

1974

LAW REFORM COMMISSION

NEW SOUTH WALES

WORKING PAPER

ON

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 C.L.D. Meares
Deputy Chairman	:	Mr. R.D. Conacher
Others	:	His Honour Judge R.F. Loveday, Q.C. Mr. C.R. Allen Mr. D. Gressier Professor K.C.T. Sutton.

This is a Working Paper circulated for comment
and criticism. It does not represent the concluded views
of the Commission.

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ABBREVIATIONS

- Cahn (1936) ... CAHN, Edmond N. "Restraints on disinheritance." (1936) 85 University of Pennsylvania Law Review 139.
- Fratcher (1965) ... FRATCHER, William F. "Protection of the family against disinheritance in American law." (1965) 14 International and Comparative Law Quarterly 293.
- Gibbs (1953) ... GIBBS, H.T. "Admissibility of statements by a testator in testator's family maintenance proceedings." (1953) 2 University of Queensland Law Journal 150.
- Gold (1938) ... GOLD, Joseph, "Freedom of testation." (1938) 1 Modern Law Review 296.
- Griffith (1965) ... GRIFFITH, R.G. De B. Probate law and practice in Victoria. Sydney 1965.
- Hanbury (1969) ... HANBURY, Harold G. "Modern equity." 9th ed. Stevens & Sons Limited, 1969.
- Hardingham (1971) ... HARDINGHAM, Ian "Schaefer v. Schuhmann: promisee v. dependant." (1971) 10 University of Western Australia Law Review 115.
- Helmores (1966) ... HELMORES B.A. "The law of real property in New South Wales." 2nd ed. Law Book Company Ltd., 1966.
- Holdsworth (1923) ... HOLDSWORTH W.S. "A history of English law." 3rd ed. Methuen & Co. Ltd., 1923.
- Jordan (1907-08) ... JORDAN, F.R. "Testamentary disposition limitations." (1907-08) 5 Commonwealth Law Review 97.
- Krause (1971) ... KRAUSE, Harry D. Illegitimacy: Law and Social Policy. The Bobbs-Merrill Company, Inc. (1971).
- Laufer (1955-56) ... LAUFER, Joseph, "Flexible restraints on testamentary freedom - a report on decedents' family maintenance legislation." (1955-56) 69 Harvard Law Review 277.
- Lee (1971) ... LEE, William A. "Contracts to make wills." (1971) 87 Law Quarterly Review 358.
- Lee (1973) ... LEE, William A. "Schaefer v. Schuhmann Contracts to make wills." (April 1973) Queensland Law Society Journal 63.
- Levene (1973) ... LEVENE, S. "The Law of Succession in Manitoba in Relation to Illegitimate Children" Legal Research Institute of the University of Manitoba (1973).

ABBREVIATIONS

- Macdonald (1960) ... MACDONALD, W.D. Fraud on the widow's share. Ann Arbor, 1960.
- Mason & Tuthill (1929)... MASON, H.H., TUTHILL, A.C. & LENNARD, Cyril G. Testator's family maintenance. Law Book Company Limited, 1929.
- Megarry and Wade (1959) ... MEGARRY R.E. and WADE H.W. "The law of real property." 2nd ed. Stevens & Sons Limited, 1959.
- Nygh (1971) ... NYGH, P.E. Conflict of laws in Australia. 2nd ed. Butterworths, 1971.
- Podder & Kakwani (1973) ... PODDER N., KAKWANI N.C., Distribution of Wealth in Australia, 1973, a study made under the auspices of the Australian Taxation Review Committee.
- Simes (1955) ... SIMES, Lewis M. Public policy and the dead hand. Ann Arbor, 1955.
- Stephens (1957) ... STEPHENS, A.C. Family protection in New Zealand. 2nd ed. Wellington 1957.
- Sykes (1972) ... SYKES, Edward I. A textbook on the Australian conflict of laws. The Law Book Company Limited, 1972.
- Todd & Jones (1972) ... TODD J.C., JONES L.M., Matrimonial property. London, H.M.S.O., 1972.
- Tyler (1971) ... TYLER, B.L.G. Family provision. London, 1971.
- Wright (1966) ... DAVERN WRIGHT, R.J. "Testator's family maintenance in Australia and New Zealand." 2nd ed. Law Book Company Limited, 1966.

ABBREVIATIONSStatutes

Alta Act	...	The Family Relief Act, Alberta (Revised Statutes of Alberta, 1955 c.109).
A.C.T. Ord.	...	Family Provision Ordinance 1969, Australian Capital Territory.
B.C. Act	...	Testator's Family Maintenance Act (Revised Statutes of British Columbia, 1960, c.378).
Man. Act	...	The Testators Family Maintenance Act, Manitoba (Revised Statutes of Manitoba, 1970, c.150).
N.B. Act	...	Testators Family Maintenance Act, New Brunswick (1959), c.14.
Nfld Act	...	The Family Relief Act, 1962, No.56 Newfoundland.
N.Z. Act	...	Family Protection Act 1955, New Zealand.
N.T. Ord.	...	Family Provision Ordinance 1970, The Northern Territory of Australia.
N.S. Act	...	Testator's Family Maintenance Act, Nova Scotia (Revised Statutes of Nova Scotia, 1967, c.303).
Qld Act	...	The Succession Acts, 1867 to 1968, Queensland (Part V, Family Provision).
Ont. Act	...	The Dependants' Relief Act (Revised Statutes of Ontario, 1970, c.126).
Sask. Act	...	The Dependants' Relief Act, Saskatchewan (Revised Statutes of Saskatchewan, 1965, c.128).
S.A. Act	...	Inheritance (Family Provision) Act, 1972, South Australia.
Tas. Act	...	Testator's Family Maintenance Act 1912, Tasmania.
The Act	...	Testator's Family Maintenance and Guardianship of Infants Act, 1916, New South Wales.
U.K. Act	...	Inheritance (Family Provision) Act, 1938, United Kingdom.
Vict. Act	...	Administration and Probate Act, 1958, Victoria (Part IV, Family Provision).
W.A. Act	...	Inheritance (Family and Dependants Provision) Act, 1972, Western Australia.

SUMMARY OF MATTERS RAISED FOR COMMENT

In the Working Paper, we invite comment on many matters. A summary of them, prefaced in each instance by a reference to the relevant part of the text, is listed below. References to the Act are references to the Testator's Family Maintenance and Guardianship of Infants Act, 1916.

1. Paragraphs 3.8 - 3.20

(1) Is a system for securing justice in the field of family inheritance which requires a survivor, first, to apply to the Court, secondly, to prove that a deceased person failed to make adequate provision for his proper maintenance, education or advancement in life and, thirdly, to rely on the exercise of the Court's discretion, the best system?

(2) What is the relevance in New South Wales of the conclusions and propositions concerning legal rights of inheritance stated in the Working Paper of the Law Commission in England on Family Property Law (see paragraphs 4.69 - 4.72 of Appendix C)?

(3) What is the relevance in New South Wales of the conclusions and proposals stated in the same Working Paper concerning a system of community of property (except the conclusions and proposals touching divorce, nullity or judicial separation) (see paragraphs 5.76 - 5.86 of Appendix C)?

(4) Where the estate of a deceased spouse is valued at less than, say, \$20,000 or \$30,000, should the application of the Act to a surviving spouse be re-examined?

2. Paragraphs 4.1 - 4.8. Should there be any difference between the application of the Act to cases where a deceased person leaves a will and where he does not? We propose that there should not be.

3. Paragraphs 5.1 - 5.7. Should any change be made to the expression in the Act without adequate provision for his proper maintenance, education or advancement in life? We propose that there should not be.

4. Part 6. Who should be included in any enlarged class of eligible applicants under the Act? Should special provision be made for -

(1) A divorced spouse? We propose that the Act should not make special provision for a divorced spouse but where such a person satisfies the conditions mentioned in paragraph (12) below, we would make that person an eligible applicant (paragraphs 6.8 - 6.14).

(2) A remarried spouse? We propose that the Act should provide that a remarried spouse is an eligible applicant (paragraphs 6.18 - 6.23).

(3) A de facto spouse? The comment made in paragraph (1) above applies also to a de facto spouse (paragraphs 6.24 - 6.32).

(4) A posthumous child? We propose that the Act should provide for the case of a posthumous child (paragraphs 6.35 - 6.36).

(5) A legitimated child? We do not think that there is any need for the Act to provide for the case of a legitimated child (paragraphs 6.37 - 6.42).

(6) An adopted child? We do not think that there is any need for the Act to provide for the case of an adopted child (paragraphs 6.43 - 6.45).

(7) A stepchild? The comment made in paragraph (1) above applies also to a stepchild (paragraphs 6.47 - 6.48).

(8) An illegitimate child? We propose that the Act should provide specifically for the case of an illegitimate child (paragraphs 6.49 - 6.57).

(9) A grandchild? The comment made in paragraph (1)

above applies also to a grandchild (paragraphs 6.58 - 6.59).

(10) A dependant, other than a spouse or child, of the deceased person? We do not propose that the Act should provide specifically for dependants of a deceased person (paragraphs 6.60 - 6.66).

(11) A person, other than a spouse or child, for whom the deceased person had a moral duty to make provision? We do not propose that the Act should provide specifically for persons fitting this description (paragraphs 6.67 - 6.68).

(12) A person, other than a spouse or child, who had a reasonable expectation of the deceased's bounty and who had been a sometime dependant of the deceased and a sometime member of his household? We propose that persons fitting this description should be eligible applicants under the Act (paragraphs 6.69 - 6.73).

5. Paragraphs 7.1 - 7.3. Should the time limit for commencing proceedings under the Act be changed? Should the Act specify the grounds upon which the Court may exercise its power to extend time? In each case, we say no.

6. Paragraphs 7.4 - 7.6. If the proposal mentioned in paragraph 4(12) above is adopted, should all eligible applicants or only the spouse and children of a deceased person have the right to apply for leave to commence proceedings out of time? We propose that only the spouse and children of the deceased person should have this right.

7. Paragraphs 7.7 - 7.8. Where an application for an extension of time to commence proceedings is made by the spouse or a child of the deceased person, should the Court be able to look at the circumstances of the applicant at the time of the application? We propose that the Court should not be able to look at events which occur more than twelve months after

the date of the grant of administration.

8. Part 8. What should constitute a "final" distribution of an estate? We propose that for the purposes of the Act, an estate should not be finally distributed until it is indefeasibly vested in interest in its beneficiaries.

9. Part 9. As at what date should an applicant's case be considered? We propose that the date should be the date of the proceedings, not the date of the death of the person concerned.

10. Paragraph 10.5. Should the Act provide that the character and conduct of an applicant may disentitle him to an order? We propose that the Act should continue so to provide and that the existing provision should be included in any new Act.

11. Paragraph 10.7. Should the Act provide that character or conduct not sufficiently grave to disentitle a person to an order should nonetheless be taken into account to reduce the amount of the order? We propose that the Act should so provide.

12. Paragraph 10.9. Should the Act provide that the Court may consider an applicant's conduct after the death of the person concerned? We propose that the Act should so provide.

13. Paragraphs 11.2 - 11.25. Should the Act be buttressed by anti-evasion provisions? We propose that it should be.

14. Paragraphs 11.28 - 11.37. Should the Act apply to property given away by the deceased person with an intention of evading the Act? Where the gift is made within three years of the death of the deceased person, we propose that it should.

15. Paragraphs 11.38 - 11.44. Should the Act apply to property disposed of by a deceased person by a will-substitute? Subject to conditions, we propose that it should.

16. Paragraphs 11.45 - 11.48 and Part III of the draft Bill. Is our proposal that the Act should impose a statutory trust upon property disposed of by a will-substitute a workable proposal?

17. Paragraphs 11.49 - 11.58. Should the Court be empowered to make an order under the Act affecting property which is disposed of by the will of a deceased person pursuant to a contract to devise or bequeath the property? We propose that the Court should be so empowered.

18. Paragraphs 11.59 - 11.68. Should the Court be empowered to make an order under the Act affecting movables in New South Wales of a person dying domiciled elsewhere? We propose that the Court should be so empowered where the applicant is a person ordinarily resident in New South Wales.

19. Paragraphs 12.3. Should the Court's existing powers under the Act be restricted in any way? We do not propose that they should be restricted.

20. Paragraphs 12.5 - 12.12. Should notice of proceedings under the Act always be given to the surviving spouse and children of the deceased person and also to any person who is entitled to share in the estate of that person? We propose that, where practicable, it should be. What are the best means of ensuring that this is done.

21. Paragraphs 12.13 - 12.18. Should the Court be empowered to make interim orders in proceedings under the Act? We propose that it should be so empowered.

22. Paragraphs 12.19 - 12.22. Should the Court be empowered to make orders for immediate provision for an applicant pending the final determination of the proceedings? We propose that it should be so empowered.
23. Paragraphs 12.23 - 12.28. Should the Court be empowered to order that property be set aside out of an estate and be held on trust as a class provision for the benefit of two or more specified persons? We propose that the Court should be so empowered.
24. Paragraphs 12.29 - 12.39. Should there be a procedure for ensuring that the rights under the Act of minors and other legally incapacitated persons are neither overlooked nor neglected? We propose that there should be. Are the procedural provisions discussed by us reasonably suitable for this purpose?
25. Paragraphs 13.1 - 13.14. Should the Court be empowered to vary an order under the Act by increasing the provision made for an applicant? We propose that the Court should be so empowered but only where the applicant is experiencing hardship by reason of an exceptional change in his circumstances since the date of the order.
26. Paragraphs 14.1 - 14.6. Should the Act contain guidelines for the exercise by the Court of its discretionary power to order that provision be made for an applicant? We do not propose that the Act should contain such guidelines.
27. Paragraphs 15.1 - 15.8. Should the Act make special provision for the admissibility of evidence in proceedings brought under it? We propose that oral statements made by a deceased person should be admissible in proceedings under the

Act relating to his estate. We do not make any other proposals touching the admissibility of evidence in these proceedings.

28. Paragraphs 17.1 - 17.12. Should a person, either before or after the death of a deceased person, be able to contract out of any right of his under the Act in relation to the estate of the deceased person? We propose that he should be able to do so. We do not propose, however, that a person should be able to limit his contract to a particular part of the estate.

29. Paragraphs 18.1 - 18.11. What part of the estate of a person who dies intestate should pass to his surviving spouse? The present provision is, in our view, inadequate. The extent of the inadequacy is, however, a question to be determined by Government. Comment to Government, through us, may influence the final determination of this question

30. Paragraphs 18.12 - 18.14. 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 intestate's death, should the surviving spouse be given the right to appropriate the interest in the dwelling house in or towards satisfaction of the interest of the surviving spouse in the estate of the intestate? We propose that the surviving spouse should have this right.

31. Paragraph 19.1. What existing problems in relation to the Act or to proceedings under it have we not considered in the Working Paper?

WORKING PAPER

on

THE TESTATOR'S FAMILY MAINTENANCE AND
GUARDIANSHIP OF INFANTS ACT, 1916.

PART 1. - PRELIMINARY.

1.1 We have a 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 dependants 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 In this Paper, we speak often of "the Act", of "applications" and of "orders": in doing so we speak of the Testator's Family Maintenance and Guardianship of Infants Act, 1916, and of applications and of orders made under section 3 of that Act. Also, we speak often of "testators" and of "husbands": unless a contrary intention appears, these words apply equally to intestates and to wives respectively. Our many references to "the Court" are references to the Supreme Court of New South Wales.

PART 2. - INTRODUCTION.

2.1 The main questions considered in this Paper are -

1. What, in 1974, is the best way for the law to assure to the family of a deceased person adequate provision out of his estate?
2. What should be the differences, if any, between the application of the Act to cases where a deceased person leaves a will and to cases where he does not?

3. What, apart from the test of relationship, should be the primary condition of the Court's jurisdiction? In other words, is it desirable to depart from the expression "left without adequate provision for ... proper maintenance, education or advancement in life" used in section 3 of the Act?
4. Who should be eligible to apply for provision under the Act?
5. What time limit, if any, should be fixed for the making of an application for an order for provision?
6. What should constitute a "final distribution" of an estate?
7. What should be the date as at which an applicant's case is considered?
8. What conduct, if any, on the part of an applicant should disentitle him to an order?
9. What property should the Court be able to affect by an order for provision?
10. What orders, other than orders for provision, should the Court be empowered to make?
11. What power, if any, should the Court have to vary an order by increasing the provision made for an applicant?
12. What guidelines, if any, should be laid down for the exercise by the Court of its powers?
13. What special rules of evidence, if any, should apply to proceedings under the Act?
14. What court or courts should exercise the jurisdiction conferred by the Act?
15. What rights, if any, should a person have to contract out of the Act?
16. What part of the estate of a person who dies without a will should pass to his surviving spouse?
17. What should be the form of any amending legislation?

2.2 Except in the case of question 1, we suggest an answer to each question listed in paragraph 2.1. The answers do not state the concluded views of the Commission. They are given for the purpose of attracting comment and criticism. In the case of question 1, we raise broad issues in the hope of evoking informed debate.

2.3 Appendixes to this Paper are -

1. Appendix A, where we reproduce the Act.
2. Appendix B, where we list the results of some of our fact-finding enquiries.
3. Appendix C, where we reproduce parts of the Working Paper Family Property Law published in 1971 by the Law Commission in England.
4. Appendix D, where we reproduce part of the Official Text of the Uniform Probate Code of the United States of America and part of the Official Commentary on that Code.
5. Appendix E, where we set out in tabulated form a summary of the law relating to intestate succession in the Australian States, the Australian Capital Territory, England and Wales, and New Zealand.¹

2.4 We thank the Law Commission in England, the West Publishing Company and the Law Reform Commission of Western Australia for letting us reproduce the material contained in Appendixes C, D and E respectively.

1. The summary was prepared by the Law Reform Commission of Western Australia.

PART 3. - WHAT IS THE BEST WAY FOR THE LAW TO ASSURE
TO THE FAMILY OF A DECEASED PERSON ADEQUATE
PROVISION OUT OF HIS ESTATE?

3.1 We consider here -

1. The policy of the Act.
2. The operation of the Act.
3. Contemporary wants and needs.
4. Some alternative inheritance laws.

The Policy of the Act

3.2 Shortly stated, the dominant purpose of the Act is to enable the Court to remedy a breach by a person of his moral duty as a wise and just husband or father to make proper provision, having regard to his property, for the maintenance, education and advancement of his family:¹
"The notion of 'moral duty' is found not in the statute but in a gloss on the statute."²

3.3 The Act encroaches upon the right of a testator to dispose of his property by will in any manner that he thinks fit: "It makes the operation of his testamentary dispositions defeasible to the extent required to give effect to the purposes of the Act The necessity, or at least the desirability, in the public interest, of such legislation is demonstrated by the way in which, after originating in New Zealand and spreading through the Australian States and Territories, it has now been adopted in a modified form in England by the Inheritance (Family Provision) Act 1938, which is described as an Act 'to amend the law relating to

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1. See Williams J. in Lieberman v. Morris (1944) 69 C.L.R. 69, 92 and Bosch v. Perpetual Trustee Co. Ltd. [1938] A.C. 463, 478.
 2. Per Fullagar J. in Coates v. National Trustees Executors and Agency Co. Ltd. (1956) 95 C.L.R. 494, 523.

testamentary dispositions'."³

3.4 The Act does not impose any duty to frame a will in any particular way: "What the Act does is to confer on the Court a discretionary jurisdiction to override what would otherwise be the operation of a will by ordering that additional provision should be made for certain relations out of the testator's estate, notwithstanding the provisions which the will actually contains. If the testator does not make adequate provision in his will for wife, husband or children, he does not thereby offend against any legal duty imposed by the statute. His will-making power remains unrestricted, but the statute in such a case authorises the Court to interpose and carve out of his estate what amounts to adequate provision for those relations if they are not sufficiently provided for."⁴

3.5 "The Court is given not only a discretion as to the nature and amount of the provision it directs but, what is even more important, a discretion as to making a provision at all. All authorities agree that it was never meant that the Court should re-write the will of a testator. Nor was it ever intended that the freedom of testamentary disposition should be so encroached upon that a testator's decisions expressed in his will have only a prima facie effect, the real dispositive power being vested in the Court."⁵

3.6 Power to override what would otherwise be the

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3. Per Williams J. in Lieberman v. Morris (1944) 69 C.L.R. 69, 91. We note, however, that since 1821 the State of Maine has had a statute under which the courts of that State may order that a widow be provided with permanent maintenance out of the personal estate of her deceased husband. (See Laufer (1955-56) 277, 281.)
 4. Per Viscount Simon L.C. in Dillon v. Public Trustee of New Zealand [1941] A.C. 294, 301.
 5. Per Dixon C.J. in Pontifical Society for the Propagation of the Faith v. Scales (1961-62) 107 C.L.R. 9, 19.

operation of a will was, it seems, given to the Court only with reluctance. Bills for Acts of the kind passed in New Zealand in 1900 were introduced into the Parliament of New South Wales in 1905, 1906 and 1907. None was enacted. One commentator of the time observed: "... it is undoubtedly arguable that certain possibilities of evil consequence are inseparable even from this modified form of limitation. Children emboldened by the confidence that some share is assured to them in the absence of flagrant misconduct, may be tempted to defy parental authority. Any limitation upon a testator's power to dispose of his own earnings as he thinks fit tends to weaken one important incentive to industry and thrift. A testator may be prevented from excluding an utterly unworthy member of his family except at the risk of exposing a grave family scandal which it is perhaps strongly in the interests of innocent members to conceal. The system relegates to a court of justice discretionary powers in a matter as to the merits of which the testator must in nearly every case be a much better judge than the Court can possibly be. Complicated questions of fact may arise regarding previous advancements to the claimant. An opportunity is given for speculative and blackmailing actions on behalf of persons who have been properly excluded."⁶

3.7 Notwithstanding objections of the kind mentioned in paragraph 3.6, in this State absolute freedom of testation has given way to the claims of the family. The principle of limiting the power of testation is accepted and followed in many countries.⁷ Indeed that principle has greater antiquity than the principle of free testation.⁸ In substance,

6. Jordan (1907-8) p.104.

7. See, generally, Jordan (1907-8) pp.98-101; Gahn (1936) p.139; Gold (1937) pp.298-299; Stephens (1957) pp.3-11, 19-28; Macdonald (1960) pp.49-62; Fratcher (1965) p.293; and para.4.3 of Appendix C.

8. Jordan (1907-8) pp.98-101.

the question we are now considering means how best should the moral obligations of a deceased person to his family be defined and enforced. In 1916, in the case of persons leaving wills, the Act gave one answer to that question. In 1938, for widows, and in 1954, for children and some grandchildren, that answer was made to apply to some persons dying without wills.⁹ But, in 1974, are the answers of 1916, 1938 and 1954 the right answers?

The Operation of the Act

3.8 Little empirical information is available about the utility of the Act. In Appendix B we list matters from which some inferences may be drawn. The inferences include -

1. In the five years ending 31 December, 1970, some 87 persons out of every 100 persons dying in this State over the age of 19 years left estates valued at less than \$20,000.
2. In the same period, the number of proceedings under the Act, when compared with the number of estates assessed for duty, was few: less than one in every hundred.
3. Widows make one-half of all applications under the Act.
4. Where a deceased spouse leaves a will, proceedings by the surviving spouse are significantly fewer than where the deceased dies intestate.
5. Some 2 out of every 3 applications made by widows relate to estates valued at less than \$20,000.
6. Some 9 out of every 10 applications made by widows result in an order for the applicant.
7. Some 8 out of every 10 applications result in an order for the applicant.

9. Conveyancing, Trustee and Probate (Amendment) Act, 1938, s.9(a) and Administration of Estates Act, 1954, s.4(1)(a)(iii), (vii).

3.9 Why, comparatively speaking, is the Act so little used? Do most testators discharge their moral duties faithfully? Where there is no will, does the law of intestate succession accord with contemporary wants and needs? Does the cost and dislike of legal proceedings deter potential applicants? Are there other reasons? Reliable knowledge of the kind needed to answer these questions is difficult to get. We do, however, venture some opinions based on our experiences -

1. In general, testamentary duties are discharged faithfully.
2. Despite the low incidence of applications under the Act, where a husband dies intestate leaving a widow and two or more young children, the law of intestate succession often does not accord with contemporary ideas of fairness. It gives the widow only one-third of his estate. A husband and father of young children will seldom provide in his will for his estate to be divided on his death in the way that it is divided if he dies intestate. Indeed, even where his children are adults, a husband who has only a small or a medium sized estate will mostly leave the whole of his estate to his widow.
3. Notwithstanding the existence of legal aid schemes, the costs of an application under the Act deter many eligible applicants. In simple cases, those costs can be to the order of \$500. Although the estate of the deceased person concerned usually bears the burden of the costs, many persons are unwilling or unable to risk incurring a substantial liability for costs.
4. Proceedings under the Act are usually disruptive of family relationships. A widow, for example, may not proceed with a proper claim because if she is

successful the provision made for her may deprive a son or a daughter or both of the same provision: she will submit to an injustice rather than "break up the family". Many valid claims under the Act are not pressed because of these family ties and loyalties. This is not a satisfactory situation. The sensitive person is too often disadvantaged.

3.10 In short, a system for securing justice in the field of succession which requires a survivor, first, to apply to the Court, secondly, to prove that a deceased person failed to make adequate provision for his proper maintenance, education or advancement in life and, thirdly, to rely on the exercise of the Court's discretion, is not necessarily the best system. It may, in this State, by tradition or otherwise, be the only practical system. But is it the system that most persons want?

Contemporary Wants and Needs

3.11 What answer would most citizens of New South Wales give to the question: "In some countries the law says that if a will is made, then the surviving spouse must be provided for in it. In other countries there is complete freedom in making the will, but the surviving spouse can ask the Court to decide whether extra provision should be made, if he or she feels unfairly treated under the will. Which do you think is the better system?" And, if that question was reworded so as to apply to children, how would it be answered? A survey¹⁰ of 1877 English and Welsh married couples made, in 1972, for the Law Commission in England showed that over one-half of the spouses were in favour of the kind of protection under which the survivor must receive something from the estate

10. Todd and Jones (1972).

under the will.¹¹ Two main reasons were given for this form of protection: first, it was just and proper that it should be so and, secondly, an expressed dislike of the idea of going to Court.¹² Opinions were divided concerning a father's obligation towards his children. Only one-fifth of husbands and one-quarter of wives thought that if a father made a will then his children should be included and two-thirds of spouses thought that the man should be free to do as he likes with regard to his children.¹³

3.12 Other findings of the survey included -

1. Among the married couples in the sample only 24% of husbands and 10% of wives had made a will and of the husbands who had made wills 27% had made them whilst in the armed services and of that 27% many did not know what had happened to the will or whether it was still valid.¹⁴
2. Over one-third of the husbands and one-half of the wives in the sample said they did not know what the laws of intestacy were.¹⁵
3. 48% of couples were not owner-occupiers of the matrimonial home. 47% of couples did not have a current bank account and 23% of couples said that, excluding the house or current bank account if they had them, the total value of their other assets was less than £100.¹⁶

11. Id., pp.47-48. The survey report explains that it was difficult to design and ask questions about this complex subject and that the questions could not be made to correspond exactly with the legal position. At pp.50-52 of the report some inconsistencies in the replies are discussed.

12. Id., p.48.

13. Id., pp.48-9.

14. Id., p.33.

15. Id., p.35.

16. Id., pp.19, 101-102.

3.13 If a like survey in this State produced similar results, it could be argued that any law proposed by us should be framed in such a way as to take account of a preference for inheritance rights, a low incidence of will making and a low level of assets owned by the majority of married couples. But surveys of the kind referred to have not been made in this State. We suspect that if they were made, the results would also show a preference for some form of inheritance rights and a low level of assets owned by the majority of married couples.¹⁷ For this reason we look briefly at the inheritance laws of some other places.

Some Alternative Inheritance Laws

3.14 As noted in paragraph 2.3.3, the Law Commission in England published, in 1971, a Working Paper on Family Property Law. One of the central problems faced by the Paper was the choice between discretionary powers and fixed rights as a basis for dealing with family property. Part 4 of the Paper¹⁸ 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 intestate or testate:¹⁹ a system found, for example, in Scotland and in parts of the United States. Part 5 of the Paper²⁰ considered how a system of community of property based on the systems in force in Scandanavia and West Germany could be adapted to English law. In 1973, the Law Commissioners said that they did not think, as then advised, that

17. See paragraph 3.8.1. See, also, Podder and Kakwani (1973) pp.3,5,7: in the 1966-67 financial year the average net worth of 87.01% of families in the urban sector of Australia was less than \$20,000.

18. See paragraphs 4.1 - 4.72 of Appendix C.

19. In English Law, as in the law of this State, a spouse has fixed rights only in the case of intestacy.

20. See paragraphs 5.1 - 5.86 of Appendix C.

recommendations on legal rights of inheritance and community of property were required.²¹ Notwithstanding this decision, the discussions in the Law Commission's Working Paper²² raise matters of fundamental importance for any one reviewing the law relating to succession to family property.

3.15 Because we are concerned with situations which arise where a marriage ends by death, as distinct from break-down, systems of legal rights of inheritance are, for our purposes, more relevant than systems of community of property.

3.16 In the context of our question: "What, in 1974, is the best way for the law to assure to the family of a deceased person adequate provision out of his estate", we invite comment on -

1. The utility of the Act in cases of testamentary succession.
2. The utility of the Act in cases of intestate succession.
3. The relevance in New South Wales of the conclusions and propositions concerning legal rights of inheritance stated in the Working Paper of the Law Commission in England.²³
4. The relevance in New South Wales of the conclusions and proposals stated in the same Paper concerning a possible system of community of property (except those conclusions and proposals relating only to divorce, nullity or judicial separation).²⁴

21. Law Com. No.52, p.20.

22. For a like discussion see Simes (1955) pp.1-31.

23. See paragraphs 4.69 - 4.72 of Appendix C.

24. See paragraphs 5.76 - 5.86 of Appendix C.

3.17 In particular, we invite comment on whether the application of the Act to a surviving spouse should not be re-examined where the estate of the deceased spouse is valued at less than, say, \$20,000 or \$30,000. We ask whether the whole of these estates should not pass to the surviving spouse, notwithstanding the terms of any will made by the deceased spouse.

3.18 It can be said in favour of this proposition that most applications under the Act are now made by the surviving spouses of persons who die leaving estates valued at less than \$30,000 and that a high proportion of these applications are successful.²⁵ Of course, applications of this kind may not be made because of legal advice that, if made, they will fail. In practice, we doubt that this is so in many cases. To us, the impact upon family relationships, not the likelihood of failure, is the primary cause of comparatively few applications being made under the Act.

3.19 If adopted, a proposal of the kind mentioned in paragraph 3.17 would give a modified legal right of inheritance to a surviving spouse. We say "modified" because, in our view, the Court should have the power to deny the inheritance where special circumstances call for its denial: the conduct of the surviving spouse, or the value of gifts made to the surviving spouse by the deceased spouse, or the special claims of an invalid child may, for example, prompt the Court to deny the inheritance. An unqualified right of inheritance would, we believe, be too inflexible and it must operate less than satisfactorily in many cases.

3.20 Any proposal to introduce a modified right of inheritance for the surviving spouse of a person who leaves

25. See paragraphs 3.8.3, 3.8.5 and 3.8.6.

a less than large estate will call for detailed consideration of matters such as -

1. The effect to be given to an agreement by a spouse to waive the right of inheritance.
2. The substantive or procedural means of implementing the proposal.

3.21 In paragraphs 3.16 - 3.20, we raise, in broad terms only, matters which should evoke public debate about the principles on which our laws of succession are based. A study of Appendix C to this Paper should aid that debate.

3.22 By way of background to the Law Commission's Working Paper, we note two differences between English and New South Wales law -

1. The English rules of intestate succession are more generous to a surviving spouse than are the New South Wales rules.²⁶
2. The English family provision legislation is more restricted than is the New South Wales legislation. For example, the primary condition of jurisdiction in England and Wales is that the disposition of a deceased's estate does not make reasonable provision for the maintenance of an applicant²⁷ whereas in New South Wales the corresponding condition speaks of an applicant being left without adequate provision for ... proper maintenance, education or advancement in life.²⁸

3.23 We turn now to more modest areas of possible change. We consider the Act without regard to the possible impact upon it of major changes in the law of succession.

26. See Appendix E.

27. U.K. Act, s.1(1).

28. The Act, s.3.

PART 4. - THE ACT, AND TESTAMENTARY
AND INTESTATE SUCCESSION.

4.1 Here we consider the question: "What should be the differences, if any, between the application of the Act to cases where a deceased person leaves a will and to cases where he does not?"

4.2 In New South Wales, a wife may apply for an order if her husband disposes of his property either wholly or partly by will or if he dies wholly intestate.¹ On the other hand, a husband may apply if his wife disposes of her property either wholly or partly by will, but not if she dies wholly intestate.²

4.3 A husband may apply for an order against his wife's wholly intestate estate in the other States and Territories of Australia,³ and in New Zealand,⁴ England and Wales,⁵ Manitoba,⁶ Newfoundland,⁷ and Saskatchewan.⁸ Until 1969, the position in Alberta was the same as it is in New South Wales.⁹ But, in 1969, the law of that Province was amended to the effect that a husband may apply for an order for provision out of his wife's wholly intestate estate.

4.4 The records of the Parliamentary Debates of this State are silent on the reason why, consequent upon a total

1. The Act, s.3(1), (1A).
2. The Act, s.3(1), (1A).
3. Vict. Act, s.91; Qld. Act, s.90(1); Tas. Act, ss.2(1) and 3A; S.A. Act, ss.6(a) and 7(1)(b); W.A. Act, ss.6(1) and 7(1)(a); A.C.T. Ord., ss.7(1)(a) and 8(1) and N.T. Ord., ss.7(1)(a) and 8(1).
4. N.Z. Act, ss.3(1)(a) and 4(1).
5. U.K. Act, s.1(1).
6. Man. Act, ss.2(b), 3(1), (5).
7. Nfld. Act, ss.2(c), 3(1)(a), (b).
8. Sask. Act, ss.2(1)(c)(i) and 4(1).
9. Alta Act, ss.2(d)(iv) and 4(1).

intestacy, a widower cannot, but a widow can, commence proceedings under the Act. To us, the distinction seems insubstantial and we see no reason for continuing it.

4.5 Many wives have property or income or both. Marriage is a relationship to which each spouse contributes. The Act implicitly acknowledges that duties flow from their relationship. If the Court can always intervene to remedy a breach of duty arising from an act of commission, the making of a will, the Court should, in principle, always be able to intervene to remedy a like breach arising from an act of omission, a failure to make a will.

4.6 In New South Wales, since 1954, the Court may make provision for the children (being under the age of twenty-one years) of any child of an intestate who died before the intestate.¹⁰ Grandchildren of a testator have not, however, any claim under the Act. This is not the position in New Zealand,¹¹ South Australia,¹² Western Australia,¹³ the Australian Capital Territory¹⁴ or the Northern Territory.¹⁵

4.7 Again we see no reason for continuing the distinction. To us, the question whether a grandchild should be able to seek an order under the Act should turn on considerations other than his grandparent's lack of testamentary diligence. Moreover, the distinction can lead to absurdities. To illustrate: a person may die intestate except as to \$100 which he leaves to a charity, his estate may be worth \$1,000,000 and yet a grandchild cannot apply for an order for provision because the deceased did not die wholly intestate.

10. The Act, s.3(1A).

11. N.Z. Act, ss.3(1)(c),(2),4.

12. S.A. Act, ss.6(h), 7(1).

13. W.A. Act, ss.4(1),6(1) and 7(1)(d).

14. A.C.T. Ord., ss.7(1)(e), (3), 8(1).

15. N.T. Ord., ss.7(1)(e),(3), 8(1).

4.8 In short, our answer to the question put in paragraph 4.1 is that there should be no differences between the application of the Act to cases where a deceased person leaves a will and to cases where he does not. A widower should be an eligible applicant on the death intestate of his wife and a grandchild should be no less an eligible applicant where his grandparent leaves a will than where his grandparent dies intestate. We consider the position of a grandchild in more detail in Part 6.¹⁶

16. See paragraphs 6.58 - 6.59.

PART 5. - THE PRIMARY CONDITION OF
THE COURT'S JURISDICTION.

