Testator's Family Maintenance in Australia and New Zealand* (3rd ed.) (1974) pages 25-29).
8. See section 61A of the Wills Probate and Administration Act, 1898.
9. Paragraph 18.11.
10. Paragraph 18.13.
11. *Ibid.*
12. See "Testator's Family Maintenance and the Conflict of Laws" (1967) 41 *Australian Law Journal* 382, 391-392.

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Appendix A - Testator's Family Maintenance and Guardianship of Infants Act, 1916

Printed in accordance with the provisions of the Amendments Incorporation Act, 1906.

[Certified 4th August, 1970.]

NEW SOUTH WALES

ANNO SEPTIMO

GEORGII V REGIS.

Act No. 41, 1916⁽¹⁾, as amended by Act No. 20, 1934⁽²⁾; Act No. 30, 1938⁽³⁾; and Act No. 40, 1954⁽⁴⁾.

The Act No. 41, 1916, is also amended or otherwise affected in certain respects which cannot be dealt with under section 2 of the Amendments Incorporation Act, 1906, by Act No. 49, 1932, s. 2; Act No. 20, 1934, s. 5 (2); Act No. 17, 1939; Act No. 44, 1949, s. 4; Act No. 40, 1954, s. 4 (2); and Act No. 4, 1959.

An Act to assure to the widow or widower and family of a testator an adequate maintenance from the estate of such testator; to amend the law relating to the guardianship of infants; and for purposes incidental thereto or consequent thereon.

(1) Testator's Family Maintenance and Guardianship of Infants Act, 1916, No. 41. Assented to 18th September 1916.

(2) Guardianship of Infants Act 1934, No. 20. Assented to 31st October 1934.

(3) Conveyancing, Trustee and Probate (Amendment) Act, 1938, No. 30. Assented to, 14th December, 1938. Date of commencement, 1st January, 1939, sec. 1 (2) and Gazette No. 188 of 23rd December, 1938, p.4951.

(4) Administration of Estates Act, 1954, No. 40. Assented to, 6th December, 1954. Date of commencement, 1st January, 1955, sec. 1 (6).

BE it enacted by the Kings Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows

1. This Act may be cited as the "Testator's Family Maintenance and Guardianship of Infants Act, 1916."

Short title.

2. In this Act, unless the context otherwise requires -

Definitions.

"Court" means the Supreme Court in its equitable jurisdiction.

"Executor" includes administrator with the will annexed.

Testator's family maintenance.

3. (1) If any person (hereinafter called "the Testator") dying or having died since the seventh day of October, one thousand nine hundred and fifteen, disposes of or has disposed of his property either wholly or partly by will in such a manner that the widow, husband, or children of such person, or any or all of them, are left without adequate provision for their proper maintenance, education, or advancement in life as the case may be, the court may at its discretion, and taking into consideration all the circumstances of the case, on application by or on behalf of such wife, husband, or children, or any of them, order that such provision for such maintenance, education, and advancement as the court thinks fit shall be made out of the estate of the testator for such wife, husband, or children, or any or all of them.

Where no adequate provision made by testator etc., court may make orders, etc.

Notice of such application shall be served by the applicant on the executor of the will of the deceased person.

The court may order such other persons as it may think fit to be served with notice of such application,

(1A) If any person (hereinafter called "the intestate") dies wholly intestate after the commencement of the Conveyancing, Trustee and Probate (Amendment) Act, 1938, and, in consequence of the provisions of the Wills, Probate and Administration Act, 1898, as amended by subsequent Acts, that are applicable to the distribution of his estate as on intestacy, his widow, or children, or any or all of them, are left without adequate provision for their proper maintenance, education, or advancement in life as the case may be, the court may, at its discretion and taking into consideration all the circumstances of the case, upon application made by or on behalf of such widow, or children, or any of them, order that such provision for such maintenance, education, and advancement as the court thinks fit shall be made out of the estate of such person.

New subsection added, Act No.30, 1938, s.9(a). Amended Act No.40, 1954, s.4(1)(a).

Notice of such application shall be served by the applicant on such persons as the court may direct.

In this subsection "children" includes children (being under the age of twenty-one years at the death of the intestate) of any child of the intestate who died before the intestate.

(2) 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 whose character or conduct is such as to disentitle him to the benefit of such an order.

(3) In making an order the court may, if it thinks fit, order that the provision may consist of a lump sum, or periodical, or other payments.

4. (1) Every provision made under this Act shall, subject to this Act, operate and take effect as if the same had been made by a codicil to the will of the deceased person executed immediately before his or her death.

Operation of provision made under Act.

(2) Any order made under subsection (1A) of section three of this Act in respect of the estate of a deceased person shall, subject to this Act, operate and take effect as a modification of the provisions of the Wills, Probate and Administration Act, 1898, as amended by subsequent Acts, that are applicable to the distribution of that estate as on intestacy.

New subsection added, Act No.30, 1938, s.9(b). Amended Act No.40, 1954, s.4(1)(b).

5. (1) No application shall be heard by the court at the instance of a party claiming the benefit of this Act unless the application is made, in the case of a testator who has died before the passing of this Act, within three months of the date thereof, but in all other cases within twelve months from the date of the grant or re-sealing in New South Wales of probate of the will or grant or re-sealing of letters of administration with the will annexed

Time within which application must be made. N.Z. Act No.60, 1901, s.33, subsec.(9)

Provision repealed
Act No.40, 1954,
s4(1)(c)(i).

(2) No application under subsection (1A) of section three of this Act shall be heard by the court unless the application is made within twelve months from the date of the grant or re-sealing in New South Wales of letters of administration of the estate of the deceased person.

New subsection
added, Act No.30,
1938, s.9(c).

(2A) Notwithstanding anything in subsections one and two of this section-

New subsection
added, Act No.40,
1954, s.4(1)(c)(ii).
Cf. N.Z. Act, 1908,
No.60, s.33(9).

(a) the time for making an application under either of those subsections may be extended for a further period by the court, after hearing such of the parties affected as the court thinks necessary, and this power extends to cases where the time for applying has already expired, including cases where -it has expired before the commencement of the Administration of Estates Act, 1954; but every application for extension shall be made before the final distribution of the estate, and no distribution of any part of the estate made before the application shall be disturbed by reason of the application or of an order made thereon;

(b) if, in any case to which the provisions of subsection one of section three of this Act apply, all the children and the widow or widower, as the case may be, shall in writing, at any time after the death of the testator, whether the testator died before or after the commencement of the Administration of Estates Act, 1954, agree to be bound by the will of the testator and if there are infants such agreement is confirmed by the Court, then no application shall be made thereafter under that subsection;

(c) if, in any case to which the provisions of subsection (1A) of section three of this Act apply, all the children and the widow shall in writing, at any time after the death of the intestate, whether the intestate died before or after the commencement of the Administration of Estates Act, 1954, agree to be bound by the provisions of the Wills, Probate and Administration Act, 1898, as amended by subsequent Acts, that are applicable to the distribution of the intestate's estate as on intestacy and if there are infants such agreement is confirmed by the court, then no application shall be made thereafter under that subsection.

In this paragraph "children" includes children (being under the age of twenty-one years at the death of the intestate) of a child of the intestate who died before the intestate.

(3) An application shall be deemed to be made on the day upon which the notice of motion or other process originating the application is filed.

New subsection
added, Act No.30,
1938, s.9(c).

6. (1) Every order making any provision under this Act shall inter alia-

Contents of order.
Vict. Act, 1906,
No.2074, s.9.

- (a) specify the amount and nature of such provision;
- (b) specify the part or parts of the estate out of which such provision shall be raised or paid, and prescribe the manner of raising and paying such provision;
- (c) state the conditions, restrictions, or limitations imposed by the court.

(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 person be borne by those persons in proportion to the values of their respective interests in such estate:

Adjustment of
burden of provision
upon beneficiaries.

Provided that the estates and interests of persons successively entitled to any property which is

settled by such will shall not for the purposes of this subsection -be separately valued, but the proportion of the provision made under this Act 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 provision is made under this Act direct that a certified copy of such order be made upon the probate of the will or letters of administration with the will annexed or, as the case may be, letters of administration of the estate of the deceased person, and for that purpose may require the production of such probate or letters.