5.1 The Court may make an order under the Act only where an applicant qualified by relationship is left without adequate provision for his proper maintenance, education or advancement in life:¹ "It is upon the fulfilment of the condition expressed by these words that the authority of the Court to intervene depends, its 'jurisdiction' as it is commonly expressed ..."²

5.2 In 1938, the Privy Council, in Bosch's Case,³ considered the language and effect of section 3(1) of the Act. It said⁴ -

"The first thing to be noticed is that the powers given to the Court only arise when any of the persons mentioned is left without adequate provision for his or her proper maintenance, which word will be used in this judgment where necessary as including education and advancement. The use of the word 'proper' in this connection is of considerable importance. It connotes something different from the word 'adequate'. A small sum may be sufficient for the 'adequate' maintenance of a child, for instance, but, having regard to the child's station in life and the fortune of his father, it may be wholly insufficient for his 'proper' maintenance. So, too, a sum may be quite insufficient for the 'adequate' maintenance of a child and yet may be sufficient for his maintenance on a scale that is 'proper' in all the circumstances. A father with a large family and a small fortune can often only afford to leave each of his children a sum insufficient for his 'adequate' maintenance. Nevertheless, such sum cannot be described as not providing for his 'proper' maintenance, taking into consideration 'all the circumstances of the case' as the sub-section requires shall be done. In the next place, it is to be observed that, when the condition precedent to the exercise of the powers given by the sub-section is shown to be fulfilled, those powers extend to making such provision as the Court thinks fit for 'such' maintenance, that is to say, for proper maintenance.

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Their Lordships agree that in every case the Court must place itself in the position of the

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1. The Act, s.3.
 2. Per Dixon C.J. in Elore v. Lang (1960) 104 C.L.R. 124, 128.
 3. [1938] A.C. 463.
 4. Id., 476, 478-9.

testator and consider what he ought to have done in all the circumstances of the case, treating the testator for that purpose as a wise and just, rather than a fond and foolish, husband or father. This no doubt is what the learned judge meant by a just, but not a loving, husband or father. As was truly said by Salmond, J. in In re Allen (Deceased, Allen v. Manchester:⁵ 'The Act is designed to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making proper and adequate provision after his death for the support of his wife and children, having regard to his means, to the means and deserts of the several claimants, and to the relative urgency of the various moral claims upon his bounty. The provision which the Court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances.'."

5.3 The words emphasised in paragraph 5.1 are used in comparable legislation in the Australian Capital Territory, the Northern Territory and South Australia.⁶ They may be contrasted with the words without adequate provision for his proper maintenance and support used in the comparable legislation of Victoria, Tasmania, Queensland and New Zealand.⁷ Subject to an exception to be mentioned in paragraph 5.5, these differences of expression are verbal only and do not go to matters of substance.⁸

5.4 In this context, the observations of Fullagar J. are pertinent⁹ -

"... New Zealand was the pioneer in the field of what has come to be known as testator's family maintenance legislation. It is now a much ploughed, if not very well harrowed, field. Legislation of a similar character is now in force in each of the six Australian States, in Canada, and in England. It is perhaps unfortunate that each successive draftsman has thought that he could do a little better than any of his predecessors. Some have not been

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- 5. [1922] N.Z.L.R. 218, 220.
 - 6. A.C.T. Ord., s.8(1); N.T. Ord., s.8(1); S.A. Act, s.7(1).
 - 7. Vict. Act, s.91; Tas. Act, s.3(1); Qld Act, s.90(1); N.Z. Act, s.4(1).
 - 8. See Kitto J. in Worlidge v. Doddridge (1957) 97 C.L.R. 1, 13, 14.
 - 9. Coates v. National Trustees Executors and Agency Co. Ltd. (1956) 95 C.L.R. 494, 517, 518.

satisfied with a first attempt, and amendments have been made. So we find verbal differences between this Act and that, and on these differences may be founded legitimate arguments that different legal effects result. But it cannot be doubted that the general object in view was the same in all cases. When, therefore, we are called upon, as we often are, to consider, in relation to one of the statutes, decisions on one or more of the others, the searching out of nice distinctions is to be deprecated, and the approach which presumes uniformity of intention is the correct approach. The presumption cannot, of course, be conclusive, but, the end being the same and the means being the same, I think that the various statutes should, so far as possible, be given the same effect."

5.5 The exception to which we refer in paragraph 5.3 flows from the use in section 3 of the Act of the expression advancement in life -

"The presence of the words 'advancement in life' in the New South Wales Act in addition to words 'maintenance and education' is not unimportant. These words appear in some but not all of the corresponding Acts and Ordinances of the other States and territories of the Commonwealth. 'Advancement' is a word of wide import. If found in a trust instrument it can often be confined by the context to the early period of the life of a beneficiary. But in the Testator's Family Maintenance and Guardianship of Infants Act no such limitation can be implied because the Act applies to children of any age."¹⁰

5.6 And, in Worlidge v. Doddridge, when considering the words maintenance and support used in the Tasmanian Act, Kitto J. observed¹¹ -

"This is not the occasion to consider matters involving substantial capital investment, such as the purchase for an applicant of a business or an income-producing property or a home. The provision of assets such as these is more likely to be within the power of the court under statutes which speak of advancement in life than under Acts like the Tasmanian and New Zealand which refer only to maintenance and support..."

But he added¹² -

"... I am not prepared to say that such a provision is never within the power conferred by the latter Acts."

5.7 We have considered whether we should propose

10. Per Dixon C.J. and Williams J. in McCosker v. McCosker (1957) 97 C.L.R. 566, 575.

11. (1957) 97 C.L.R. 1, 19.

12. Ibid.

changes in the Act's jurisdictional formula: whether, for example, we should propose the adoption of the Western Australian words maintenance, support, education or advancement in life¹³ or the adoption of the English word maintenance.¹⁴ We do not make any proposal for change. Section 3(1) of the Act has been used for more than fifty years. It and its counterparts have been closely analysed by superior courts and its purpose and application are well understood. Legislative intervention at this stage would not, in our view, add to the utility of the Act. Indeed it may do harm. But we invite comment.

13. W.A. Act, s.6(1).

14. U.K. Act, s.1(1).

PART 6. - WHO SHOULD BE ELIGIBLE TO
APPLY FOR PROVISION?

6.1 In cases of testamentary succession, eligible applicants are the widow, widower and children of the testator.¹ In cases of intestate succession, eligible applicants are the widow and children, but not the widower, of the intestate and 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 We have already proposed³ that there should be no difference between the application of the Act to cases of testamentary succession and to cases of intestate succession. And there is, we believe, no case for narrowing the class of eligible applicants.

6.2 Here we consider who might be included in any enlarged class of eligible applicants.

6.3 The Act of 1916, though speaking in its long title of "family", was confined in its operative section to widows, husbands and children. It was enlarged in 1954 to include the grandchildren referred to in paragraph 6.1. We now consider whether in 1974 it should be further enlarged. The question is who, on present day ideas, should be regarded as being amongst the family of a deceased person for the purposes of the Act.

6.4 We presume that the power of the Court to override what otherwise would be the operation of a will or the rules relating to intestacy is a power which people agree the Court should continue to exercise for the benefit of widows,

1. The Act, s.3(1).
2. The Act, s.3(1A).
3. Paragraph 4.8.

children and, in some instances, widowers and grandchildren. Indeed, we presume that there is no objection in principle to that power being used in aid of other persons: the claims of any particular class of persons being a matter for assessment in each case.

6.5 To avoid giving any impression that we would plunder testamentary freedom, we express our agreement with the view that in the case of a widow or a young child the Court is dealing with a person who is, as a rule, dependent upon the testator or the intestate and, as a rule, has a claim to provision out of the estate. But, in general, other persons do not have reasonable expectations of provision out of the estate of the deceased person and some special need or some special claim must be shown to justify intervention by the Court.⁴ And, in considering who might be included in any enlarged class of eligible applicants, we do not have in mind the case of a person who has worked for, or rendered services to, a deceased person and who has been promised a testamentary benefit but who, in the event, has not received the benefit. Compensation in these cases is, in our view, more properly the concern of an Act such as The Law Reform (Testamentary Promises) Act 1949 of New Zealand than of the Testators' Family Maintenance and Guardianship of Infants Act.

6.6 We consider the claims of -

1. The surviving lawful spouse of a deceased person, whether or not a dependant of the deceased, and persons who, for the purposes of the Act, might be put in a position akin to that of a lawful spouse.
2. A surviving lawful child of a deceased person, whether or not a dependant of the deceased, and persons who, for the purposes of the Act,

4. See Fullagar J. Re Sinnott [1948] V.L.R. 279, 280.

might be put in a position akin to that of a lawful child.

3. A person, other than a surviving lawful spouse or child of a deceased person, who is a dependant of the deceased.
4. A person, other than a surviving lawful spouse or child of a deceased person, who is not a dependant of the deceased but who is a person for whose maintenance, education or advancement in life the deceased had a moral duty at the time of his death.
5. A person, other than a surviving lawful spouse or child of a deceased person, who had a reasonable expectation that provision would be made for him out of the estate of the deceased where the person concerned had, at any time during the lifetime of the deceased, been a dependant of the deceased and a member of his household.

A SURVIVING SPOUSE

6.7 We do not question the right of a surviving lawful wife to commence proceedings under the Act in relation to the estate of her deceased husband. And we have proposed that the right of a surviving husband be the same as that of a surviving wife.⁵ Now we consider whether, for the purposes of the Act, the status of a surviving spouse should be given to -

1. A divorced spouse.
2. A remarried spouse.
3. A party to a de facto marriage.

In this context, the use of the words "spouse" and "marriage" is wrong. Nonetheless, for the sake of convenience, we use them: in doing so we trust we do not put a verbal obstacle in the way of clear discussion.

5. See paragraphs 4.3 and 4.4.

A Divorced Spouse

6.8 Where we speak of a divorced spouse, we include a person whose marriage has been annulled. "Divorced spouse" does not connote that the divorce was granted on the petition of the other spouse.

6.9 In New South Wales, a divorced spouse is not an eligible plaintiff.⁶

6.10 In South Australia,⁷ Western Australia,⁸ the Australian Capital Territory,⁹ and the Northern Territory¹⁰ a former spouse, whether a man or a woman, may commence proceedings under the relevant Act or Ordinances. In Victoria,¹¹ Queensland¹² and Tasmania¹³ a divorced wife is an eligible plaintiff but she must have been in receipt of or entitled to receive payments of alimony or maintenance from the deceased former husband. This condition applies also to applicants in Western Australia, the Australian Capital Territory and the Northern Territory. In Tasmania, the divorced wife must not have remarried.¹⁴

6.11 In the United Kingdom, under section 26 of the Matrimonial Causes Act 1965, a former spouse who has not remarried may apply for maintenance from the estate of the deceased former spouse on the ground that it would have been reasonable for the deceased to make provision for the survivor and that the deceased has made no provision or has not made reasonable provision for his or her maintenance. Section 26 derives from recommendations made in the Report of the Royal Commission on Marriage and Divorce.¹⁵ The Report said -

6. See, for example, Hart v. Hart [1968] 3 N.S.W.R. 43, 45.

7. S.A. Act, s.6(b).

8. W.A. Act, s.7(1)(b).

9. A.C.T. Ord., s.7(1)(b),(2),(7). 12. Qld Act, s.89.

10. N.T. Ord., s.7(1)(b),(2),(7). 13. Tas. Act, s.3A.

11. Vict. Act, s.91.

14. Tas. Act, s.3A.

15. (1956)Cmd. 9678.

"522. Maintenance payments made to a wife under an order of the court cease on the death of the husband or former husband, except where the marriage has been dissolved or annulled and the wife has obtained an order for a secured provision for her life. Where the marriage was still existing at the time of the husband's death the wife has the rights conferred by law on a married woman in respect of her husband's estate. Thus, she may claim under the Inheritance (Family Provision) Act, 1938, on the ground that his will does not make suitable provision for her, or, if he died intestate, she will inherit the share of his estate due to her under the law governing intestate succession. If the marriage had been dissolved or annulled, the wife has no similar rights in respect of her former husband's estate, nor does her right to apply for provision to be made for her consequent upon the divorce or annulment carry over against the estate.¹⁶

523. Several witnesses drew attention to the hardship which can arise when a wife who has been entirely dependent on the maintenance her husband has been paying her, is left destitute on his death. It may well be that, although she was not able to obtain secured maintenance at the time of the divorce because he had then no resources beyond his earnings, yet, unknown to her, he has later acquired substantial capital upon which she has no claim.

524. We consider it reasonable that the deceased's estate should be made liable for the support of a former spouse in such circumstances. The position is similar to that arising on an application under the Inheritance (Family Provision) Act, 1938. There is the same need to give careful consideration not only to the interests of the applicant but also to the interests of the deceased's dependants and the person or persons who apart from any order of the court would be entitled to the property under the terms of the will or in accordance with the law of intestate succession. We recommend, therefore, that where the marriage has been dissolved or annulled and one spouse has since died, the other spouse should have the right to apply for provision to be made for her or him out of the deceased's net estate and the court should have power to make such order as it thinks fit. The court should be able to order that periodical payments be made out of income from part of the estate, such payments ceasing on the re-marriage or death of the person to whom they are to be made, or that a lump sum payment be made out of the capital. A spouse should be able to apply whether or not an order for maintenance has been made against the deceased spouse in his or her lifetime,

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16. Dipple v. Dipple [1942] P.65. But when an order for a secured provision has been made and the subject matter to be provided as security has been agreed upon in the husband's lifetime, the court will require his legal personal representatives to execute the necessary deed to give effect to the court's order, Hyde v. Hyde [1948] P.198; see also Mosey v. Mosey and Barker [1955] 2 W.L.R. 1118.

but if no order has been made, then the reason why no application was made, or why, if made, it was refused, would be one of the matters to be taken into consideration by the court. In our opinion, the court should also be guided by the same general principles which relate to applications under the Inheritance (Family Provision) Act, 1938, as amended by the Intestates' Estates Act, 1952, in so far as such principles are appropriate."

6.12 In New Zealand, under sections 40 and 41 of the Matrimonial Proceedings Act 1963, 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 husband's estate.

6.13 In our view, a person should not be able to commence proceedings under the Act by virtue only of being the divorced spouse of a deceased person. In saying this, we do not say that a divorced spouse should never be able to commence proceedings under the Act in relation to the estate of a deceased former spouse. Later in this Paper,¹⁷ we recommend that any person who satisfies the conditions stated in paragraph 6.6.5 (a reasonable expectation, sometime dependency and sometime membership of the deceased's household) should be an eligible applicant. Some former spouses will be able to satisfy these conditions. Some will not.¹⁸ But, to us, after a marriage is dissolved the rights under the Act of the parties to the marriage should turn on circumstances peculiar to them, not on their former status.¹⁹

6.14 In short, we say that a divorced person should be an eligible applicant under the Act only where he or she can fulfil the requirements noted in paragraph 6.13. In that event, we would not distinguish between men and women

17. See paragraphs 6.70 - 6.72.

18. See, for example, Re Mayo [1968] 2 N.S.W.R. 709, 712.

19. See, generally, Lord Atkin in Fonder v. St. John-Mildmay [1938] A.C. 1, 16-17.

or between those who have remarried and those who have not. But we would not give any special standing to a divorced person as such. We invite views to the contrary.

6.15 In proposing that in some circumstances a divorced person should be an eligible applicant for provision out of the estate of a deceased former spouse, we have had regard to the maintenance provisions of the Matrimonial Causes Act 1959-1973 (Cth).²⁰ In a constitutional sense, there is no inconsistency between this State's Testators' Family Maintenance Act and the Commonwealth's Matrimonial Causes Act and the adoption of our proposal will not, on the present state of the authorities, lead to any inconsistency between them.²¹

6.16 The Commonwealth Act does not advert to the matter of maintenance out of the estate of a deceased former spouse and it is said that orders under that Act "may provide only illusory protection to the divorced spouse".²² This comment is prompted by the different reasons given for the decision in Johnston v. Krakowski.²³ In that case, a majority of the High Court seems to have held that an order for maintenance under the Commonwealth Act is purely personal and, whatever its terms, comes to an effectual end upon the death of one of the parties.²⁴ In this situation, we think it desirable that the Act should supplement the Commonwealth Act. If adopted, our proposal will have that effect. The fact that an order for maintenance has been made under the

20. See Part VIII of that Act.

21. Johnston v. Krakowski (1965) 113 C.L.R. 552.

22. Per Hutley J.A. in Lake v. Quinton [1973] 1 N.S.W.L.R. 111,139.

23. (1965) 113 C.L.R. 552.

24. See Jacobs P. in Lake v. Quinton [1973] 1 N.S.W.L.R. 115, 117 but see Street C.J. in Eq. 133.

Commonwealth Act, or that a deed satisfying the terms of section 87(1)(k) of that Act²⁵ has been sanctioned by the Court, will be a factor to be considered in deciding whether an order for provision should be made under the State Act, and, if so, what the nature and amount of the order should be.²⁶

6.17 We note, incidentally, that a person is not prevented from obtaining an order under the Act because he has covenanted not to apply for an order: public policy, as settled by the courts, overrides the covenant.²⁷ On the other hand, a person may be prevented from making an application for maintenance under the Commonwealth Act because of his covenant not to do so: public policy, as stated in that Act, is that a covenant which satisfies section 87(1)(k)²⁸ and is sanctioned by the Court, is an

25. "The court ... may ... sanction an agreement for the acceptance of a lump sum or periodic sums or other benefits in lieu of rights under an order made in respect of a matter referred to in any of the last three preceding sections, or any right to seek such an order ..."

26. We note that section 61 of the Family Law Bill 1974 (Cth) provides -

"(2) Subject to sub-section (3), an order with respect to the maintenance of a party to a marriage or a child of a marriage ceases to have effect upon the death of the person liable to make payments under the order.

(3) Sub-section (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 but may be varied or discharged on the application of the legal personal representative by a court having jurisdiction under this Act."

27. Lieberman v. Morris (1944) 69 C.L.R. 69.

28. See footnote 25.

enforceable covenant.²⁹ If the law provides the means for a person to avoid claims for family maintenance during his lifetime, it can be argued that it should provide like means for a person to avoid claims for family maintenance after his death. We return to this question in Part 17.

A Remarried Spouse

6.18 In New South Wales, it has been held that a spouse who remarries after the death of a former spouse, but before making an application under the Act, does not lose the right to apply for an order for provision.³⁰

In Victoria, the position is not clear. Sholl J. has observed³¹ -

"If Parliament really meant to say that a person left a widow or widower can apply notwithstanding remarriage before the application, it ought to make its meaning much more clear. The ambiguity should be removed as soon as possible."

In New Zealand, the same question has been the subject of conflicting judicial opinions.³² Sholl J., in speaking of these conflicts, said³³ -

"The reasoning of the Court in Bailey's Case [which decided that a remarried spouse is an eligible applicant] may be thought to be not altogether satisfactory. It depends, as is expressly said, on the presence of the word 'wife' in the New Zealand section, and the judgment concedes that the position might be different in the case of a statute using the word 'widow'."

The New South Wales Act, in section 3(1), uses the word "widow" and the word "wife". We include in the draft Bill a section which adopts our understanding of the decision in Re Claverie.³⁴ We do this to avoid any possible

29. Per Barwick C.J. in Felton v. Mulligan (1971) 124 C.L.R. 367, 375.

30. Re Claverie [1970] 2 N.S.W.R. 380.

31. Re De Feu [1964] V.R. 420, 426.

32. Newman v. Newman [1927] N.Z.L.R. 418 and Bailey v. Public Trustee [1960] N.Z.L.R. 741.

33. Re De Feu [1964] V.R. 420, 423.

34. [1970] 2 N.S.W.R. 380. See draft Bill, s.6(2)(a).

argument in the future about the correctness in law of that decision.

6.19 Implicit in the proposal put in paragraph 6.18 is our agreement with what we term, for convenience, the policy of Re Claverie: remarriage should not deprive a surviving spouse of a right to apply for provision out of the estate of his or her deceased spouse. Differing views can be held about this question and we summarise some of them in the three paragraphs which follow.

6.20 It can be said against the policy of Re Claverie that the estate of a dead person should not be liable to maintain the spouse of a living person. Or, why should one man's estate be liable to maintain another man's wife. When a widow remarries she should abandon her claims to provision out of the estate of her former husband. If she does not, in the event of the early death of her second husband, she may have claims under the Act against the estates of two husbands. The Act should not contemplate the possibility of such a situation occurring. To a substantial extent, value judgments are needed to assess the merits, if any, of the views put in this paragraph. Different persons will make different judgments.

6.21 On the other hand, the claims of a widow under the Compensation to Relatives Act, 1897, survive her remarriage.³⁵ The support given to her by her new husband may be taken into account as limiting or bringing to an end the pecuniary loss suffered by her through the death.³⁶ This, in the context of the Act, is the approach we prefer. In our view, remarriage

35. Willis v. The Commonwealth (1946) 73 C.L.R. 105.

36. See Manning J.A. in Wild v. Eves (1970) 92 W.N. (N.S.W.) 347, 352.

should give rise to questions going to discretion, not questions going to jurisdiction. If every remarried spouse is denied the right to apply for an order for provision, hardship cases will occur. Suppose, for the purpose of illustration, that A and B have been happily married for forty years, that for the last ten years of his life A was nursed devotedly by B, that A dies leaving the matrimonial home to B for life and after her death to a charity. If B remarries and moves from the former matrimonial home, it is better, as we see it, that the Court be able to consider a claim by B for the matrimonial home than that the Court be powerless to intervene on her behalf.

6.22 It can also be said of the policy inherent in Re Claverie that it does not discourage remarriage: no entitlement to apply for an order is lost by a surviving spouse marrying again.

6.23 We note that the Law Commission in England has proposed that remarriage should not automatically bring to an end an order in favour of the surviving spouse made under the United Kingdom Act.³⁷ That Act now provides that orders for provision cease on remarriage.³⁸

A Party to a De Facto Marriage

6.24 Where we speak of a de facto marriage, we include a void marriage (for example, a bigamous marriage).

6.25 In New South Wales, a party to a de facto marriage is not an eligible plaintiff under the Act: he or she is not a widow or widower of the other party.

37. Law Com. Working Paper No.42, para.3.32.

38. U.K. Act, s.1(2)(a).

6.26 In Western Australia, a de facto widow may claim.³⁹ She must satisfy three conditions: first, she must at the time of the death of the deceased have been wholly or partly dependent upon him, secondly, she must ordinarily have been a member of the household of the deceased and, thirdly, she must be a person for whom the deceased, in the opinion of the Court, had some special moral responsibility to make provision.

6.27 In the United Kingdom, the surviving party to a void marriage entered into with the deceased in good faith may apply for family provision.⁴⁰

6.28 In Israel, where a man and a woman have lived as man and wife in a common household although not married to each other, on the death of one of them, if neither of them is then married to another person, a right to maintenance extends to the survivor as if they had been married to each other.⁴¹

6.29 De facto marriages are given statutory recognition in this State in the Workers' Compensation Act, 1936. Section 6 of that Act includes in its definition of "dependants", "a woman ... who for not less than three years immediately before the worker's death, although not legally married to him, lived with him as his wife on a permanent and bona fide domestic basis".

6.30 Whether the Act should recognise de facto marriages is a question which must turn on matters of

39. W.A. Act, s.7(1)(f).

40. Law Reform (Miscellaneous Provisions) Act 1970, s.6(1)-(4).

41. Succession Law, 5725-1965, c.4, s.57(c).

public policy. But men and women do live together in extra-marital unions. If injustice (in the sense of avoidable hurt) may flow from the Act not acknowledging that fact, is it better for the community to remove the cause of the injustice (and in so doing offend some of its members) or to permit the injustice to continue? And, is it right that the Court can invade the testamentary provisions of a married person but not those of a person who declines to marry but nonetheless assumes marriage-like obligations? A person determined to preserve his testamentary freedom is better placed to succeed if he does not marry. Should public policy countenance this situation when public policy, through the Act, recognises that not all testators are wise and just?

6.31 We do not believe that acquiring the status of a de facto spouse should be sufficient, without more, to attract the provisions of the Act. Notwithstanding some contemporary comments to the effect that marriage may soon be less than fashionable, we think that most people are concerned to preserve the traditional concept of marriage. Yet, in the case of workers' compensation legislation, most people accept that benefits which flow from marriage might sometimes flow from a de facto marriage.⁴² We believe that the same people would consider it just that the benefits of the Act should be available to some, but not to all, de facto spouses.

6.32 In our view, a de facto spouse who can satisfy the three conditions mentioned in paragraph 6.6.5 (reasonable expectation of the deceased's bounty, sometime dependency)

42. See para.6.29.

and sometime membership of the deceased's household) should be an eligible applicant. Under the head of reasonable expectation, the Court can evaluate the claims of those who have lived together for, say, six months or six years: it can, without difficulty, distinguish between a casual liaison and a domestic household situation.

A SURVIVING CHILD

6.33 A surviving lawful child of a deceased person is an eligible applicant under the Act, whether or not he was a dependant of the deceased person.⁴³ Although this proposition is not the law in some other places,⁴⁴ we do not question its merits.

6.34 We now consider the special positions of -

1. A posthumous child.
2. A legitimated child.
3. An adopted child.
4. A stepchild.
5. An illegitimate child.
6. A grandchild.

A Posthumous Child

6.35 In our view, a posthumous child should, for the purposes of the Act, be treated as a child of ordinary status. We think that there can be no valid argument to the contrary. We raise the matter only because the Act makes no specific reference to children of this class but specific reference is made to them in the Ordinances of the Australian

43. See, for example, Pontifical Society for the Propagation of the Faith v. Scales (1962) 107 C.L.R. 9.

44. See, for example, the U.K. Act which provides that "(b) a daughter who has not been married, or who is, by reason of some mental or physical disability, incapable of maintaining herself; (c) an infant son; or (d) a son who is, by reason of some mental or physical disability, incapable of maintaining himself" are the only children who may apply (U.K. Act, s.1(1)).

Capital Territory⁴⁵ and of the Northern Territory⁴⁶ and in the Acts of Western Australia,⁴⁷ England and Wales,⁴⁸ Alberta,⁴⁹ Newfoundland,⁵⁰ New Brunswick,⁵¹ Manitoba,⁵² Nova Scotia⁵³ and Saskatchewan.⁵⁴ The question is whether there is a legal need for the Act to make this specific reference.

6.36 There is a rule of construction that words referring to children in existence at a particular time may be read as large enough to include a child conceived before but born after that time if so to read them would secure to the child a benefit to which it would have been entitled if then born, and if it appears that such a child is within the reason and motive of the gift.⁵⁵ This rule has been applied to bring posthumously born children within the provisions of the Workers' Compensation Acts of England and New South Wales,⁵⁶ and within the provisions of Lord Campbell's Act.⁵⁷ We have not, however, found any case under the New South Wales Act where the rights of a person

45. A.C.T. Ord., s.7(8).

46. N.T. Ord., s.7(8).

47. W.A. Act, s.7(1)(c).

48. U.K. Act, s.5(1).

49. Alta Act, s.2(b)(i).

50. Nfld Act, s.2(a)(ii).

51. N.B. Act, s.1(a).

52. Man., Act, s.2(a)

53. N.S. Act, s.1(a)(ii).

54. Sask. Act, s.2(1)(a).

55. Elliot v. Joicey [1935] A.C. 209, 233-4.

56. Williams v. Ocean Coal Co. Ltd. [1907] 2 K.B. 422, Schofield v. Orrell Colliery Co. Ltd. [1909] 1 K.B. 178, Connare v. Pistola [1943] W.C.R. 25, Redfern v. Hearne Pty. Ltd. [1971] W.C.R. 208.

57. The George and Richard (1871) L.R. 3 A. & E. 466.

born after the death of a parent have been in issue.⁵⁸
 We think that the Act would be construed so as to bring a posthumous child within its application.⁵⁹ But we may be wrong. The draft Bill deals specifically with the matter.⁶⁰

A Legitimated Child

6.37 "The principal provisions of Pt.VI of the Act [the Marriage Act 1961-1973 (Cth)] provide for legitimacy in a case where parents of a child born before marriage marry afterwards (s.89) and in a case where a child is born to parents whose marriage was void but was believed by one of them on reasonable grounds to be a valid marriage (s.91). There is also a provision legitimating a child born before marriage to parents who marry outside Australia where, according to the law of the father's then domicile, the marriage would legitimate an earlier-born child (s.90). Provision is also made for a person to obtain a declaration of legitimacy (s.92)."⁶¹

6.38 A child to whom section 89, 90 or 91 of the Marriage Act 1961-1973 (Cth) is applied is for all purposes the legitimate child of his parents. Hence he is an eligible plaintiff under the Act.⁶²

6.39 Part VI of the Marriage Act 1961-1973 (Cth) commenced on 1st September, 1963. Before that date the

58. In Queensland, on 3rd May, 1973, Williams J. held that a posthumous child was within the application of the Qld. Act (In the matter of the Will of James Lawrence deceased) [1973] Qd.R. 201.

59. So too do Wright (1966) p.14 and Mason and Tuthill (1929) p.50.

60. s.6(2)(b)(ii).

61. Per Menzies J. in Attorney-General for the State of Victoria v. The Commonwealth (1961-62) 107 C.L.R. 529, 571-572.

62. The S.A. Act (1972) does, however, specifically mention a legitimated child as a person entitled to claim under that Act (s.6(e)).

Legitimation Act, 1902, stated the statute law of this State on legitimation. Under that Act, a child born before marriage could, on the subsequent marriage of his parents, acquire all the rights of a child born in wedlock and so be an eligible plaintiff under the Act if, at the time of the birth of the child, there was no legal impediment to the intermarriage of his parents. This last mentioned condition is not mentioned in the Commonwealth Act.

6.40 We raise the matter of legitimation only to enquire whether in practice any difficulties are encountered in cases involving legitimated children: difficulties flowing from the substantive law contained in the Commonwealth Act or from the registration provisions contained in the State Act.

6.41 We have considered the extent to which State law might operate in the face of legitimation, or a declaration of legitimacy, by operation of Commonwealth law. The High Court in The Attorney General for the State of Victoria v. The Commonwealth of Australia⁶³ was divided on this question. Kitto, J. (one of the majority) said⁶⁴ -

"... I should have thought the learned Solicitor-General for the Commonwealth was right when he said that if a State legislature should consider that the extension by ss.89 and 90 (and s.91 also) [Marriage Act 1961-1973 (Cth)] of the class of persons to be recognized as lawful children results in any of its laws taking effect in a manner of which it disapproves the remedy is in its own hands. A State law which refers to 'children', for example, might be amended so as to limit the class to children born or conceived during the marriage."

On the other hand, Dixon C.J. (one of the minority) said⁶⁵ -

"Consistently, however, with the argument for the Commonwealth, a concession was made or suggested on behalf of the Commonwealth which it is difficult to

63. (1961-62) 107 C.L.R. 529.

64. (1961-62) 107 C.L.R. 529, 553.

65. Id., 546-547.

accept. The concession was that although in face of s.89 and s.91 State law could not proceed on a basis that a child covered by those provisions was not a legitimate child of his parents - for to do so would be to bring invalidity under s.109 of the Constitution - yet the State could enact laws which would distinguish between the legitimate and (if one may use the expression) those federally legitimated, and mould their inheritance laws and other such laws to prefer the former and perhaps thus consequentially or impliedly exclude the latter. It is not clear how far the suggested concession went: for it was not developed. But it is necessary to say that, unless by a very restrictive and unnatural interpretation of s.89 and s.91, it seems impossible without doing violence to the application commonly ascribed to s.109 to understand how such a result could be justified."

6.42 We think that a legitimated child is and should be an eligible applicant. To us, the problem adverted to in paragraph 6.41 is theoretical. If there is a contrary view, we will be pleased to have it put to us.

An Adopted Child

6.43 In our view, an adopted child should, for the purpose of the Act, be treated as a child of ordinary status. As we said in the case of a posthumous child, we think that there can be no valid argument to the contrary. Again, we raise the matter only because the Act makes no specific reference to children of this class but specific reference is made to them in the comparable Acts of some other places.⁶⁶ The question is whether there is a legal need for the Act to make this specific reference. We answer "no" to this question.

6.44 Shortly stated, the Adoption of Children Act, 1965, provides that for the purposes of the laws of New South Wales -

1. A child adopted according to the law of this State is treated as if born to the adopter or adopters in lawful wedlock.⁶⁷
2. A child adopted in another State or Territory of

66. See, for example, U.K. Act, s.5(1), W.A. Act, s.4(1), S.A. Act, s.6(d), Tas. Act, s.2(1) and Qld Act, s.89.

67. s.35.

the Commonwealth according to the law of that other State or Territory is treated (so long as the adoption is not rescinded under the law in force in that other State or Territory) as if he had been adopted in New South Wales on the date on which the adoption was effected.⁶⁸

3. When specified conditions are satisfied, a child adopted in a country outside the Commonwealth and the Territories of the Commonwealth is treated (so long as the adoption is not rescinded under the law of that country) as if he had been adopted in New South Wales on the day on which the adoption was effected.⁶⁹

6.45 When read with the cases decided on comparable statutes,⁷⁰ the Adoption of Children Act, 1965, appears to resolve any difficulty touching the eligibility of adopted children to commence proceedings under the Act. Our draft Bill makes no special provision for them. If, however, the experience of others indicates a need for special provision we wish to be told.

6.46 We note, incidentally, that an adopted child cannot apply for an order for provision out of the estate of a natural parent.^{70a} We propose that this should continue to be the law.

A Stepchild

6.47 No provision is made in the Act for stepchildren. Provision is made for them in New Zealand,⁷¹ Queensland,⁷²

68. s.45.

69. s.46.

70. See, for example, Re Pratt Deceased [1964] N.S.W.R. 105 and the cases therein referred to and Re Yarrell [1956] N.Z.L.R. 739.

70a. Adoption of Children Act, 1965, s.35(1)(b). But see s.35(2).

71. N.Z. Act, ss.2(1), 3(1)(d).

72. Qld Act, s.89.

Tasmania,⁷³ South Australia,⁷⁴ the Australian Capital Territory⁷⁵ and the Northern Territory.⁷⁶ In each of the three last mentioned places and in New Zealand a condition that the children were maintained by the deceased immediately before his death is imposed.

6.48 Our present view is that a stepchild should be an eligible applicant, but only where conditions of reasonable expectation of the deceased's bounty, sometime dependency and sometime membership of the deceased's household, are satisfied.⁷⁷ We do not think that a stepchild of a deceased person can, without more, be equated for the purposes of the Act with a child of the deceased. The relationship of parent and child is always a special relationship. The relationship of parent and stepchild may often develop into a special relationship but it will not always do so. Where it does do so, the conditions we specify should not often disadvantage the stepchild. There will, of course, be cases where the conditions operate too restrictively. These cases will, we believe, be fewer than the cases where the relationship between the deceased and the stepchild does not develop into a special relationship. We are reluctant to propose the encroachment on testamentary freedom which might result from equating, in all cases, stepchild with child.

An Illegitimate Child

6.49 An illegitimate child is not an eligible plaintiff under the Act.⁷⁸

73. Tas. Act, s.2(1).

74. S.A. Act, s.6(g).

75. A.C.T. Ord., s.7(1)(d),(2),(7).

76. N.T. Ord., s.7(1)(d),(2),(7).

77. See paragraphs 6.6.5 and 6.6.9 - 6.7.3.

78. See, for example, In re Pritchard (1940) 40 S.R. (N.S.W.) 443.

6.50 In 1968 (the last year for which we have figures) the number of extra marital births in this State was 6,622, which represented 8.11% of the total live births.⁷⁹ Many of these children may have been adopted and many of them may have been legitimated, but nonetheless we are here considering the rights of a substantial number of persons.

6.51 Subject to varying conditions, illegitimate children may obtain orders for family provision in, amongst other places, the United Kingdom,⁸⁰ New Zealand,⁸¹ Queensland,⁸² South Australia,⁸³ Victoria,⁸⁴ British Columbia,⁸⁵ Nova Scotia⁸⁶ and Saskatchewan.⁸⁷

6.52 In New Zealand, the Status of Children Act 1969 removes, for all the purposes of the law of that country, the legal disabilities of illegitimate children. In South Australia, in 1972, the Law Reform Committee made recommendations relating to illegitimate children.⁸⁸ With some modifications, the Committee's recommendations follow the pattern of the New Zealand legislation. In Victoria, a draft Bill has been prepared "To remove the legal disabilities of children born

79. Official Year Book of N.S.W. No.61, 1971, p.294.

80. Family Law Reform Act 1969, s.18.

81. Status of Children Act 1969, ss.3, 7(1)(a),(b).

82. Qld Act, ss.89, 90.

83. S.A. Act, s.6(f)(i),(ii),(iii).

84. Vict. Act, s.91.

85. B.C. Act, s.3(2).

86. N.S. Act, ss.1(a)(iii), 2(1).

87. Sask. Act, ss.2(1)(a), 3(1),(2).

88. Eighteenth Report of the Law Reform Committee of South Australia.

out of wedlock". It too is along the lines of the New Zealand legislation. We understand that the Standing Committee of the Commonwealth and State Attorneys-General have considered the Victorian Bill and that the Commonwealth Government will be raising the matter with the Law Council of Australia.