Certified copy of order to be made on probate.
Amended Act No.30, 1938, s.9(d)(i).

(4) The court may at any time and from time to time on the application by motion of the executor of the testator's estate or of the administrator of the estate of the intestate or of any person beneficially entitled to or interested in any part of the estate of the deceased person rescind or alter any order making any provision under this Act. Notice of such motion shall be served on -all persons taking any benefit under the order sought to be rescinded or altered.

Power to vary or revoke order.
Amended Act No.30, 1938, s.9(d)(ii).

(5) The court may make such order as to the costs of any proceeding under this Act as it deems just.

Costs.

7. The court may at any time fix a periodic payment or lump sum to be paid to any legatee or devisee or beneficiary, to represent, or in commutation of, such proportion of the sum ordered to be paid as falls upon the portion of the estate to which he is entitled under the will or in consequence of the intestacy, and may exonerate such portion from further liability, and 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.

Court may fix periodic payment or lump sum.
N.Z. Act, No.60, 1908, s.33(6).

8. Where the court has ordered periodic payments, or has ordered a lump sum to be invested for the benefit of any person, it may inquire whether at any subsequent date the party benefited by its order has become possessed of or entitled to provision for his proper maintenance or support, and into the adequacy of such provision, and may discharge, vary, or suspend its order, or make such other order as is just in the circumstances.

Court may make subsequent inquiries, and vary or discharge order.
N.Z. Act, No.60, 1908, s.33, subsec. (13).

9. No mortgage, charge, or assignment of any kind whatsoever over any interest dependent on any order of the court under this Act, whether before or after such order is made, shall be of any force validity, or effect, unless made with the permission of the court or the Master in Equity first had and obtained.

Permission of court, &c., necessary to mortgage.

10. (1) Where an order is made by the court under this Act, all probate duties payable under the will of the testator or in consequence of the death of the deceased person shall be computed as if the provisions of -the order had been part of the will.

Duty on estate, how computed.
N.Z. Act No.60, 1908, s.34.
Amended, Act No.30, 1938, s.9(f)(i).

(2) Any duty paid in excess of the amount required to be paid under this section shall, on application, and without further appropriation than this Act, be returned by the Colonial Treasurer to the executor or administrator, and by him remitted to the person entitled to receive the same.

Amended, Ibid. s.9(f)(i).

11. (1) Where an executor or administrator has given such or the like notices as in the opinion of the court before which an application under this Act is made would have been given by the Supreme Court in its equitable jurisdiction in an administration suit for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, as the case may be, such executor or administrator may, at the expiration of the time named in the said notices, or the last of the said notices, for sending in such claims, distribute the assets of the

Distribution of assets.
Wills, Probate and Administration Act, 1898, s.92.
Amended, Ibid.

testator or intestate, as the case may be, or any part thereof, amongst the persons entitled thereto, having regard to any applications under this Act of which such executor or administrator has then notice.

s.9(g)(i)(ii).

(2) Such executor or administrator shall not be liable for the assets, or any part thereof, so distributed to any person of whose application under this Act he has not had notice at the time of such distribution.

Amended, *Ibid.*
s.9(g)(iii).

(3) Nothing in this section shall prevent the court from ordering that any provision under this Act shall be made out of any assets so distributed.

12. An executor of a testator who has died prior to the passing of this Act shall not under any circumstances be liable to any person claiming under this Act in respect of any assets which such executor has lawfully distributed prior to the passing of this Act.

Executor not liable
for assets legally
distributed.

Guardianship of infants

13. (1) On the death of the father of an infant, the mother, if surviving, shall, subject to the provisions of this v Act, be guardian of the infant, either alone or jointly with any guardian appointed by the father.

Rights of surviving
parent as to
guardianship.
15 & 16 Geo. V c.45,
s.4.

Where no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is or are dead or refuses or refuse to act, the court may, if it thinks fit, appoint a guardian to act jointly with the mother.

Substituted section,
Act No.20, 1934,
s.5(1)(a).

(2) On the death of the mother of an infant, the father, if surviving, shall, subject to the provisions of this Act, be guardian -of the infant, either alone or jointly, with any guardian appointed by the mother.

Where no guardian has been appointed by the mother, or if the guardian or guardians appointed by the mother is or are dead or refuses or refuse to act, the court may, if it thinks fit, appoint a guardian to act jointly with the father.

14. (1) The father of an infant may by deed or will appoint any person to be guardian of the infant after his death.

Power of mother and
father to appoint
guardians.
15 & 16 Geo. V.,
c.45, s.5.

(2) The mother of an infant may by deed or will appoint any person to be guardian of the infant after her death.

Substituted section,
Act No.20, 1934,
s.5(1)(a).

(3) Any guardian so appointed shall act jointly with the mother or father, as the case may be, of the infant so long as the mother or father remains alive, unless the mother or father objects to his so acting.

(4) If the mother or father so objects, or if the guardian so appointed considers that the mother or father is unfit to have the custody of the infant, the guardian may apply to the court.

The court may either refuse to make an order (in which case the mother or father shall remain sole guardian) or make an order that the guardian so appointed shall act jointly with the mother or father, or that he shall be sole guardian of the infant.

Where the court makes an order that the guardian so appointed shall be the sole guardian of the infant, the court may make such order regarding the custody of the infant and the right of access

thereto of its mother or father as, having regard to the welfare of the infant, the court may think fit, and may further order that the mother or father shall pay to the guardian towards the maintenance and education of the infant such weekly or other periodical sum as, having regard to the means of the mother or father, the court may consider reasonable.

The powers conferred -by this subsection may be exercised at any time and shall include power to vary or discharge any order previously made in virtue of those powers.

Cf. 22 and 23 Geo. V., c.46, s.79(2).

(5) Where guardians are appointed by both parents, the guardians so appointed shall, after the death of the surviving parent, act jointly.

(6) If under the preceding section a guardian has been appointed 'by the court to act jointly with a surviving parent, he shall continue to act as guardian after the death of the surviving parent; but if the surviving parent has appointed a guardian, the guardian appointed by the court shall act jointly with the guardian appointed by the surviving parent.

15.

Repealed, Act No.20, 1934, s.5(1)(a).

16.

Repealed, *Ibid.*

17. (1) In the event of guardians being unable to agree upon a question affecting the welfare of an infant, any of them may apply to the court for its direction, and the court may make such order regarding the matters in difference as it may think proper.

Guardians may apply to court for directions.
Eng. Act.49 and 50 Vic., ch.27, s.3(3).

(2) The power conferred by the foregoing provisions of this section shall include power to vary or discharge any order made under this section or made by any court under the Infants' Custody and Settlements Act, 1899-1934, and, where one of the guardians is the mother or father of the infant, shall also include power-

cf. 22 & 23 Geo. V., c.46, s.79(1) (3).
New subsection added, *Ibid.* s.5(1)(b).

(a) to make such orders regarding the custody of the infant and the right of access thereto as, having regard to the welfare of the infant, the court may think fit; and

(b) to order the mother or father to pay towards the maintenance or education of the infant such weekly or other periodical sum as, having regard to the means of the mother or father, the court may consider reasonable.

18. The court may, in its discretion, on being satisfied that it is for the welfare of the infant, remove from his office any testamentary guardian, or any guardian appointed or acting by virtue of this Act, and may also, if they shall deem it to be for the welfare of the infant, appoint another guardian in place of the guardian so removed.

Power of court to remove guardian.
Eng. Act 49 and 50 Vic., ch.27, s.6.
Amended, *Ibid.* s.6(1)(a).

The powers of the court under this section extend to the removal of either parent from guardianship under this Act.

New paragraph added, Act No.20, 1934, s.6(1)(b).

19. Every guardian under this Act shall have all such powers over the estate and the person, or over the estate (as the case may be) of an infant, as any guardian appointed by will or otherwise now has.

Powers of guardians.
Eng. Act. 49 and 50 Vic., ch.27, s.4.

20. Nothing in this Act shall restrict or affect the jurisdiction of the court to appoint or remove guardians in respect of infants.