6.53 Clearly there is a trend towards equating the rights of an illegitimate child with those of a legitimate child.⁸⁹ We agree that there is a strong case that this should be so. In the meantime, the position of an illegitimate child under the Act is unsatisfactory. We propose that the Act be amended so that for its purposes the disabilities of illegitimacy do not attach to an illegitimate child.

6.54 As we see it, the case for making an illegitimate child an eligible plaintiff under the Act is strong.

6.55 So far as a woman is concerned, we say that there should be no distinction between the rights under the Act of her legitimate and illegitimate children.

6.56 Where a father leaves an illegitimate child, the paternity of which he has admitted or of which a court has been sufficiently satisfied to make an affiliation order, the position may be less clear. Other factors may need to be considered. Did, for example, the illegitimate child at some time form part of his father's household? If he did, should the Act say that that child has fewer rights than a legitimate child within the same household? We think that it should not. But what of the case where the illegitimate child

89. And see, generally, Krause (1971) Chs.6 and 7 and Levene (1973).

has never formed part of his father's household? Can it then be said, without more, that the relationship of father and child is one that gives rise to moral duties enforceable by the Court? Men against whom affiliation orders have been made in contested proceedings may answer "no" to this question. And men who have admitted paternity of a child may give the same answer. They are likely to say that they are better placed than anyone else to assess the extent of their duty to their illegitimate child or children. But is this the right answer? We do not think so.

6.57 To us, the problem must be seen from the viewpoint of the child, not from the viewpoint of the father nor from the viewpoint of those persons who argue, in their terms, that the sins of a father may be visited upon his children. The responsibility of a father for his child is of its nature a special responsibility. The fact that it flows from an extra-marital union is, to us, irrelevant. The child counts, not the circumstance of his conception. Where a man dies leaving an illegitimate child, we would make that child an eligible applicant under the Act on the same basis as a legitimate child. The details of this proposal, including those touching the difficult problem of proof, are discussed in the notes to the draft Bill.⁹⁰

A Grandchild

6.58 As noted in paragraph 4.6, the Court may make

90. See paragraphs 21.14 - 21.18.

provision for children (being under the age of twenty-one years) of any child of an intestate who died before the intestate, but grandchildren of a testator may not claim under the Act.

6.59 Our view is that a grandchild who cannot satisfy conditions of reasonable expectation of the deceased's bounty, sometime dependency and sometime membership of the deceased's household,⁹¹ should not be an eligible applicant. Adoption of this view may deprive some grandchildren of a right they have under the existing law. But, to us, the comments we made in the context of stepchildren⁹² apply to grandchildren.

A DEPENDANT OF A DECEASED PERSON

6.60 A person other than the surviving spouse or a surviving child of a deceased person may be a dependant of the deceased. A parent, for example, is often dependent upon a child or children.

6.61 In Ontario, Western Australia and the United Kingdom the position of a dependant has been examined in relation to the family provision laws of those places.

6.62 In 1967, the Ontario Law Reform Commission said, in a Report on its Family Law Project⁹³ -

91. See paragraphs 6.6.5 and 6.67 - 6.72.

92. See paragraph 6.48.

93. Study on Property Subjects. Vol.III, Part IV, Conclusions Chapter 3, p.539 (rev.). See also Vol.III, Part III, Ch.3, p.478 ff.

"There may also have been other persons whom the deceased was supporting, and he may not have covered these commitments adequately in his will, he may have no will, or his will may be invalid. The court should have a discretion to continue against the estate of the deceased, on such terms as to amount and mode of payment as it may think reasonable, support obligations in existence at the date of death, whether legal or de facto."

And, in 1974, these views were restated in that Commission's recommendations on Family Property Law.⁹⁴

6.63 In 1968, the Law Reform Commission of Western Australia said⁹⁵ -

"... it is possible to argue in favour of the sort of proposal for reform which has been made with regard to the law of Ontario; namely to admit claims by any person who was dependent on the deceased at the time of his death. The idea needs some refinement; it is not basically unacceptable. A possible formula would be - 'any person who has been wholly or partly maintained by the deceased and for whose maintenance the deceased had some moral responsibility at the time of his death'."

6.64 In 1971, the Law Commission in England said⁹⁶ -

"The problem of deciding which relationships should be recognised could be avoided by making the right to apply depend ... not on the applicant's relationship to the deceased but on whether the deceased had in fact been contributing to the support of the applicant. In other words, we think that consideration should be given to extending the right to apply for family provision to all persons who were in fact wholly or partially dependent on the deceased at the time of his death. There are many factors to be considered before such a change could be made. For example, it might be appropriate to attach special weight to the deceased's intentions."

6.65 In this State, statutory recognition of the fact that persons other than the surviving spouse or children may have been dependent upon a deceased person can be found in the Workers' Compensation Act, 1926. Section 6 of that Act contains the following definitions -

94. Part IV, p.112.

95. Working Paper on Testator's Family Maintenance (18th December, 1968) paragraph 66.

96. Published Working Paper No:42 paragraph 3.47.

" 'Dependants' means such of the members of the worker's family as were wholly or in part dependent for support upon the worker at the time of his death, or would but for the incapacity due to the injury have been so dependent, and includes a person so dependent to whom the worker stands in loco parentis or a person so dependent who stands in loco parentis to the worker, and also includes a woman so dependent who for not less than three years immediately before the worker's death, although not legally married to him, lived with him as his wife on a permanent and bona fide domestic basis.

Where the worker, being the parent or grandparent of an illegitimate child, leaves such a child so dependent upon him, or being an illegitimate child, leaves a parent or grandparent so dependent upon him, 'dependants' shall include such an illegitimate child and parent or grandparent respectively."

"'Member of a family' means wife or husband, father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, grand-daughter, stepson, stepdaughter, brother, sister, half-brother, half-sister."

6.66 Our present thoughts are that dependency alone is too broad a base from which to invoke the operation of the Act. The circumstances which can give rise to situations of dependency are endless. Dependants may include the children of a deceased friend, a former employee, or even a charitable organisation. We do not believe that the principle of testamentary freedom should be encroached upon to the extent that would be possible if all dependants became eligible applicants under the Act. And, we do not believe that opportunities for speculative actions should be enlarged to the extent that they would be enlarged if any person claiming to be a dependant of a deceased person could commence proceedings under the Act.

A PERSON FOR WHOM A DECEASED PERSON
HAD A MORAL DUTY TO MAKE PROVISION

6.67 As indicated earlier,⁹⁷ the Court conceives its task under the Act to be one of correcting a breach of a moral duty on the part of a deceased person. The Court

97. Paragraph 3.2.

also recognises that a deceased person may assume moral duties to persons outside his legal family. Where a testator discharges those duties by the provisions of his will, the Court may say that he is entitled to do so even to the detriment of his legal family.⁹⁸ If, to that extent, the Court may recognise moral duties to persons outside the legal family, it may be that the Court should be able to take the further step and make an order for provision out of the estate in favour of those persons. For example, if a de facto wife or an illegitimate child of a deceased person may seek, in opposing proceedings for provision under the Act, to uphold a will on the ground that the deceased was discharging a moral duty in making the will he did make, should not the same person have the right to commence proceedings on the ground that the deceased failed to discharge a moral duty?

6.68 Although in many cases it may be right to say "yes" to the question last asked, we believe that breach of moral duty should not, by itself, attract the provisions of the Act. If all persons to whom a person owed a moral duty thereby became eligible applicants, the scope of the Act would be greatly widened. Under the present law, duty is "but an element, however important an element, that is to be taken into account in weighing all the considerations".⁹⁹ We doubt again that the principle of freedom of testation should be encroached upon to the extent that would be possible if breach of moral duty became, by itself, a sufficient condition of the Court's jurisdiction in proceedings under the Act. And our earlier comment¹⁰⁰ about speculative actions is pertinent.

98. See, for example, Re Ruxton [1946] V.L.R. 334, 337; Re Raybould (1963) 56 Qd.R. 188; Re Gear (1964) 57 Qd.R. 528 and Re Clissold [1970] 2 N.S.W.R. 619.

99. Per Dixon C.J. in Pontifical Society for the Propagation of the Faith v. Scales (1962) 107 C.L.R. 9, 20.

100. Paragraph 6.66.

A PERSON WHO HAD REASONABLE EXPECTATIONS OF THE
DECEASED'S BOUNTY AND WHO HAD BEEN A DEPENDANT
OF THE DECEASED AND A MEMBER OF HIS HOUSEHOLD.

6.69 A person may from time to time support persons other than his spouse and children. Sometimes he may bring them into his home and support them there. In so doing, he does not necessarily assume any moral obligation to support them after his death. But if, in addition, he so acts towards them that they may reasonably believe that he will provide for them after his death, he is, in our view, treating them as members of his legal family. Where this situation occurs, we see no good reason why the law should not treat them in the same way and allow them to apply to the Court for an order for provision. As noted in paragraph 6.67, the Court already recognises that a testator may have a duty to provide for a person outside his family which overrides the duty he owes his family. We propose that the Court should be able to give greater recognition to a duty of this kind and that a person to whom it is owed should be an eligible applicant under the Act.

6.70 In more precise terms, we propose that an applicant for provision who is not a spouse or child of the deceased person concerned should prove -

1. That at the time of the deceased's death, he, the applicant, had a reasonable expectation that he would be provided for out of the deceased's estate.
2. That some time during the lifetime of the deceased, whether or not at the same time, the applicant, had been a dependant of the deceased and a member of his household.

6.71 In adopting this approach, we avoid the inflexibility which follows the prescription of a class of eligible applicants. In our view, circumstances, not status, should control eligibility. On our proposal, an eligible applicant might be a parent, a brother, a sister, a stepchild, a foster child, a grandchild, a niece, a nephew, a spouse of a void marriage, a divorced

spouse or a de facto spouse or, indeed, a special friend of the deceased.

6.72 Our proposal is a compromise between, first, our desire not to plunder testamentary freedom and, secondly, our desire to allow the Court to intervene in special situations where its intervention is necessary if what we see as injustice is to be avoided. We realise, of course, that other jurisdictional tests might achieve the same compromise. But, to us, the combination of "reasonable expectation", "some time dependency" and "some time membership of the household" is persuasive. It is, we trust, sufficient to aid the special deserving case and to deter the speculative case.

6.73 We do not see that the Court would have difficulty in applying the proposed test. To illustrate: An innocent party to a bigamous marriage of some twenty years duration would usually satisfy the test. On the other hand, a party to a de facto marriage of some twenty days duration would have little chance of satisfying it: if, however, the domestic relationship continued for some years and children were involved, the position would be clearly different. A grandchild orphaned shortly after birth, taken into the home of a grandparent and reared and educated by that grandparent might well have a reasonable expectation that provision will be made for him out of the estate of that grandparent. But most grandchildren do not have a special relationship of this kind with their grandparents. The position of a child who becomes a stepchild at the age of eighteen years is manifestly different from the position of a child who acquires the status of stepchild at the age of two years. Endless illustrations can be given of instances where the Court could, with little difficulty, decide that the proposed test has or has not been satisfied.

6.74 In this Part, we have briefly considered matters which more closely touch public policy issues than legal issues. We invite views on the general question: "Who should be an eligible applicant under the Act?" We add one comment. No matter who becomes an eligible applicant, the Court has the final say. In each case before it, the Court decides the effect to be given to the words "adequate", "proper" and "all the circumstances of the case" used in section 3 of the Act. A widening of the class of eligible applicants will not change the function of the Court. 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 a greater uncertainty in beneficiaries about their entitlement to property which a deceased person may have earnestly wished them to have. But, as we see it, the advantage of allowing the Court to intervene in appropriate cases outweighs the disadvantages.

PART 7. - TIME LIMIT FOR COMMENCING PROCEEDINGS.

7.1 Section 5 of the Act fixes the time within which application must be made by a person claiming the benefit of the Act: twelve months from the date of the relevant grant of probate or letters of administration. By virtue of that section, the Court may extend the time for making application 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".¹

7.2 This State has followed the example of New Zealand. There, in 1900, the relevant Act fixed a limitation period of six months.² In 1906, the period was extended to twelve months and the Court was given power to extend the period for a further twelve months.³ In 1922, the Court was given power to extend time generally.⁴ Here, the limitation period of twelve months was fixed in 1916 and the power to extend was given in 1954.⁵ On the other hand, limitation periods of six months, coupled with a power in the Court to extend time, apply in many other places.⁶

7.3 We do not at present propose any change in the limitation period. In our experience, neither applicants nor personal representatives nor beneficiaries are seriously

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1. The Act, s.5(2A)(a).
 2. The Testator's Family Maintenance Act 1900, s.4 (N.Z.).
 3. The Testator's Family Maintenance Act 1906, s.3(9) (N.Z.).
 4. The Family Protection Amendment Act 1921-1922, s.2(a) (N.Z.).
 5. Act No.40, 1954, s.4(1)(c)(ii).
 6. See, for example, Qld Act, s.90(8); Vict. Act, s.99; S.A. Act, s.8(1),(2); W.A. Act, s.7(2)(a),(b); U.K. Act, s.2(1); Man. Act, s.15(1),(2) and Nfld Act, s.14(1),(2).

disadvantaged by the existing provision of the Act. Nor do we propose any legislative statements of the grounds upon which the Court may exercise its power to extend time. The law as developed by the Court is, as we see it, working satisfactorily.⁷

7.4 If, as we suggest in Part 6 of this Paper, the class of eligible applicants is enlarged, a question which arises is whether every eligible applicant should have the right to apply for an extension of time or whether that right should be limited to a special class of applicants such as spouses and children.

7.5 Much can be said for and against giving the right 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.

7.6 To us, the spouse and children of a deceased person have such compelling claims on his bounty that the

7. See, for example, Re Dun (1956) 56 S.R. (N.S.W.) 181; Re Newton (1959) 76 W.N. 479; Re Claverie (1970) 91 W.N. (N.S.W.) 858; and Spies v. Baker [1970] 3 N.S.W.R. 39.

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 potential applicant 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.

7.7 In Part 9 of this Paper, we say that the question whether the provision made for an applicant is adequate for his proper maintenance should be determined as at the date of the application, not as at the date of the death of the testator or intestate. If this view is adopted, another question must be answered: should a spouse or a child who had no chance of making a successful claim at the date of the deceased's death but who suffers, years later, an unforeseeable misfortune, then be able, because of that misfortune, to apply for an extension of time to commence proceedings. We argue that he should not be able to do so.

7.8 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 fact.⁸

8. Spies v. Baker [1970] 3 N.S.W.R. 39.

The financial need of the applicant touches this question of success or failure. On an application for leave in a paragraph 7.7 situation, we would limit evidence of the need of the applicant arising from unforeseeable misfortune to evidence of circumstances existing at the expiration of the time for the commencement of proceedings, namely, twelve months after the date of the relevant grant. In our view, to do otherwise is to permit chance to play too important a role in the application of the law relating to succession to property: the reasonable expectations of one person should not be frustrated because of possible misfortunes that may befall another, even though the other is a spouse or child of the deceased. Any time limit of the kind we propose is, of course, an arbitrary limit. We choose the twelve months period because it is already a limitation period under the Act and a variety of limitation periods is undesirable.

PART 8. - WHAT SHOULD CONSTITUTE A "FINAL DISTRIBUTION" OF AN ESTATE.

8.1 "Every application for extension [of time for making an application for provision] shall be made before the final distribution of the estate."¹ Here we consider what should constitute the "final distribution" of an estate.

8.2 A commonly held view is that there is a final distribution when the executor has got in all the estate, has completed his executorial duties and has consented to the dispositions of the will taking effect so that thereafter he holds the estate as trustee for the persons entitled.² For present purposes, we assume that this view is correct in law but we ask whether it is correct in principle. It can give rise to a situation where an estate may be finally distributed in the sense mentioned but, for practical purposes, it is not distributed at all. 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.

8.3 In New Zealand, the position is³ -

"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 who died after the seventh day of October, nineteen hundred and thirty-nine (being the date of the passing of section twenty-three of the Statutes Amendment

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1. The Act, s.5(2A)(a).
 2. Brown v. Holt [1961] V.R. 435, 441; and see Re Pratt (1964) 80 W.N. (N.S.W.) 1414, 1421-22 and Re McPhail [1971] V.R. 534, 537-38.
 3. N.Z. Act, s.2(4).

Act 1939), 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."

8.4 We propose a more specific provision, namely, that for the purposes of the Act an estate shall not be finally distributed until it is indefeasibly vested in interest in the persons beneficially entitled to it, whether the entitlement arises from a will, an intestacy or an order under the Act.⁴ We invite comment on the utility of the suggested provision.

8.5 If this proposal is adopted, the Court will sometimes be asked to rule on nice points of law. But the issue whether an interest is indefeasibly and beneficially vested often arises in the courts, and the subject is well covered by authority.⁵

4. Draft Bill, s.12(6).

5. See, generally, Helmore (1966) Chs XXIII and XXIV and Megarry & Wade (1959) Chs. 3 and 5.

PART 9. - AS AT WHAT DATE SHOULD AN APPLICANT'S CASE BE CONSIDERED?

9.1 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.² As Kitto J. has said³ -

"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 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."

9.2 The rule stated in paragraph 9.1 resolved much judicial debate. In stating it, Dixon CJ. referred to decisions in New Zealand and in some of the Australian States in cases arising under statutes similar to the Act. He pointed

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1. See Coates v. National Trustees Executors & Agency Ltd. (1956) 95 C.L.R. 494 and Dun v. Dun [1959] A.C. 272.
 2. Ibid.
 3. Coates v. National Trustees Executors & Agency Ltd. (1956) 95 C.L.R. 494, 528,

out that in New Zealand, Tasmania, Victoria and Queensland the view had been taken that the question was to be determined as at the date of death of the deceased, whereas in New South Wales and South Australia the view had been adopted that the sufficiency of the provision must be determined as at the time when the Court is dealing with the question.⁴ Dixon CJ. preferred the view that the material date was the date of the death.⁵ That view is now binding on the Court.

9.3 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 CJ. in Equity, in 1926, in Re Forsaith⁶: a rule disapproved, in 1956, by a majority of the High Court in Coates' Case⁷ and overruled, in 1959, by the Privy Council in Dun's Case.⁸

9.4 Reasons for returning to the Re Forsaith rule are to be found in the judgment of Fullagar J. in Coates' Case⁹ -

"The view taken by Harvey C.J. in Eq. in Re Forsaith Dec'd¹⁰ and by Paine A.J. in In re Wheare¹¹ 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

4. Coates v. National Trustees Executors & Agency Ltd. (1956) 95 C.L.R. 494, 505.

5. Id., 507.

6. (1926) 26 S.R. (N.S.W.) 613.

7. (1956) 95 C.L.R. 494.

8. [1959] A.C. 272.

9. (1956) 95 C.L.R. 494, 520-521.

10. (1926) 26 S.R. (NS.W.) 613.

11. (1950) S.A. S.R. 61.

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."

9.5 Arguments against returning to the Re Forsaith rule are to be found in the judgment of Myers J. in Re T.F. Dun¹²: 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 said¹³ -

"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.

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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

12. (1956) 56 S.R. 181.

13. Id., 184.

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 thirteen 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."

9.6 In 1959, the Privy Council expressed views similar to those noted in paragraph 9.5¹⁴ -

"... 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 dependant: 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 recognise 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."

9.7 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 justice¹⁵ are less real and less useful than those which are concerned with the present welfare of living persons.

14. Dun v. Dun [1959] A.C. 272, 290.

15. See Kitto J. in Coates v. National Trustees Executors & Agency Ltd. (1956) 95 C.L.R. 494, 526, 527.

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. Any possibility of hardship flowing from a return to the latter rule is substantially lessened if the proposals made in Part 7 of this Paper concerning extensions of time for commencing proceedings under the Act are adopted. In this context, we are, of course, faced with a problem of compromise. But, unlike the judges who had to reach the decision in Coates' Case on the language of the legislation,¹⁶ we may consider what the policy of the legislation ought to be. We propose one policy but we invite alternatives.

16. Id., 526.

PART 10. - WHAT CONDUCT SHOULD DISENTITLE
A PLAINTIFF TO AN ORDER?

10.1 The Court "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".¹ Courts in other places have a like power.² And, in some places the power of refusal is given in wider terms. In South Australia and Western Australia, for example, the Court may refuse to make an order on any other ground which the Court thinks sufficient.³

10.2 "... the 'character or conduct' envisaged by the latter sub-section [section 3(2) of the Act] must be taken to refer to character or conduct of such a nature as to entitle the court to say that the applicant has forfeited or abandoned his or her moral claim on the testator."⁴ Forfeiture or abandonment of this kind is more easily illustrated than defined. Adultery,⁵ chronic drunkenness,⁶ abandonment of marital obligation,⁷ abandonment of filial obligations,⁸ leaving home without consent of parents⁹ and making unfounded allegations of serious misconduct by the deceased¹⁰ have, in particular cases, been regarded as sufficient to disentitle an applicant to an order. On the

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1. The Act, s.3(2).
 2. See, for example, N.Z. Act, s.5(1); Qld Act, s.90(2)(c); Vict. Act, s.96(1); Tas. Act, s.8(1); S.A. Act, s.7(3) and the A.C.T. Ord., s.8(3).
 3. S.A. Act, s.7(3); W.A. Act, s.6(3).
 4. Delacour v. Waddington (1953) 89 C.L.R. 117, 127.
 5. In the Will of T.M. [1929] Q.W.N. 2.
 6. Ray v. Moncrieff [1917] N.Z.L.R. 234.
 7. Re McGoun [1910] V.L.R. 153.
 8. Re Hallahan (1918) 18 S.R. 138.
 9. Ibid.
 10. Re K. [1921] St.R. Qd.172.

other hand, living apart from a spouse,¹¹ marrying without parental consent¹² and refusing to bring up children in the religion of the deceased¹³ have, in particular cases, been regarded as not disentitling an applicant to an order.

10.3 In the view of Sir Frederick Jordan, the words we are now considering mean¹⁴ -

"... character or conduct relevant to the purposes which the Act is intended to serve, for example, misconduct towards the testator or character or conduct which shows that any need which an applicant may have for maintenance is due to his or her own default."

In the same case, Maxwell J. said¹⁵ that the words "include such matters as affect the worthiness of the applicant ... to expect provision for proper maintenance, education or advancement in life as the case may be". He added¹⁶ -

"The words 'character or conduct' are used in apposition; both are related to the purpose of the Act. 'Character' would enable the Court to have regard to the question whether the need for maintenance arose from the mode of life and the habits or actions of the applicant; 'conduct' would have regard to the relations between the applicant and the testator. It is of course not suggested that the fields of inquiry are separate or would not most often cover parts of the same area."

10.4 One author says¹⁷ -

"The decided cases indicate that the defects in character and conduct should be of such a nature as to contain in themselves elements which call for condemnation according to accepted standards or such as would ordinarily move a just spouse or father to take them into consideration when making his testamentary dispositions."

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11. Toner v. Lister [1919] N.Z. G.L.R. 498; Re Williams [1933] S.A. S.R. 107.
 12. Re Harris (1918) 18 S.R. 303.
 13. Re Gunn (1913) 32 N.Z.L.R. 153.
 14. Re Gilbert (1946) 46 S.R. (N.S.W.) 318, 321.
 15. Id., 326.
 16. Ibid.
 17. Griffith (1965) p.162.

10.5 We do not think that any useful result would flow from changing the wording of the second limb of section 3(2) of the Act. Provisions which call for the making of value judgments are often better left imprecise. The Court is then able to give effect to its view of contemporary community standards without statutory restriction.

10.6 An incidental question convenient to be considered here is whether the second limb of section 3(2) is appropriately positioned in the Act or is needed at all. Does that limb merely make explicit the power of the Court to refuse an application where the character or conduct of the applicant negatives any moral claim of his to participate in the estate of the deceased? Or, does the second limb of the section provide an independent ground for refusing an application: the other ground being the applicant's lack of any moral claim? We favour the view that the provision merely makes explicit the power of the Court to consider the circumstance of the applicant's character or conduct in addition to the other circumstances of the case. The draft Bill reflects this view.¹⁸ In practice, little may turn on the distinction. The onus in the first instance is on the applicant to establish his case. A prima facie case is made out by proof of relationship and other circumstances indicating a moral claim. The onus is then on the opponent to negative moral claim or, "what seems to be the same thing",¹⁹ to show character or conduct disentitling. It is not irrelevant to note that the second limb of section 3(2) did not form part of the original Bill for the Act. It was included to ensure that there was no doubt of the Court's power to consider the

18. s.8(3)(a).

19. Per Sholl J. in Re Paulin [1950] V.L.R. 462, 473.

character and conduct of a plaintiff.²⁰ We include it in the draft Bill only because its omission may lead to wasteful conjecture about the effect of the omission.

10.7 It is also convenient to consider here whether conduct not sufficiently grave to disentitle a person to an order should nevertheless be taken into account to reduce the amount of the order. The conduct to which we refer is conduct occurring before the death of the deceased person concerned. In Re Hall²¹ the Full Court of this State said²² -

"Now we are of opinion that evidence as to the nature of the relationship between the testator and his wife could not be regarded as irrelevant to the application before the Court, notwithstanding that the case was one in which it was conceded that she was entitled to an order and it was not claimed that she was disentitled by reason of her conduct or character or otherwise. It could, we think, have a bearing as to what order the Court should make in her favour, 'taking into consideration all the circumstances of the case', as the Court was required to do by section 3(1) of the Act."

In South Australia, Mitchell J. has given a recent answer to the same question²³ -

"In In re Dingle²⁴ Street CJ. in Equity held that where it had not been suggested that the conduct of the widow was such as to disentitle her to the benefit of an order under the Act, then evidence of such conduct was immaterial and inadmissible in deciding the amount which she should receive. A similar view was taken by Clark J. in In re Greene's Estate.²⁵ In a number of cases, however, it has been held that the conduct of an applicant may be a ground for reduction of the claim. In In re Sinnott²⁶ Fullagar J. said: 'I would add that, in my opinion, the extent of the moral claim may be affected by conduct which falls short of 'disentitling' an applicant'²⁷ cf. McGrath v. Queensland Trustees Limited;²⁸ In re Paulin; In re Williams;²⁹ In re Jackson (deceased);³⁰ In re Neagle.³¹ I respectfully agree with the view of Fullagar J. in In re Sinnott³² and that of Sholl J. in In re Paulin.³³ Apart from the

20. See N.S.W. Parliamentary Debates, Session 1916, Vol.65, pp.1312-1313.

21. (1959) 59 S.R. (N.S.W.) 219.

22. Id., 228.

23. Chapman v. Elder's Trustee and Executor Co. Ltd. [1971] S.A.S.R. 63, 70, 71.

24. (1921) 21 S.R. (N.S.W.) 723, 726.

provisions of s.3(3) of the Act, [the same provisions as are contained in section 3(2) of the New South Wales Act] the Court has to consider what provision a wise and just testator would have made for his wife or his children as the case may be. Such a testator would be entitled to be affected by bad conduct on the part of his wife or children in determining the extent of the provision to be made by him.³⁴

10.8 We agree that the Court should be entitled to look at the conduct of an applicant in determining the extent of any provision to be made for him. The draft Bill so provides.³⁴ In the light of Re Hall³⁵ the provision in the draft Bill may be unnecessary. Nonetheless we think it desirable to include it in any new legislation. We repeat that here we are considering conduct which occurred before the death of the testator or intestate concerned.

10.9 We note, incidentally, that it has been held that it is proper for the Court to consider an applicant's conduct after the death of the deceased person concerned.³⁶ We see no reason to disagree in principle with this ruling.

25. (1930) 25 Tas. L.R. 15, 27.

26. [1948] V.L.R. 279, 281.

27. [1919] Q.S.R. 169.

28. [1950] V.L.R. 462, 473.

29. [1953] N.Z.L.R. 151, 153.

30. [1954] N.Z.L.R. 175.

31. (1957) 33 N.Z.L.J. 280.

32. [1948] V.L.R. 279.

33. [1950] V.L.R. 462.

34. s.8(3)(a).

35. (1959) 59 S.R. (N.S.W.) 219.

36. Re De Poli [1964] N.S.W.R. 424.

PART 11. - WHAT PROPERTY SHOULD THE COURT
BE ABLE TO AFFECT BY ITS ORDERS?

11.1 In proceedings under the Act, the Court deals only with the property of a deceased person which is available for distribution after administration has been concluded.¹

The Court does not deal with, amongst other things -

1. Property which is effectively disposed of by a person in his lifetime² unless the property may be appointed by the will of that person under a general power of appointment.³
2. Property which passes after the death of a deceased person pursuant to arrangements made by him in his lifetime: for example, property the subject of a joint tenancy.⁴
3. Property which is disposed of by the will of a deceased person pursuant to a contract made by him to devise or bequeath the property.⁵
4. Immovable property which is situated outside New South Wales.⁶
5. Movable property, wherever situated, of a person domiciled outside New South Wales.⁷

11.2 If the Act can be defeated, its effectiveness is limited. It need not concern those with the means and the

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1. Pain v. Holt (1919) 19 S.R. (N.S.W.) 105, 106-107.
 2. See, for example, Thomson v. Thomson [1933] N.Z.G.L.R. 274, 277-278.
 3. Re Carter (1944) 44 S.R. (N.S.W.) 285.
 4. See, for example, Palmer v. Bank of New South Wales [1973] 2 N.S.W.L.R. 244.
 5. Schaefer v. Schuhmann [1972] A.C. 572.
 6. See, generally, Re Paulin [1950] V.L.R. 462, 465.
 7. Ibid.

determination to obtain and follow expert advice; only the poor or the inert need be affected by it. The Act can be defeated.⁸ Property can be taken out of a person's estate 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".⁹ 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. Few solicitors in this State are without some 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. In 1974, sophisticated property dealings are more common than they were in 1916.

11.3 But should the Act be buttressed by anti-avoidance provisions? Should the Court have power to override what would otherwise be valid dispositions of property? The rights involved are fundamental: on the one hand, the right of a person to arrange his affairs in his way and the right of a transferee of property to a secure title and, on the other hand, the right of a family not to be 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 Act gives incomplete protection to the family: if the surviving members can claim against property disposed

8. Stephens (1957) pp.45-46; Wright (1966) p.ix and Tyler (1971) pp.24-27.

9. (1944-45) The Conveyancer and Property Lawyer, Vol.9, p.282.

of by, say, their deceased father, the Act will be recognising a potential interest in property which must clog its alienability and thereby adversely affect its utility and value.

11.4 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 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.¹⁰ In that circumstance, why should the Act be amended to 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 Act should the Court be permitted to scrutinize property transactions carried out by him in his lifetime?

11.5 In matters of property, this hypothetical person will usually be guided by proper motives. He may dispose of part of his estate because his love and affection for his family prompt him to do so or because he wants to reduce the amount of death duties and other taxes which will be payable in consequence of his death. If he is old and lonely, he may be prepared to pay a high price to ensure that he will have company and care for the rest of his life. The question whether property so disposed of should be capable of being made the subject of an order under the Act is difficult.

10. Perhaps in an exceptional case the management of his property may be taken from him under the Mental Health Act, 1958.

11.6 The policy issue can be stated in short form: generally, the law will compel the representative of a deceased person to give effect to rights which stem from a gift made or a contract entered into by the deceased, and, through the Act, the law will also enforce the obligation of a person to provide for his family after his death: which is more potent, a right stemming from a gift or a contract, or a right stemming from a statute?

11.7 Most people would say that the Court should be able to make an order affecting property given by a husband to his second wife for the sole purpose, known to her, of defeating a claim under the Act by a needy and dutiful child of the husband's first marriage. On the other hand, some people might say that the Court should not have that power if the wife did not know of her husband's motive for his gift to her. And, most people would say that the Court should not have the power if, at the time of the proceedings, the property was owned by an innocent third party who had purchased it from the wife for full value.

11.8 In short, people may wish to protect families from disinheritance but seldom are they prepared to arm the Court with powers to affect accrued property rights. Hence we adopt a somewhat narrow approach to the question of giving the Court power to make orders affecting property which is now outside the application of the Act.

11.9 Before developing our proposals we look at how problems of the kind we are now considering are coped with in some other places.

Some Overseas Experiences

11.10 In New Zealand, the relevant legislation is silent on the question. In 1953, the then Minister of Justice for

that country wrote¹¹ -

"The only reason why nothing has been done to amend the legislation is that we have not succeeded in devising a practicable method of avoiding dispositions made to defeat claims without causing as many anomalies and injustices as are cured. The question was last considered a year or so ago by our Law Revision Committee which decided that no practicable remedy was possible."

11.11 In Ontario, the Dependents Relief Act defines a "will" as meaning "a deed, will, codicil, instrument or other act by which a testator so disposes of real or personal property that the property will pass at his death to some other person".¹² "Testator" is defined as meaning "a person who by deed or will or by any other instrument or act so disposes of real or personal property, or an interest therein, that the property or interest will pass at his death to some other person".¹³ Orders may be made against the "estate" of a testator but the word "estate" is not defined in the statute. The Court in Ontario has said:"... it would seem that property not in the control of the executor cannot be affected by the Act."¹⁴

11.12 In 1969, the Commissioners on Uniformity of Legislation in Canada proposed a Draft Family Relief Act containing the following provision¹⁵ -

"20. (1) ... for the purposes of this Act the capital value of the following transactions effected by a deceased before his death, whether benefiting his dependants or any other person, shall, as of the date of the death of the deceased, be included in his net estate:

(a) gifts mortis causa;

11. See Macdonald (1960) p.297.

12. Ont. Act, s.1(f).

13. Ont. Act, s.1(e).

14. Per Macdonell Sur. Ct.J. in Re Young [1955] 5 D.L.R. 225, 228 and see Re Kerslake [1955] 4 D.L.R. 326.

15. See Report of the Proceedings of the Fifty-First Annual meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1969) p.160.

- (b) money deposited, together with interest thereon, in an account in the name of the deceased in trust for another or others with any chartered bank, savings office or trust company, and remaining on deposit at the date of the death of the deceased;
- (c) money deposited, together with interest thereon, in an account in the name of the deceased and another person or persons and payable on death pursuant to the terms of the deposit or by operation of law to the survivor or survivors of such persons with any chartered bank, savings office or trust company, and remaining on deposit at the date of the death of the deceased;
- (d) any disposition of property made by a deceased whereby property is held at the date of his death by the deceased and another as joint tenants with right of survivorship or as tenants by the entirety;
- (e) any disposition of property made by the deceased in trust or otherwise, to the extent that the deceased at the date of his death retained, either alone or in conjunction with another person or persons by the express provisions of the disposing instrument, a power to revoke such disposition, or a power to consume, invoke or dispose of the principal thereof; but the provisions of this subsection shall not affect the right of any income beneficiary to the income accrued and undistributed at the date of the death of the deceased;
- (f) any amount payable under a policy of insurance effected on the life of the deceased and owned by him, where the beneficiary of such policy was not, immediately prior to the death of the deceased, designated irrevocably under the provisions of Part V of The Insurance Act."

11.13 In 1972, the draft of the Canadian Uniform Family Relief Act mentioned in paragraph 11.12 was amended by the addition of the following new provisions¹⁶ -

"21.--(1) Where, upon an application for an order ... , it appears to the judge that:

- (a) the deceased has within one year prior to his death made an unreasonably large disposition of real or personal property:
 - (i) as an immediate gift inter vivos, whether by transfer, delivery, declaration or revokable or irrevocable trust or otherwise; or
 - (ii) the value of which at the date of

16. See Report of the Proceedings of the Fifty-Fourth Annual meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1972) p.233-235.

the disposition exceeded the consideration received by the deceased therefor; and

- (b) there are insufficient assets in the estate of the deceased to provide adequate maintenance and support for the dependants or any of them,

the judge may, subject to subsection (2), order that any person who benefited, or who will benefit, by the disposition pay to the executor, administrator or trustee of the estate of the deceased or to the dependants or any of them, as the judge may direct, such amount as the judge deems adequate for the proper maintenance and support of the dependants or any of them.

(2) The amount that a person may be ordered to pay under subsection (1) shall be determined in accordance with the following rules:

1. No person to whom property was disposed of is liable to contribute more than an amount equal to the extent to which the disposition was unreasonably large;
2. If the deceased made several dispositions of property that were unreasonably large, no person to whom property was disposed of shall be ordered to pay more than his pro rata share based on the extent to which the disposition was unreasonably large;
3. The judge shall consider the injurious effect on a person to whom property was disposed of from an order to pay in view of any circumstances occurring between the date of the disposition of the property and the date on which the transferee received notice of the application under section 3;
4. If the person to whom the property was disposed of has retained the property he shall not be liable to contribute more than the value of his beneficial interest in the property;
5. If the person to whom property was disposed of has disposed of or exchanged the property, in whole or in part, he shall not be liable to contribute more than the combined value of any remaining original property and any remaining proceeds or substituted property;
6. For the purposes of paragraphs 4 and 5 "value" is the fair market value as at the date of the application under section 3.

(3) In determining whether a disposition of property is a disposition of an unreasonably large amount of property within the meaning of subsection (1), the judge shall consider:

- (a) the ratio of value of the property

disposed of to the value of the property determined under this Act to comprise the estate of the deceased at the time of his death;

- (b) the aggregate value of any property disposed of under prior and simultaneous dispositions and for this purpose the judge shall consider all dispositions drawn to his attention whether made prior or subsequent to one year prior to the death of the deceased;
- (c) any moral or legal obligation of the deceased to make the disposition;
- (d) the amount, in money or moneys worth, of any consideration paid by the person to whom the property was disposed;
- (e) any other circumstance that the judge considers relevant."

11.14 In 1969, the Uniform Probate Code of the United States of America was approved by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association. The Code contains what it calls "augmented estate" provisions.¹⁷ An expressed object of these provisions is to prevent persons from deliberately defeating the claims of a surviving spouse to share in the estate of a deceased spouse.

11.15 In 1965, Israel enacted its Succession Law¹⁸ which provides, amongst other things -

"63. (a) Where the estate is insufficient to provide maintenance for all persons entitled thereto, the Court may treat as part of the estate anything disposed of by the deceased without adequate consideration within two years prior to his death, excluding gifts and donations which are usual in the circumstances.

(b) The Court may require the recipient to reimburse the estate or to pay maintenance up to the value of what remained in his possession at

17. The provisions are set out in Appendix D to this Paper.

18. Succession Law, 5725-1965, c.4.

the time of the death of the deceased and if he received the same otherwise than in good faith, up to the value of what he received.

(c) The recipient may deduct the consideration he gave or its value from what he has to restore or to pay."

11.16 Examples of courts having power to interfere, on behalf of the family, with dispositions of property made by a deceased person in his lifetime are also found in English legal history and in those States of the United States of America where legal rights of inheritance are part of the law. Because these examples have influenced our thinking, we comment on them.

English Legal History¹⁹

11.17 At least as early as the reign of Henry II, a man's goods were divided upon his death into three equal parts, one of which went to his children, another to his widow, and the third according to his will. If he died without leaving a widow, the share of his children was one-half and he could dispose of the other half by will. So too, if he left a widow but no children. These shares were called "reasonable parts" and were, until the ecclesiastical jurisdiction over testamentary matters was consolidated, recoverable by a writ de rationabile parte bonorum. This method of distributing goods was sanctioned by Magna Carta and was used generally until the reign of Charles I. By 1700 it was limited to London and was known as the "Custom of London". It was abolished in 1724.²⁰

11.18 Some of the cases decided on the Custom of London are relevant to our present enquiry. For example -

19. See, generally, Holdsworth Vol.III pp.550-556.

20. 11 Geo.1 c.18, s.17 (effective from 1st June, 1725).

1. In Hall v. Hall (1692)²¹ the plaintiff was a widow of a freeman of the city of London who sought to have her customary part paid to her. The defendants pleaded that their father by deed executed in his life had given his goods to them. The Court said: "If goods are absolutely given away by a freeman in his lifetime, this will stand good against the custom. But if he has it in his power, as by the keeping of the deed etc., or if he retains the possession of the goods, or any part of them, this will be a fraud upon the custom."
2. In Finner v. Longland (1708)²² the Lord Chancellor, Lord Cowper, said²³ -

"Where a Citizen doth by Deed in his Life-time convey away his personal Estate, and puts it absolutely out of his Power, such a Disposition is good; but if he so dismisses himself of it as to have himself an Hand over it, this is not good, and is in Defraud of the Custom. This Deed of Assignment hath the marks of Fraud in all its Circumstances: It appears to be made when the Father was very much indisposed; he hath reserved a Disposition to himself during his Life, and doth not absolutely dismiss the Estate out of himself; but he still continued in Possession, and it was in his Power whenever he pleased to have possessed himself of the Deed. If this was allowed, there would be an End of the Custom."
3. In Edmundson v. Cox (1716)²⁴ a freeman of the city of London executed a bond conditioned to pay the defendant £1,000 or to transfer to him £1,000 stock in a specified bank. The freeman put the bond, which appeared to the court to be voluntary and not given for valuable consideration, with his will. The Master of the Rolls, Sir John Trevor, said²⁵ -

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21. 2 Vern. 277; 23 E.R. 779.
 22. 2 Eq. Ca. Abr. 263; 22 E.R. 222.
 23. Id., 263; 223.
 24. 2 Eq. Ca. Abr. 275; 22 E.R. 233.
 25. Id., 276; 233.

"... the Bond ... is fraudulent quoad the Wife's Customary Share and shall not stand in her way; and such sort of Conveyances to evade the Custom are always set aside in this Court."

4. In Coomes v. Elling (1747),²⁶ where the plaintiff was the son of a freeman of the city of London, Lord Hardwicke L.C. said:²⁷ "Here the freeman, possessed of a personal estate, lays out some of it in a purchase of a leasehold estate for the joint lives of himself and his wife.

The consequence is, the husband might have disposed of the whole.

It has been said, if the wife survives him, the moment he dies, this is to be taken out of his personal estate; for that it does not come to her by the gift of the husband, but by operation of law, the *jus accrescendi*.

And yet it must be allowed, that in his lifetime he had equal power to dispose of it as any other part of his personal estate; for the wife cannot during the coverture acquire any property distinct from the husband." The Lord Chancellor added - "I am of opinion, that there cannot be a clearer case of a fraud on the custom."

5. And, in Tomkyns v. Ladbroke (1755)²⁸ a freeman of the city of London made a voluntary assignment by deed of part of his personal estate in trust for his married daughter for her own separate use. On the same day he made his will. He died two days later without delivering the deed. Lord Hardwicke L.C. said²⁹ - "It appears to me, that this

26. 3 Atk. 676; 26 E.R. 1188.

27. Id., 679; 1190

28. 2 Ves. Sen. 591, 594; 28 E.R. 377, 379.

29. Id., 594; 379.

act of the father was in nature of a testamentary act, done at the same time as he made his will; and therefore must be judged to be an act in fraud of the custom, though not an actual fraud."

11.19 In short, the Courts would not permit a widow to be denied her rights under the Custom of London by dispositions of property which were not absolute or which were testamentary in character.

11.20 Cases decided on the Custom of London have influenced the development of other law which is also relevant to our present enquiry. We refer, in particular, to the law relating to contracts made by a person to devise or bequeath property. This law is considered in some detail later in this Part³⁰ but we note now that in Fortescue v. Hennah³¹ the Master of the Rolls, Sir William Grant, said,³² in relation to a covenant by a father for an equal division on his death of all the property he should die seized or possessed of between his two daughters or their families -

"The custom of London, like a covenant of this description, attaches only upon the property, which the freeman has at his death. During his life he has full liberty to dispose of his personal property in any manner he thinks fit: yet it has been held, that a disposition by a freeman, that is not to take effect until after his death, though by an irrevocable instrument, is a fraud upon the custom. Thus in the case of Bowers v. Fairbeard (2 Vern. 202) a judgment, acknowledged by a freeman to secure to the mother of illegitimate children by him the payment of £500 within three months after his death, was held not to be available against the wife's customary right. So, in Turner v. Jennings (2 Vern. 612, 685) an assignment by a freeman of London by deed of the greatest part of his personal estate in trust for himself for life, and then for his grand-children, was held a fraud upon the custom.

The case of Jones v. Martin (5 Ves. 266, n.) is certainly one of an intended fraud upon the covenant. That was shown by other circumstances besides that of

30. Paragraphs 11.49 - 11.58.

31. (1812) 19 Ves. Jun. 67; 34 E.R. 443.

32. Id. 72-73; 445.

the reservation of the dividends by the father during his life; and those other circumstances were of course noticed, and relied on in the judgment; but I do not collect from the note of Lord Rossllyn's speech, that the latter circumstance, the reservation of the dividends, would of itself have been considered sufficient; and that in his conception a father, who after entering into such a covenant, means to give any preference, must give it against himself, and not make a mere reversionary gift; and it is evident, from what is said in the case of Lewis v. Madocks (8 Ves. 150; 17 Ves. 48) by the present Lord Chancellor, who was counsel in Jones v. Martin, that he understood the judgment of the House of Lords to have gone that full length; and I concur with Lord Rossllyn in thinking, that if the father means to be partial, and will give a preference, 'he must give against himself; and not make a mere reversionary gift. He should immediately feel himself so much the poorer for his gift. If he is willing to suffer that, let him then yield to the impulse of his partiality: but, if a father may effect his purpose by any thing short of this,' that is, by any thing short of an immediate absolute gift in his life, 'it will furnish perpetual opportunity for subterfuge and scheme to defeat and disappoint these covenants; which ought to be most honorably observed.'"

11.21 In our view, the courts' approach to the Custom of London and to family settlements provides sound guidelines for protecting the Act from evasions.

The U.S.A. Experience

11.22 In most common law states of the United States of America a statutory (or "forced") share normally guarantees the surviving spouse a specified fraction of the estate of the deceased spouse. This share may be elected ("forced") regardless of the Will.³³ A large body of American case law is concerned with evasions of forced share statutes by husbands disposing of property before death.³⁴ English judicial decisions on the Custom of London have had an important influence on the development of that law.³⁵

33. MacDonald (1960) p.21.

34. Id., pp.6-9.

35. Id., pp.54-58.

11.23 One American commentator says of the cases on evasions of forced share statutes³⁶ -

"Assume that a particular inter vivos transfer is otherwise valid; in other words, that it is a valid transfer aside from any question of the widow's rights. The cases involving transfers of this sort fall into two groups: those that concede the widow a chance to invalidate the transfer and those that refuse to concede her any possible cause of action that is based on her "rights" under the statutory share. Turning to the first group of cases, we may for convenience make an arbitrary subgrouping. One subgroup tests the validity of the transfer by the degree of 'control' retained by the decedent over the res of the transfer. The other subgroup inquires into the 'intent' (motive) with which the transfer was made. But this generalization, once made, must immediately be qualified. The validity of a given transfer depends on a variety of uncertainties. The courts themselves are not clear as to the precise significance of the 'control' and 'intent' tests. The fuzziness of these tests is no doubt due in part to the judicial tendency to follow the equities but to announce the decision in terms of 'control' or 'intent'. These equities, in addition to retention of control and intent to disinherit, include the amount of property transferred, proximity of the transfer to the date of death, relationship of the donee, treatment of the decedent by the claimant, independent wealth of the claimant, and the like. To summarize, the cases leave an impression of ad hoc compromise, couched in elusive doctrine."

The author of the words quoted above argues for the adoption in the United States of legislation similar to the Act but legislation supplemented by anti-evasion provisions.³⁷

11.24 In 1965, a member of the Special Committee on the United States Uniform Probate Code said of the view that the United States should adopt legislation similar to the Act³⁸ -

"There is much to be said for these proposals but it is unlikely that the revised Model Probate Code will accord discretion to the judge as to the amount of the forced share or the types of inter vivos transfers which are voidable. Because state judicial systems in the United States are decentralised, with the judges in each county popularly elected for short terms and paid rather low salaries, there is reluctance to entrust them with this much discretion."

36. Id., pp.4-5.

37. Id., p.299.

38. Fratcher (1965) p.301.

11.25 In the event, the authors of the Uniform Probate Code proposed that property transferred by a spouse during marriage, for undervalue and over which he retains control or from which he continues to derive a benefit should be included in his estate for the purpose of computing the elective share of the surviving spouse.³⁹ If the Code is adopted generally in the United States, this Part of American law will be similar to the Custom of London as it was understood in 1607 when English law first arrived in America.⁴⁰

OUR APPROACH

11.26 We return to the question of giving the Court power to make orders affecting property which is now outside the Act:⁴¹ enough power to give families an extra protection against disinheritance and yet not enough power to interfere unreasonably with what a person may do with his property or with accrued property rights.

11.27 We look, first, at subjective tests for determining whether the Court should be able to make an order affecting particular property and, secondly, at objective tests for determining whether property disposed of in a particular way should be within the Court's powers.

Subjective Tests

11.28 Where we speak of a subjective test, we refer to a test which turns on the intention of the person disposing of the property. Did he intend to defeat an application

39. Appendix D, section 2.202(1).

40. Fratcher (1965) p.302.

41. See paragraph 11.1.

under the Act or to reduce the amount of a likely order; did that intention have a substantial influence on his decision to dispose of the property or on the terms of the disposition; was this intention his only intention and, if not, was it his dominant intention? The mere asking of these questions points to the difficulties of stating a subjective test with precision. Yet, tests of this type are often prescribed by statute.

11.29 Statutes which state subjective criteria include -

1. The Stamp Duties Act, 1920. Section 100 of that Act provides that for death duty purposes a "disposition" of property means, amongst other things - "any transaction entered into by any person with intent thereby⁴² to diminish directly or indirectly the value of his own estate and to increase the value of the estate of any other person".
2. The Commonwealth Matrimonial Causes Act 1959-1973. Section 120 of that Act states -

"(1.) In proceedings under this Act, the court may set aside or restrain the making of an instrument or disposition by or on behalf of, or by direction or in the interest of, a party, if it is made or proposed to be made to defeat an existing or anticipated order in those proceedings⁴³ for costs, damages, maintenance or the making or variation of a settlement.

(2.) The court may order that any money or real or personal property dealt with by any such instrument or disposition may be taken in execution or charged with the payment of such sums for costs, damages or maintenance as the court directs, or that the proceeds of a sale shall be paid into court to abide its order.

(3.) The court shall have regard to the interests of, and shall make any order proper for the protection of, a bona fide purchaser or other person interested.

(4.) A party or a person acting in collusion with a party may be ordered to pay the costs of any other party or of a bona fide purchaser or

42. Emphasis added.

43. Emphasis added.

other person interested of and incidental to any such instrument or disposition and the setting aside or restraining of the instrument or disposition.

(5.) In this section, 'disposition' includes a sale and a gift."

3. The Commonwealth Bankruptcy Act 1966-1973. Section 121 of that Act states -

"(1.) Subject to this section, a disposition of property, whether made before or after the commencement of this Act, with intent to defraud creditors,⁴⁴ not being a disposition for valuable consideration in favour of a person who acted in good faith, is, if the person making the disposition subsequently becomes a bankrupt, void as against the trustee in the bankruptcy.

(2.) Nothing in this section shall be taken to affect or prejudice the title or interest of a person who has, in good faith and for valuable consideration, purchased or acquired the property the subject of the disposition or any interest in that property.

(3.) In this section, "disposition of property" includes a mortgage of property or a charge on or in respect of property."

11.30 Proceedings under the Act are, of course, unlike proceedings in divorce or in bankruptcy: the person who knows most about his intentions is dead. But that situation applies in cases arising under the Stamp Duties Act provision mentioned in paragraph 11.29.1. And, although "the devil himself knoweth not the mind of man", judges are accustomed to having regard to circumstances from which inferences can reasonably be drawn as to the accuracy or otherwise of evidence put before them. We do not think that in proceedings under the Act a provision requiring proof of a deceased person's intention would be unworkable. But, would it be fair?

11.31 A desire to evade the Act may be blameless or blameworthy. It may be prompted by benevolence towards a child or malice towards a wife or both. And, until a court

44. Emphasis added.

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 Act. These are factors which weigh heavily against any proposal, based on intention, for bringing dispositions of property made before death within the application of the Act.

11.32 On the other hand, a proposal of this kind is, to us, right in principle. In proceedings following the end of a marriage by breakdown, any disposition of property can be set aside because of an intention to defeat the Matrimonial Causes Act 1959-1973 (Oth). In proceedings following the end of a marriage by death, can it be said that a like rule would be wrong? We think not.

11.33 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 real or imagined motives prompt attempts to evade the law. We look for a way to defeat these attempts where they are directed at the Act.

11.34 We propose a compromise. Shortly stated, it is this: property disposed of, or appointed, by a deceased person within three years before his death should be capable of being made the subject of an order under the Act where, in the case of a disposition of property, the disposition was made wholly or partly by way of gift and with an intention of evading the Act and, in the case of an appointment, the appointment was made with the same intention.

11.35 We think that the Act should be closely confined so far as concerns upsetting absolute gifts made by a deceased person during his lifetime. The confinements we propose are the time limit of three years (so as to keep the social evils of insecure titles within reasonable limits)⁴⁵ and the subjective test of intention to evade the Act.

11.36 Our proposal has limitations. It requires a person attacking, for example, a disposition of property to prove both a gift and an intention. The necessary evidence will often be hard to get. Lack of evidence is, however, a hazard in all litigation and proceedings under the Act are, in this sense, no different from other proceedings.

11.37 Further particulars of the proposal are given in paragraphs 11.46 and 11.48, in the draft Bill⁴⁶ and in the notes on the Bill.⁴⁷

Objective Tests

11.38 We turn now to the objective tests we referred to in paragraph 11.27. Where we speak of an objective test, we mean a test which turns on things external to the mind of the deceased. Does a particular disposition of property fall within the description of a particular ^{fact}/situation? Section 102 of the Stamp Duties Act, 1920, provides examples of the objective tests we now have in mind. The section says, amongst other things -

"... the estate of a deceased person shall be deemed to include and consist of the following classes of property:-

(1)(a) All property of the deceased which is situate in New South Wales at his death.

.

45. See paragraph 11.44.

46. ss.21(7), 13(2).

47. See paragraphs 21.63 - 21.67.

- (2)(a) All property which the deceased has disposed of, whether before or after the passing of this Act, by will or by a settlement containing any trust in respect of that property to take effect after his death"

Section 20 of the Canadian Draft Family Relief Act⁴⁸ and section 2.202 of the Uniform Probate Code of the United States⁴⁹ also provide examples of objective tests relevant to our present purpose.

11.39 Although we are reluctant to suggest that the Act be made more complex, we propose that concepts of the kind referred to in paragraph 11.38 be adopted. We make this proposal because property can be taken outside the Act without any intention of evading the Act. In these cases the proposal made in paragraph 11.34 (involving proof of an intention to evade) is inapt. But, in our view, some property should be within the application of the Act whatever the intention was that led to its disposition. Shortly and imprecisely stated, the test we propose is: "Was the property disposed of by a will substitute?".

11.40 In our terms a will substitute may take many forms. First, there is the arrangement under which a person retains the enjoyment and disposal of property until his death, but commits 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.

48. See paragraph 11.12.

49. See Appendix D.

11.41 Secondly, there is the arrangement typified by the joint bank account (either to draw) whereby, although the effect of death is fixed by contract, a person may at any time before his death reduce the asset to 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.

11.42 Thirdly, there is the arrangement typified by a settlement of property made by the deceased 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.

11.43 We have made some particular references in paragraphs 11.40 - 11.42 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.

11.44 But, where the deceased has disposed of property in such a way that the property is absolutely vested in some person before the death of the deceased, different considerations apply. It is much in the public interest that the title to property should not be uncertain. If A gives land to B and the gift remains liable to attack until some time after A's death, which may not happen for some 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 of improvements an adequate counter: a man 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.

OUTLINE OF PROPOSALS

11.45 In the notes on the draft Bill,⁵⁰ we consider many of the details of our proposals to extend the Act to property which is not now within its application. Here we speak of the proposals in general terms only. But first we note that the arrangements to which they are intended to apply are substantially the same as the arrangements to which the Courts of the seventeenth and eighteenth centuries gave special attention in cases on the Custom of London. The rules then evolved lost their importance, not because they were found to be wrong in principle, but because they became redundant when testamentary freedom became a tenet of English law. Now that the Act has limited that freedom, the rules are again pertinent: North American experience shows that they provide guidelines for modern legislators.⁵¹

50. Paragraphs 21.58 - 21.81.

51. See paragraph 11.25.

11.46 We propose that a statutory trust be created in relation to the property with which we are now concerned (which, for convenience, we call "notional estate"). Under this statutory trust, the Court may make an appointment of the notional estate for the purpose, amongst others, of making an order for provision under the Act.⁵² The statutory trust is a trust for, amongst others, such one or more of them, the applicant and all persons beneficially interested in the notional estate, as the Court may appoint.⁵³

11.47 The statutory trust will apply to the following property -

1. Property which the deceased has power to appoint or otherwise dispose of for his own benefit.

Such a power may arise under a settlement made by a stranger, or it may arise under a contractual arrangement such as a joint bank account (either to draw).

Different views can be held about the fairness of this proposal in its application to a joint bank account on which either party may operate. Thus, if A and B set up, and contributed equally to, the 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 beneficial interest in the account which accrues to B by virtue of his surviving A. Our present, and tentative,

52. Draft Bill, s.27.

53. Draft Bill, s.26.

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. We stress that we are speaking here only in the context and for the purposes of proceedings under the Act.

We add that in the case of a joint bank account it can be argued that our proposal might give rise to practical difficulties. If the account became subject to the statutory trust immediately upon the death of one of two owners, might not the surviving owner be prevented from operating on the account? We aim to avoid problems of this kind by providing in the Bill that the statutory trust does not impose any personal liability on any person bound by the statutory trust except liability for matters arising after notice to him of proceedings under the Act.^{53a}

We invite expressions of opinion on what may be a controversial question, namely, the application of our notional estate provisions to joint bank accounts. The draft Bill does not distinguish between joint bank accounts and other jointly owned property.

53a. Draft Bill, s.28(3).

2. Property which a deceased person has power to appoint or otherwise dispose of for the benefit of the applicant.

This embraces property over which the deceased has such a power, for example, a special power to appoint, under a settlement made by himself or under a will or settlement made by a stranger or, in some cases, a superannuation scheme with death benefits. Although novel, the last mentioned operation does not trouble us because the property was part of the resources available to the deceased from which provision might have been made for at least one eligible applicant.

3. Property comprised in a settlement made by the deceased person, wholly or partly by way of gift, which, immediately before his death, is not indefeasibly vested in interest in some person beneficially.

We referred to property of this kind in paragraph 11.43. We believe that a person who does not have a vested beneficial interest in property the subject of a settlement, no matter what his expectations concerning it might be, should be no better off than the beneficiary named in the will of a living person. 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 propose, 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, firm expectations are not thereby frustrated. But where the deceased person has disposed of property in such a way that the property is absolutely vested in some person before the death of the deceased, different considerations apply. As noted before,⁵⁴ it is much in the public interest that the title to property should not be uncertain.

4. Property comprised in a disposition made by the deceased person, wholly or partly by way of gift, by virtue of which the property is conveyed to, or vested in, the deceased person and another person jointly.

Particular mention is made of property fitting this description because the rules of law relating to the joint ownership of property are such that paragraphs 11.47.1 and 11.47.3 will not apply to all jointly owned property. For example, a joint tenant of realty cannot lawfully dispose of the property subject to the joint tenancy for his own benefit: and it is difficult to argue that immediately before the death of a joint tenant of realty the property subject to the joint tenancy is not absolutely vested beneficially.

5. The proceeds of a policy of assurance maturing on the death of the deceased person where the policy is in force by virtue of a disposition of property made by the deceased person wholly or partly by way of gift.

Particular mention is made of the proceeds of life policies because they represent property which

54. See paragraph 11.44.

does not exist until the life assured dies.

Without this particular mention, these proceeds may be outside the scope of our proposals and, where a gift is involved, we do not believe that this should be so. In many cases, the existence of life policies is the basis upon which a person plans how property will pass on his death. To the extent that the Act fails to recognise this fact, the Act is, in our view, defective.

6. The benefits of a pension, retirement or superannuation scheme of or in which the deceased person was a member or participant immediately before his death.

Death benefits flowing from schemes of the kind mentioned may take many forms. They may, for example, be a lump sum payment of an annuity. Indeed, the schemes themselves may take many forms. They may be voluntary or compulsory, they may be contributory or non-contributory or they may give, or not give, a right to the member or participant to choose the beneficiary of the benefits.

Many persons plan the disposition of property after death by reference to the benefits available from particular schemes. Often these benefits are 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 orders under the Act affecting the benefits, the Court may sometimes be hindered in its efforts to make adequate provision for the proper maintenance of an eligible person. On the other hand, the death benefits do not always come solely from dispositions of property made by the deceased. In many cases, the deceased's employer makes contributions which add to the value of the benefits. In this situation, it seems to us that the employer has an interest

which should not be ignored by the Court. For this reason, we propose that the Court may appoint the benefits only amongst the persons to whom any administrator of the scheme might lawfully have appointed them. To illustrate: if the scheme provides for benefits to be divided between the widow and the children of the deceased, the Court shall not divide the benefits between the widow and, say, a parent of the deceased.

7. Property disposed of or appointed by a deceased person within three years before his death where, in the case of a disposition of property, the disposition was made wholly or partly by way of gift and with an intention of evading the Act or, in the case of an appointment, the appointment was made with an intention of evading the Act.⁵⁵

11.48 Incidental aspects of our proposal include -

1. In the case of a disposition of property made with an intention of evading the Act, the statutory trust is imposed upon the property from a time immediately before the disposition.⁵⁶
The object is to let in the equitable doctrines of bona fide purchaser for value and such like, so as to escape the need of, and possible inadvertent injustice or impracticability in, legislation on questions of knowledge. There is the further object of letting in the equitable doctrine of tracing trust property. If a person takes the property with notice of the evasive intention, strict rules of tracing will be applied; if he takes in good faith without notice, much

55. See paragraphs 11.28 - 11.37.

56. Draft Bill, s.21(7),(8).

less strict rules will be applied.⁵⁷

2. In the case of property within the scope of our proposal but not disposed of with an intention of evading the Act, the property is subject to the statutory trust only from and after the death of the deceased.⁵⁸
3. Property may be excluded from the notional estate of a deceased person by order of the Court.^{58a}
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 order 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.
4. Property may also be excluded from the notional estate of a deceased person by a person consenting to a disposition of the property which, but for the consent, would have attracted the notional estate provisions of the Bill to the property concerned.^{58b}
5. 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

57. In Re Diplock [1948] Ch.465.

58. Draft Bill, s. 21(2), (3), (4), (5), (6).

58a. Draft Bill, s.23.

58b. Draft Bill, s.24.

partly by way of gift. The draft Bill provides^{58c} that where the property is in the notional estate of a deceased person the Court must make a just allowance for this situation. Under this provision the Court might say, for example, that the property which was valued at \$50,000 when it was disposed of for one-half of its value in 1964 is valued at \$100,000 in 1974 and that any order under the Act affecting the property made in 1974 should be limited to one-half of the then value of the property.

6. It will also happen that the legal 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 legal owner.^{58d}
7. The statutory trust is not intended to allow an eligible person to harass the legal owner of property which is in the notional estate of a person: the draft Bill provides that the statutory trust does not enable any person claiming beneficial interest under the statutory trust to commence proceedings in any Court against a person bound by the statutory trust:^{58e} the only exceptions relate to an order for provision under the Act.^{58f}
8. Subject to limited exceptions, the statutory trust does not impose any personal liability on any person

58c. s.25(1)(a).

58d. Draft Bill, s.25(1)(b),(c).

58e. Draft Bill, s.28(1).

58f. Draft Bill, s.28(2).

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.^{58g}

SCHAEFER V. SCHUHMAN

11.49 In paragraph 11.1.3, we note that in proceedings under the Act, the Court may not make any order affecting property which is disposed of by the will of a deceased person pursuant to a contract to devise or bequeath the property. We look now at some implications of this rule.

11.50 The rule itself was stated authoritatively only recently. In 1941, the Privy Council held that an order under the Act could affect property disposed of by the will of a deceased person pursuant to a contract made by him to devise or bequeath that property.⁵⁹ But, in 1971, the Privy Council, Lord Simon of Glaisdale dissenting, held that an order under the Act could not affect property so disposed of.⁶⁰

11.51 This judicial conflict stems from differing views about how the person named in both the contract and the will is to be classified. Is he a beneficiary of the deceased

58g. Draft Bill, s.28(3), (4).

59. Dillon v. Public Trustee of New Zealand [1941] A.C. 294.

60. Schaefer v. Schuhmann [1972] A.C. 572.

or a creditor of the deceased?⁶¹ In Dillon's Case,
Viscount Simon L.C. said⁶² -

"There can be no dispute or doubt that the lands left to the children form part of the testator's estate, and the children are bound to accept the position that the provision made for them is liable to be reduced by order of the court in favour of their stepmother, unless, indeed, their claim on the estate could be regarded as constituting a debt which has to be discharged before benefits are distributed. But these devisees are not creditors of the estate. They are beneficiaries under the will.⁶³ There is nothing in the nature of a debt owing to the children from the testator's estate. The testator has done what he contracted to do, namely, to make the testamentary provisions defined in ... the agreement."

But in Schaefer's Case, Lord Cross, in tendering the advice of the majority of the Board, accepted the creditor theory of a promisee's rights under a contract to devise or bequeath and refused to follow Dillon's Case.

11.52 One writer has said of the differing beneficiary and creditor theories⁶⁴ -

"The creditor theory commands the weight of authority The beneficiary theory is difficult of application, does lead to anomalous results, and is probably not in accordance with the intentions of the contracting parties who would more likely contemplate a substantial or effectual rather than a merely formal conferment of benefits. But the beneficiary theory has one outstanding virtue which is lacking in the creditor theory: it leads to the result that the terms of a dispute as to priority between a promisee under a contract to will and dependants of the promisor are not resolved automatically and perhaps unjustly in favour of the promisee. The dispute is committed to judicial discretion where the circumstances and the merits of each case may be investigated fully with a view to producing a just and socially desirable result."

11.53 The social effects of Schaefer's Case must concern

61. See Lee (1971) p.358, pp.363-366.

62. [1941] A.C. 294, 302-3.

63. Emphasis added.

64. Hardingham (1971) p.127, and see Lee (1973) pp.63-65.

us. They lead us to consider whether or not the law stated in Dillon's Case should be restored by amendment of the Act. In his dissenting judgment in Schaefer's Case, Lord Simon of Glaisdale spoke of the problem. His Lordship said⁶⁵ -

"The effect of overruling Dillon's case is that the New South Wales statute is so construed as to countenance the following situation: 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. The legislatures of the various jurisdictions concerned may wish to consider this situation."

11.54 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?"⁶⁶ 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 partially set aside by the Court under the Act?"⁶⁷ 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 testation was restricted in the twentieth century, so too should a nineteenth century freedom of contract be restricted.

11.55 No proposal in this area will be entirely satisfactory.

65. [1972] A.C. 572, 593-594.

66. See Lord Simon of Glaisdale in Schaefer's Case [1972] A.C. 572, 599.

67. See Lord Cross in Schaefer's Case [1972] A.C. 572, 592.

In many cases the applicant under the Act needs protection and the person named in both the contract and the will also needs protection. Both parties being worthy of the Court's aid, it follows that one suffers if the rights of the other are said to be exclusive. An approach which allows the Court to balance the equities between the applicant on the one hand and the person named in the contract and the will on the other hand is, in our view, the better approach.

11.56 We would, however, limit the Court's discretion. We propose that the Court may make an order under the Act in relation to the property the subject of the contract and will but only to the extent that the value of the property exceeds the value to the deceased at the time of the contract of the promise made by the other party to the contract. This approach may be compared with the approach of the Commissioners on Uniformity of Legislation in Canada. They propose⁶⁸ that property of the kind we are now considering be not liable to be made the subject of an order under family provision legislation except to the extent that the value of the property exceeds the consideration received for it by the deceased. But take the case where A enters into a contract to devise Blackacre, valued at \$20,000, to B in consideration of a promise by B to care for A for life. A has an expectation of life of ten years but is killed by accident the next day. What is the consideration received by him? One day's care or the promise of care for life? It ought, in our view, be open to the Court to say that it was a fair bargain in the light of future uncertainties and that an order will not be made affecting Blackacre. On the other hand, if A's expectation of life was six months and Blackacre was valued at \$1,000,000, the Court may well make an order affecting Blackacre to the extent that there

68. Draft Family Relief Act, s.16 (See page 159 of Proceedings of 1969 Meeting of the Conference of Commissioners).

is a gift in the arrangement made between A and B.

11.57 On our approach, the Court can take into account both the needs of an applicant and the consideration given for the testamentary promise. To illustrate: where an applicant is a needy and a deserving widow, her claim might prevail over that of a person who gave undervalue for his contractual benefit; or, where the claims of an applicant are less strong and almost full consideration was given for the benefit, the applicant might receive nothing or only part of that which the Court might otherwise have ordered.

11.58 The Dillon Case v. the Schaefer Case debate is difficult to decide. We have given one answer but we invite different answers.

CONFLICT OF LAWS

11.59 We look now at other classes of property in respect of which orders cannot be made under the Act. The Court cannot make an order affecting -

1. In the case of a person dying domiciled in New South Wales, the immovables of that person situated outside New South Wales.
2. 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 elsewhere, and the immovables of that person situated outside New South Wales.

11.60 The propositions stated in paragraph 11.59 are supported by well known rules of private international law. In Re Paulin,⁶⁹ Sholl J. stated them as follows -

"In my opinion, the following propositions are established by the authorities, save as to cases where the legislation expressly otherwise provides:

69. [1950] V.L.R. 462, 465.

(1) The Courts of the testator's domicile alone can exercise the discretionary power arising under the appropriate testator's family maintenance legislation of the domicile so as to affect his movables and his immovables in the territory of the domicile; Pain v. Holt (1919), 19 S.R. (N.S.W.) 105.

(2) The same Courts alone can exercise such discretionary power so as to affect under the same legislation his movables outside the territory of the domicile; Re Sellar (1925), 25 S.R. (N.S.W.) 540 (New South Wales Court dealing with movables out of the jurisdiction); Re Butchart, [1932] N.Z.L.R. 125, at p.131 (where it was stated that the New Zealand Court would not touch the movables in New Zealand of a testator domiciled abroad); Re Ostrander Estate, 8 W.W.R. 367 (Court of the situs of land declining to deal with the movables in that jurisdiction of a testator who died domiciled elsewhere).

(3) The Courts of the situs can alone exercise a discretionary power to affect, and then only if there is testator's family maintenance legislation in the situs providing for it, immovables of the testator out of the jurisdiction of the Courts of his domicile; and the Courts of his domicile cannot exercise their discretion so as to deal with such immovables; Pain v. Holt (supra); Re Donnelly (1927), 28 S.R. (N.S.W.) 34; Re Osborne, [1928] St. R. (Qd.) 129; Re Butchart (supra)."

11.61 These limitations on the Court's power can give rise to difficulties. To illustrate: a person dying domiciled in New South Wales may leave land in Victoria and Queensland but the Court cannot make orders under the Act affecting the land in Victoria or Queensland and an applicant may have to commence separate proceedings in the three States. Or, a person dying domiciled in Victoria may leave land and shares in New South Wales; the Court may make an order affecting the land, but not the shares; an applicant may have to commence proceedings in both States. Or, a person domiciled in a country where there is no equivalent of the Act may leave movables in New South Wales worth one million dollars and a destitute widow, the widow cannot apply for an order for provision anywhere. Instances of this kind may not often occur, but when they do occur the law is found to be less than satisfactory.