Saving clause.
Ibid. s.13.

21. In the event of the death before or after the passing of this Act of the parents or of one of the parents of an infant the court may order that the maternal or paternal grandparents of such infant or any one of them shall have access to such infant at such times and places as the court shall deem proper:

court may order
access by
grandparents.

Provided that applications under this section shall be heard in camera.

General.

22. The court may make rules for regulating the practice and procedure in any applications and proceedings under this Act, and prescribe the forms in such proceedings.

Rules.

Any application under this Act shall be made in accordance with such rules.

Until such rules are made, any application under this Act shall be by motion, and the practice of the Equity Court shall apply thereto.

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Appendix B - Draft Family Provision Act, 1977

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SCHEDULE 1

A DRAFT BILL FOR AN ACT

To amend the law relating to the provision which may be made for the dependents and others of a deceased person out of property which was disposed of by him in his lifetime or which passes under his will or on his intestacy; to amend the Testator's Family Maintenance and Guardianship of Infants Act, 1916; and for purposes connected therewith.

PART I. - PRELIMINARY

1. This Act may be cited as the "Family Provision Act, 1977

Short title.

2. (1) This section and section 1 shall commence on the date of assent to this Act.

Commencement.

(2) Except as provided in subsection (1), this Act shall commence on such day, being a day not earlier than 6 months after the date of assent to this Act, as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

3. Thus Act is divided as follows:-

Division of Act.

PART I.-PRELIMINARY-SS. 1-7.

PART II.-PROVISION FOR ELIGIBLE PERSONS-SS. 8-21.

PART III.-NOTIONAL ESTATE-ss. 22-33.

PART IV.- GENERAL-SS. 34-40.

SCHEDULE 1.

4. (1) Subject to subsection (2), this Act does not apply in relation to the estate of any deceased person who died before the appointed day.

Application.

(2) This Act applies in relation to the estate of a deceased person where it is uncertain whether he died before or after the appointed day.

5. (1) In this Act, except in so far as the context or subject matter otherwise indicates or requires-

Interpretation.

"administration" means probate, granted in New South Wales, of the will of a deceased person or letters of administration, granted in New South Wales, of the estate of a deceased person, whether with or without a will annexed,, and whether granted for general, special or limited purposes and includes an order under section 18 (2) of the Public Trustee Act, 1913, transferring the estate of a deceased person to the Public Trustee for administration, and an election by the Public Trustee under section 18A of that Act.

"administrator", in relation to the estate of a deceased person, means a person to whom administration has been granted in respect of the estate of the deceased person or who is otherwise entitled to administer any property of the deceased person or who holds any property of the deceased person on a trust which is created by or arises out of the will or on the intestacy of the deceased person.

"appointed day" means the day appointed and notified under section 2 (2).

"consideration" does not include marriage or a promise of marriage.

“Court” means the Supreme Court of New South Wales.

“estate”, in relation to a deceased person, includes-

- (a) property over which the deceased person had, at the time of his death a general power to appoint by will;
- (b) property of the deceased person held on a trust which is created by or arises out of the will or on the intestacy of the deceased person; and
- (c) property the subject of a donatio mortis causa by the deceased person.

“notional estate”, in relation to a deceased person, means property subject to the statutory trust.

“property” includes real and personal property and any estate or interest in property real or personal, and any debt, and any thing in action, and any other right or interest.

“property subject to the statutory trust”, in relation to a deceased person, means property subject to the statutory trust created by section 28 (1).

“will” includes a codicil.

(2) Where probate of a will, or letters of administration of an estate, granted outside New South Wales are sealed with the seal of the Court in pursuance of section 107 of the Wills, Probate and Administration Act, 1898, the probate as so sealed or the letters of administration as so sealed, as the case requires, shall be, for the purposes of this Act, probate of the will, or letters of administration of the estate, granted in New South Wales.

(3) Where property in the estate of a deceased person is held by an administrator, not as personal representative, but as trustee for a person or for a charitable purpose, then, for the purposes of this Act, the property is distributed, unless the property will not become absolutely vested in interest in that person or for that purpose except upon a contingency, in which case, for the purposes of this Act, the property is not distributed.

(4) Where, by or under a disposition (by will or otherwise) made by a deceased person, any part of the estate or notional estate of the deceased person is disposed of for a charitable purpose-

(a) the references in sections 8 (2), 19 (1) and 28 (1) to persons entitled to an interest in the estate or notional estate and the cognate references in section 19 (2) and (3) include references to the charitable purpose;

(b) the references in sections 16 (1), 19 (4) and 20 (1) to any person entitled to an interest in the estate or notional estate and the cognate reference in section 19 (6) include references to-

- (i) the trustee, if any, for the charitable purpose; or
- (ii) where there is no trustee for the charitable purpose, the Attorney General; and

(c) the reference in section 20 (1) to “that person” includes a reference to the charitable purpose.

6. (1) In this Act, “eligible person”, in relation to the estate or notional estate of a deceased person, means-

“Eligible person”.

(a) the widow or widower of the deceased person;

(b) any child of the deceased person; and

(c) subject to subsection (2), any person-

(i) who was, at any time, wholly or partly dependent upon the deceased person;

(ii) who was, at any time, a member of a household of which the deceased person was a member; and

(iii) who is a person whom the deceased person ought not, in the opinion of the Court, to have left without adequate provision for his proper maintenance, education or advancement in life.

(2) Subsection (1) (c) (ii) does not apply to any person who is a grandchild of the deceased

person.

(3) In applying subsection (1) (c) (iii), the Court shall have regard to the circumstances existing from time to time up to the time when the question arises, whether or not foreseeable at the date of the death of the deceased person.

(4) For the purposes of this section, the widow or widower of a deceased person remains the widow or widower if that person notwithstanding remarriage.

7. Where, under this Act, the Court may make any appointment or order or do any thing, the Court may make the appointment or order or do the thing on such terms and conditions, if any, as the Court thinks fit.

Appointments and orders on terms.

PART II.

PROVISION FOR ELIGIBLE PERSONS

8. (1) The provisions of the will of a deceased person, and the rules relating to the distribution of property on the intestacy of a deceased person, shall have effect subject to the powers of appointment created by this Act.

Priority and objects, of appointments under the Act.

(2) Where, under this Act, the Court may appoint property in the estate of a deceased person, the Court may, subject to this Act, appoint that property to or for the benefit of such one or more of the following objects, that is to say, eligible persons and persons entitled to an interest in the estate or notional estate of the deceased person, and in such manner and to such extent as the Court thinks fit.

9. (1) Where-

Appointments for provision.

- (a) the Court finds that a person is an eligible person; and
- (b) the Court is satisfied that a deceased person has left the eligible person without adequate provision for his proper maintenance, education or advancement in life,

the Court may, in its discretion and having regard to all the circumstances of the case, but subject to this Act, appoint that such provision for such maintenance, education or advancement in life as the Court thinks fit shall be made for the eligible person out of the estate or notional estate, or both, of the deceased person.

(2) In applying subsection (1) (b), the Court shall have regard to the circumstances existing from time to time up to the time when the question arises, whether or not foreseeable at the date of the death of the deceased person.

(3) Where it appears to the Court that the deceased person has, or may have, left each of two or more eligible persons without adequate provision for his proper maintenance, education or advancement in life, and of those persons one or more apply for provision under this Act within the time allowed by or under this Act but one or more do not so apply, the Court may act under subsection (1) (b) in relation to any applicant on the footing that the deceased person did not leave without adequate provision for his proper maintenance, education or advancement in life any person who has chosen not to apply for provision under this Act.

(4) For the purposes of subsection (3), the Court may determine that a person has chosen not to apply for provision under this Act if the prescribed notice has been served on him and he has not within the time limited by the notice applied for provision under this Act.