11.62 There is, of course, no geographical reason why the laws relating to family provision should be different in any part of this continent. But "the States are separate countries in private international law, and are to be so regarded in relation to one another".⁷⁰ This statement reflects the basic attitude of the Australian courts: in general, they apply to intranational conflicts of law cases, the rules they apply to international conflicts of law cases.⁷⁰ This is so because there does not seem to be any separate body of common law rules dealing with intranational conflicts.⁷¹ Moreover, in the case of proceedings under the Act which turn on conflict of laws rules, there is nothing in the Constitution or in federal or state statute law which would justify the use of any but international conflict rules. Hence the Court construes the Act as having only the effect that the rules of international law let it have.⁷²

11.63 In this context, it is necessary to refer, first, to section 118 of the Constitution which provides -

"Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State."

and, secondly, to section 18 of the State and Territorial Laws and Records Recognition Act 1901-1973 (Cth) which provides -

"All public acts, records and judicial proceedings of any State or territory, if proved or authenticated as required by this Act, shall have such faith and credit given to them in every Court and public office as they have by law or usage in the Courts and public offices of the State or Territory from whence they are taken."

70. Nygh (1971) p.721.

71. Id., 724-725.

72. See Dixon J. in Wanganui-Rangitikei Electric Power Board v. Australian Mutual Provident Society (1933-34) 50 C.L.R. 581, 601.

11.64 According to Professor Nygh,⁷³ "The crucial question, which is as yet unresolved in Australia, is whether full faith and credit involves not merely the taking note of, but also the giving of substantive effect to, interstate laws and judgments". And, "If full faith and credit does have a substantive effect, what exact effect does it have? Should a distinction be drawn between the giving of full faith and credit to judgments and the giving of full faith and credit to statutes?" In this Paper, we do not have to suggest answers to these questions. We mention them merely to show that our statement in paragraph 11.62 (that the Court construes the Act as having only the effect the rules of international law let it have) must be read subject to the imprecise limitations of the full faith and credit doctrine.

11.65 We note that in South Australia, since 1972, an order may be made "where a person has died domiciled in the State or owning real or personal property in the State".⁷⁴ The use of the words "or personal property" extends the jurisdiction of the Court in that State beyond normal limits. It has the effect of giving legislative recognition to a criticized decision of Murray CJ. that the South Australian Supreme Court may make orders affecting any property in South Australia notwithstanding that the deceased was domiciled elsewhere.⁷⁵

11.66 One result of the South Australian legislation is that in the case of a person dying domiciled in New South Wales leaving personal property in South Australia, the Supreme Courts of both States appear to have power to make

73. (1971) p.732, 736.

74. S.A. Act, s.7(1)(a).

75. Re Found [1924] S.A.S.R. 236, 240 and see Re Paulin [1950] V.L.R. 462, 468, Sykes (1972) 526 and 41 A.L.J. 382, 384.

an order affecting that property. If this were done and the orders were made in favour of different persons, whose order would prevail? In the absence of a legislative or judicial ruling, the question cannot be answered with certainty. Because the South Australian Supreme Court has power to refuse to make the order or to adjourn the hearing if it appears that the matter would be more properly determined by proceedings outside the State,⁷⁶ it is clear that the South Australian legislature does not claim exclusive jurisdiction for its Supreme Court.

11.67 Uniform legislation relating to the Australian property which an Australian Court may affect by an order under family provision laws is called for. Where a deceased person dies within Australia, it may be that the Court of his domicile should be the only Court empowered to make orders affecting his Australian assets, wherever they are situated. Our terms of reference do not extend to making recommendations for uniform legislation and we do not develop this thought.

11.68 We propose, however, that New South Wales should follow the South Australian example and extend the Court's jurisdiction under the Act. The extension to which we refer is to allow the Court, in favour of an applicant who is ordinarily resident in New South Wales, to make an order affecting the personal property of a deceased person which is situated in New South Wales, whether or not the deceased was, at the time of his death, domiciled in New South Wales.

See now section 11(1)(b) and section 11(2) of the Family Provision Act, 1982.

76. S.A. Act, s.7(5).

PART 12. - WHAT ORDERS SHOULD THE COURT
BE EMPOWERED TO MAKE?

12.1 In proceedings under the Act, the Court may make orders of many kinds. Apart from the primary power to order that provision be made for an applicant out of the estate of a deceased person,¹ the Court may, amongst other things, order -

1. That the time for making an application be extended.²
2. That the provision to be made for an applicant consist of a lump sum or periodical or other payment.³
3. That the burden upon beneficiaries of an order for provision be adjusted between them.⁴
4. That an order for provision be varied or revoked.⁵

12.2 In Part 13 of this Paper, we give detailed consideration to the Court's lack of power to vary an order by increasing the provision made for an applicant. Here we consider whether the powers of the Court should otherwise be restricted or enlarged.

12.3 We do not propose that the powers of the Court be restricted in any way. We know of no instance where it has been claimed for good reason that the existing powers of the Court are too wide. If there are misgivings in this area we ask for particulars of them.

12.4 There are, however, areas where an enlargement of the powers of the Court might be useful. In particular, we think of -

-
1. s.3(1), (1A).
 2. s.5(2A).
 3. s.3(3).
 4. s.6(2).
 5. ss.6(4), 8.

1. A power to order that a person be joined as a party to proceedings under the Act.
2. A power to make an interim order.
3. A power to make an order for immediate maintenance.
4. A power to order that a sum be set aside as a class fund for the benefit of two or more persons for whom provision is made under the Act.
5. A power to give advice or directions.

Addition of Parties

12.5 The quick determination of legal proceedings is desirable. This is particularly so in the case of proceedings under the Act. 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,⁶ for example, Street J. said⁷ -

"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."

6. [1968] 2 N.S.W.R. 453.

7. Id., 456.

If all eligible applicants are parties to particular proceedings, the Court will ordinarily be better placed to evaluate the testamentary obligations of the deceased person concerned and to determine priorities between the competing applicants.

12.6 Moreover, the Court will ordinarily be better placed to evaluate the testamentary obligations of a deceased person if a beneficiary of that person is heard to say why the provision made for him by the deceased should not be disturbed by the Court.

12.7 In short, there is a need for the Court to hear of or from all eligible applicants and beneficiaries. At first glance, the Court is able to satisfy that need. Under the Supreme Court Rules, 1970⁸ the Court may direct that any person be added as a party to proceedings under the Act or that notice of the proceedings be served on any person. But, in practice, is the need satisfied?

12.8 One answer to the question last asked is that the executor is protector of the will and it is his duty to place all relevant evidence before the Court:⁹ hence the need of which we speak should be satisfied. This might be a satisfactory answer if all executors were conscientious and if all relevant information was available to all executors. But, it cannot be claimed that all executors are conscientious or that all conscientious executors are able to collect all relevant information or that the Court is always able to detect the shortcomings of information put before it.¹⁰ Indeed,

8. Pt.77 r.28 and see, generally, Pt.8.

9. See Re Lanfear (1940) 57 W.N. (N.S.W.) 181, 183 and Re Hall (1959) 59 S.R. (N.S.W.) 219, 227.

10. See, for example, the unreported decision of the Court of Appeal (N.S.W.) in Vesiljev v. The Public Trustee (1st November, 1973).

it must be said that the Court is reluctant to allow all interested persons to intervene in proceedings under the Act.¹¹

12.9 In the United Kingdom, an applicant for family provision will, at the outset, join as defendants not only the testator's executors or other legal personal representatives but also such beneficiaries as appear to be necessary parties.¹² The Court may also direct that any person be added as a party to the proceedings or that notice of proceedings be served on any person.¹³

12.10 In New Zealand specified persons must be served with an application under the Family Protection Act 1955. Section 4 of that Act provides, amongst other things -

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

(3) It shall not be necessary to serve any application 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."

12.11 In our view, notice of proceedings under the Act should, wherever practicable, be given to the surviving spouse and

11. Id.

12. Ordinary practice in the Chancery Division.

13. Rules of the Supreme Court, Order 99 r.2.

children of a deceased person and also to any person who by virtue of the will of the deceased person or the rules of intestacy is entitled to share in the estate of that person. A requirement of this kind would satisfy complaints such as the following -

"We act for a charitable organization engaged in community service which was named as a residuary beneficiary in the Will of a testator who died last year. The estate was of a net value after payment of debts and duties of approximately \$200,000 and our client, together with three other charitable organizations, were left the whole of this estate subject to life interests in favour of the deceased's four children.

The application by the children under the [Testators' Family Maintenance and Guardianship of Infants Act, 1916], resulted in a court order providing for the four children to have the whole estate absolutely.

What concerns us and our client is that the first knowledge we or it had of the application was a letter from the executor forwarding a copy of the order some six months after it had been made.

There does not appear to be any requirement that notice of such an application should be given to beneficiaries either by the applicant or by the executor apart from judicial statements to the effect that it is the duty of an executor to seek to uphold the provisions of the Will, and in cases such as the above a beneficiary may be deprived of the benefit given under a Will without any opportunity for making submissions or producing evidence.

Somewhat similar situations have come to our notice in the past and we are writing to suggest that this may be a matter to which the Commission might consider attention could be given."

12.12 In more precise terms, we propose that Part 77 of the Supreme Court Rules, 1970, should be amended so as to provide that notice of a summons under the Act shall be given by the administrator to the surviving spouse and children of the deceased person and to every person beneficially entitled to share in the estate of that person. At paragraph 12.29, we consider the case of a legally incapacitated person.

Interim Orders

12.13 In proceedings under the Act, the Court sometimes makes an order which does not make complete and final provision for a plaintiff. It makes an interim order.

In the words of Myers J.¹⁴ -

"... interim orders take two forms - one in which provision is made for a limited period with leave to the applicant to move for further provision at the expiration of the period, and the other in which the court makes complete provision for the applicant but directs that it is only to endure until the further order of the court, reserving liberty to any party to apply at any time or from time to time to vary the order in any way by increasing it, reducing it, rescinding it or substituting provisions of a different nature."

12.14 Opinion is divided on whether the Court's practice is authorised by the Act. Again in the words of Myers J.¹⁵ -

"In Re Yates¹⁶, I held that the court had no power to make such orders [interim orders of the kind mentioned in paragraph 12.13]. In Welch v. Mulcock¹⁷, it was held by a court of three judges, the judgment of which was delivered by Salmond J., that the court had no power, under a New Zealand statute which is in similar terms to our own, to make interim orders. In In re Breen¹⁸, Mann C.J., came to the same conclusion, and this decision was approved by the Full Court of the Supreme Court of Victoria in Re Porteous¹⁹. Since my decision in Re Yates²⁰, the Full Court of the Supreme Court of Queensland has come to a similar conclusion in Re McGregor²¹. Although the decision in Welch v. Mulcock²² was a decision of a bench of three judges, some courts in New Zealand which have considered the matter since the time of that decision have declined to recognize it as being the decision of a Full Court and therefore binding on them, and some judges in New Zealand have therefore felt at liberty to decline to follow the decision. There is, thus, a conflict of authority in New Zealand, but in Victoria and Queensland it has been definitely established that interim orders are not in the power of the court to make. I see no reason to alter the view which I previously formed, and indeed it has been strengthened by the subsequent decision by the Full Court of the Supreme Court of Queensland and possibly by some of the remarks in Coates v. National Trustees Executors & Agency Co. Ltd.²³, and Dun v. Dun²⁴ and by the remarks of some of the members of the court when that case came before the High Court of Australia.²⁵"

14. Re Piper (1960) S.R. (N.S.W.) 328, 330.

15. Ibid.

16. (1955) 72 W.N. (N.S.W.) 497.

17. [1924] N.Z.L.R. 673.

18. [1933] V.L.R. 455.

22. [1924] N.Z.L.R. 673.

19. [1949] V.L.R. 383.

23. (1956) 95 C.L.R. 494.

20. (1955) 72 W.N. (N.S.W.) 497.

24. [1959] A.C. 272.

21. [1956] Q.S.R. 496.

25. (1957) 99 C.L.R. 325.

And, in 1972, a sub-committee of the Chief Justice's Law Reform Committee in Victoria said²⁶ that interim orders "appear to be without any legislative warrant and thus of very doubtful validity".

12.15 Notwithstanding opinions of the kind just quoted, interim orders are made in proceedings under the Act. In Re Blakemore,²⁷ for example, McClelland CJ. in Equity, held that where there is uncertainty about the true value of a substantial asset in the estate of the deceased, it may be desirable, in order to protect an applicant, that the order made be of an interim nature for a limited period with leave to restore the application to the list at the end of that period.²⁸

12.16 We do not have to decide whether the Court has power to make an interim order. The law lacks certainty and doubts should be removed. Should the Court have the power to make an interim order or should it be denied that power? For the reasons which follow, we say that the Court should have the power and the draft Bill contains a provision to this effect.²⁹

12.17 It can be argued against our proposal that by the making of an interim order, the administration and winding up of an estate and the final determination of the rights of beneficiaries are unreasonably delayed. In theory, there is force in this argument. In practice, experience seems to show that the fears are unfounded. Whether rightly or wrongly, interim orders have been made in proceedings under the Act

26. Report Testator's Family Maintenance - Variation of Orders (31st October, 1972) p.4.

27. [1967] 1 N.S.W.R. 10, 11.

28. See, for other examples, Re Scott (1964) 82 W.N. (Pt.1)(N.S.W.) 313, 314; Re White [1965] N.S.W.R. 1035, 1038; and Re Carlaw [1966] 1 N.S.W.R. 148, 153.

29. s.8(5).

for many years. The judges who make them are experienced. Commonly all the relevant facts are before the Court and the Court is able to tell whether an interim order is the appropriate order. And, as the sub-committee of the Chief Justice's Law Reform Committee in Victoria has noted,³⁰ the device has apparently been acquiesced in without demur by all concerned. We say that where the Court thinks it is wise and just to make an interim order, the Court should have no doubts about its powers to make the order. We invite the expression of contrary views.

12.18 We add that the making of an interim order would not stop all distributions from the estate. The draft Bill empowers the Court to permit distribution of specific parts of the estate notwithstanding the existence of an interim order.³¹

Order for Immediate Maintenance

12.19 The draft Bill contains a provision enabling the Court to order that money be paid to an applicant who is in immediate need of financial assistance.³² The Court must be satisfied, first, that the applicant is in immediate financial need, secondly, that it is not yet possible for the Court to determine what order, if any, should be made for the applicant and, thirdly, that property forming part of the estate of the deceased person is, or can be made, available to meet the need of the applicant.

12.20 English experience leads us to propose this last mentioned provision. It does not have a counterpart in any comparable Australasian legislation. The draft section is based on section 4A of the English Inheritance (Family)

30. Report Testator's Family Maintenance - Variation of Orders (31st October, 1972) p.4.

31. Draft Bill, s.8(6).

32. s.10.

Provision) Act 1938.³³

12.21 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.

12.22 The proposal referred to in paragraph 12.19 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. Moreover the order may be made on terms.³⁴ If the proposal is adopted, we expect few problems in practice. We invite comment on its likely utility.

33. s.4A was inserted by the Family Provision Act 1966, s.6.

34. Draft Bill, s.10(1).

Class Funds

12.23 In New Zealand, the Court may order that an amount specified in an order under the Family Protection Act 1955 be set aside out of the estate and be held on trust as a class fund for the benefit of two 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.³⁵

12.24 The Act does not have any comparable provision. "Class fund" provisions are now included in the family maintenance legislation of Tasmania,³⁶ Western Australia,³⁷ the Australian Capital Territory,³⁸ and the Northern Territory.³⁹

12.25 As we see it, the class fund concept was introduced into the New Zealand Act following the decision of the New Zealand Court of Appeal in In re Maxwell.⁴⁰ In that case, the Court said⁴¹ -

"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 twenty-one 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'."

35. N.Z. Act, s.6(1), (2).

36. Tas. Act, s.10(1), (2).

37. W.A. Act, s.13(1), (2).

38. A.C.T. Ord., s.12(1), (2), (3).

39. N.T. Ord., s.12(1), (2), (3).

40. [1954] N.Z.L.R. 720.

41. Id., 736.

12.26 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, four young children as a group and not as four 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.

12.27 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.⁴² 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.

12.28 Our draft Bill includes a class fund provision.⁴³ The New Zealand experience indicates that it will not often be used.⁴⁴ But when an occasion arises for its use, its

42. The Act, s.4.

43. s.11.

44. See Report Testator's Family Maintenance - Variation of Orders (3rd October, 1972) p.3.

presence will, we believe, be beneficial.

Advice and Directions

12.29 Where a person dies leaving a child who is a minor, or a spouse or a child suffering from mental illness, who shall decide whether proceedings under the Act are to 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.⁴⁵ In other cases, the problem is a real one. We realise, 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.

12.30 Part 63 of the Supreme Court Rules, 1970, deals generally with proceedings in the Court by or against minors or mentally disable persons. But neither the Rules nor the Act aids the determination of the preliminary question whether proceedings should be commenced at all.

12.31 In New Zealand⁴⁶ -

"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 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."

12.32 In Queensland⁴⁷ -

"The personal representative or the Public Curator of Queensland or the Director of Children's

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

46. N.Z. Act, s.4(4).

47. Qld Act, s.90(7).

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."

12.33 Provisions of the kind mentioned in paragraphs 12.31 and 12.32 do not completely solve the problems 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 Act.

12.34 We have considered a proposal that every applicant for probate or administration be required to put on an affidavit naming any eligible applicant who is under legal disability and that it be made a duty of a Master to determine whether proceedings under the Act 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. Furthermore, not every administrator will know of every eligible applicant. 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, difficult to determine and a wrong answer is potentially dangerous in its consequences.

12.35 We have also considered a variation of this last proposal, namely, that the solicitor for every applicant for probate or administration be required to certify to the Court that he has enquired about eligible applicants who may be under legal disability and to disclose the result of

his enquiries. Apart from difficulties of the kind adverted to in paragraph 12.34, 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.

12.36 We are presently unable to propose any procedure for protecting interests under the Act of minors and mentally disable persons which is neither ponderous nor extensive. We invite suggestions for a procedure which is not open to the same objections.

12.37 For the purpose of illustrating some of the matters which must be considered, we return to the proposal mentioned in paragraph 12.34. If that proposal were to be adopted, rules of court to the effect of the following might be called for -

1. The administrator of the estate of the deceased person must obtain from every person interested in the estate or notional estate⁴⁸ of the deceased an affidavit setting out, as far as is known to the deponent, the name, address and description of every eligible person.
2. Paragraph 1 applies only as regards persons whose identity and name and address are known to the administrator and who are not themselves under disability.
3. Paragraph 1 does not apply to any person taking an interest valued at less than \$
4. The administrator must also make an affidavit as mentioned in paragraph 1.

48. See paragraph 11.46.

5. The administrator must file the affidavits in the Court. The Court (by a Master or Registrar) will consider, in private, the affidavit and stamp affidavit and any other evidence the administrator may adduce and, where he considers that proceedings for provision should be commenced by a person under disability, he will give appropriate directions.
6. The estate of the deceased person shall not be distributed pending compliance with the directions, except by leave of the Court.
7. The administrator must give notice to each eligible person disclosed by the affidavits. The notice must contain a brief statement or description of the rights of the eligible person under the Act.
8. Where a person defaults in making an affidavit when required, or makes an affidavit knowing it to be false, or does not comply with a direction of the Court, time shall run in his favour against a disable person whose case was not considered, by reason of the default, until the default is made good.
9. An applicant under the Act must make an affidavit as mentioned in paragraph 1 and, in case of default or falsehood, any provision made for him may be attached by a disable eligible person, time running only from remedying the defect.
10. A person interested in the notional estate of a deceased person may make an affidavit giving the names, addresses and descriptions of the eligible persons and distinguishing those under disability, so far as within his knowledge. He may file the affidavit and give notice, as in paragraph 7, to eligible persons not under disability. The Court (by a Master or Registrar) will consider the affidavit

and any other evidence adduced and may direct the commencement of proceedings on behalf of an eligible person to a disable person.

12.38 A procedure of the kind broadly described in paragraph 12.37 would often have the effect of alerting persons, other than disable persons, to their rights under the Act. In particular, we think of overseas widows or children of men who have migrated to and died in New South Wales.

12.39 At least one substantial objection to these procedures is the administrative cost involved in having a public officer discharge the duty mentioned in paragraph 12.37.5.

PART 13. - WHAT POWERS, IF ANY, SHOULD THE COURT HAVE TO VARY AN ORDER BY INCREASING THE PROVISION MADE FOR AN APPLICANT.¹

13.1 Under the Act, the Court has two heads of power for varying its orders. Section 6(4) says that the Court may at any time and from time to time rescind or alter any order making any provision under the Act. Section 8 confers a like power in cases where the Court has ordered periodic payments or has ordered a lump sum to be invested for the benefit of any person.

13.2 We note, incidentally, that the general power conferred upon the Court by section 6(4) of the Act is not cut down by section 8. Street CJ. in Equity commented on the two sections in the following terms² -

"The words of s.6(4) standing alone are wide enough to enable the Court to alter any order in any way that it may think fit, but it has been contended that they must be read in conjunction with the words of s.8, and that these indicate that the intention of the Legislature was to restrict the power of alteration to orders for periodical or continuing payments, under which there are payments still remaining to be made. It was said that orders of this kind which are capable of being controlled or modified stand on a different footing from an order for immediate and unconditional payment of a lump sum, and that, irrespective of whether payment has been made under it or not, an order of the latter kind once made cannot be recalled or altered merely by reason of a change in the circumstances of the party to be benefited by it. I do not agree. Sect.8 appears to have been taken from an Act of the Legislature of New Zealand which does not contain a general power of rescission or alteration such as is contained in the local Act. It may be intended to confer a power to inquire into and to vary orders made under s.7; but in any event it appears to be superfluous in view of the wide powers conferred by s.6(4), unless the intention was to restrict those powers in some way. I do not think that this was intended. If it had been, I think that the Legislature would have expressed its meaning differently and more unmistakably; and I think that the probability is that the clause was introduced in forgetfulness of the fact that it was rendered unnecessary by the provisions of s.6(4)."

1. In this Part, we draw heavily on the Report of a Sub-committee of the Chief Justice's Law Reform Committee in Victoria Testator's Family Maintenance - Variation of Orders (1972).
2. Re Butler (1923) 23 S.R. (N.S.W.) 540, 542-3.

13.3 Section 6(4) of the Act has been construed as not allowing the Court to increase the amount of the provision originally allowed to an applicant.³ Our concern is whether the section should be amended so as to negate this construction. We look at the question on the basis that if the section is so amended, a variation order increasing the provision made for an applicant will not affect any property distributed before the making of the variation order.

13.4 Arguments against any change 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 the real power to dispose of an estate is not with

3. Re Molloy (1928) 45 W.N. (N.S.W.) 142.

the Court but with the deceased⁴ 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.⁵ And, in Queensland where, since 1968, the Court has had the power to vary an order upwards, application for its use is seldom made.⁶ 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.

13.5 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

4. See paragraph 3.5.

5. See Report Testator's Family Maintenance - Variation of Orders (1972) p.3.

6. Id., p.4.

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 whereby 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 1974, may appear to be a generous final order may prove, in 1994, to have been an 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 to increased provision.
4. The legislatures of New Zealand,⁷ Queensland,⁸ Western Australia⁹ and Tasmania¹⁰ have seen fit to make the change now being considered. In Victoria,

7. N.Z. Act, s.12(1).

9. W.A. Act, s.16.

8. Qld Act, s.91.

10. Tas. Act, s.9(5)(b).

informed opinion is divided on the question.¹¹
 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.

13.6 Much can be said for and against a proposal to allow the Court to increase the amount of a provision originally allowed to an applicant. We have debated the question at length but still we waver in our thinking. The question cannot, of course, be looked at in isolation. The problem of the unsuccessful applicant whose circumstances change for the worse after the date of the hearing must also be considered. So too must the problem of the eligible applicant who does not make an application within time: his circumstances, or the circumstances of the estate, may change after the time for making an application has expired.

13.7 Cases giving rise to problems include cases such as the following -

1. A farmer's widow applies for an order and is given a fixed income for life. Later her cost of living and the income from the farm and the value of the farm all rise. Should she be entitled to apply for an order that her income be increased?
2. An applicant is awarded the whole of a deceased person's personal estate. Later the deceased's real estate, previously thought to be of little value, increases greatly in value. Should the person concerned be entitled to apply for provision out of the real estate?
3. A father makes no provision in his will for his able-bodied sons A and B. A becomes permanently

11. See Report Testator's Family Maintenance - Variation of Orders (1972) pp.1,2,5,6.

crippled before his father dies but, through inadvertence, the will is not changed. A and B apply for orders under the Act. A is successful but B is unsuccessful. Five years later, B is permanently crippled. Should B then be entitled to apply for provision out of the undistributed assets in his father's estate?

4. A widow does not make an application for provision out of her deceased husband's estate. Events which the husband could never have foreseen cause his estate to treble in value in five years. Should the widow then be able, as of right, to apply for an order under the Act?

13.8 If some, or all, of the questions put in paragraph 13.7 are answered in the affirmative, other questions must be asked. For example -

1. Should all time limitations for the commencement of proceedings under the Act be abandoned?
2. Should any new or enlarged rights to apply for provision be limited to "hardship" cases. If so, how is "hardship" to be defined. If not, what other tests, if any, should be proposed?
3. Should any new or enlarged rights to apply for provision be given to widows only? Or to widowers and children? Or to any eligible applicant?

13.9 We are satisfied that, if implemented, any proposal for reform in this area will create anomalies. Value judgments have to be made about the nature and extent of anomalies which are tolerable and about the point beyond which claims under the Act must yield to other claims.

13.10 For the purposes of discussion, we propose 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, then the Court may order that additional provision be made for him.

13.11 The proposal would not help a person who has applied unsuccessfully for an order for provision. We would apply to him the general rule in litigation that failure is final. Son B in the illustration given in paragraph 13.7.3 would remain without rights under the Act. To change this situation is, we believe, to leave an estate open to recurring attacks which must adversely affect it financially and which must unreasonably interfere with the settled expectations of its beneficiaries.

13.12 The proposal would not help an eligible applicant who failed to apply for an order within time. If he is precluded from making an application for extension of time (as, on our proposals,¹² he would be if he were neither a spouse nor a child of the deceased) or if he is unsuccessful in that application, he is without rights under the Act. The widow in the illustration given in paragraph 13.7.4 would have to seek an extension of time if she wished to apply for an order for provision. If successful, she may then benefit from the increase in the value of her deceased husband's estate. If unsuccessful, she too is without rights. But we are not convinced that we should propose the abandonment of time limits for the commencement of proceedings under the Act.

13.13 The proposal does not extend to any change of circumstances, only to an exceptional change in the circumstances of the applicant which occurs after the date of the original

12. See paragraphs 7.4 - 7.6.

order. We are concerned only to protect persons from hardship, not to give them an opportunity of enlarging their fortunes at the expense of others. The person mentioned in the illustration given in paragraph 13.7.2 could not benefit from the proposal unless his circumstances had changed for the worse since the date of the order. If that person were the widow of the deceased, she may regret that she had applied for an order at all: if, after the increase in the value of the real estate, she had successfully applied to commence proceedings out of time, the provision made for her might have been substantially more than the personal estate she actually received.

13.14 No proposal in this area can hope to achieve a fair result in every conceivable case. The proposal made in paragraph 13.10 is an attempt to relieve hardship in some cases. We invite other proposals and we seek comment on the general subject matter of this Part.

PART 14. - WHAT GUIDELINES, IF ANY, SHOULD BE
LAI D DOWN FOR THE EXERCISE BY THE
COURT OF ITS DISCRETIONARY POWERS.

14.1 Apart from the reference to "character or conduct",¹ the Act gives the Court little aid as to what it should take into account when exercising its powers. It is generally agreed, however, that the Act calls for an investigation by the Court of matters such as the following² -

1. The standard of maintenance which at the deceased's death was "proper" for the applicant, in the sense of being appropriate in the light of what he had been accustomed to up to that time.
2. Whether the provision, if any, made for him is in fact adequate, in the sense of sufficient, to provide the applicant with such a standard thereafter.
3. What property was left by the deceased.
4. What was the need of the applicant as known to, or reasonably to be anticipated by, the deceased, including what other sources, if any, were, or might reasonably be expected to be, available to provide the applicant with the required standard of maintenance.
5. What was the applicant's moral claim on the deceased, his deserts, based upon relationship, services, friendship, conduct and so on, as distinct from need.
6. What others had needs known to, or reasonably to be anticipated by, the deceased.
7. How should a just and wise testator have adjusted the balance, having regard to the estate available.
8. Whether the deceased has been guilty of a breach

1. s.3(2).

2. See Sholl J. in Re Hodgson [1955] V.L.R. 481, 491-492.

of his moral duty to the applicant in not making greater provision for him.

9. What is the applicant's present need?

14.2 Questions relevant to our terms of reference are whether the Act should contain guidelines for the use of the Court and, if so, what should they be.

14.3 In England, in deciding whether the deceased has made reasonable provision for his dependant and, if not, what provision, if any, should be made, the Court must have regard, amongst other things, to -

1. The past, present or future capital of the dependant and to any income of the dependant from any source.³
2. The dependant's conduct in relation to the deceased and otherwise.⁴
3. Any other matter or thing which, in the circumstances of the case, the Court may consider relevant or material in relation to the dependant, persons interested in the estate of the deceased or otherwise.⁵

There is also a direction that "the court shall have regard to the nature of the property representing the deceased's net estate and shall not order any such provision to be made as would necessitate a realisation that would be improvident having regard to the interests of the deceased's dependants and of the person who, apart from the order, would be entitled to that property".⁶

14.4 In England, section 5(1) of the Matrimonial Proceedings and Property Act 1970, introduced a set of

3. U.K. Act, s.1(6).
4. U.K. Act, s.1(6).
5. U.K. Act, s.1(6).
6. U.K. Act, s.1(5).

guidelines to which the Court must have regard when exercising all or any of its powers on the making of a decree of divorce, nullity or judicial separation. The Law Commission in England has taken these guidelines as a starting point and has listed the matters to which, in its view, the Court should have regard in applications for family provision by a surviving spouse.⁷ They include -

1. The income, earning capacity, property and other financial resources which any applicant for family provision has or is likely to have in the foreseeable future.
2. The financial needs, obligations and responsibilities which any applicant for family provision has or is likely to have in the foreseeable future.
3. The financial resources and financial needs of any beneficiary of the estate of the deceased who would be entitled to apply for family provision.
4. The obligations and responsibilities of the deceased towards any applicant for family provision and any beneficiary of the estate of the deceased.
5. The size and nature of the estate.
6. The age of the surviving spouse and the duration of the marriage.
7. Any physical or mental disability of the surviving spouse.
8. The contributions made by the surviving spouse to the welfare of the family, including any contribution made by looking after the home or caring for the family.
9. The conduct of the surviving spouse in relation to the deceased and otherwise.

14.5 The Law Commission in England has proposed that in

7. The Law Commission's published Working Paper No: 42 Family Property Law (1971) paras.3.17 - 3.18.

the case of an application for family provision by a child, guidelines similar to those listed in paragraph 13.4 should be included in the relevant legislation.⁸

14.6 We invite comment on the desirability of spelling out in the Act matters which the Court may or must consider. The draft Bill does not contain any provision of this kind. Our present thoughts are that we would not favour listing matters which the Court must consider to the exclusion of everything else. In our view, such a provision would limit undesirably the Court's flexibility. And, we doubt that a provision which enabled the Court to look at listed matters as well as unlisted matters would add to the utility of the Act. The principles upon which the Court acts are well understood. It may be argued that these views have less force if proceedings under the Act are not always to be heard by a small number of specialist judges sitting in the Equity Division of the Court. If, for example, the jurisdiction of the District Court given by section 134 of the District Court Act, 1973, is used widely, statutory guidelines may assist any judge of that Court who infrequently decides cases arising under the Act. And, if proceedings under the Act were to be assigned to, say, the Family Law Division of the Court, similar considerations might apply; at least for a short time after the assignment.

8. Id., para.3.44.

PART 15. - WHAT SPECIAL RULES OF EVIDENCE, IF ANY,
SHOULD APPLY IN PROCEEDINGS UNDER THE ACT.

15.1 We consider here whether oral statements made by a person should be admissible in proceedings under the Act relating to his estate.

15.2 Where a statement of a deceased person is tendered to prove the truth of the matters stated, the statement is hearsay.¹ In the case of an oral statement, there is no existing exception to the hearsay rule which would make it admissible to prove the truth of the matters stated in it. In the case of a statement made in a document, the exception to the hearsay rule made in 1954 by section 14B of the Evidence Act, 1898 (admissibility of documentary evidence as to facts in issue) would, in the circumstances specified in the section, make the statement admissible as evidence of the truth of the facts stated. For the purposes of the Act, should this difference between the admissibility of oral and written statements be perpetuated? We think that it should not. We agree with the Law Commission in England that it is desirable that any relevant statement made orally or in writing by the deceased be available to the Court.²

15.3 In proceedings under the Act, evidence of oral statements made by a deceased person are now admissible only where the statements testify directly to the state of the deceased's mind which prompted his final disposition of his estate.³ The evidence is not admissible as evidence of the facts stated.⁴ It is admissible, it seems, only because the reasons or intentions of the deceased are said to

1. See, generally, Gibbs (1953) p.151.

2. Published Working Paper No: 42 (1971) paragraph 3.24.

3. See Re Jones (1921) 21 S.R. (N.S.W.) 693, 695 and Re Hall (1930) 30 S.R. (N.S.W.) 165, 166.

4. Re Jones (1921) 21 S.R. (N.S.W.) 693, 695.

be themselves relevant to the issues before the Court.⁵

15.4 We would remove the conditions mentioned in paragraph 15.3. 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 oral statements were admissible generally and we propose that they be made so admissible. The Court will evaluate the worth, as evidence, of such statements.

15.5 Our proposal is already the law in England. There the Civil Evidence Act 1968 provides⁶ -

"In any civil proceedings a statement made, whether orally or in a document or otherwise, by any person, ..., shall, subject to this section and to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible."

In its Working Paper on Family Property Law,⁷ the Law Commission in England made no criticism of the last mentioned provision in its application to family provision proceedings. Indeed, the Law Commission says that the section makes it unnecessary to retain section 1(7) of the Inheritance (Family Provision) Act 1938 (U.K.).⁸ That subsection says -

"The court shall also ... have regard to the deceased's reasons, so far as ascertainable, for making the dispositions made by his will (if any), or for refraining from disposing by will of his estate or part of his estate, or for not making any provision, or any further provision, as the case may be, for a dependant, and the court may accept such evidence of those reasons as it considers sufficient including any statement in writing signed by the deceased and dated, so, however, that in estimating the weight, if any, to be attached to any such statement the court shall have regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement."

5. Gibbs (1953) p.151.

6. s.2(1).

7. Published Working Paper No: 42 (1971).

8. Id., paragraph 3.24.

15.6 Provisions comparable to section 1(7) of the United Kingdom Act are to be found in the New Zealand Act and in the Acts of some of the Australian States and Territories.⁹ In our view, the bolder reform represented by section 2(1) of the Civil Evidence Act 1968 (U.K.) is well suited to proceedings under the Act.

15.7 We are working on a reference: "To review the law of evidence in both civil and criminal cases". In the circumstances, the comments made in this Part are of an interim nature only.

15.8 We invite comment on any matter touching the admissibility of evidence in proceedings under the Act.

9. N.Z. Act, s.11; Tas. Act, s.8A(1); A.C.T. Ord., s.22; N.T. Ord., s.22.

PART 16. - WHAT COURT OR COURTS SHOULD EXERCISE
THE JURISDICTION CONFERRED BY THE ACT?

16.1 Proceedings under the Act are assigned to the Equity Division of the Court.¹ They may, by rule of court, be assigned to any other division of the Court,² and it has been put to us that they should be assigned to the Family Law Division.

16.2 In England, in 1970, a like question was debated in Parliament.³ The issue was whether proceedings under the Inheritance (Family Provision) Act 1938 should be commenced in the Chancery Division or in the Family Division of the High Court of Justice. One member (Mr. Bruce Campbell) said⁴ -

"I turn ... to the ... Amendment which ... proposes that the new Family Division should deal also with proceedings under the Inheritance (Family Provision) Act 1938. This Act orders that proper provision be made out of a testator's estate if he himself has not made it. This is surely a family matter if ever there was one. If the testator chooses to leave his whole estate, which may be a large one, to strangers, it is possible for his widow and children to come to the court and say that he should have made provision for them. This is a jurisdiction which hitherto [has] always been dealt with in the Chancery Division, but now that we are making a change and creating the Family Division, this jurisdiction should go to that Family Division as it is so much a family matter, and I can think of no good reason for assigning it to the Chancery Division.

Since 1958 it has been possible not only for a widow to apply to the court to have reasonable provision made for her out of her deceased husband's estate but also for a former wife to make a similar application so long as she has not remarried. There may be a divorce, so that the wife is no longer a wife and will never therefore be a widow. Nevertheless, provided she has not remarried she may, after her former husband's death, apply to have proper provision made for her out of his estate. This jurisdiction is dealt with in what until now has been the Divorce Division but will in future be the Family Division. Here are two almost exactly similar jurisdictions, one being dealt with in the Family Division and the other in the Chancery Division, the only difference being that in one case there has been a divorce and in the other there has not.

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1. Supreme Court Rules, 1970, Pt.77 r.23.
 2. See Supreme Court Act, 1970, s.53.
 3. 801 H.C. Deb. cols.109-117 (4th May, 1970).
 4. Id., cols.112-113.

It is even more ridiculous than that. The former wife may have had children who are still infants and who will have the right to apply to have proper provision made for them out of their father's estate, but they have to go, and will continue to have to go if the Bill in its present form becomes law, to the Chancery Division, while the mother goes to the Family Division. I know that arrangements are made for the two applications to be consolidated and dealt with in one division, but they have to be started in different divisions. That same deceased testator may have remarried, so that he will not only have a former wife but a widow as well, and it is nonsensical that these different classes of people, all making the same application, should have to make it in different divisions."

In reply, the Attorney-General (Sir Elwyn Jones)

said⁵ -

"The purpose of [the] amendment, ... is to transfer the High Court's jurisdiction under the Inheritance (Family Provision) Act, 1938, from the Chancery Division to the Family Division. I accept that the 1938 Act and the work arising under it presents us with a border line case between the Chancery and the Family Divisions and I recognise that there are arguments for sending this work to the Family Division. The difference between the two jurisdictions is a slim one, but the line has to be drawn somewhere and I am inclined to think that it runs between them.

There has never been any suggestion that the Chancery Division has not exercised its jurisdiction under the 1938 Act in a perfectly proper and understanding way. The property element in that jurisdiction is sufficient to differentiate it from the wardship and guardianship jurisdiction which is being transferred to the Family Division. Indeed, it might be argued that the Section 26 matrimonial jurisdiction is on the property side of the line and should also be transferred to the Chancery Division.

The fact is, however, that there can be no satisfactory logical distinction between family and property work, and there are bound to be borderline cases. It is also necessary to bear in mind that we do not want to disturb existing institutions merely for the fun of it. Where the existing institutions, as they do in this instance in the Chancery Division in relation to this work, operate satisfactorily, there is no ground why those arrangements should be disturbed.

Accordingly, I do not think that the case for transferring the jurisdiction under the 1938 Act has been made, and the arrangements proposed in the Bill are the most practical and the most convenient."

16.3 In the event, proceedings under the Inheritance

5. Id., col.115.

(Family Provision) Act 1938 continue to be heard in the Chancery Division. The Law Commission in England has, however, proposed that the jurisdiction conferred by the 1938 Act be exercised by the Family Division. It says⁶ -

"The creation of the new Family Division by the Administration of Justice Act 1970 would have provided an opportunity to assign all the family provision jurisdiction to one court. Nevertheless, for reasons which are difficult to understand, the former allocation of jurisdiction has been maintained. Only cases under the 1965 [Matrimonial Causes] Act have been transferred to the Family Division. The surviving spouse and children of the deceased must still apply to the Chancery Division. In our view, the jurisdictions are essentially the same, and should be administered by one court, with power to take into account the interests of all persons entitled to apply for family provision. We therefore propose that jurisdiction under the 1938 Act be transferred to the Family Division. The county court should continue to have its present jurisdiction."

16.4 In this State, the position is different from that prevailing in England. A divorced wife cannot apply here, either under the Act or under the Matrimonial Causes Act 1959-1973 (Oth), for provision out of the estate of her deceased former husband. Hence, the argument noted in paragraph 16.3 has little application in New South Wales. Indeed, in England, that argument would also support a proposition that the jurisdiction of the Family Division under sections 26-28A of the Matrimonial Causes Act 1965 should be transferred to the Chancery Division.

16.5 In determining whether it would be better to assign proceedings under the Act to the Family Law Division, matters such as administrative convenience and the present and future workloads of the respective Divisions must be considered. The Rule Committee of the Supreme Court is well placed to evaluate the weight of these matters and in this Paper we do not make any proposals for change. We have, however, references relating to the Supreme Court Act, 1970, and proposals for change in the area now under consideration may be made in later Papers.

6. Published Working Paper No: 42 (1971) paragraph 3.5.

PART 17. - WHAT RIGHTS, IF ANY, SHOULD A PERSON
HAVE TO CONTRACT OUT OF THE ACT?

17.1 A person is not precluded from obtaining an order for provision out of the estate of a deceased person because he contracted with the deceased not to apply for an order. Public policy, as settled by the High Court in 1944, overrides the contract.¹ We ask whether the policy itself should now be overridden by statute.

17.2 We note that the policy was settled only after much judicial debate. In 1923, Harvey J., as he then was, held, in Re Doogan,² that the Act is not intended to be in relief of the public burden but for the private and individual benefit of a testator's dependants and that they may contract out of the Act. In 1943, a majority of the Full Court, in Re Morris,³ overruled Re Doogan. Jordan CJ. and Nicholas CJ. in Eq. were of the view that the Act deals with a subject matter of such a character that it should be held that persons have no power to exclude themselves from its benefits. Davidson J. held that the provisions of the Act show that it is concerned with the protection of individuals rather than with the protection of the public. In 1944, in Lieberman v. Morris⁴ the High Court affirmed the decision of the majority of the Full Court in Re Morris. Latham CJ. decided the issue on considerations other than those of public policy, but the judgments of the other members of the Court all turn on public policy.

17.3 The conclusion reached in Lieberman v. Morris was influenced by decisions on the Supreme Court of Judicature (Consolidation) Act 1925 (Imp.) under which the

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1. Lieberman v. Morris (1944) 69 C.L.R. 69.
 2. (1923) 23 S.R. (N.S.W.) 484.
 3. (1943) 43 S.R. (N.S.W.) 352.
 4. (1944) 69 C.L.R. 69.

matrimonial courts in England were vested with authority to make provision for the future maintenance of a wife upon the dissolution of her marriage.⁵ We refer, in particular, to the decision in Hyman v. Hyman⁶ where the House of Lords held that a wife, who covenanted by deed of separation not to take proceedings against her husband for the allowance to her of alimony or maintenance beyond the provision made for her by the deed, was not thereby precluded from petitioning the Court for permanent maintenance: the authority, it was held, was conferred upon the courts not merely "in the interests of the wife but of the public"; it was a "matter of public concern".⁷

17.4 But the public policy stated in Hyman v. Hyman has been substantially modified. Before 1958, it had become common practice for the Court to sanction maintenance agreements in divorce proceedings.⁸ The Matrimonial Causes (Amendment) Act, 1958 (N.S.W.) conferred on the Court specific power to sanction an agreement for maintenance.⁹ And, the Matrimonial Causes Act, 1959-1973 (Cth) conferred a like power.¹⁰

17.5 The Court does not lightly sanction agreements under section 87(1)(k) of the Matrimonial Causes Act, 1959-1973 (Cth). As Asprey JA. has said¹¹ -

"A heavy responsibility is placed upon the court under this statutory provision and the court

5. See (1944) 69 C.L.R. 69, 86 (Starke J.), 90 (Williams J.).

6. [1929] A.C. 601.

7. Id., 614, 629.

8. Shaw v. Shaw (1965) 66 S.R. (N.S.W.) 30, 33.

9. See s.40(1)(1) of the Matrimonial Causes Act, 1899-1958.

10. s.87(1)(k).

11. Shaw v. Shaw (1965) 66 S.R. (N.S.W.) 30, 47.

should not be asked to exercise its jurisdiction thereunder without the fullest disclosure to it of all the relevant facts to enable it to decide whether or not to make the order asked of it. In particular, the court should be wary of exercising its powers under s.87(1)(k) when the interests of children are involved."

17.6 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 every-day 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.

17.7 The draft Bill incorporates the views just expressed.¹²

17.8 To this point, we have been considering contracts made in the lifetime of a deceased person. We turn now to contracts made after his death.

17.9 Under the Act,¹³ where all eligible applicants agree

12. s.35(2).

13. s.5(2A)(b) and (c).

to be bound by the will of a deceased person, or by the rules of intestacy applicable to the estate of a person who dies without a will, no application for provision shall be made after the date of the agreement. We ask whether an eligible applicant, as distinct from all eligible applicants, should be able to enter into an agreement of this kind.

17.10 We note, incidentally, that if our proposal concerning eligible applicants¹⁴ are adopted, the present section 5(2A) (b) and (c) of the Act may, in many cases, cease to have practical significance: it may be impossible to identify all the persons who are eligible applicants for the purpose of securing their agreement. Moreover, the effect of the provision is merely to reduce the time for commencing proceedings to less than one year. 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".¹⁵ Nowadays, in our experience, an administrator with excellent intentions is seldom able to distribute within a year. We doubt that there is any need to keep these provisions. If, however, the experience of others shows that there is such a need, we will be pleased to receive particulars of it.

17.11 We propose that after the death of a person, any eligible applicant should be able to waive his right to apply for an order for provision out of the estate of that person, and the draft Bill so provides.¹⁶ To us, this is merely an extension of our view that a person should be able to contract out of the Act before the death of the person concerned. We invite contrary views.

14. See paragraph 6.

15. See Parliamentary Debates for Session 1916, Vol.64, p.742.

16. s.35(2).

17.12 A more difficult question is whether an eligible applicant should be able to contract to the effect that he will limit his claim for provision to a specified sum or to a specified asset. The draft Bill does not contain such a provision. As we see it, there may be cases where the administration of an estate would be made less difficult if the administrator knew that because of an agreement made by him he could deal freely with particular parts of the estate. On the other hand, there are difficulties in the concept. Suppose, for the purposes of illustration, that a testator devises Blackacre to A, and B and C each intends to apply for an order under the Act for the primary purpose of obtaining Blackacre for himself. B agrees to abandon all his claims under the Act other than his claim to Blackacre but, unknown to B, C has a particularly strong case that Blackacre be transferred to him. In this event, B has prejudiced his chance of securing Blackacre. An eligible applicant cannot know all the strengths and weaknesses of the case for another applicant. To allow agreements/^{to be}negotiated which relate to part only of an estate may be to introduce opportunities for pre-trial manoeuvres which will rebound on the participants and make the task of the Court more difficult. We invite comments.

PART 18. - WHAT PART OF THE ESTATE OF AN INTESTATE
SPOUSE SHOULD PASS TO HIS SURVIVING SPOUSE?

18.1 Our terms of reference¹ make mention of section 61A of the Wills, Probate and Administration Act, 1898. Section 61A (as we will refer to the section) altered, for the estates of persons dying intestate or partly intestate on or after the 1st January, 1955, the rules relating to the distribution of both real and personal property. The effect of the rules is noted in Appendix E.

18.2 In general, we concern ourselves with section 61A only to the extent indicated in the heading to this Part. We do not, for example, concern ourselves with the rights of an illegitimate child and the mother of that child to succeed on the intestacy of the other. Our terms of reference may bear a wider construction than we give them, but we restrict ourselves to the particular matters we mentioned to the Attorney General when we sought our present terms of reference.

18.3 Records are not kept of the number of persons who die intestate in this State, but an officer of the Probate Division of the Court tells us that Letters of Administration (including Letters of Administration with the will annexed) are granted in respect of some 10% of the estates which pass through the Division. We cannot know how many intestate estates do not pass through that Division. Our experience tells us that it is a considerable number.

18.4 We estimate that some 13% of applications under the Act relate to intestate estates and of these applications -

1. See para.1.1.

1. Some 80% relate to estates valued at less than \$20,001.
2. Some 80% are made by the surviving spouse of the deceased person.
3. Some 90% of the applications made by surviving spouses are successful.

18.5 In this State, where a deceased person is survived by a spouse and children, the spouse receives one-third of the estate of the deceased person if there are two or more children and one-half of the estate if there is only one child. Appendix E shows the comparative situation in some other places.

18.6 It is clear that the surviving spouse of a person who dies intestate frequently sees section 61A as applying less than fairly. It is clear too that in most cases coming before it, the Court shares that view.

18.7 The persons interviewed during a Matrimonial Property Survey in England and Wales in 1971 were asked: "A man dies without making a will. He leaves a wife and three grown-up sons. What do you think should happen to the estate?" The Survey gives the following results and comments² -

"	An estate of £5,000		An estate of £15,000	
	Husbands %	Wives %	Husbands %	Wives %
All to wife	58	54	42	37
All to sons	-	-	-	-
$\frac{1}{2}$ to wife, $\frac{1}{2}$ to sons	17	23	19	24
$\frac{2}{3}$ to wife, $\frac{1}{3}$ to sons	13	13	21	22
$\frac{1}{3}$ to wife, $\frac{2}{3}$ to sons	3	1	5	4
Equally shared among 4	4	6	6	9
Other answers	5	3	6	3
Don't know	-	-	1	1
	<u>100</u>	<u>100</u>	<u>100</u>	<u>100</u>
Base	(1877)	(1877)	(1877)	(1877)

2. Todd and Jones (1972) p.54.

In the case of the lower value estate 58% of husbands and 54% of wives felt the wife should receive all the estate. This proportion was lower when the estate of £15,000 was considered. Here 42% of husbands and 37% of wives felt that the wife should receive the whole estate. Thus there was a change associated with value. More people thought the children should have a share when the value of the estate was higher.

There was a range of four possible ways of sharing suggested, of these two were more often considered to be reasonable settlements; that is a share of half to the wife and half to the sons, and two thirds to the wife and one third to the sons.

When considering the estate of £5,000 value 17% of husbands and 23% of wives felt that half to the wife and a half to the sons would be fair, 13% of spouses felt the wife should get two thirds of the estate and the sons one third between them. It is of interest to see that when the bigger amount of money was involved and the spouses more often felt some sharing should take place, it was predominantly one form of sharing that increased. The proportion of spouses thinking the shares should be two thirds to the wife and one third among the sons rose from 13% to 21%."

18.8 We do not know how the citizens of New South Wales would reply to questions about how property should be divided between a spouse and children on the death intestate of the other spouse. We believe that there would be strong preference for the surviving spouse to receive everything in a less-than-large estate and for the estate to be divided between the spouse and the children only where a large estate is involved. If this is so, provisions along the lines of those found in the comparable Acts of the United Kingdom, New Zealand, Western Australia, Victoria, Tasmania and the Australian Capital Territory³ would find favour here.

18.9 Fixing dividing lines between estates which are large and those which are less than large is an arbitrary matter which involves more intuitive responses than it does

3. See Appendix E.

the application of law. Nonetheless the legislation of other places provides guidelines. In particular, we look to the relevant Ordinance of the Australian Capital Territory⁴ which, in 1970, provided that where a person dies leaving a spouse and children surviving him, the spouse takes the deceased person's chattels, \$10,000 and one-third of the residue if there are two or more children and one-half of the residue if there is only one child. In our view, a provision of this kind is more in tune with contemporary social and money values than the New South Wales provision mentioned in paragraph 18.5 whereby the spouse receives one-third of the estate if there are two or more children and one-half of the estate if there is only child. We repeat that in the five years ending 31st December, 1970, some 87 persons of every 100 persons dying in this State over the age of nineteen years left estates valued at less than \$20,000.⁵

18.10 In New South Wales, an estate is now exempt from death duty if, in the case of a person who dies after the 20th December, 1973, it passes to, amongst others, the widow of the deceased and its net value is less than \$50,000.⁶ It can be argued, of course, that the level of death duty exemptions has no relevance to the law of intestate succession. But, as we see it, an estate is exempted from death duty primarily because it is an estate which, in the view of policy makers, is not large. On this view, the surviving spouse of an intestate might well consider that if the estate will extend to it his or her entitlement should be

4. Administration and Probate Ordinance 1929-1970, s.45.

5. See paragraph 3.8.1 and Appendix B, paragraph 3.13.

6. Stamp Duties Act, 1920, s.1CLD(4)(c)(viii), (4A)(a).

to the order of \$50,000.

18.11 We know that in making the comments we have made in this Part, we are entering policy areas where the making of arbitrary rules cannot be avoided. We are satisfied that the present entitlement of a surviving spouse under section 61A is inadequate. We are also satisfied that our view is a widely held view. The determination of the extent of the inadequacy is a more difficult matter. Moreover it is a matter to be determined by the persons who decide policy, namely, members of the Government. In this area, honest and well informed minds may differ. We invite views on what should be the entitlement of a surviving spouse under section 61A. Views expressed to us will aid the later determination of the policy issues by the Government.

18.12 On the death of a spouse, the worries and anxieties of the surviving spouse often focus on the matrimonial home. Commonly, one of the first questions asked of the family solicitor is: "Will I be able to keep the house?". To us, it is wrong that in many cases of intestacy the solicitor must reply: "The house now belongs to you and to the children. Perhaps they won't want it sold while you wish to live in it. But they may want you to pay some rent. Or perhaps they may be prepared to sell you their interest in it." A situation of this kind often results in an application being made under the Act. The surviving spouse's desire for the security of the home being stronger than the desire not to "take the children to court".

18.13 In England, the Second Schedule of the Intestates' Estates Act 1952 gives one answer to the problem mentioned in paragraph 18.12. Relevant parts of the Schedule provide -

"1.-(1) Subject to the provisions of this Schedule, where the residuary estate of the intestate comprises an interest in a dwelling-house in which the surviving husband or wife was resident at the time of the intestate's death, the surviving husband or wife may require the personal representative ... to

appropriate the said interest in the dwelling-house in or towards satisfaction of any absolute interest of the surviving husband or wife in the real and personal estate of the intestate.

.

2. Where -

- (a) the dwelling-house forms part of a building and an interest in the whole of the building is comprised in the residuary estate; or
- (b) the dwelling-house is held with agricultural land and an interest in the agricultural land is comprised in the residuary estate; or
- (c) the whole or a part of the dwelling-house was at the time of the intestate's death used as a hotel or lodging house; or
- (d) a part of the dwelling-house was at the time of the intestate's death used for purposes other than domestic purposes,

the right conferred by paragraph 1 of this Schedule shall not be exercisable unless the court, on being satisfied that the exercise of that right is not likely to diminish the value of assets in the residuary estate (other than the said interest in the dwelling-house) or make them more difficult to dispose of, so orders.

3.--(1) The right conferred by paragraph 1 of this Schedule -

- (a) shall not be exercisable after the expiration of twelve months from the first taking out of representation with respect to the intestate's estate;
- (b) shall not be exercisable after the death of the surviving husband or wife;

.

4.--(1) During the period of twelve months mentioned in paragraph 3 of this Schedule the personal representative shall not without the written consent of the surviving husband or wife sell or otherwise dispose of the said interest in the dwelling-house except in the course of administration owing to want of other assets.

.

"

18.14 Although we do not include in the draft Bill a provision to the effect of the Second Schedule of the Intestates' Estates Act 1952 (U.K.), we favour the adoption of such a provision. We invite comment on its likely usefulness.

PART 19. - CONCLUSION

19.1 We cannot claim to have identified all the problems which arise in relation to the Act or to proceedings under it. We are, however, only at the Working Paper stage of our work on this reference and we wish to be told of the problems we have not yet considered.

19.2 With few exceptions, the proposals we suggest in this Paper have more social than legal significance. Policy will therefore be the determining factor in how the questions we ask are finally answered. Informed comment will, however, aid us greatly in making our final recommendations. A summary of the matters in respect of which comment is sought appears at page 7.

PART 20.

A DRAFT BILL
FOR AN ACT

To amend the law relating to the dispositions of estates of deceased persons; to amend the Testator's Family Maintenance and Guardianship of Infants Act, 1916; and for purposes connected therewith.

BE it enacted by the Queen's 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:-

PART I.

PRELIMINARY.

- | | |
|--|-------------------------|
| <p>1. This Act may be cited as the "Family Provision Act, 1974".</p> | <p>Short title.</p> |
| <p>2. This Act shall commence on such day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.</p> | <p>Commencement.</p> |
| <p>3. This Act is divided as follows:-
PART I. - PRELIMINARY - <u>ss.</u>1-7.
PART II. - PROCEEDINGS AND ORDERS - <u>ss.</u>8-19.
PART III. - NOTIONAL ESTATE - <u>ss.</u>20-29.
PART IV. - GENERAL - <u>ss.</u>30-37.
SCHEDULE.</p> | <p>Division of Act.</p> |

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

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

(3) This Act does not apply in relation to any property forming part of the notional estate of a deceased person where that person died after the commencement of this Act and the property was the subject of a settlement or other disposition within the meaning of Part III made before the commencement of this Act.

5. (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 to the Public Trustee under section 18 of the Public Trustee Act, 1913, 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

Interpretation generally.

A.C.T. Ordinance No.15, 1969, s.4;
N.Z. Act 1955, No.88, s.2(1).

administration has been granted in respect 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 trusts of or arising out of the will or on the intestacy of the deceased person.

"notional estate", in relation to a deceased person, means property subject to the statutory trust constituted by section 26(1).

"the Court" means the Supreme Court.

"will" includes a codicil.

(2) Where probate of a will, or letters of administration of an estate, granted outside New South Wales is 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 on the date on which it was so sealed.

6. (1) In this Act, "eligible person", "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) any person who satisfies the Court -

(i) 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

- (ii) 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 a household of which the deceased person was a member.

(2) For the purposes of this section -

- (a) the widow or widower of a deceased person remains the widow or widower of that person notwithstanding remarriage;
- (b) "child" includes -
- (i) any illegitimate child of the deceased person; and
- (ii) any child of the deceased person who is born alive after the death of that person.

7. Where under this Act the Court may make any order or do any thing on terms, the Court may make the order or do the thing on such terms and conditions (if any) as the Court thinks fit.

Order on terms.
Act No.52, 1970,
s.21.

PART II.

PROCEEDINGS AND ORDERS.

8. (1) Any eligible person may commence proceedings in the Court for an order that provision be made for him out of the estate or notional estate, or both, of a deceased person.

Orders for
provision.

Act No.41,
1916, s.3.

(2) Where, in proceedings under this section, the Court, having regard to the

circumstances at the time of the proceedings, is satisfied that the deceased person has left the eligible person without adequate provisions 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, order that such provision as the Court thinks fit be made for the eligible person out of the estate or notional estate, or both, of the deceased person.

(3) In particular, but without limiting the generality of subsection (2) -

- (a) the Court may have regard to whether the character or conduct of an eligible person, before and after the death of the deceased person, is such as -
 - (i) to disentitle him to the benefit of any order; or
 - (ii) to entitle him only to the benefit of a reduced order;
- (b) the Court may order that the provision consist of one or more of the following -
 - (i) the payment of a lump sum;
 - (ii) the payment of periodical or other sums; or
 - (iii) property other than money;
- (c) the Court may order that property be purchased for, or for the use of, an eligible person.

(4) Where, in proceedings under this section, the eligible person is ordinarily resident in New South Wales, the Court may order that provision be made for him out of the movables of the deceased person situated in New South Wales, whether or not the deceased person was, at the time of his death, domiciled in New South Wales.

(5) In proceedings under this section, the Court may make an interim order.

(6) Notwithstanding the existence of an order under subsection (5), the Court may, by order, give leave to the administrator of the estate of the deceased person to distribute part of the estate of that person.

(7) In proceedings under this section, the Court may make an order on terms.

(8) In proceedings under this section, the Court shall make an order for provision out of the notional estate of the deceased person only if the Court is satisfied -

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

(9) This section has effect subject to sections 10, 12(9) and 3 and to Part III.

9. Where property in the estate of a deceased person passes to any person in accordance with the provisions of an agreement made by the deceased person, the Court may, in proceedings under this Act, make an order, on terms, in relation to the property, but only to the extent by which the value of the property, in the opinion of the Court, exceeds the value to the deceased person, at the date of the agreement, of the consideration, if any, promised to him under the agreement, increased or decreased, as the case may be, to an amount that bears to that value the same proportion

Property passing in accordance with agreement.

(Schaefer v. Schuhmann [1972] A.C. 572.)

as the value of the property at the date of the order bears to the value of the property at the date of the agreement.

- | | |
|---|--|
| <p>10. (1) Where, in proceedings under section 8, the Court is satisfied -</p> <p>(a) that an eligible person is in immediate need of provision;</p> <p>(b) that it is not yet possible to determine what order, if any, should be made in favour of the eligible person; and</p> <p>(c) that property in the estate or notional estate of the deceased person is or can be made available to meet the need of the eligible person,</p> | <p>Order for immediate provision.
1966, c.35, s.6.</p> |
|---|--|

the Court may, on terms, order that such provision as the Court thinks fit be made for the eligible person out of the estate or notional estate, or both, of the deceased person.

(2) In determining what order, 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 order should be made in the proceedings.

(3) An order under section 8 may provide that provision made for the benefit of the eligible person by virtue of this section shall be treated as having been made on account of the provision made by that order.

(4) Subject to subsection (3), section 15 applies in relation to an order under this section as it applies to an order under section 8.

(5) In so far as this section applies to the

notional estate of a deceased person, it has effect subject to Part III.

11. (1) Without limiting any power of the Court, the Court may, on terms, order that property specified in an order be set aside out of the estate of a deceased person and be held on trust as a class fund for the benefit of two or more eligible persons.

Class fund.
N.Z. Act 1955,
No.88, s.6;
A.C.T. Ordinance
No.15, 1969,
s.12.

(2) Where property is ordered to be held in trust as a class fund, the trustee of the fund shall invest so much of the property as he does not apply in accordance with this subsection and may, subject to such directions or conditions as the Court gives or imposes, but otherwise as he thinks fit, 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.

(3) Where one or more of the persons for whose benefit property is held in trust as a class fund dies, a reference in subsection (2) to the persons for whose benefit property is held in trust as a class fund shall, after the death of that person, be read as a reference to the survivor or survivors of those persons.

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

12. (1) Subject to subsection (2), an order under section 8 for provision out of the estate of a deceased person shall not be made unless the proceedings for the order are commenced within twelve months after the date on which administration in respect of the estate of the deceased person is granted.

Time for proceedings for provision out of estate.

Act No.41, 1916, s.5.

(2) Subject to subsection (6), the Court may, after hearing such of the persons affected as the Court thinks necessary, by order, extend the time within which proceedings may be commenced by the widow, widower or a child of the deceased person for an order for provision out of the estate of that person.

(3) The Court may extend time under subsection (2) as well after as before the time expires, whether or not an application for extension is made before the time expires.

(4) Where an application for an order for extension of time is made after the time has expired, the Court shall not make the order unless it is satisfied that having regard to the circumstances existing at the expiration of the time the applicant then had a reasonable chance of succeeding in the proceedings.

(5) The Court may make an order for extension of time on terms.

(6) An application for extension of time must be made before the estate of the deceased person is indefeasibly vested in its beneficiaries.

(7) An application, or an order, for extension of time does not affect any distribution of the estate of the deceased person made before notice to the administrator of the application.

(8) Where proceedings are commenced under section 8 by virtue only of an order under subsection (2), the Court shall not make any order for provision out of any notional estate of the deceased person.

13. (1) Subject to subsection (2), an order under section 8 for provision out of the notional estate of a deceased person, or other order under this Act affecting the notional estate of a deceased person, shall not be made unless the proceedings for the order are commenced within eighteen months after the date of the death of the deceased person.

Time for
proceedings for
provision out of
notional estate.

(2) Where the Court is satisfied that the beneficial owner of any property in the notional estate of a deceased person took the property with knowledge that the deceased person disposed of it with the intent to evade this Act, wholly or in part, the Court may, after hearing such of the persons affected as the Court thinks necessary, by order, extend the time within which proceedings for an order for provision out of the notional estate of the deceased person or other order under this Act affecting the notional estate of the deceased person may be commenced.

(3) The Court may extend time under subsection (2) as well after as before the time expires, whether or not an application is made before the time expires.

(4) The Court may make an order for extension of time on terms.

(5) Where proceedings are commenced under section 8 by virtue only of an order under subsection (3), the Court shall not make an order for provision out of the estate of the deceased person.

14. (1) Where the Court orders that provision be made for an eligible person wholly out of the estate of a deceased person, the burden of the order shall, subject to subsection (4) and unless the Court otherwise orders, be borne between the persons beneficially entitled to the estate in proportion to the value of their respective interests in the estate.

Burden of provision.
Act No.41, 1916,
s.6(2).

(2) Where the Court orders that provision be made for an eligible person wholly out of the notional estate of a deceased person, or partly out of the notional estate and partly out of the estate of that person, the burden of the order shall, subject to subsection (4) and Part III, be borne by such persons and in such proportions as the Court shall order.

(3) For the purposes of subsections (1) and (2), the Court may order that such contributions or adjustments as the Court thinks fit be made by or between the persons beneficially entitled to the estate and notional estate of the deceased person.

(4) Where persons are successively entitled to interests in any property that forms part of the estate or notional estate of a deceased person, 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.

(5) The Court may make an order under this section on terms.

15. (1) An order under this Act operates and takes effect -

Operation of order for provision.

(a) in so far as it relates to any property forming part of the estate of a deceased person, as if the terms of the order had been part of a will made by the deceased person immediately before his death; and

Act No.41, 1916, s.4.

(b) in so far as it relates to any property forming part of the notional estate of a deceased person, according to the provisions of Part III.

(2) This section does not affect the operation of sections 14, 16, 17, 19 and 34.

16. The Court may, at any time and from time to time and on terms, upon application made by the administrator of the estate of a deceased person or by any person beneficially entitled to or interested in any part of the estate or notional estate of the deceased person, discharge, reduce, suspend or vary, but not so as to increase, any order for provision made under this Act.

Discharge, reduction, suspension or variation of order.

Act No.41, 1916, s.6(4).

17. (1) 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, at any time and from time to time and on terms, upon application made by that person, order that the provision be increased.

Increased provision.

(2) An order under subsection (1) does not affect any distribution of the estate of the deceased person concerned made before notice to the administrator of the application for the increased provision nor a distribution made after notice but by leave of the Court.

(3) An order under subsection (1) does not affect any notional estate of the deceased person concerned.

18. (1) The Court may, on terms, order that provision be made under this Act out of the estate of a deceased person which has been distributed by the administrator.

Estate distributed.

Act No.41, 1916,
s.11(3).

(2) This section applies notwithstanding that the distribution may have been made by the administrator before he had notice of the commencement of any proceedings under this Act.

(3) This section does not affect the operation of section 12(8) and section 17(2).

19. (1) Where the Court makes an order for provision under this Act, the Court may, at any time and on terms, order any person who is entitled to a portion of the estate or notional estate out of which the provision is to be made to pay a lump sum or periodical payment or both to represent, or in commutation of, such proportion of the provision as falls upon that person and may exonerate the portion or a specified part of the portion to which that person is entitled from further liability in respect of the provision.

Exoneration of part of estate from provision made under this Act.

Act No.41, 1916,
s.7.

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

(a) the manner in which a lump sum or

- periodical payment is to be secured;
- (b) the person to whom the lump sum or periodical payment is to be made; and
- (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 order for provision was made.

(3) This section has effect subject to Part III.

PART III.

NOTIONAL ESTATE.

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

"deceased person" means a deceased person
in respect of whose notional estate
any order is sought under Part II.

"settlement" in relation to a deceased
person, includes any disposition of
property, or agreement for a disposition
of property, by will or otherwise, 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.

"statutory trust" means the statutory trust
constituted by section 26.

21. (1) This section has effect subject Property subject
to sections 22, 23, 24 and 25. to the statutory
trust.

(2) Where, immediately before his

death, the deceased person has, by any instrument or contract, power to dispose of any property for his own benefit or for the benefit of an object of the power in section 26(1), that property, and property from time to time representing that property, is, from and after the death of the deceased person, subject to the statutory trust, in priority to any estate or interest arising or taking effect in default of disposition by the deceased person or arising or taking effect so far as any disposition by the deceased person does not extend.

(3) Where the deceased person makes a settlement wholly or partly by way of gift and, immediately before his death, any property comprised in the settlement is not absolutely and indefeasibly vested -

(a) in a person beneficially; or

(b) for a charitable purpose -

that property, and property from time to time representing that property, is, from and after the death of the deceased person, subject to the statutory trust, in priority to any estate or interest not so vested.

(4) Where the deceased person makes a disposition wholly or partly by way of gift by virtue of which any property is conveyed to or vested in himself and any other person jointly, and the deceased person and another person are jointly entitled to that property immediately before the death of the deceased person, that property, and property from time to time representing that property, is, from and after the death of the deceased person, subject to the statutory trust.

(5) Where the deceased person makes a contract, disposition or arrangement wholly or partly by way of gift by virtue of which the proceeds of a policy of assurance maturing on the death of the deceased person are payable to any person on or after the death of the deceased person, the

proceeds of the policy, and any property from time to time representing the proceeds are, from and after the death of the deceased person, subject to the statutory trust.

(6) Where, immediately before his death, the deceased person is a member of or a participant in a scheme, fund or plan by virtue of which benefits of a kind commonly provided by pension, retirement or superannuation schemes are provided for any person on or after the death of the deceased person, the benefits, and any property from time to time representing the benefits, are, from and after the death of the deceased person, subject to the statutory trust.

(7) Where the deceased person disposes of property wholly or partly by way of gift with intent to evade this Act, wholly or in part, the disposition shall take effect, and the rights and interests of all persons shall be, as if the property were, immediately before the disposition, subject to the statutory trust, unless the disposition is made more than three years before the death of the deceased person, and accordingly property from time to time representing that property shall also be subject to the statutory trust.

(8) Where the deceased person, having by any instrument or contract a power to dispose of any property for the benefit of an object of the power in section 26(1), disposes of the property in exercise of his power with intent to evade this Act, wholly or in part, the disposition shall take effect, and the rights and interests of all persons shall be, as if the property were, immediately before the disposition, subject to the statutory trust, unless the disposition is made more than three years before the death of the deceased person, and accordingly property from time to time representing that property shall also be

subject to the statutory trust.

(9) Where, at the time of any disposition of property by a deceased person, the deceased person would have power to dispose of the property for the benefit of a person who is an object of the power in section 26(1) if that person had been born or had attained some age or if some other event had happened, then, for the purposes of subsection (8), 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 has the first mentioned power at the time of the disposition.

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

Exclusion:
actual estate.

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

Exclusion:
confirmed
disposition.

(2) 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 settlor - he is a person who, had the settlor 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 settlor - he is an eligible person or a person who might be made liable to the burden of an order for provision under Part II -

unless he has consented to the disposition or provision.

(3) An application for confirmation under this section may be made by the settlor or (before or after the death of the settlor) by a person who is or may become entitled under the disposition or provision.

(4) The Court may, on terms, confirm the disposition or provision wholly or in part as against all or any interested persons.

(5) Where the Court confirms the disposition or provision, wholly or in part, as against all eligible persons, property affected by the disposition or provision is, to the extent of the order of confirmation, but subject to the terms of the order, not subject to the statutory trust.

(6) Where the Court confirms the disposition, wholly or in part, as against some one or more but not all eligible persons, property affected by the disposition or provision 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 disposition or provision and interested persons as against whom the disposition or provision is confirmed, not subject to the statutory trust.

(7) An order of confirmation under this section does not have effect in favour of any person interested under the disposition or provision so far as concerns a claim made

in proceedings under this Act that the burden of any provision under this Act should fall on property affected by the disposition or provision confirmed, being a claim of which notice is given to that person before his commencement of proceedings for an order of confirmation under this section.

24. Where a person consents to any disposition or provision by a settlement, or to any other disposition, the property affected by the disposition or provision is, as between persons who are or may become entitled to any interest in the property under the disposition or provision and the consenting person, not subject to the statutory trust in relation to proceedings under this Act in respect of the notional estate of the person making the settlement or other disposition.

Exclusion:
consent.

25. (1) 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) For the purposes of subsection (1), "property in the notional estate" includes property represented by property which at the time of the hearing of proceedings under Part II is property in the notional estate.

(3) For the purposes of subsection (2), property is represented by other property if, notwithstanding any sale, conversion, investment or other transmutation, whether before or after the statutory trust arises, there is in the circumstances a substantial identity between the first mentioned property and that other property, such that the first mentioned property, if held by a trustee, would be traceable into that other property.

(4) 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.

(5) 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, in priority to the interests of persons claiming under the statutory trust, for the amount of the allowance together with interest.

(6) For the purposes of subsection (5), 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.

(7) Interest on an allowance under this section shall run from the time fixed under subsection (6) until payment of the allowance.