(5) In proceedings under this section-

- (a) the Court may have regard to whether the character or conduct of an eligible person, either

before or after the death of the deceased person, is such as-

- (i) to disentitle him to the benefit of any provision under this Act; or
 - (ii) to entitle him only to the benefit of a reduced provision under this Act;
- (b) the Court may appoint-
- (i) that provision be made for an eligible person out of the estate or notional estate, or both, of the deceased person which is situated in New South Wales at the time of, or at any time after, the appointment, whether or not the deceased person was, at the time of his death, domiciled in New South Wales;
 - (ii) that payment be made of a lump sum, whether in one amount or by instalments;
 - (iii) that payment be made of any periodic sum; and
 - (iv) where payment of money is appointed, that interest be paid, at Such rate as the Court thinks fit, on the whole or any part of the money for the whole or any part of the period between the date of death of the deceased person and the date when the money is paid;
- (c) the Court may-
- (i) make an interim appointment or, subject to sections, 16 and 17, a permanent appointment, an appointment for a fixed term or for a life or until further appointment; and
 - (ii) make any other appointment (whether or not of the same nature as those mentioned in paragraph (b) or subparagraph (i)) which it thinks necessary to make to do justice;
- (d) the Court may order-
- (i) that payment of any money payable under an appointment be wholly or partly secured in such manner as the Court directs;
 - (ii) that any necessary deed or instrument be executed and that such documents of title be produced or such other things be done as are necessary to enable effect to be given to an appointment or to provide security for the due performance of an appointment or order;
 - (iii) that payments be made directly to an eligible person, to a trustee to be appointed by the Court or as the Court directs, or into Court or to a public authority for the benefit of the eligible person;
- (e) the Court may make an other order (whether or not of the same nature as those mentioned in paragraph (d)) which it thinks necessary to make to do justice; and
- (f) the Court shall not make an appointment for provision out of the notional estate of a deceased person unless the Court is satisfied-
- (i) that the estate of the deceased person is insufficient to satisfy the provision that should be made; or
 - (ii) that by reason of the existence of other eligible persons or the existence of special circumstances the provision should not be satisfied wholly out of the estate.

(6) Subsection 5 (b) (i) does not limit any power of the Court in relation to any property in the estate of a deceased person which is situated outside New South Wales.

(7) This section has effect subject to sections 10, 11 and 14 (5) and (6) and Part III.

10. (1) Any person who has commenced proceedings under section 9 may apply to the Court under this section for immediate provision.

Appointments for immediate provision.

(2) Where, in proceedings under this section-

- (a) the Court finds that the applicant is an eligible person; and
 - (b) the Court is satisfied-
- (i) that the applicant is in immediate need of provision;
 - (ii) that it is not yet possible to determine what final appointment, if any, should be made under section 9 in favour of the applicant; and
 - (iii) that part of the estate or notional estate, or both, of the deceased person can be made available to meet the need of the applicant,

the Court may appoint that such provision as the Court thinks fit be made for the applicant out of the estate or notional estate, or both, of the deceased person.

(3) The Court shall not make an appointment under this section unless it is satisfied that the appointment will not adversely affect any creditor.

(4) In determining what appointment, if any, should be made under this section, the Court shall, so far as the urgency of the case admits, take account of the same considerations as would be relevant in determining what final appointment, if any, should be made in the proceedings.

(5) An appointment under section 9 may provide that provision made for the benefit of an eligible person by virtue of this section shall be treated as having been made on account of the provision made by that appointment.

(6) Section 21 applies in relation to an appointment under this section as it applies to an appointment under section 9.

(7) Where an administrator of the estate of a deceased person gives effect to an appointment made under this section, he shall not be under any liability if, in consequence of his so doing, he is unable to satisfy any lawful claim against the estate, unless, at the time of his so doing, he had reason to believe that by his so doing he would be unable to satisfy the claim.

(8) Subsection (7) does not affect the operation of section 114 of the Stamp Duties Act, 1920.

(9) In so far as this section applies to the notional estate of a deceased person, it has effect subject to Part III.

11. (1) Where-

Testamentary
promise: promise
performed.
(*Ischaefer v.*
Schuhmann [1972]
A.C. 572)

(a) in -accordance with a promise made in his lifetime, a deceased person, by will or otherwise, makes provision for property to pass from his estate to a person (in this section called the "donee") on or after his death; and

(b) in proceedings under section 9, the Court is, satisfied that an appointment for provision should be made for an eligible person out of the estate of the deceased person,

the Court may appoint the property, but only to the extent by which, in the opinion of the Court, the value of the property exceeds the value to the deceased person, at the date of the promise, of the consideration, if any, for the promise, increased or decreased, as the case maybe, to an amount that bears to that value the same proportion as the value of the property at the date of the appointment bears to the value of the property at the date of the promise.

(2) In determining whether and in what manner to exercise its powers under this section, the Court shall have regard to all the circumstances of the case, including the circumstances in which the promise was made by the deceased person, the relationship, if any, of the parties to the promise, and the conduct and financial resources of those parties.

(3) Where the Court makes an appointment under this section, it may give such consequential directions as it thinks fit for giving effect to the appointment or for securing a fair adjustment of the rights of the persons affected by it.

(4) Where an appointment made under this section is inconsistent with any part of the promise made by the deceased person, the right of any person to enforce the promise or to recover damages or to obtain other relief for its breach shall -be subject to the appointment and shall survive only to such extent as is consistent with giving effect to the appointment.

(5) This section does not apply to any promise made before the appointed day.

(6) This section does not apply to any property in the notional estate of a deceased person.

12. (1) Where-

Testamentary

promise: promise
not performed.

- (a) a deceased person makes in his lifetime a promise to dispose, by will or otherwise, of property out of his estate;
- (b) the deceased person does not perform the promise;
- (c) a person (in this section called “the promisee”), or any person claiming under him, has a right to enforce the promise or to recover damages or to obtain other relief for its breach; and
- (d) in proceedings under section 9, the Court makes an appointment for provision for an eligible person out of the estate of the deceased person,

the Court may, subject to subsection (2), order that the right of the promisee, or any person claiming under him, to enforce the promise or to recover damages or to obtain other relief for its breach shall be subject to the appointment and shall survive only to such extent as is consistent with giving effect to the appointment.

(2) An order under subsection (1) shall bar the right of the promisee, or any person claiming under him, to enforce the promise or to recover damages or to obtain other relief for its breach only to the extent by which, in the opinion of the Court, the value of the property exceeds the value to the deceased person, at the date of the promise, of the consideration, if any, for the promise, increased or decreased, as the case may be, to an amount that bears to that value the same proportion as the value of the property at the date of the order bears to the value of the property at the date of the promise.

(3) In determining whether and in what manner to exercise its powers under this section, the Court shall have regard to all the circumstances of the case including the circumstances in which the promise was made by the deceased person, the relationship, if any, of the parties to the promise, and the conduct and financial resources of those parties.

(4) Where the Court makes an order under this section, it may give such consequential directions as it thinks fit for giving effect to the order or for securing a fair adjustment of the rights of the persons affected by the order and the appointment under section 9.

(5) This section does not apply to any promise made before the appointed day.

13. (1) In proceedings under section 9, the Court may appoint that specified property be set aside out of the estate or notional estate, or both, of a deceased person and be held on trust as a class fund for the benefit of two or more eligible persons.

Class fund.

(2) Where property is set aside as a class fund, the Court shall appoint a trustee of the fund.

(3) Where property is ordered to be held in trust as a class fund, the trustee, subject to such directions or conditions as the Court gives or imposes, but otherwise as it thinks fit, may, from time to time, apply the whole or any part of the income and capital of the fund for or towards the maintenance, education or advancement in life of the persons for whose benefit the fund is held, or any one or more of them to the exclusion of the other or others of them in such shares and in such manner as the trustee, from time to time, determines.

14. (1) Subject to subsections (2) and (3) (b) and to any order under section 15, an appointment under section 9 that provision be made for an eligible person out of the estate, or notional estate, or both, of a deceased person shall not be made unless the proceedings for the appointment are commenced by the eligible person within 18 months after the date of the death of the deceased person.

Time for
proceedings for
provision.

(2) Subject to subsections (3) (b) and (4) and to any order under section 15, the Court may, on the application of any person who adduces prima facie evidence that he is an eligible person and who shows sufficient cause, extend the time within which he may commence proceedings for an appointment for provision under section 9.

(3) (a) The Court may extend time under subsection (2) whether or not the time fixed by subsection (1) has expired and whether or not an application for the extension is made before that time has expired;

(b) the Court may extend time under subsection (2) in proceedings for an appointment for provision under section 9 notwithstanding that the proceedings are commenced after the time fixed by subsection (1) has expired.

(4) Subject to subsection (7), an application under subsection (2) for an order extending time within which to commence proceedings for provision out of the estate of a deceased person shall be made before all the property in the estate is distributed.

(5) Subject to subsection (7), an application for an order under subsection (2), and an appointment under section 9 made in proceedings commenced in pursuance of an order made on the application, shall not affect any property in the estate of the deceased person which was distributed before the date of the application.

(6) An appointment under section 9 made in proceedings commenced in pursuance of an order made under subsection (2) shall not affect any property subject to the statutory trust unless, in the proceedings for the appointment, the Court is satisfied that that property was taken, by the person entitled to it at the date of the appointment, with notice that the deceased person disposed of it with the intention, wholly or in part, of defeating, wholly or in part, an application under section 9.

(7) Subsections (4) and (5) do not apply where the applicant for an order under subsection (2) is a person who has not attained the age of 18 years or who, owing to mental illness, is incapable of managing his affairs.

15. (1) Where, on application made to the Court by an administrator of the estate of a deceased person, or by a person interested in the estate or national estate of a deceased person, the Court is satisfied-

Shortening of time
for proceedings for
provision.

(a) (i) that the time fixed by section 14 (1) has more than 3 months to run before it expires and that the applicant has cause to apprehend that a person may commence proceedings under section 9 for an appointment for provision out of the estate of the deceased person; or

(ii) that the time fixed by section 14 (1) has expired and that the applicant has cause to apprehend that a person may commence proceedings under section 14 (2) for an order extending the time within which he may commence proceedings under section 9 for an appointment for provision out of the estate of the deceased person; and

(b) that, having regard to all the circumstances of the case, it is reasonable to make an order under this section,

the Court may-

(c) in a case to which paragraph (a) (i) applies, order that the time fixed by section 14 (1) be shortened so as to expire at a time not sooner than 28 days after the time when the order takes effect; and

(d) in a case to which paragraph (a) (ii) applies, order that any proceedings for an order under section 14 (2) be commenced within a time not later than 28 days after the time when the order takes effect,

and, thereupon, for the purpose of any proceedings under section 9 or section 14 (2) commenced by the person concerned, the time is altered accordingly.

(2) An application under this section is not an admission for any purpose by an administrator.

(3) An administrator is not under any liability by reason of not making an application under this section.

16. (1) The Court may, at any time and from time to time, upon application made by an

Revocation or

administrator of the estate of a deceased person or by any person entitled to an interest in the estate or notional estate of the deceased person, revoke or alter any provision made under this Act.

alteration of provision.

(2) Subsection (1) does not affect the operation of section 17.

17. (1) Where the Court is satisfied that a person in whose favour an appointment for provision has been made under this Act is experiencing hardship by reason of an exceptional change in his circumstances since the date of the appointment, the Court may, at any time and from time to time, upon application made by that person, appoint that the provision be increased.

Increased provision.

(2) Notwithstanding section 5 (3), an appointment may be made under subsection (1) of property in the estate of the deceased person concerned which has been distributed, except property to which any person is entitled in possession.

(3) An under subsection (1) shall not affect any property subject to the statutory trust.

18. (1) The Court may appoint that provision be made under this Act out of any property in the estate of a deceased person which has been distributed by an administrator.

Property distributed.

(2) This section applies notwithstanding that the distribution may have been made before the administrator had notice of the commencement of any proceedings under this Act.

(3) This section does not affect the operation of section 14 (5) and section 17 (2).

19. (1) The 'burden of an appointment under this Act that provision be made for an eligible person out of any property in the estate of a deceased person or out of any property subject to the statutory trust shall, subject to this Act, be borne by such of the persons entitled to an interest in the estate or notional estate of the deceased person, and in such proportions, as the Court thinks fit.

Burden of provision.

(2) For the purposes of subsection (1), the Court may appoint that such contribution or adjustment as the Court thinks fit shall be made by or between the persons entitled as mentioned in that subsection.

(3) Where persons are successively entitled to interests in any property in the estate of a deceased person or in any property subject to the statutory trust, those interests shall not, unless the Court otherwise orders, be valued separately but the proportion of any provision to be borne by those persons out of those interests shall be raised or charged against the corpus of the property.

(4) Subject to subsection (5), the Court shall not make an order under subsection (1) or (2) in relation to any person interested in the notional estate of a deceased person unless that person has, in the time and manner prescribed, been served with the prescribed notice of the proceedings for provision.

(5) Where, under subsection (4), a prescribed notice of proceedings is served on a person interested in the notional estate, then, unless the Court otherwise orders-

(a) if the person served is so interested as trustee under a trust, it shall not be necessary to serve notice on any person by reason of his interest under the trust; and

(b). if the person served is so interested as personal representative of the estate of a deceased person, it shall not be necessary to serve notice on any person by reason of his interest in the last-mentioned estate.

(6) The Court shall, on application made in the time and manner prescribed by any person entitled

as mentioned in subsection (1), give that person an opportunity to be heard on the question whether any provision for the eligible person should be made-

- (a) out of any property in the estate of the deceased person, to the exclusion of any other property in the estate and any property subject to the statutory trust; or
- (b) out of any property subject to the statutory trust, to the exclusion of any other property subject to the statutory trust and any property in the estate of the deceased person.

(7) Subsection (6) does not affect the operation of section 9 (5) (f).

20. (1) Where, under this Act, the Court makes an appointment for provision, the Court may, at any time, on application by any person entitled to an interest in the estate or notional estate out of which the provision is to be made, by the Court for payment, of a lump sum or a periodical payment or both to represent, or in commutation of, such proportion of the provision as falls upon that person the interest or a specified part of the interest to which that person is entitled shall be exonerated from further liability in respect of the provision.

Exoneration of property from provision.

(2) Where the Court makes an order under this section, the Court may direct-

- (a) in what manner, if any, the lump sum or periodical payment is to be secured;
- (b) the person to whom the lump sum is to be paid or the periodical payment is to be made;
- (c) in what manner, if, any, the lump sum or periodical payment is to be invested for the benefit of the eligible person in whose favour the appointment for provision was made; and
- (d) that interest be paid, at such rate as the Court thinks fit, on the whole or any part of the lump sum or periodical payment for the whole or any part of the period between the date of the order and the date when the order is satisfied.

(3) This section has effect subject to Part III.

21. (1) Subject to this section, an appointment under this Act for provision for an eligible person operates and takes effect, for all purposes-

Operation of appointment for provision.

- (a) in so far as it affects the estate of a deceased person, as if the provisions of the appointment had 'been part of a will made by the deceased person immediately before his death; and
- (b) in so far as it affects the notional estate of a deceased person, according to the provisions of Part III.

(2) Where an appointment for provision under this Act provides for the payment of money and an appointment is not made under section 9 (5) (b) (iv) for the payment of interest on that money, interest is not payable.

PART III.

NOTIONAL ESTATE

22. In this Part, except in so far as the context or subject matter otherwise indicates or requires-

Interpretation.

“deceased person” means a person in relation to whose notional estate an order is sought under Part II.

“disposition of property” includes-

- (a) any conveyance, transfer, assignment, appointment, settlement, mortgage, delivery, payment, lease, bailment, reconveyance, discharge of mortgage or other alienation of property;
- (b) the creation of a trust;
- (c) the release, surrender, or abandonment of any property; and
- (d) the grant or exercise of a power in relation to property;

whether having effect at law or in equity and whether effected with or without an instrument in writing.

“gift” means any disposition of property made otherwise than by will without full consideration.

“settlement”, in relation to a deceased person, includes any disposition of property, or agreement for a disposition of property, under which any trust or provision relating to property is to take effect, or the possession or enjoyment of property is to change, on or after the death of the deceased person.

23. (1) Where, immediately before his death, under a disposition of property or an agreement made on or after the appointed day, a deceased person had power to dispose of any property for his own benefit or had power to dispose of any property for the benefit of an eligible person, that property is, from and after the death of the deceased person, subject to the statutory trust.