(8) Interest under this section shall be at the rate prescribed or, subject to the rules, at such rate as the Court may fix.

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

26. (1) The statutory trust is a trust - Statutory trust.

(a) for such one or more of them, all persons who are eligible persons in relation to the estate of the deceased person and all persons interested in the estate or notional estate of the deceased person; and

(b) for such one or more charitable purposes, being charitable purposes for which any part of the estate or notional estate of the deceased person is disposed of by the deceased person, by will or otherwise -

in such manner and to such extent as the Court may from time to time by order under this Act 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 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 21(2), 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.

(5) Where the proceeds of a policy of assurance on the life of the deceased person are subject to the statutory trust by virtue of section 21(5) and the proceeds of the policy are within the disposition of a person other than the administrator of the estate of the deceased person, subsection (1) does not authorise an appointment of the proceeds except to a person to whom the person with the power of disposition might lawfully have disposed of them.

(6) Where the benefits of a scheme, fund or plan of or in which the deceased person was a member or participant immediately before his death are subject to the statutory trust by virtue of section 21(6) and the benefits are within the disposition of a person other than the administrator of the estate of the deceased person, subsection (1) does not authorise an appointment of the benefits except to a person to whom the person with the power of disposition might lawfully have disposed of them.

(7) Where property is subject to the statutory trust by virtue of section 21(8), 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 21(8).

(8) Section 21(9) has effect for the purposes of subsection (7) as it has effect for the purposes of section 21(8).

27. The Court may make an appointment under the statutory trust for the following purposes but no other -

Appointment under the statutory trust.

- (a) for the purpose of making an order for provision under section 8;
- (b) for the purpose of giving effect to the terms on which an order for provision is made under section 8;
- (c) for the purpose of making an order for immediate provision under section 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 discharging, varying or suspending any order made by the Court under this Act.

28. (1) Subject to subsection (2), a 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.

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 subsection (4), a statutory trust does not impose any personal liability on any

person bound by the statutory trust 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 (3) does not affect any proceedings so far as the proceedings are for or relate to -

- (a) the identification, preservation, disposal or recovery of property subject to the statutory trust; or
- (b) the enforcement against an administrator of the estate of a deceased person bound during his lifetime by the statutory trust, or in the bankruptcy of a person so bound, or against any person on whom there otherwise devolves a liability of a person so bound, for anything done or left undone by the person so bound after notice to him as mentioned in subsection (2).

(5) A statutory trust does not enable any person to lodge a caveat under the Real Property Act, 1900 -

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

29. The Court may, on terms, order or declare that the whole or any part of the notional estate shall not be the subject of any appointment or further appointment under this Act.

Exoneration
of notional
estate.

PART IV.

GENERAL.

30. (1) Without limiting any power of the Court, where, in proceedings under this Act, the Court is satisfied that a person who

Addition of
parties.

Supreme Court
Rules, 1970,
Part 8 rule 8.

is not a party is a person whose joinder as a party is necessary or desirable to ensure that all matters in dispute in the proceedings may be effectually and completely determined and adjudicated upon, the Court, on application by him or by any party or of its own motion, may, on terms, order that he be added as a party and make orders for the further conduct of the proceedings.

(2) A person shall not be added as a plaintiff without his consent.

(3) This section has effect subject to sections 12 and 13.

31. (1) In any proceedings under this Act, 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 if he were alive.

Evidence.

1968, c.64,
ss.2,6,7.

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

(3) Where, in proceedings under this Act, a statement made by the deceased person while giving oral evidence in some other legal proceedings is admissible by virtue of this section, the statement may be proved in any manner authorised by the Court.

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

(5) For the purpose of determining whether or not a statement is admissible in evidence by virtue of this section, the Court may draw any reasonable inference from the circumstances in which the statement was made or from any other circumstances, including, in the case of a statement contained in a document, the form and contents of that document.

(6) In estimating the weight, if any, to be attached to a statement admissible in evidence by virtue of 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 and, in particular, to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the deceased person had any incentive to conceal or misrepresent the facts.

(7) Subject to subsection (9), where, in proceedings under this Act, a statement is admissible in evidence by virtue of this section, evidence is admissible for the purpose of destroying or supporting the credibility of the deceased person.

(8) Subject to subsection (9), where, in proceedings under this Act, a statement is admissible in evidence by virtue of this section, evidence tending

to prove that, whether before or after the deceased person made that statement, the deceased person made (whether orally or in a document or otherwise) another statement inconsistent therewith shall be admissible for the purpose of showing that the deceased person had contradicted himself.

(9) Subsections (7) and (8) do not enable evidence to be given of any matter of which, if the deceased person had denied that matter in cross-examination, evidence could not have been adduced by the cross-examining party.

32. Without limiting any power of the Court, the Court may, on terms, order that the costs of or incidental to proceedings under this Act be paid out of the estate or notional estate of the deceased person concerned. Costs.

33. (1) Where the Court makes an order for provision under this Act out of the estate of a deceased person and, for the purposes of the assessment and payment of duty under Part IV (Death Duty) of the Stamp Duties Act, 1920, the property affected by the order for provision is part of the dutiable estate of the deceased person, all death duties payable under the Stamp Duties Act, 1920, in relation to the property shall be computed as if the provision of the order had been part of a will made by the deceased person immediately before his death. Death duty.
Act No.41,
1916, s.10.

(2) Where the Court makes an order for provision under this Act out of the notional estate of a deceased person and, for the purposes of the assessment and payment of duty under Part IV (Death Duty) of the Stamp Duties Act, 1920, the property

affected by the order for provision is part of the dutiable estate of the deceased person, all death duties payable under the Stamp Duties Act, 1920, in relation to the property shall be computed as if the property had been disposed of by a will made by the deceased person immediately before his death in the same way as the order for provision disposes of the property.

(3) 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 Treasurer to the administrator of the estate of the deceased person and by him remitted to the person entitled to receive the same.

34. An action does not lie against the 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.

Act No.41, 1916, s.11(1), (2).

- (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 order made under section 8(6) or section 10.

35. (1) The Court may, by order, sanction any agreement whereby an eligible person agrees

Release of right to apply for order for provision.

to release his right to apply under this Act for an order for provision out of the estate or notional estate, or both, of a deceased person.

(2) An order under subsection (1) may be made before or after the death of the person whose estate or notional estate, or both, is the subject of the agreement.

(3) An order under subsection (1) may be made on terms.

(4) The Court shall not make an order under subsection (1) unless the Court is satisfied that the order is for the benefit of the eligible person.

36. (1) Rules of court may be made under the Supreme Court Act, 1970, and 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. Rules of court.

(2) Subsection (1) does not limit the rule-making powers conferred by the Supreme Court Act, 1970, and the District Court Act, 1973.

37. An Act specified in the first column of the Schedule is amended or repealed to the extent specified opposite that Act in the second column of the Schedule. Repeals and amendments. Schedule.

THE SCHEDULE

First Column	Second Column
Year and No. of Act.	Short title. Extent of amendment or repeal.
1898 No.13.	<p>Wills, Probate and Administration Act, 1898.</p> <p>Section 40A(2) - omit "and Part XV of the Conveyancing Act, 1919-1930," insert instead "Part XV of the Conveyancing Act, 1919, and the Family Provision Act, 1974,".</p>
1916 No.41.	<p>Testator's Family Maintenance and Guardianship of Infants Act, 1916.</p> <p>Insert next after section 1 the following new section -</p> <p>1A. Subject Application. to section 6(4C), this Act does not apply in relation to the estate of any person who dies after the commencement of the Family Provision Act, 1974, 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) Subsections (4A) and (4B) apply in relation to the estate of any person dying since the 7th October, 1915.</p>

First Column		Second Column
Year and No. of Act.	Short title.	Extent of amendment or repeal.
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 order under section 8 of the Family Provision Act, 1974".</p> <p>Section 134(2) - after "Testator's Family Maintenance and Guardianship of Infants Act, 1916," insert "or the Family Provision Act, 1974,".</p>

PART 21. - NOTES ON DRAFT BILL.

21.1 To avoid cluttering these notes with conditional expressions, we write as if the draft Bill were enacted. The Bill does not, however, express any final thoughts.

21.2 We continue to refer to the Act as "the Act". We refer to the draft Bill as "the Bill" or, sometimes, as "the new Act".

21.3 Where a section in the Bill introduces matter not considered in the text of this Paper, we comment in some detail. Where a section in the Bill is intended to restate a section in the Act or to give effect to a proposal discussed in the text, we give only a cross reference to the sections or to the text. In the case of any restatement of a section, we invite comment on the accuracy of the restatement. Where, in our view, a section in the Bill is self-explanatory, we do not comment.

Section 1. - Short Title

21.4 The title of the Act is inapt in that it gives dominance to the word "Testator's". Since 1938, the Act has applied to the estates of male intestates.¹

21.5 To us, the proposed short title "Family Provision Act" is apt. Proceedings under the Act are proceedings for provision, whether the provision be for maintenance, education or advancement in life. It can be said that the use of the word "Family" in the context of persons who may not be related to the deceased person by blood or by

1. The Act, s.3(1A).

marriage is wrong. But, as we see it, persons who satisfy the conditions specified in section 6(1)(c) of the Bill (reasonable expectation, sometime dependency and sometime membership of the same household) can be said to be a member of a family without doing hurt to that word.

Section 4. - Application

21.6 The Bill proposes two far reaching changes. Section 8, when read with section 6, widens the class of persons who may obtain an order for provision and, when read with Part III, allows an order for provision to affect property which is not part of the actual estate of the deceased person. We would think it wrong to apply a new Act containing these provisions to the actual or notional estate of a person who died before its commencement. Indeed, in the case of notional estate, we would think it wrong to apply the new provisions to property disposed of before the commencement of the new Act, even though the person disposing of the property died after that commencement.

21.7 Proceedings relating to the estates of persons dying after the commencement of the new Act will be commenced under that Act. Proceedings relating to the estates of persons dying before the commencement of the new Act will be made as they are now made.² Except for applications made out of time, these last mentioned applications will all be made within twelve months of the commencement of the new Act.³ Thereafter orders under section 3 of the

2. Draft Bill, ss.4 and 37.

3. The Act, s.5.

Act will be made infrequently and, in due course, the provisions of the Act relating to family maintenance can be repealed.

Section 5. - Interpretation Generally

21.8 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.⁴ 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 intestates⁵ 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 1914-1973 (Cth).

21.9 Section 5(2) of the Bill follows section 4(2) of the A.C.T. Ordinance mentioned in paragraph 21.8. It reproduces, at greater length, the substance of those parts of section 5(1) and (2) of the Act dealing with the resealing in this State of grants of probate and letters of administration made elsewhere.

Section 6. - "Eligible Person"

Husband of Wife Who Dies Intestate

21.10 The inclusion of "widower" in section 6(1)(a)

4. A.C.T. Ord., s.4.

5. See paragraphs 4.1 - 4.8.

effects our proposal that a man should be an eligible applicant in relation to the intestate estate of his deceased wife.⁶

A Remarried Spouse

21.11 The words "widow" and "widower" used in section 6(1)(a) are to be read with section 6(2)(a) which puts the decision in Re Claverie⁷ on a statutory basis.⁸

Posthumous Child

21.12 "Child" in section 6(1)(b) is to be read with section 6(2)(b). Paragraph (ii) of section 6(2)(b) seeks to remove any doubts about the eligibility of a posthumous child to commence proceedings under the Act.⁹

Illegitimate Child¹⁰

21.13 "Child" in section 6(1)(b) is also to be read with section 6(2)(b)(i).

21.14 The Bill does not contain any provision dealing with proof of illegitimacy. We considered provisions touching this matter in comparable legislation in some other places. For example -

1. For the purposes of a claim under the New Zealand Family Protection Act 1955, the relationship of father and child shall be recognised only if¹¹ -
 - (a) the father and mother of the child were married to each other at the time of its

6. Ibid.

7. [1970] 2 N.S.W.R. 380.

8. See paragraphs 6.18 - 6.23.

9. See paragraphs 6.35 - 6.36.

10. See paragraphs 6.49 - 6.57.

11. See Status of Children Act 1969 (N.Z.) s.7(1).

- conception or at some subsequent time; or
- (b) paternity has been admitted (expressly or by implication) by or established against the father in his lifetime.
2. In Queensland,¹² before making an order in respect of an illegitimate child of a deceased person, the Court shall satisfy itself that the evidence submitted to it on behalf of such child is reasonably sufficient to establish that such child is the offspring of the deceased person.
3. In Victoria,¹³ "children" includes illegitimate children of the deceased totally or partially dependent on or supported by the deceased immediately before his death or in respect of whom there was then in force against the deceased any order for the payment of maintenance or confinement expenses.
4. In South Australia,¹⁴ an illegitimate child is entitled to claim the benefit of the Act -
- (a) if the deceased person was the mother or was by an affiliation order adjudicated the father of the child;
 - (b) if the deceased person had been ordered by a court, or had agreed in writing, to maintain the child either wholly or partially; or
 - (c) if the child satisfied the Court that the deceased person acknowledged him as his child or contributed to his maintenance.

21.15 As we see it, the alternatives available to us are, first, to specify the criteria by reference to which an

12. Qld Act, s.90(1).

13. Vict. Act, s.91.

14. S.A. Act, s.6(f).

issue of paternity is to be determined or, secondly, to leave it to the Court to determine the issue according to the general law.¹⁵ We prefer the second approach. It is likely to raise fewer jurisdictional-type questions than the first approach. And yet, in substance, the approaches are much the same. Amongst other things, the general law looks to acknowledgement of paternity, affiliation orders and voluntary payments of maintenance. But, in our view, to specify these matters in the Bill is to do little except to run the risk of omitting something which might be significant. Moreover, we believe that some comparable Acts attach undue importance to admissions of paternity. Admissions of this kind have limited value only. The man concerned must rely for his belief upon the statement of others or upon inference from circumstances which he knows or which have been reported to him. Evidence of his admissions may be admissible but it does not follow that the evidence is enough to prove the issue.¹⁶ More evidence may or may not be called for.¹⁷ Likewise, to us, affiliation orders have only limited value in proving paternity: a mother may often successfully select from a number of candidates a man who is the best financial prospect.

21.16 In short, we believe that it should be left to the Court to decide on the whole of the evidence before it whether the applicant has, on the balance of probabilities, established that he is a child of the deceased person.¹⁸ This approach has been adopted in England.¹⁹

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15. See generally, Halsbury's Laws of England 3rd ed. Vol.3 (1953) 98 et seq.
16. See Lustre Hosiery Ltd. v. York (1936) 54 C.L.R. 134, 138; Comptroller of Customs v. Western Electric Co. [1966] A.C. 367.
17. Smith v. Joyce (1954) 89 C.L.R. 529; Allen v. Roughley (1955) 94 C.L.R. 98, 142.
18. See the Report of the Committee on the Law of Succession in relation to Illegitimate Persons (the Russell Report) (1966) (Cmd.3051) paragraph 44.
19. Family Law Reform Act 1969, s.18.

21.17 We note that even if an applicant is unable to satisfy the Court that he is a child of the deceased person, he may still obtain an order for provision: he may be able to satisfy the conditions specified in section 6(1)(c).

21.18 We note too that section 31 of the Bill (concerning evidence in proceedings under the Act) should avoid, for the purposes of the Act, some of the difficulties in the law relating to the admissibility in evidence of pedigree declarations.²⁰ Statements of the deceased person which satisfy the conditions of the section will be admissible as evidence of an applicant's pedigree.

A Person Who Has a Reasonable Expectation
of the Deceased's Bounty and Who Has Been
a Sometime Dependant of the Deceased and
a Member of His Household.

21.19 Section 6(1)(c) states in legislative form the conclusions we reached in Part 6, namely, that a person who satisfies the three conditions specified in the heading to this paragraph shall be eligible to apply for an order for provision.

21.20 We stress that section 6(1)(c) proposes only conditions of eligibility for a person who is neither a spouse nor a child of the deceased person. We stress too that the provision leaves unfettered the Court's discretion to make, or not to make, an order for provision under section 8 of the Bill.

21.21 The words "if the deceased person acted reasonably" are intended to make it clear that the Court should determine the issue of eligibility by reference to objective, not

20. See Cross (1970) pp.523-528.

subjective, considerations. 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 lived together for many years but, shortly before his death, A makes a will making no provision for B because he genuinely believes, though foolishly and mistakenly, that B is poisoning him. It may be arguable that it is not reasonable to expect that A would have made provision for B. The words "if the deceased person acted reasonably" are intended to ensure that such an argument is unsuccessful.

21.22 In section 6(1)(c)(ii), we do not attempt to define the word "dependant". Such difficulties as may arise in determining whether a person is a dependant are evidential and raise questions of fact and not of law.²¹

21.23 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.²²

Section 7. - Order on Terms

21.24 Section 7 is merely a drafting device for shortening other sections in the Bill: see, for example, sections 8(7), 9 and 10.

21. Re Baden's Deed Trusts (No. 2) [1972] 2 All E.R. (C.A.) 1304, 1311 and see, generally, Fenton v. Batton [1948] V.L.R. 422; Bonson v. C.A. Hine & Co. Pty. Ltd. [1965] W.A.R. 19 and Re W. (A Protected Person) [1966] N.Z.L.R. 380.

22. See English v. Western [1940] 2 K.B.156.

Section 8. - Orders for Provision

21.25 Section 8(1) and (2) seek, first, to restate the substance of the first paragraph of section 3(1) and (1A) of the Act, secondly, by use of the defined expressions "eligible person" and "notional estate", to widen the application of the Act, and, thirdly, by the use of the words "having regard to the circumstances at the time of the hearing" to implement the view stated in paragraph 9.7, namely, that Coates' Case²³ should be overruled.

21.26 Section 8(3)(a), which relates to the "character and conduct" of the applicant, puts in legislative form the view stated in paragraphs 10.5 - 10.9.

21.27 Section 8(3)(b)(1) and (ii) restate the effect of section 3(3) of the Act. Section 8(3)(b)(iii) and (c) give statutory recognition to existing practices of the Court and seek to remove any doubts about the legal basis of those practices.

21.28 Section 8(4) puts in legislative form the view stated in paragraph 11.68, namely, that the Court should have the power to make an order under the Act affecting personal property in New South Wales, notwithstanding that the deceased person died domiciled elsewhere.

21.29 Section 8(5) tries to end the debate about the validity of interim orders under the Act. It states in legislative form the ideas we put in paragraphs 12.16 and 12.17. In effect, it allows the Court to adjourn the further hearing of proceedings under the Act until, for example, the lapse of some time or the happening of some event.

23. Coates v. National Trustees, Executors & Agency Ltd.
(1956) 95 C.L.R. 494.

21.30 Section 8(8) is intended to limit the application of the Bill's provisions relating to notional estate (Part III). The subsection seeks to give a legislative guideline to the effect that the Court should look to the notional estate of the deceased person only in special circumstances.

Section 9. - Property Passing in Accordance
With Agreement

21.31 Section 9 is intended to overrule the decision in Schaefer v. Schuhmann²⁴ : the section states the proposal we put in paragraphs 11.54 - 11.57. In addition, it contains a formula whereby changes in the value of the property concerned shall be taken into account by the Court. We invite comment on the utility of this last mentioned provision.

Section 10. - Order for Immediate Provision

21.32 Section 10 is new. It puts in legislative form the proposals we made in paragraphs 12.19 - 12.22.

Section 11. - Class Fund

21.33 Section 11 is also new. It states the views we expressed in paragraphs 12.23 - 12.28.

Section 12. - Time for Proceedings out of Time

21.34 Section 12 picks up the substance of section 5(1), (2) and (2A)(a) of the Act. The Bill does not, however, have any provisions comparable with section 5(2A)(b) and (c) or section 5(3) of the Act.

21.35 We omit section 5(2A)(b) and (c)-type provisions

24. [1972] A.C. 572.

for the reasons given in paragraphs 17.9 - 17.11. We omit a section 5(3)-type provision because Part 7 r.6(1) of the Supreme Court Rules, 1970, makes such a provision unnecessary. The rule says that "proceedings shall be commenced by the filing of the originating process#

21.36 Section 12(3), in providing, in effect, that an order for an extension of time for commencing proceedings may be made only in favour of a widow, widower or child of the deceased person, puts in legislative form the proposals made in paragraphs 7.4 - 7.6.

21.37 Section 12(5) limits the circumstances to which the Court may have regard in applications for extension of time. The section states the proposal we made in paragraphs 7.7 - 7.8.

21.38 Section 12(7) of the Bill is to be compared with section 5(2A)(a) of the Act which speaks of "the final distribution of the estate". The Bill looks to the time when "the estate of the deceased person is indefeasibly vested in its beneficiaries". The differences are referred to in paragraphs 8.1 - 8.5.

21.39 Section 12(7) is intended to complement section 13 which makes special provision for the time within which proceedings for provision out of the notional estate of a deceased person may be commenced.

Section 13. - Time for Proceedings out of
Notional Estate

21.40 As we see it, it is necessary to make special provision for the time within which proceedings must be commenced for an order out of the notional estate of a

deceased person. This is so because the person concerned may die leaving only notional estate. In that event, there will be no grant of administration and the limitation period fixed by section 12 will be inapt.

21.41 One result of this situation is that where a person dies leaving both an estate and a notional estate, a person seeking an order out of both estates must look to the section 13 limitation period, namely, eighteen months after the date of death, and to the section 12 period, namely, twelve months after the date of the grant of administration. The periods will seldom, if ever, expire on the same day. This result is unfortunate but we do not see any alternative.

21.42 Section 13(3) provides the only basis upon which the time for commencing proceedings for an order out of notional estate can be extended. If knowledge, on the part of the legal owner of the notional estate, of the deceased person's intent to evade the Act cannot be proved, the legal owner is free from attack under the Act at the end of eighteen months after the date of death. In adopting this approach, we have considered, first, the necessity of preserving security of titles and, secondly, the necessity of protecting a family from what is, in effect, a fraud upon the Act. Our proposal does not aid the fraudulent (using that word in a non-technical sense) but it does limit time within which the expectations of an innocent legal owner can be disturbed by the Court. It may be argued that a twelve months limitation period would be fairer to an innocent legal owner than the proposed eighteen months period. We are inclined to agree with this view but we choose the latter provision because we think it desirable in practice that the limitation periods under sections 12 and 13 be much the same. In practice, a period which expires eighteen months after death will often expire about the time

that a period twelve months after grant expires.

21.43 The combined effect of section 12(8) and section 13(5) is that an eligible person may sometimes have to make one application for an extension of time within which to commence proceedings for an order out of the estate of a deceased person and another application for a like order out of the notional estate of that person. In most instances, however, the two applications will be joined in the one proceeding.

Section 14. - Burden of Provision

21.44 Section 14(1) and (2) of the Bill are intended to express 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 change. In most cases, the order specifies how the provision is to be borne, failing that the burden of the order is borne rateably in proportion to the values of the beneficiaries' interest. But, the power to apportion the burden of an order other than rateably is a necessary power if, in special cases, the Court is to avoid giving unnecessary hurt to a person.²⁵

21.45 Section 12 of the Bill 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 any apparent difficulty. The words of Street C.J. in Equity are pertinent²⁶ -

25. 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.

26. Re Seery [1969] 2 N.S.W.R. 290, 296.

"So far as I am aware there is no guidance laid down in the authorities upon the manner of exercise of the discretion conferred by s.6(2) or upon the considerations relevant to the exercise of such discretion. A question was raised during argument whether the discretion is to be exercised by having regard to what a wise and just testator would have done in adjusting the interests of the beneficiaries to the changed circumstances brought about by the making of an order in favour of an applicant; alternatively, the relevant inquiry may be directed to what the testator himself would have done in such changed circumstances.

The discretion given to the Court by s.6(2) is a discretion to displace the statutory rule laid down therein, namely, that the burden shall be borne by the beneficiaries in proportion to the values of their respective interests. The legislature has indicated what might be regarded as the ordinary consequence upon the interests of beneficiaries in the event of an applicant succeeding in obtaining an order in his favour under s.3. The discretion given to the Court by s.6(2) is a discretion to depart from the statutory rule. The subsection itself contains no express indication of the manner of exercise of the discretion. After careful deliberation on the point I have reached the conclusion that the discretion is not one to be restricted to one or other of the alternatives mentioned earlier. That is to say, I do not assent to having to choose, in considering whether this discretion should be exercised, between what a hypothetical wise and just testator would have done in adjusting the burden of the order or, alternatively, what the instant testator would have done. The making of an order necessarily brings about a change in the manner in which the testator adjusted his affairs. And the Court's discretion to displace the statutory rule requiring the consequent burden to be ratably distributed is a discretion exercisable with due regard to the whole of the circumstances. Apart from discarding considerations entirely extraneous I do not consider that the Court's discretion under s.6(2) is to be confined by attempting precise definition. Weight may undoubtedly be given to what a 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 p.179), with due regard to the whole of the surrounding circumstances.

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

Section 15. - Operation of Order for Provision

21.46 Section 15(1)(a) of the Bill is intended to do the work of section 4(1) and (2) of the Act. In our view, no useful purpose is achieved by maintaining separate provisions

for cases of testate and intestate succession. Indeed, in section 10(1) of the Act (which relates to death duty) only the will analogy is used. And "will", as defined in section 5(1) of the Bill, includes a codicil.

21.47 The Privy Council has said that section 4(1) of the Act "only emphasizes and makes explicit what would be implicit in the Act if it were not there".²⁷ And, Williams J. has said²⁸ -

"The [T.F.M.] Acts usually provide that the order shall operate as a codicil to the will but it is not a codicil in any true sense. No codicil could provide that it should operate according to its terms until some person or even some Court should think fit to suspend, rescind or vary it. The Acts do not authorise the Courts to make a will or codicil for the testator. His will-making power remains unrestricted but the Acts authorise the Court to interpose and carve out of his estate what amounts to adequate provision for the applicant if he is not sufficiently provided for."

21.48 Yet, we do not propose omitting from the Bill an equivalent of section 4(1) and (2). Our reasons are, first, that the omission might lead to wasteful conjecture about the effect of the omission and, secondly, that the provisions of subsection (1)(a) clearly indicate to the personal representative of a deceased person how an order under the Act is intended to work. In theory, the provisions may not be needed but, in practice, they serve a useful purpose.

21.49 Section 15(1)(b) of the Bill is intended to ensure that the Court gives special attention to how the burden of an order is to be borne where the order affects notional estate. We do not think that a ratable proportion provision is apt where the interests of both beneficiaries

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

28. Coates v. National Trustees Executors and Agency Co. Ltd. (1956) 95 C.L.R. 494, 513, 514.

in the estate and legal owners of notional estate may be involved: the possibility of complex adjustments being needed is real.

Section 16. - Discharge, Reduction, Suspension or Variation of Order

21.50 Section 16 of the Bill states the substance of section 6(4) of the Act. It gives the Court an additional power, namely, the power to vary an order. This addition does not, in our view, call for justification.

Section 17. - Increased Provision

21.51 Section 17 puts in legislative form the proposal we made in Part 13.

Section 18. - Property Distributed

21.52 Where a person applies for an order under the Act within the twelve months period fixed by section 5(1) and (2), the Court may make an order out of any part of the estate of the person concerned, whether or not the estate has been distributed (section 11(3)). But where the application is not made within that time, the Court may not make an order out of any part of an estate which was distributed before the application under section 5(2A) was made. Section 18 of the Bill does not seek to change this position.

21.53 Administrators of estates and potential applicants under the Act are often mutually antagonistic. 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, a period of twelve months 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 of an order under the Act affecting it.

21.54 Section 18 of the Bill may be compared with sections 8(1) and 11 of the Western Australia Act and section 20(1) and (2) of the Australian Capital Territory Ordinance. In substance, these last mentioned provisions 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 totally or partially dependent on the deceased person immediately before his death. As we see it, the Court can give proper consideration to such matters in exercising its general power to have "regard to all the circumstances of the case".

Section 19. - Exoneration of Part of Estate from Provision Made under this Act.

21.55 Section 19 of the Bill is a restatement of section 7 of the Act. It should be noted that in prints of the Act before 18th February, 1974, there is an error. Following the amendment of section 7 of the Act by Act No.30, 1938, copies of the Act printed before 18th February, 1974, in accordance with the Amendments Incorporation Act, 1906, and the Red Statutes, were printed with the word "to" instead of the word "by" in the second line.

21.56 Our restatement of section 7 of the Act has regard to our general proposals. Hence, section 19 of the Bill does not use the words "legatee", "devise", "beneficiary", "will" and "intestacy".

21.57 We do not question the need for provision of the kind now being considered. The Court must be able to free

property from the consequences of its orders. Without this power the alienability of property might, in many instances, be unreasonably restricted during the currency of an order made under the Act.

PART III. - NOTIONAL ESTATE.

Section 20. - Interpretation.

21.58 In drafting Part III, we face special difficulties. We wish to use death and estate duty-type concepts but if we do we may end up with the deplorable results of which Lord Diplock spoke in one estate duty case²⁹ -

"As in nearly all appeals about estate duty, I reach my decision without confidence. Were I a betting man I should lay the odds on its being right at 6 to 4 (i.e. 3 to 2) for - or against. If ever a branch of the law called for reform in 1966, it is the law relating to estate duty. It ought to be certain; it ought to be sensible - it is neither. One cannot read even the score of cases which have been cited in the present case without realizing that it has got into a mess from which I see no hope of the court's rescuing it without drastic legislative assistance."

Should we use words which have led to "scores of cases" or should we try to find new words or a new approach?

21.59 In the event, we compromise. We use standard terms but, with one exception, we do not give them defined meanings and we place them in new surroundings.

21.60 We do not define "property". The word itself is a most comprehensive term. It is indicative and descriptive of every possible interest that a person can have.³⁰ We do not define "disposition of property". The words are ordinary

29. In re Kilpatrick's Trusts [1966] Ch. 730, 766, 767.

30. See Jones v. Skinner (1835) 5 L.J. Ch. (N.S.) 87, 90.

words. Where they are not limited by their context, they extend to all acts by which a new interest in property is effectively created³¹ and they are wide enough to cover all forms of alienation.³² And, we do not define "gift". It too is a most comprehensive word. It covers any act whereby something is voluntarily and gratuitously transferred from one person to another, with the full intention that the thing shall not return to the giver, and with the full intention on the part of the receiver to retain the thing entirely as his own without restoring it to the giver.³³

21.61 We do, however, propose a wide and inclusive definition of "settlement".³⁴ The primary purpose of the definition is to aid the construction of section 21(3) of the Bill. That section applies only to settlements made by a deceased person wholly or partly by way of gift where, immediately before his death, property comprised in the settlement is/^{not}absolutely and indefeasibly vested in a person beneficially or for a charitable purpose. Hence, in its practical application, the width of the definition is narrowed by the context in which it is relevant.

21.62 The words "by will" in the definition of "settlement" refer to the will of a person other than the person in respect

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31. Carter v. Carter [1896] 1 Ch. 62, 67.
 32. Henty House Pty. Ltd. (In Voluntary Liquidation) v. Federal Commissioner of Taxation (1953) 88 C.L.R. 141, 151, 152.
 33. Halsbury's Laws of England (3rd Edn.) Vol.18 p.364.
 34. For comparative definitions see Stamp Duties Act, 1923, s.100 and Estate Duty Assessment Act 1914-1973 (Cth) s.3.

of whose estate proceedings have been commenced under the Act. Property disposed of by the will of the deceased person whose estate is the subject of proceedings forms part of his actual estate and s.22 takes that property outside the application of Part III.

Section 21. - Property Subject to the
Statutory Trust.

21.63 In effect, section 21 lists, in subsections (2) - (8), the seven classes of property which we propose should be subject to the statutory trust constituted by section 26(1). Section 21 specifies, also in subsections (2) - (8), when each class of property becomes subject to the statutory trust.

21.64 Subsections (2) - (8) give legislative form to the broad proposals we put in paragraphs 11.28 - 11.36 and in paragraphs 11.38 - 11.44. They also give formal expression to the statements made in paragraph 11.47.

21.65 In subsections (2) - (8), the words "and property from time to time representing that property", and other words to a like effect, are intended to ensure that the equitable doctrine of tracing³⁵ applies to property subject to the statutory trust. In our view, it is futile to enact provisions relating to the notional estate of a deceased person if the provisions can be avoided by the simple expedient of changing the form of the property in the notional estate. Indeed, when, for the purposes of the Act, property is fixed with the character of trust property it should, in our view, attract the laws relating to trusts and this is the intended effect of our proposals.

35. See, generally, Hanbury (1969) pp.418-431.

21.66 We note, incidentally, that the rules of tracing do 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, we seek only to apply the existing tracing rules to property which is within the application of Part III.

21.67 We invite comment on the classes of property which we propose should be subject to the statutory trust. Are the classes too wide or too narrow? Do they include property which ought to be excluded or do they exclude property which ought to be included? And, what difficulties of construction arise out of the present drafting of subsections (2) - (9)?

Sections 22, 23 and 24 - Exclusions from Statutory Trust.

21.68 Section 22 provides that property in the estate of the deceased person is not subject to the statutory trust. Part II of the Bill gives the Court ample powers to make orders affecting that property.

21.69 In effect, section 23 allows the Court to order that particular property be excluded from the statutory trust. The test is whether the disposition of the property 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". We do not fix guidelines of the kind mentioned in section 21(3) of the draft Canadian Uniform Family Relief Act.³⁶ The

36. See paragraph 11.13.

Court will look at the whole of the circumstances surrounding a particular transaction and make its orders accordingly.

21.70 We anticipate that proceedings under section 23 will be limited to transactions affecting property of a substantial value where consents which satisfy section 24 of the Bill cannot be obtained. Suppose, for the purposes of illustration, that A has a wife, a son B and two daughters, that A has a large family business from which he wishes to retire and which B has made his life's work. A may wish to transfer the business to B but in a way which will attract to the business the provisions of Part III. A or B may ask the mother and sisters to consent to the transactions. If the consents are given, section 24 will exclude the business from A's notional estate. If the consents are not given, A or B, or both, may ask the Court for an order under section 23 in relation to the business.

21.71 If, in the illustration given in paragraph 21.70, the transaction with the business is completed before A's death and the business forms part of A's notional estate and the widow applies for an order for provision out of the business and gives notice of the application to B, it will be useless for B to apply then for an order of confirmation under section 23. In substance, section 23(7) provides that the order, if made, would have no effect. Hence the Court would not make the order. This is so because the Court is able to consider all the relevant issues in the proceedings for provision commenced by the widow.

21.72 Section 24 speaks of property being excluded from the statutory trust by consent. This exclusion operates only as between persons who are or may become entitled to an interest in the property and the consenting person. The section does

not specify that the consent shall be in writing or that it shall be given before the disposition of the property is made. In our view, the Court should be able to look to the continuing conduct of the persons concerned. If consent can be reasonably inferred from conduct, then the Court should be able to say that the property is excluded from the notional estate so far as the consenting person is concerned.

Section 25. - Allowances for Consideration Etc.

21.73 Section 25 is our legislative expression of the matters mentioned in paragraph 11.48. Subsections (2) and (3) are intended to apply, in this context, to rules of tracing referred to in paragraphs 21.65 and 21.66.

21.74 Section 25 gives wide powers to the Court and it does not specify the criteria by reference to which a "just allowance" is to be made. We believe that it is not feasible to list all the matters at which the Court might need to look. The Court already has wide discretionary powers under the Act and we do not believe that the present proposal involves any unreasonable extension of those powers.

Section 26. - Statutory Trust.

21.75 Section 26 constitutes the statutory trust and specifies its objects and the appointments that may, and may not, be made under it.

21.76 The trust itself is the means we adopt for effecting our proposal that some property disposed of by a person in his lifetime should be within the application of the Act.³⁷

37. See Part 11.

We favour the concept of the statutory trust because it enables many of the laws relating to trusts to be used in aid of proceedings under the Act.

21.77 Section 26(1) and (2) 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 proceedings under the new Act.

21.78 Subsections (4) - (7) put in legislative form the proposals we noted in paragraph 11.48.

Section 27 - Appointments under the Statutory Trust.

21.79 Section 27 is self explanatory.

Section 28. - Restrictions on the Statutory Trust.

21.80 Section 28 expresses the proposals we noted in paragraph 11.48.

Section 29. - Exoneration of Notional Estate.