Property subject to the statutory trust.

(2) Where, on or after the appointed day, a deceased person made a settlement by way of gift and, immediately before his death, any property comprised in the settlement was, by the terms of the settlement, not absolutely vested-

- (a) in a person beneficially; or
- (b) for a charitable purpose,

that property is, from and after the death of the deceased person, subject to the statutory trust.

(3) Where-

- (a) under a disposition of property or an agreement made on or after the appointed day, a deceased person and another person are, immediately before the death of the deceased person, jointly entitled to any property; and
- (b) a beneficial interest in that property passes or accrues by survivorship to that other person on the death of the deceased person,

that property is, from and after the death of the deceased person, subject to the statutory

trust.

(4) (a) This subsection applies where-

(i) a policy of assurance on the life of a deceased person is made on or after the appointed day;

(ii) the premium on the policy, or part of the premium, is paid, directly or indirectly, by the deceased person;

(iii) immediately before his death, the deceased person had power to surrender or otherwise deal with the policy or its proceeds for his own benefit or had power to surrender or otherwise deal with the policy or its proceeds for the benefit of an eligible person; and

(iv) money (in this section called "the proceeds") is payable under the policy in consequence of his death.

(b) Where the deceased person contributed to a scheme, fund or plan and a premium is paid, or part of a premium is paid out of the assets of the scheme, fund or plan, the payment, to the extent to which its amount does not exceed the amount of his contributions, is, for the purposes of this subsection, a payment by the deceased person.

(c) For the purposes of paragraph (a) (iii), the deceased person had power to deal with the policy or its proceeds as mentioned in paragraph (a) (iii) notwithstanding that he may not do so except with the consent of the insurer or of some other person, being a person not having any beneficial interest in the policy or its proceeds.

(d) For the purposes of paragraphs (e) and (f), the nett payment by the deceased person is the amount of the premium paid by the deceased person, less the amount of any reimbursement in money or money's worth made in his lifetime, directly or indirectly, to him, or to any scheme, fund or plan to which he contributed, for the premiums paid by him.

(e) Where the nett payment by the deceased person is equal to the whole of the premium, the whole of the proceeds is, from and after the death of the deceased person, subject to the statutory trust.

(f) Where the nett payment by the deceased person is equal to a part of the premium, a like part of the proceeds is, from and after the death of the deceased person, subject to the statutory trust.

(5) Where-

(a) by virtue or in pursuance of-

(i) a disposition of property or agreement made on or after the appointed day by a deceased person; or

(ii) the memorandum, articles or rules (whether or not comprised in an Act or made under an Act) of any body (corporate or unincorporate), association, scheme, fund or plan of or in which a deceased person became a member or participant on or after the appointed day, a benefit accrues to any person or money is paid or payable to any person by reason of the deceased person having died while he was holding an office or while he was an employee; and

(b) that person, in the opinion of the Court, is an eligible person, whether or not he is an applicant under this Act for an appointment for provision,

the benefit or the money is, if the Court so orders, from and after the death of the deceased person, subject to the statutory trust, whether or not the benefit or payment is enforceable and whether or not that person was ascertained on the death of the deceased person and whether or not the benefit accrues or the payment is made pursuant to the exercise of a discretion by any person.

(6) Where, within 3 years before his death and on or after the appointed day, a deceased person made a gift with the intention, wholly or in part, of defeating, wholly or in part, an application under section 9, the gift shall take effect, and the rights and interests of all persons shall be, as if the property comprised in the gift was, immediately before the gift, subject to the statutory trust.

(7) Where-

(a) a deceased person had power to make a disposition of property for his own benefit or had

power to make a disposition of property for the benefit of an eligible person; and
(b) within 3 years before his death and on or after the appointed day, the deceased person, in exercise of the power, disposed of the property with the intention, wholly or in part, of defeating, wholly or in part, an application under section 9,

the disposition shall take effect, and the rights and interests of a persons shall be, as if the property was, immediately before the disposition, subject to the statutory trust.

(8) Where, at the time of any disposition of property by a deceased person, the deceased person would have had power to dispose of the property to a person if that person had been born or had attained some age or ff some other event had happened, then, for the purposes of subsection (7), if before the death of the deceased person that other person is born or attains that age or that other event happens, the deceased person had the power at the time of the disposition.

(9) Where, within 12 months before his death and on or after the appointed day, a deceased person made an unjust gift, the gift shall take effect, and the rights and interests of all persons shall be, as if the property comprised in the gift was, immediately before the gift, subject to the statutory trust.

(10) For the purposes of subsection (9), a gift is unjust if, in the opinion of the Court-
(a) at the date of the gift, any moral obligation of the deceased person to make provision by will or otherwise, for the maintenance, education or advancement in life of an eligible person was substantially greater than any moral obligation of the deceased person to make the provision which he made by the gift; and
(b) the estate of the deceased person is insufficient to satisfy the provision that should be made under this Act for an eligible person.

(11) This section has effect subject to sections 24, 25 and 27.

24. Property in the estate of a deceased person is not subject to the statutory trust.

Exclusion: actual estate.

25. (1) In this section, “transaction” means, in relation to property which, but for this section, is or may become subject to the statutory trust by virtue of the respective enactments mentioned in any of the paragraphs below in this subsection, the transaction specified in the paragraph, namely-

Exclusion: confirmed transaction.

- (a) the disposition of property or agreement mentioned in section 23 (1);
- (b) the settlement mentioned in section 23 (2);
- (c) the disposition of property or agreement mentioned in section 23 (3);
- (d) the making of the policy of assurance mentioned in section 23 (4);
- (e) the disposition of property or agreement mentioned in section 23 (5) (a) (i);
- (f) the transaction by which the deceased person became a member or participant as mentioned in section 23 (5) (a) (ii);
- (g) the gift mentioned in section 23 (6);
- (h) the disposition mentioned in section 23 (7); or
- (i) the gift mentioned in section 23 (8).

(2) In this section, “person concerned”, in relation to any transaction, means a person in respect of whose notional estate in case of his death property would or might become subject to the statutory trust by virtue or section 23 and in consequence of the transaction.

(3) For the purposes of this section, a person is interested under this Act if-

- (a) where the Court hears proceedings under this section before the death of the person concerned he is a person who, had the person concerned died immediately before the hearing, would be an eligible person or a person who might be made Triable to all or any of the burden of an order for provision under Part II; or
- (b) where the Court hears proceedings under this section after the death of the person concerned he is an eligible person or a person who might be made liable to the burden of an

order for provision under Part II.

(4) Where it appears to the Court that any transaction is, at the time when the transaction is made, not unreasonable having regard to the interests of the persons who are or may become entitled to any interest under the transaction and to -the interests of all or any of the persons interested under this Act, the Court may confirm the transaction as mentioned in this section.

(5) An application for confirmation under this section may be made by the person concerned or (before or after the death of the person concerned) by a person who is or may become entitled under the transaction.

(6) The Court may confirm the transaction, wholly or in part, as against all or any persons interested under this Act.

(7) Where the Court confirms the transaction, wholly or in part, as against all persons interested under this Act, property affected by the transaction is, to the extent of the order of confirmation, but subject to the terms of the order, not subject to the statutory trust.

(8) Where the Court confirms the transaction, wholly or in part, as against some one or more but not all persons interested under this Act, property affected by the transaction is, to the extent of the order of confirmation, but subject to the terms of the order, and as between persons who are or may become entitled to any interest in the property under the transaction and persons interested under this Act as against whom the transaction is confirmed, not subject to the statutory trust.

26. The Court may order or declare that the whole or any part of the notional estate of a deceased person shall not be the subject of an appointment or further appointment under this Act. Exoneration of notional estate.

27. (1) In proceedings under Part II, the Court shall make a just allowance for-

Allowance for
consideration, etc.

(a) any consideration for a settlement or other disposition by the deceased person of property in the notional estate;

(b) any improvement made to property in the notional estate by a person taking the property under a settlement or other disposition by the deceased person or taking the property in default of disposition of the property by the deceased person; and

(c) any expenditure or liability incurred in respect of property in the notional estate by a person so taking.

(2) Where the Court makes an allowance under subsection (1) in respect of property in the notional estate, and two or more persons hold or have interests in the property, the Court shall make just apportionment of the allowance amongst those persons.

(3) A person to whom an allowance is made under this section in respect of property in the notional estate shall be entitled to a charge on the property for the amount of the allowance together with interest, in priority to the interests of persons claiming under the statutory trust.

(4) For the purposes of subsection (3), the Court shall fix the time from which interest on an allowance under this section is to run, having regard to the time when the consideration was given, improvement was made, or expenditure or liability was incurred, as the case requires.

(5) Interest on an allowance under this section shall run from the time fixed under subsection (4) until payment of the allowance.

(6) Interest under this section shall be at the rate prescribed or, subject to rules of court, at such rate as the Court may fix.

(7) The Court may make orders for raising the amount of a charge under this section and for payment to the persons entitled.

28. (1) The statutory trust is a trust for such one or more of the following objects, that is to say, all persons who are eligible persons in relation to the estate or notional estate of the deceased person and all persons entitled to an interest in the estate or notional estate of the deceased person, and in such manner and to such extent as the Court may from time to time appoint.

Statutory trust.

(2) The Court may, under the power of appointment in subsection (1), appoint that property subject to the statutory trust or such estate, charge, lien or other interest in property subject to the statutory trust as the Court may direct-

(a) be the property of an object of the power;

(b) be held on trust for an object of the power by a person appointed by or under direction of the Court, the trust to be in such terms and to contain such conditions, powers and provisions as the Court may direct.

(3) Subsection (2) does not limit the generality of subsection (1).

(4) Where property is subject to the statutory trust by virtue of section 23 (1), subsection (1) does not authorise an appointment of the property except in a manner in which the deceased person might lawfully and without any fraud on ,a power have disposed of the property immediately -before his death.

(5) Where property is subject to the statutory trust by virtue of section 23 (3), subsection (1) authorises an appointment of the property to the extent of the beneficial interest in the property passing or accruing by survivorship on the death of the deceased person.

(6) Where money to the credit of a deceased person and another person in an account with a financial institution is subject to the statutory trust by virtue of section 23 (1) or (3), the Court may, under subsection (1), appoint only so much of the money as, in the opinion of the Court, is reasonable having regard to the circumstances in which the account was opened and to

the deposits to the credit of the account, and the withdrawals from the account, made by the deceased person and the other person.

(7) In subsection (6) “financial institution” means bank or a building society or any other person receiving money on current account or on deposit.

(8) A bank or other person holding any property subject to the statutory trust and acting in the ordinary course of business is not affected by the statutory trust notwithstanding notice of the facts by which the property is subject to the statutory trust, except where notice in writing of the statutory trust has been given to the bank by an administrator or by a person interested in the estate or notional estate of a deceased person.

(9) Where property is subject to the statutory trust by virtue of section 23 (7), subsection (1) does not authorise an appointment of the property except in a manner in which the deceased might lawfully and without any fraud on a power have disposed of the property immediately before his death, if he had not made the disposition mentioned in section 23 (7).

(10) Section 23 (8) has effect for the purpose of subsection (9) as it has effect for the purposes of section 23 (7).

29. The Court may make an appointment under the statutory trust for the following purposes but, subject to section 35, no other-

- (a) for the purpose of making an appointment for provision under section 9;
- (b) for the purpose of making an appointment for immediate provision under section 10;
- (c) for the purpose of giving effect to the terms on which appointments for provision are made under sections 9 and 10;
- (d) for the purpose of providing for the manner in which the burden of any provision made under this Act is to be borne;
- (e) for the purpose of giving effect to an order under section 16 revoking or altering any provision made under this Act for an eligible person;

Appointment under the statutory trust.

(f) for the purpose of giving effect to an appointment under section 17 increasing any provision made under this Act for an eligible person.

30. (1) Where, under section 28, property subject to the statutory trust or an estate, charge, lien or other interest in property subject to the statutory trust is appointed, the Court may, to enable effect to be given to the appointment, make an order vesting the property or the estate, charge, lien or other interest in the property in the appointee.

Operation of appointment under the statutory trust.

(2) Sections 78 and 79 of the Trustee Act, 1925, apply to an order under subsection (1).

(3) Section 78 (2) of the Trustee Act, 1925, applies to an order under subsection (1) as if this section were included in the provisions of Part III of that Act.

31. (1) Subject to subsections (2) and (4), the statutory trust does not enable any person claiming a beneficial interest under it to commence proceedings in a court against any person bound by it.

Restrictions on the statutory trust.

(2) Subsection (1) does not apply to-

(a) proceedings for an order for provision under Part II; or

(b) proceedings commenced by leave of the Court given in proceedings for an order for provision under Part II.

(3) Subject to subsections (4) and (5), the statutory trust does not impose any personal liability on any person bound by it except liability for any thing done or left undone by him after notice to him of proceedings against him, being proceedings mentioned in subsection (2).

(4) Subsection (1) does not apply to, and subsection (3) does not affect, any proceedings so far as the proceedings are for or relate to the identification, preservation, disposal or recovery of property subject to the statutory trust.

(5) Where-

- (a) notice is given as mentioned in subsection (3) to a person bound by the statutory trust;
- (b) that person becomes liable by reason of the statutory trust for anything done or left undone by him after the notice is given; and
- (c) afterwards that liability devolves on another person, whether on the personal representative of the person so bound in case of his death, or on his trustee in bankruptcy in case of his bankruptcy, or otherwise,

that liability may be enforced against that other person notwithstanding that notice has not been given to that other person as mentioned in subsection (3).

(6) Notwithstanding any of the provisions of the Real Property Act, 1900, the statutory trust does not enable any person to lodge a caveat under that Act-

- (a) before the death of the deceased person; or
- (b) after the death of the deceased person, except by leave of the Court.

32. Subject to section 31 (6), nothing in this Part affects any of the provisions of the Real Property Act, 1900, or any regulation made under that Act.

Effects of this Part
on the Real Property
Act, 1900.

33. Property which is situated outside New South Wales is not subject to the statutory trust.

Notional estate
outside the State.

PART IV.

GENERAL

34. (1) In any proceedings under this Act for an order for provision out of the estate or notional estate, or both, of a deceased person, a statement made, whether orally or in a

Evidence.

document or otherwise, by the deceased person shall, subject to this section, be admissible as evidence of any fact stated therein of which direct oral evidence by the deceased person would be admissible.

(2) Subject to subsections (3) and (13) and unless the Court otherwise orders, where a statement which was made otherwise than in a document is admissible under this section in any proceedings, no evidence other than direct testimony by a person who heard or otherwise perceived the statement being made shall be admissible for the purpose of proving it.

(3) Where a statement made by the deceased person while giving oral evidence in a legal proceeding is admissible under this section, the statement may be proved in any manner authorised by the Court.

(4) Where a statement contained in a document is proposed to be tendered, or is tendered, in evidence under this section, it may be proved by the production of the document or, whether or not the document is still in existence, by leave of the Court, by the production of a copy of the document, or of the material part of the document, authenticated in such manner as the Court may approve.

(5) Where, under this section, a person proposes to tender, or tenders, a statement contained in a document, the Court may, subject to subsection (1), require that any other document related to the statement be produced and, in default, may reject the statement or, if it has been received, exclude it.

(6) For the purpose of determining questions of admissibility under this section the Court may draw any reasonable inference from the circumstances in which the statement was made or from any other circumstance, including, in the case of a statement contained in a document, the form or content of the document.

(7) In estimating the weight, if any, to be attached to a statement tendered for admission or admitted under this section, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, including the recency or otherwise at the time when the deceased person made the statement of any relevant matter dealt with in the statement and the presence or absence of any incentive for the deceased person to conceal or misrepresent any relevant matter in the statement.

(8) Subject to subsection (10), where a statement of a deceased person is tendered for admission or is admitted in evidence under this section, evidence is admissible for the purpose of destroying or supporting the credibility of the deceased person.

(9) Subject to subsection (10), where a statement of a deceased person is tendered for admission or is admitted under this Section, evidence is admissible for the purpose of showing that -the statement is inconsistent with another statement made at any time by the deceased person.

(10) Subsections (8) and (9) do not make admissible evidence of any matter of which, if the deceased person had been called as a witness and had denied the matter in cross-examination, evidence would not be admissible if adduced by the cross-examining party.

(11) This section makes a statement of a deceased person admissible notwithstanding-

- (a) the rules against hearsay; or
- (b) the rules against secondary evidence of the contents of a document,

and notwithstanding that the statement is in such a form that it would not be admissible if given as oral testimony, but does not make admissible a statement of a deceased person which is otherwise inadmissible.

(12) This section does not apply to a statement to which Part IIc of the Evidence Act, 1898,

applies.

(13) In subsection (2), “testimony” includes oral evidence and evidence by affidavit and evidence taken before a commissioner or other person authorised to receive evidence for the purpose of the proceedings.

(14) In subsection (3), “legal proceeding” means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration.

(15) In this section, “document” includes any record of information.

35. (1) Without limiting any power of the Court, the Court may order that the costs, charges and expenses of or incident to proceedings under this Act be paid out of the estate or notional estate, or both, of the deceased person concerned in such manner as the Court thinks fit.

Costs, charges and expenses.

(2) The Court shall not make an order under subsection (1) against any person entitled to an interest in any notional estate of a deceased person except in proceedings of which notice has been given to that person in accordance with section 19.

36. (1) Where any duty is payable under Part IV of the Stamp Duties Act, 1920, in respect of property which is appointed under this Act, the duty shall be computed as if the deceased person concerned had power to make, and had made, a will containing the provisions of the appointment immediately before his death.

Death duty.

(2) Subsection (1) shall not make any property liable to duty under Part IV of the Stamp Duties Act, 1920, which, if this Act had not been enacted, would not be liable to that duty.

(3) Where any duty is paid in excess of the amount required to be paid under subsection (1), the excess duty shall, on application, and without further appropriation than this Act, be returned by the Treasurer to the personal representative of the deceased person and by him remitted to the person entitled to receive it.

(4) Where, under this Act, any property in the estate of a deceased person, or any property subject to the statutory trust, is appointed, the Court may, by order, direct that such contribution to, or adjustment of, the death duty, if any, payable under Part IV of the Stamp Duties Act, 1920, in respect of the property be made by or between such persons, and in such proportions, as the Court thinks fit.

(5) The Court shall not make an order under subsection (4) against any person entitled to an interest in the notional estate of a deceased person except in proceedings of which notice has been given to that person in accordance with section 19.

(6) Subsection (4) does not affect the operation of any provision of the Stamp Duties Act, 1920, as between the Commissioner of Stamp Duties and any other person.

37. An action does not lie against an administrator of the estate of a deceased person by reason of his having distributed the whole or any part of that estate if-
protection of administrator.

(a) the distribution was made before the administrator had notice of the commencement of proceedings under this Act or of an application to extend the time within which such proceedings may be commenced and, before making the distribution, the administrator had given the prescribed notices and the time specified in the notice or in the last of the notices had expired; or

(b) the distribution was made in pursuance of an interim appointment made under section 9.

38. (1) Subject to this section, this Act has effect notwithstanding any agreement or release. Release of right to apply for appointment for provision.

(2) This section applies to an agreement in writing made after the commencement of this Act under which a person (in this section called “the releasing party”) agrees to release his rights, if any, to apply under this Act for an appointment for provision out of the estate or notional estate, or both, of another person.

(3) The agreement does not have any effect unless it is approved by the Court.

(4) Proceedings for the approval of the agreement may be commenced before or after the death of the person whose estate or notional estate, or both, is the subject of the agreement.

(5) In proceedings for the approval of the agreement, the Court shall have regard to all the circumstances of the case, including whether, at the time the agreement was made-

(a) it was to the advantage, financially or otherwise, of the releasing party to make the agreement;

(b) it was prudent for the releasing party to make the agreement;

(c) the provisions of the agreement were fair and reasonable; and

(d) the releasing party had taken independent advice in relation to the agreement and, if so, had given due consideration to that advice.

(6) The Court may revoke its approval of the agreement if, and only if, it is satisfied-

(a) that its approval was obtained by fraud;

(b) that the concurrence of the releasing party was obtained by fraud or undue influence; or

(c) that the parties to the agreement desire the revocation of the approval.

(7) Where, under subsection (5), an approval is revoked, the agreement ceases to be in force.

39. (1) For the purpose of regulating any proceedings under this Act in or before the Court, rules of court may be made under the Supreme Court Act, 1970, for or with respect to any matter that by this Act is required to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
Rules of Court.

(2) Subsection (1) does not limit the rule-making powers conferred by the Supreme Court Act, 1970.

(3) For the purpose of regulating any proceedings under this Act in or before the District Court, rules of court may be made under the District Court Act, 1973, for or with respect to any matter that by this Act is required to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(4) Subsection (3) does not limit the rule-making powers conferred by the District Court Act, 1973.

40. An Act specified in the first column of Schedule I is amended or repealed to the extent specified opposite that Act in the second column of the Schedule.
Repeals and amendments Schedule 1.

SCHEDULE 1.

Second Column.

Extent of amendment or repeal.

Year and No. of Act	First Column Short Title.	Second Column Extent of amendment or repeal.
1898 No.13	Wills, Probate and Administration Act, 1898.	<p>Section 40-omit, insert instead-</p> <p>40. The Court shall have jurisdiction to grant probate of the will or administration of the estate of any deceased person, whether or not leaving property in New South Wales.</p> <p>Section 40A (2)-omit "and Part XN of the Conveyancing Act, 1919-1930," insert instead "Part XV of the Conveyancing Act, 1919, and the Family Provision Act, 1977,".</p>
1916 No.41	Testator's Family Maintenance and Guardianship of Infants Act, 1916.	<p>Insert next after section 1 the following new section-</p> <p>1A. This Act does not apply in relation to the estate of any person who dies after the commencement of the Family Provision Act, 1977, nor in relation to the estate of any person where it is uncertain whether he died before or after the commencement of that Act.</p> <p>Insert next after section 3 (3) the following new subsection-</p> <p>(4) In an application made under this section, the Court may make an interim order.</p> <p>Insert next after section 6 (4) the following new subsections-</p> <p>(4A) Where the Court is satisfied that a person in whose favour an order for provision has been made under this Act is experiencing hardship by reason of an exceptional change in his circumstances since the date of the order, the Court may, on the application of that person, increase the order for provision.</p> <p>(4B) An order under subsection (4A) shall not affect any distribution of the assets of the testator or intestate, as the case may be, made before notice of the application for increased provision is given to the executor or administrator, as the case may be.</p> <p>(4c) For the purposes of subsection (4B), an asset of a testator or intestate is not distributed unless any person is entitled in possession to the asset.</p> <p>(4D) Subsection (4A) applies to any order for provision made under this Act since the 7th October, 1916.</p>
1973 No.9	District Court Act, 1973.	<p>Section 134 (1) (c)-after "Testator's Family Maintenance and Guardianship of Infants Act, 1916" insert "or an appointment under section 9 of the Family Provision Act, 1977."</p> <p>Section 134 (2)-after "Testator's Family Maintenance and Guardianship of Infants Act, 1916," insert "or the Family Provision Act, 1977,".</p>

Appendix C - Commentators on Working Paper

Bar Association of New South Wales.
C.H.U.M.'s (Care and Help for Unmarried Mothers).
Davern Wright R. J., His Honour Judge.
Department of Youth, Ethnic and Community Affairs.
Farrell R. J., Solicitor.
Hutley F. C., the Honourable Mr Justice.
Law Society of New South Wales.
Olliffe C. J., Solicitor.
Palmer K. J., Solicitor.
Protective Commissioner, the Supreme Court.
Public Curator (Queensland).
Public Trustee of N.S.W.
Roach F. R., Solicitor.
Registrar-General's Department.
Registrar in Probate.
Thompson A. J., Solicitor.
Trustee Companies Association.
Women's Electoral Lobby.
Women Lawyers Association of New South Wales.

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