21.81 Section 29 allows the Court to say that property in the notional estate is henceforth free from claims under the statutory trust. An order under section 23 (exclusion: confirmed disposition) has the effect of taking property outside the statutory trust. Section 29 operates differently. It recognises that property may still be subject to the statutory trust but that there are good reasons why an order should not be made in relation to 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 legal owner of the notional estate suffers some catastrophic injury and it is unreasonable to expect that an order would ever be made under the Act detrimental

to his interests. In this situation, we see no good reason why property of that person should not be taken outside the application of Part III.

Section 30. - Addition of Parties.

21.82 Section 30(1) and (2) restate the existing power of the Court arising from Part 8 rule 8 of the Supreme Court Rules, 1970. We restate this provision in the Bill merely because we think it wise to emphasise that a person may apply to the Court for leave to be added as a party to proceedings under the Act. If the proposal made in paragraph 12.12 (that notice of proceedings should be given to the spouse, children and beneficiaries of a deceased person) is adopted, section 30 should go a long way to avoiding complaints of the kind referred to in paragraph 12.11.

21.83 Section 30(3) expresses our view that section 30(1) and (2) should not operate in derogation of the limitation periods fixed in sections 12 and 13.

Section 31. - Evidence.

21.84 Section 31 puts in legislative form the views we expressed in Part 15.

Section 32. - Costs.

21.85 Although section 76 of the Supreme Court Act, 1970, and Part 52 of the Supreme Court Rules, 1970, deal generally with the question of costs, we make special provision for orders that costs be paid out of the estate or notional estate of a deceased person.

Section 33. - Death Duty.

21.86 Subsections (1) and (3) of section 33 of the Bill

restate the substance of section 10 of the Act. Section 33(2) of the Bill expresses the substance of subsection (1) in relation to the notional estate of a deceased person.

Section 34. - Protection of Administrator.

21.87 Section 34 of the Bill departs from section 11(1) and (2) of the Act in two areas, first, it takes account of the proposed section 10 (orders for immediate maintenance) and, secondly, it allows more flexibility in the form of the notice to be given by the administrator.

21.88 Where the Court directs an administrator to make provision for the urgent and immediate needs of a plaintiff, the administrator should not be at risk for complying with the direction. Hence we propose paragraph (b) of section 34.

21.89 Notices which, in the terms of section 11(1) of the Act, "would have been given by the Supreme Court in its equitable jurisdiction in an administration suit for creditors" are notices which, as time passes, will become more and more difficult to define. We think it better that the form of the notice be prescribed. Indeed that has already been done.³⁸

38. Supreme Court Rules, 1970, Schedule F, Form 121.

Section 35. - Release of Right to Apply
for Order for Provision.

21.90 Section 35 expresses in legislative form the proposal we made in Part 17.

)
The Schedule

21.91 The proposed new section 1A of the Act complements section 4 of the Bill.³⁹

21.92 The proposed new subsection (4) of section 3 is prompted by the same factors that prompted section 8(5) of the Bill (power to make interim orders).⁴⁰

21.93 The proposed new subsections (4A), (4B) and (4C) of section 6 of the Act are intended to give the Court power to increase the provision made for an applicant in proceedings already dealt with under the Act. If part of an estate is undistributed and a successful applicant can demonstrate that he is experiencing hardship by reason of an exceptional change in his circumstances since the date of the order, we believe that that applicant should be able to ask the Court for an order for increased provision. If the Court is satisfied that the need of the applicant cannot be met without unduly interfering with the expectations of others, the Court will not make the order. If, on the other hand, the need can be met without unduly interfering with the expectations of others, the need should be met. We invite the expression of contrary opinions. The views we put in Part 13 are pertinent to this question.

39. See paragraphs 21.6 - 21.7.

40. See paragraphs 12.13 - 12.18.

Omissions from the Bill - Section 6(1) and (3),
Section 9 and Section 12 of the Act.

21.94 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.

21.95 Part 77 rule 3 of the Supreme Court Rules, 1970, makes it unnecessary to include in the Bill a provision to the effect of section 6(3) of the Act. In our view, matters relating to certified copies of orders are better dealt with by rules of court than by the Act itself.

21.96 The worth of section 9 of the Act was debated in Parliament in 1916.⁴¹ 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".⁴² It was said:⁴³ "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

41. N.S.W. Parliamentary Debates, Session 1916, Vol.65, pp.1305-1308.

42. Id., p.1307.

43. Ibid.

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 an estate arising out of an order of the Court. The Court does not have to approve a mortgage over an interest in an estate which arises out of a will or on an intestacy.

21.97 A provision equivalent to section 12 of the Act is not needed in the Bill because the Bill is expressed not to apply in relation to the estate of any deceased person who dies before its commencement.

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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.

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BE

(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).

Testator's Family Maintenance and Guardianship of Infants.

BE it enacted by the King's 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 :—

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

Definitions. 2. In this Act, unless the context otherwise requires—

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

"Executor" includes administrator with the will annexed.

Testator's family maintenance.

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

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.

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)

Testator's Family Maintenance and Guardianship of Infants.

(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. 36, 1938, s. 9 (a).
Amended, Act No. 46, 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. 36, 1938, s. 9 (b).
Substituted subsection, Act No. 46, 1954, s. 4
(1) (b).

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

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:

Proviso repealed, Act No. 46, 1954, s. 4 (1) (c) (i).

* * * * *

New subsection added, Act No. 36, 1938, s. 9 (c).

(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 resealing in New South Wales of letters of administration of the estate of the deceased person.

New subsection added, Act No. 46, 1954, s. 4 (1) (c) (ii).
cf. N.Z. Act, 1908, No. 60, s. 33 (9).

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

- (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

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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—

- (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.

Contents of order. Vict. Act, 1906, No. 2,074, s. 9.

(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

6

Act No. 41, 1916.

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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.

Certified copy of order to be made on probate. Amended, Act No. 36, 1936, s. 9 (d) (i).

(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.

Power to vary or revoke order. Amended, Ibid. s. 9 (d) (ii).

(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.

COMS.

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

Court may fix periodic payment or lump sum. N.Z. Act, No. 60, 1908, s. 33 (6). Amended, Ibid. s. 9 (e).

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.

8.

Act No. 41, 1916.

7

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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. 50, 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.
Ibid. s. 34.
Amended, Act No. 36, 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) (ii).

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 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.

Distribution of assets.
Wills, Probate and Administration Act, 1898, s. 92.
Amended, Ibid. s. 9 (2) (i) (ii).

(2)

Testator's Family Maintenance and Guardianship of Infants.

Amended,
Act No. 36,
1934, s. 9
(g) (h).

(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.

(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.

Executor not
liable for
assets legally
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.

Guardianship of infants.

Rights of
surviving
parent as to
guardianship.
15 & 16 Geo. V,
c. 45, s. 4.
Substituted
section,
Act No. 30,
1934, s. 5
(1) (a).

13. (1) On the death of the father of an infant, the mother, 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 father.

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.

(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.

Testator's Family Maintenance and Guardianship of Infants.

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 sections, Act No. 29, 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)

Testator's Family Maintenance and Guardianship of Infants.

(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.

Repealed,
Act No. 20,
1904, s. 3
(1) (b).
Repealed,
Ibid.

15. * * * * *

16. * * * * *

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

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.

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

(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—

- (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.

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

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.

The

Testator's Family Maintenance and Guardianship of Infants.

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. 28, 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.

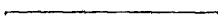
Provided that applications under this section shall be heard in camera.

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

The Results of Some Factual Enquiries
 Made by Law Reform Commission of N.S.W.

1.	In New South Wales -	
(1)	The average number of deaths registered in each of the five years ending 31 December, 1970, was . . .	41246 ¹
(2)	The average number of deaths of persons over the age of 19 years in each of those years was . . .	38733 ²
(3)	The average number of estates of deceased persons assessed for death duty in each of the five years ending 30 June, 1971, was . . .	28202 ³
	And of those -	
	The average number not liable to duty was . . .	10451 ⁴
	The average number valued at \$2,000 or less was . . .	2247
	The average number valued at \$2,001-\$10,000 was . . .	6823
	The average number valued at \$10,001-\$20,000 was . . .	3722
	The average number valued at \$20,001-\$50,000 was . . .	3176
	The average number valued at \$50,001-\$100,000 was . . .	1162

-
1. N.S.W. Statistical Bulletin (1972) No.364, p.9.
 2. Calculated by us from information obtained from the Commonwealth Bureau of Census and Statistics, N.S.W. Office.
 3. N.S.W. Statistical Register, Finance, (1970-71) p.58.
 4. For the relevant period, estates not liable to duty comprised those of certain members of the armed services and those not exceeding \$2,000 in value and, in certain circumstances and according to date of death, \$20,000 if passing to widow, widower or children under 21.

The average number valued at
\$100,001 or more was . . . 621

- (4) The average number of proceedings commenced
under the Act in each of the five years
ending 31 December, 1971, was . . . 252

2. Our random examination of the papers in the Court
relating to 150 (59.76%) of the 251 applications made under
the Act in the year ending 31 December, 1970, showed -

- (1) That the 150 applications related to 125 separate
estates: 108 estates (86.40%) where the deceased
person had left a will (131 applications) and 17
estates (13.60%) where the deceased person had
died intestate (19 applications).
- (2) That we could obtain a clear indication of the net
value of the estate in only 141 cases. Of these
141 applications -
- 2 (1.42%) related to an estate valued at less than
\$2,000.
- 43 (30.50%) related to an estate valued at between
\$2,000-\$10,000.
- 48 (34.04%) related to an estate valued at between
\$10,001-\$20,000.
- 17 (12.06%) related to an estate valued at between
\$20,001-\$50,000.
- 18 (12.76%) related to an estate valued at
between \$50,001-\$100,000.
- 13 (9.22%) related to an estate valued at more
than \$100,001.
- (3) That of the 150 applications -
- 75 (50%) were made by widows.
- 39 (26%) were made by sons (including 7 minors).
- 28 (18.67%) were made by daughters (including 3 minors).
- 8 (5.33%) were made by widowers.

- (4) That of the 131 applications where the deceased person had left a will -
61 (46.57%) applicants were widows.
38 (29.01%) applicants were sons (including 6 minors).
25 (19.08%) applicants were daughters (including 2 minors).
7 (5.34%) applicants were widowers.
- (5) That of the 19 applications where the deceased person had died intestate -
14 (73.69%) applicants were widows.
3 (15.79%) applicants were daughters (including 1 minor).
1 (5.26%) applicant was a minor son.
1 (5.26%) applicant was a widower.
- (6) That of the widows' applications where the net value of the estate was known to us (72 applications), 49 (68.05%) were made in estates valued at less than \$20,000.
- (7) That of the 150 applications examined, 127 (84.67%) had been completed before 31 May, 1973, and of these 18 (14.17%) had been dismissed and 109 (85.83%) had resulted in the making of an order for provision.
- (8) That of the 109 orders made -
62 (56.88%) were made in favour of widows.
22 (20.18%) were made in favour of sons (including 4 minors).
17 (15.60%) were made in favour of daughters (including 2 minors).
8 (7.34%) were made in favour of widowers.
- (9) That of the 131 applications which related to a will, 20 (15.27%) were made under the Legal Assistance Act, 1943.
- (10) That of the 19 applications which related to an intestacy, 7 (36.84%) were made under the provisions of the Legal Assistance Act, 1943.

APPENDIX C

PARTS 4 AND 5 OF THE WORKING PAPER
FAMILY PROPERTY LAW PUBLISHED IN 1971
BY THE LAW COMMISSION IN ENGLAND

PART 4

LEGAL RIGHTS OF INHERITANCE

1 INTRODUCTION

4.1 It has been stressed in the Paper that during a stable marriage it is seldom of importance to the spouses to establish their precise property rights. These rights become important at two stages: when the marriage breaks down, and when it ends with the death of a spouse. In Part 3 the law of family provision was examined to see whether improved protection could be given to the spouse, former spouse or child of a deceased.

4.2 Another way of providing for surviving members of the family, where the deceased intentionally or accidentally failed to provide for them, would be to give them a legal right to inherit a fixed portion of the estate. Such a legal right of inheritance must be distinguished from the right to apply for family provision, which depends on discretionary factors.¹ It would also differ from succession rights on intestacy, which operate only where there is no will or where the will does not dispose of all the deceased's estate. A legal right of inheritance would operate irrespective of the provisions of the will.

4.3 Legal rights of inheritance were known to Roman law, and were also recognised in early English law.² Although legal rights

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1. See Guest, "Family Provision and the Legitima Portio" (1957) 73 L.Q.R. 74, for a comparison of legal rights and family provision.
 2. Plucknett, A Concise History of the Common Law (5th ed. 1956) "The Family Reserve", p.743 ff.; Pollock and Maitland, History of English Law, Vol. II, p.348.

to succeed to the deceased's personalty were largely abolished in England by the 17th century, the widow's right to dower (i.e. to a life estate in one-third of her husband's real property) and the widower's corresponding right to curtesy were not finally abolished until 1925.³ Legal rights of inheritance still apply in Scotland⁴ and in many other modern legal systems, including both those where community of property applies,⁵ and those where it does not.⁶ We use the term "legal rights of inheritance": but in some countries the equivalent right is referred to as "legitim", "compulsory portion", "fixed portion", "forced share", "reserve" or "elective right".

4.4 In preparing this Paper we have studied several systems of law under which the surviving spouse and children are given legal rights of inheritance, and have been assisted by the recent study of this subject in the United States,⁷ where legal rights for the surviving spouse are common. It is impracticable to describe here all these systems, but we give one example, that of Scotland, to show how legal rights operate in practice.

3. Administration of Estates Act 1925, s. 45.

4. See below, para. 4.5.

5. E.g., DENMARK: Pedersen, "Matrimonial Property in Denmark" (1965) 28 M.L.R. 137, 148; GERMANY: Cohn, Manual of German Law, Vol. 1 (2nd ed. 1968) ss. 518, 582, 633 ff.; M. Hanotiau "Le conjoint survivant en droit allemand", in Le Statut civil du conjoint survivant, Bibliotheque de la Faculté de Droit de l'Université Catholique de Louvain No. VII (1970) p. 369.

6. E.g., SCOTLAND: see below, para. 4.5; REPUBLIC OF IRELAND: Succession Act 1965, Part IX, s. 109 ff.; Gerard Clarke, "Some Aspects of the Succession Act, 1965; Caveat Executors; New Powers and Burdens for Personal Representatives" (1966) 1 Irish Jurist 222; UNITED STATES: for problems concerning legal rights of inheritance in those common law states which have them, see Macdonald, Fraud on the Widow's Share (1960); ITALY: The Italian Civil Code (transl. by M. Beltramo, etc. 1969) Chapter X: Forced Heirs, ss. 536-552.

7. Uniform Probate Code (approved by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association in August 1969) Article II, part 2: "Elective Share of Surviving Spouse". The Uniform Code strengthens the right of the surviving spouse to an elective share by allowing certain transfers in "fraud" of the share to be taken into account. At the same time it provides that the survivor must give credit for benefits received from the deceased during joint lives.

4.5 Under Scots law⁸ both the surviving spouse and children may claim legal rights.⁹ Legal rights affect only the moveable estate, and no longer apply to heritage (immoveables). On intestacy, they apply only to that part of the estate left after the surviving spouse's rights have been satisfied.¹⁰ A spouse's legal rights are to one-third of the moveable estate or, if there is no issue, to one-half. The children's¹¹ legal rights are to one-third of the moveable estate or, if there is no surviving spouse, to one-half. The balance, which may be disposed of by will, is called the "dead's part". The following brief summary shows how Scots law deals with some of the problems considered below:

- (a) Renunciation and discharge. A spouse may renounce or discharge legal rights expressly (for example, in an ante-nuptial contract), or by clear implication (for example, acceptance by a spouse of a life interest will exclude any claim to legal rights in respect of the property burdened by the life interest).¹²

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8. Gloag and Henderson's Introduction to the Law of Scotland (7th ed. 1968) by A.M. Johnston, Q.C. and J.A.D. Hope, p. 570 ff.; David M. Walker, Principles of Scottish Private Law Vol. II (1970) p. 1794 ff.; M.C. Meston, The Succession Scotland Act 1964 (2nd ed. 1969) p. 41 ff.
9. Legal rights include the widow's rights (jus relictæ) the widower's rights (jus relictæ) and the children's rights (legitim).
10. Where the intestate estate includes an interest in a dwelling house, the surviving spouse is entitled to receive: (1) that interest or the value thereof if the value does not exceed £15,000 or, if it does, a sum of £15,000; (2) the contents of the house (i.e. furniture and plenishings) up to the value of £5,000; and (3) a legacy of £2,500 if the intestate is survived by issue (i.e. descendants) whether legitimate or not, or £5,000 if he is not survived by issue: Succession (Scotland) Act 1964, ss. 8, 9 and 10. See Walker, op. cit. p. 1762 ff.; Meston, op. cit. p. 27.
11. Including illegitimate children: Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, ss. 2, 3 and 22(5) and Sch. 1, paras. 3, 4, 5 and 7, and the issue of a child who predeceased the deceased: Succession (Scotland) Act 1964, s. 11(1).
12. Gloag and Henderson, op. cit. p. 577; Meston, op. cit. p. 52 children and remoter issue may also discharge legal rights, but a parent cannot exclude the child's right to claim legitim unless the child elects to accept the provision made for him: Succession (Scotland) Act 1964, s. 12.

- (b) Benefits received from the estate. It is implied, in the absence of an express declaration to the contrary, that a legacy to a spouse or child is in full satisfaction of legal rights; an election must be made between the legacy and legal rights if there is a testamentary provision in favour of the elector.¹³
- (c) Dispositions in favour of third parties, and avoidance of legal rights. During the testator's lifetime he may minimise legal rights by converting his property into heritage, or by alienating it, even if he does so gratuitously. He may also evade legal rights by a transfer of property under reservation of a life interest therein, even if this is done expressly to defeat legal rights. However, if he retains any power of disposition over the property disposed of or the reversion the transfer will not effectively preclude legal rights.¹⁴

4.6 In those countries where legal rights of inheritance apply, they are combined in various ways with the rules of intestate succession, with the right to claim maintenance from the estate of the deceased, and with the survivor's share on the division of community property. The survivor's legal rights are sometimes expressed as a fraction of the rights on intestacy: for example, in Germany a spouse's legal rights are one-half of the amount due on intestacy. Whether or not this is the case, the amount which a spouse would receive under legal rights is invariably less than he would have received on intestacy. For this reason, legal rights are seldom of relevance in the case of complete intestacy.

13. Succession (Scotland) Act 1964, s. 13. This does not necessarily preclude a claim to legal rights in any estate falling into intestacy: Meston, p. 51.

14. Gloag and Henderson, pp. 570-571.

4.7 It is not usual for legal rights and the right to apply for maintenance to be combined. In countries with systems of separate property, a surviving spouse sometimes has a right to apply for maintenance from the estate¹⁵ and sometimes a fixed legal right of inheritance.¹⁶ In countries with systems of community of property, the survivor is entitled to his or her share of the community property on the death of the other spouse. This is not an inheritance right, since the community must be shared whether the marriage ends in death or by divorce; it may, in fact, involve the survivor paying the deceased's share of the community into the estate. Once the community property has been shared, the surviving spouse may have a right to inherit part of the deceased's estate (i.e. the deceased's share of the community and any separate property)¹⁷ or to maintenance from the estate.¹⁸

4.8 In some countries only the surviving spouse has legal rights;¹⁹ in others only the children (or other heirs);²⁰ in yet others, both the spouse and the children (or other heirs).²¹ Legal rights are often expressed as a fraction of the estate of the deceased and the fraction may vary according to the number and class of those entitled. Sometimes there is a right to a minimum amount.²²

15. E.g. England, Australia, New Zealand, Ontario.

16. E.g. Scotland, Republic of Ireland (the children, on the other hand, have the right to claim proper provision from the estate, but not legal rights), Italy.

17. E.g. Germany, Denmark.

18. E.g. France, Belgium. On the relationship between legal rights and maintenance, see Le Statut civil du conjoint survivant, "Droit Néerlandais", p. 348 ff., and "Conclusions" p. 546 ff.

19. E.g. Republic of Ireland.

20. France.

21. E.g. Germany, Scotland, Italy.

22. Denmark, Sweden.

2 THE CASE FOR A SYSTEM OF LEGAL RIGHTS:
ITS PLACE IN FAMILY PROPERTY LAW

4.9 Before considering how a system of legal rights would operate, we examine briefly its relationship to the other aspects of family property law dealt with in the Paper and its relative advantages and disadvantages. One aim of the reforms here considered is to give greater protection to the economically weaker spouse.²³ We have already suggested two basic ways of achieving this aim:

- (i) by strengthening a spouse's right to be supported by the other spouse (i.e. by improved family provision, and by protection of occupation rights and the use and enjoyment of the household goods);
- (ii) by changing the laws relating to ownership of property, to ensure that a spouse who has been unable to make a financial contribution will nevertheless have an interest in certain family assets (i.e. co-ownership of the matrimonial home).

As was pointed out in the General Introduction²⁴ support rights and property rights are complementary, since a spouse with property rights in the family assets will have less need to rely on support rights, and a spouse who successfully enforces support rights may obtain either the ownership or the use of some of the other spouse's property. What would be the relationship between legal rights of inheritance and the other proposals considered?

4.10 We start by comparing legal rights with family provision law as a means of providing support for the surviving spouse. The chief difference is that legal rights would ensure for the survivor a fixed proportion of the estate whereas under family provision law the survivor must apply to the court, prove that the deceased failed

23. The term "economically weaker spouse" means the spouse who, because he or she has no earnings or other means, has been unable to make a financial contribution to the acquisition of the family assets or to acquire any assets.

24. Para. 0.20 above.

to make reasonable provision for the survivor, and then rely on the exercise of the court's discretion. The certainty of legal rights could be seen as its greatest advantage over family provision. On the other hand, because legal rights are fixed, they may give the survivor more or less than is needed for support: they take no account of the means or needs of the survivor or of the special circumstances of each case.²⁵ It is very difficult to work out a formula for calculating legal rights which would apply fairly to both large and small estates.

4.11 This raises the question whether, if a system of legal rights were introduced for a surviving spouse, it should be considered as a substitute for family provision law or as a supplement to that law.²⁶ In the former case legal rights would establish both the minimum and the maximum sum which a surviving spouse could claim; in the latter case they would fix only the minimum sum. The details of a system of legal rights would depend to a large extent on whether it was in addition to or in substitution for family provision. For example, the amount of legal rights might be smaller if the surviving spouse could claim family provision; on the other hand if there were no right to apply for family provision, a system of legal rights would almost certainly have to incorporate anti-avoidance provisions, similar to those we have proposed for family provision, to prevent a spouse from nullifying the other spouse's rights by inter vivos dispositions. It would be premature to decide the relationship between family provision and legal rights until we have considered the latter in

25. As to the possibility of barring or varying legal rights on the ground that the survivor has not performed his or her matrimonial obligations, see para. 4.58 ff. below.

26. As we do not propose legal rights for children (see para. 4.16 below) their right to apply for family provision would not be affected.

some detail. It should be remembered, however, that whereas the advantage of certainty would be partly lost if family provision were retained, in the case of small estates (which constitute the majority) some surviving spouses might do less well if legal rights were substituted for the right to apply for family provision.

4.12 Next, legal rights of inheritance could be considered as a rough and ready means of ensuring that on the termination of the marriage by death, the survivor would receive a share of such family assets²⁷ as were owned by the deceased. It would be an imprecise method of achieving this end, because a system of legal rights could not easily be restricted to that part of the estate consisting of family assets,²⁸ but would usually give the survivor a share of the whole estate. In comparison with the other systems of fixed rights considered in the Paper the following points can be made:

- (a) The proposals concerning co-ownership of the matrimonial home were based on the view that the home is the principal family asset. If those proposals were introduced, it could be argued that legal rights of inheritance would be unnecessary, assuming that the home was owned, as the survivor would already have an interest in the major family asset. If, nevertheless, legal rights were introduced in addition to co-ownership, it would be necessary to consider whether they should be reduced, or even excluded, where the survivor had already received an interest in the home under the co-ownership principle. Ways of avoiding possible accumulation of rights will be considered below.²⁹

27. See General Introduction, para. 0.24 above, for the meaning of "family assets."

28. See para. 4.26 below.

29. Para. 4.45 ff.

- (b) In Part 5 we consider a system of community of property, under which on termination of marriage by divorce or death there would be a sharing of those assets acquired by the spouses during the marriage. Legal rights, which operate on the whole of the deceased's estate and without regard to the survivor's own assets, would be an alternative way of achieving sharing on the termination of marriage by death. It could be less detailed in defining the property to be shared, but it would not necessarily be any simpler in operation.

4.13 A possible objection to a system of legal rights is that it would further restrict freedom of testation. As against this, however, it has been said that:

"The protection of the rights of the family as an essential unit in society is a primary concern of most systems of law. Complete freedom of testation, as enjoyed under English law for a brief period of forty-seven years, is therefore by the standards of comparative jurisprudence an anomaly."³⁰

The principle of absolute freedom of testation would be acceptable only if the view were taken that it is more important to be able to dispose of property than to meet natural and legal obligations to the family. We do not believe this view to have any degree of support; it was rejected in 1938. No one now seriously questions that there are obligations to the family enforceable against the estate; what is in question is how those obligations should be defined and enforced.

4.14 In the following sections we discuss the basic principles of a possible system of legal rights of inheritance, leaving open

30. Albery, The Inheritance (Family Provision) Act, 1938 (1950) p. 1. The period of 47 years is that between The Mortmain and Charitable Uses Act 1891, which removed restrictions on devises for charitable purposes, and the Inheritance (Family Provision) Act 1938.

the question of whether such a system is desirable, and whether it is to be preferred to the other proposals considered in the Paper. We refer in general terms to "the deceased" and "the survivor". It is more common for the husband to die before the wife, and for the bulk of the family assets to be in the husband's name or in joint names, rather than in the wife's name, but the principles discussed are intended to apply equally to husband and wife.

3 WHO SHOULD BE ENTITLED TO LEGAL RIGHTS OF INHERITANCE

(a) The surviving spouse?

4.15 If a system of legal rights were introduced, in our view the surviving spouse of a valid marriage should be entitled to claim legal rights. A decree of divorce, nullity or judicial separation should bring to an end the right to claim legal rights, just as it brings to an end succession rights on intestacy.³¹ The court granting a decree would be able to take into account the possible loss of legal rights in assessing financial provision.³²

(b) Children?

4.16 Should children be given a fixed proprietary interest in the estates of their parents? The moral obligation to provide for children is as great as that to provide for a spouse. If both spouse and children were given fixed rights of inheritance, family

31. While a decree of judicial separation is in force the separated spouses are not entitled to any rights of intestate succession in each other's estates: Matrimonial Proceedings and Property Act 1970, s. 40.

32. Matrimonial Proceedings and Property Act 1970, s. 5(1)(g). A spouse whose marriage has been terminated by a decree may apply for family provision from the estate: in the case of judicial separation, under the Inheritance (Family Provision) Act 1938; in the case of divorce or nullity, under the Matrimonial Causes Act 1965, s. 26; see Part 3 above.

disputes might be avoided. In Scotland children have legal rights,³³ but neither they nor the surviving spouse may apply for family provision. On the other hand, while a surviving spouse would frequently have played a part in building up the family assets it is much less likely that the children would have done so. Further, when their parents die the vast majority would be self-supporting adults independent of their parents. A system of legal rights could not readily distinguish between the independent child and the dependent child. Where the estate was small a system of fixed rights would limit the testator's power to dispose of his estate so as to make provision where it was most needed. In our view, the interests of those children for whom the parent has failed to make proper provision should be protected by the family provision law, under which the court would exercise its discretion, taking into account age, disabilities, means, needs, and other factors.³⁴

4 HOW SHOULD LEGAL RIGHTS OF INHERITANCE BE DEFINED?

4.17 Among the various methods of defining legal rights, the following are considered:

- (a) A fixed sum
- (c) A proportion of the estate
- (c) A life interest
- (d) An equalisation claim
- (e) Specific assets: the matrimonial home.

(a) A fixed sum

4.18 Under this method legal rights would be defined as a fixed sum, for example, £2,000. If the estate were less than £2,000 the

33. Para. 4.5 above; on intestacy the surviving spouse's rights may exhaust the estate.

34. The rights of children to claim support from a living parent may well need to be strengthened. This problem needs to be considered separately.

surviving spouse would take all, to the exclusion of any other beneficiary. On the other hand, if the estate were very large, the fixed sum might represent only a small fraction of it. This does not seem likely to be regarded as satisfactory.

(b) A proportion of the estate

(i) Fixed proportion

4.19 If legal rights were calculated as a fixed proportion of the estate, the survivor's share would increase or decrease with the size of the estate. This is the solution adopted in other countries with legal rights, and appears to be more promising. Whatever proportion were fixed ought to take into account that the estate of the deceased might include property which could not be considered as family assets; it ought also to take into account the probability that some of the family assets were already owned by the survivor. On this basis we would provisionally suggest one-third of the estate as the appropriate amount.³⁵

(ii) Fixed proportion and minimum sum

4.20 If the estate were very small a fixed proportion of it would give the survivor an insignificant sum. In some countries the survivor is entitled to a minimum sum, or a proportion, whichever is the greater.³⁶ Under a system of this kind, if the estate was less than the minimum sum the deceased would not be able to make a bequest to any other person.³⁷ This could be avoided by allowing the testator to dispose freely of up to 10 per cent in value of the estate. In the following examples it is assumed that the survivor is entitled to one-third of the estate, with a minimum of £2,000, and that the deceased is permitted to dispose freely of at least 10 per cent of the estate.

35. This is a customary proportion and that chosen by the U.S. Uniform Probate Code, s. 2-201.

36. E.g. Denmark: the sum is Kr. 12,000 (about £660).

37. If the surviving spouse were entitled to a minimum sum, there would be a stronger case for allowing all actual dependants of the deceased the right to apply for family provision: para. 3.47 above and 4.67 below.

to the personal chattels, a fixed sum of £8,750, and a life interest in half the balance, if any. If the deceased is not survived by children or their issue but is survived by a parent, or by a brother or sister (or the issue of either) the surviving spouse is entitled to the personal chattels, a fixed sum of £30,000, and half the balance. In any other case the surviving spouse is entitled to the whole estate.

4.23 The rules of intestacy are based on what a reasonable testator might be expected to do in each of the situations described above, and on what a sample of testators have in fact done. Since only a small minority of estates exceed £8,750,³⁹ in practice the widow or widower takes the whole estate on intestacy. In the case of a very small estate it might be satisfactory to equate legal rights with intestacy; we have already recognised that in such cases the survivor should receive a substantial proportion of the estate. But it is more difficult to justify giving the whole of a more substantial estate to the widow or widower since this would probably be thought to impose unnecessary limitations on the deceased's power of disposal.

(v) Bequests to children

4.24 Although, in our view, children should not be given direct legal rights, there may be a case for varying the survivor's rights in favour of actual bequests to children. For example, it could be the rule that the deceased must leave at least half the estate to the surviving spouse and children; the surviving spouse must always receive at least one-third of the estate, and could only be given less than one-half if the difference (i.e. up to one-sixth) were given to the children. This could be limited to cases where there was a surviving spouse and children.

39. About 15%: ibid.

Example 1 In an estate of £2,000 the survivor would be entitled to £1,800 (minimum of £2,000, less 10 per cent)

Example 2 In an estate of £5,000 the survivor would be entitled to £2,000 (minimum of £2,000)

Example 3 In an estate of £6,000 or over the survivor would be entitled to one-third (one-third would equal or exceed the minimum sum).

(iii) Graduated proportion

4.21 Another way of ensuring that the surviving spouse obtained a substantial proportion of a small estate but a lesser proportion of a large estate, would be to calculate legal rights on a sliding scale or "slice" basis. For example, it could be provided that the survivor should be entitled to 80 per cent of the first £5,000 of the estate,³⁸ 40 per cent of the next £10,000, and 20 per cent of any balance over £15,000.

Example 4 In an estate of £2,000 the survivor would be entitled to £1,600 (80 per cent)

Example 5 In an estate of £10,000 the survivor would be entitled to £6,000

Example 6 In an estate of £20,000 the survivor would be entitled to £9,000.

(iv) Rights on intestacy

4.22 Another way of determining legal rights would be to provide that the surviving spouse should be entitled to receive an amount equivalent to what would have been due if the deceased had died intestate. Under the present law, if a deceased is survived by a spouse and children or their issue, the surviving spouse is entitled

38. Of those estates in respect of which representation is granted, about 28% exceed £5,000: 111th Report of the Commissioners of Her Majesty's Inland Revenue for the year ended 31 March 1968, Cmnd. 3879, p. 194.

(vi) The length of the marriage and the assets acquired during the marriage

4.25 If legal rights of inheritance were always calculated as a proportion of the estate, the survivor of a marriage which had lasted less than a year would receive as much as the survivor of a 50 year marriage. If it were thought that the survivor of a short marriage should receive less, legal rights of inheritance could be calculated on a sliding scale, according to the length of marriage. For example, the survivor could be allowed 2 per cent of the deceased's estate per completed year of marriage, up to a maximum of 50 per cent.

Example 7 In an estate of £5,000, where the marriage had lasted 5 years, the survivor would be entitled to £500 (5 x 2% of £5,000). If the marriage had lasted 25 years or over, the survivor would be entitled to £2,500.

4.26 Another way of relating the survivor's interest in the estate to the length of the marriage and the value of the property built up by the spouses' efforts during the marriage would be to deduct from the estate the value of any property owned by the deceased at the time of the marriage or acquired during the marriage by gift or inheritance before calculating legal rights. This method of calculation would depend on there being available, after the death of a spouse, some record of the value of the property to be deducted. If the deductions could be made, the balance would represent assets which had been acquired by the efforts of the deceased (or of both spouses) during the marriage; this is one way of defining family assets, so that it could then be argued that the survivor should be entitled to half the balance, (i.e. half the family assets owned by the deceased) instead of one-third.

(c) A life interest

4.27 If legal rights were considered as a means of providing support for the survivor, advantages might be seen in defining the rights as a life interest in the estate, especially where the bulk of it consisted of the home. The deceased would be able to dispose of the ultimate interest in the property, subject to the survivor's life interest, and there would be estate duty advantages in estates over £12,500 in value.⁴⁰ On the other hand, a life interest would not give the survivor any capital, and it would be of little value in the case of small estates. Most estates are less than £5,000 in value; only about 10 per cent of estates in respect of which representation is granted exceed £12,500.⁴¹

4.28 It would, of course, be possible to allow the survivor to commute the life interest, but the capital value would be small in most cases, and would be less for older survivors. In our view the life interest would be acceptable only if it were combined with a fixed minimum capital value. For example, the survivor could be permitted to elect to receive £2,000 or one-third of the estate (whichever was the higher) instead of a life interest in the whole estate. On balance, it seems that the main advantage of the life interest would be in those cases where the bulk of the estate consisted of the matrimonial home.

Example 8 In an estate of £9,000 the survivor could choose between a life interest in the whole, and a capital sum of £3,000.

40. No further duty would be payable when the life interest passed on the death of the survivor: Finance Act 1894, s. 5(2); Finance Act 1898, s. 13; Finance Act 1914, s. 14(a) as amended; Green's Death Duties (6th ed. 1967) p.263 ff.

41. 111th Report of the Commissioners of H.M. Inland Revenue for the year ended 31 March 1968, Cmnd. 3872, p. 194, Table 129.

Example 9 In an estate of £2,000 the survivor could choose between a life interest in the whole and a capital sum of £1,800 (£2,000, less 10 per cent).⁴²

(d) An equalisation claim

4.29 Another possibility would be to give the surviving spouse the right to claim from the estate an amount which, when added to the survivor's assets, would be sufficient to give the survivor one-half of the total assets of both deceased and survivor. This would be, in effect, a balancing claim, which would operate only where the survivor's assets were less than the deceased's estate. The attraction of this method of calculation is that it would recognise that spouses ought to share their assets equally. It would also meet one of the objections to a system of legal rights, namely that it gives inheritance rights even where the survivor's assets greatly exceed those of the deceased. Nevertheless, the principle of an equalisation claim is really one form of community of property. In Part 5 we consider the possibilities of such a system which, if introduced, should as we see it apply whether the marriage ends by death or divorce.

(e) Specific assets: the matrimonial home

4.30 As the matrimonial home is often the only substantial asset in the estate, there is a case for saying that legal rights should secure the survivor some interest in it. The rules of intestate succession give the surviving spouse specific rights in respect of the home,⁴³ but these would not apply where there was a will. We have already made proposals to improve the occupation rights of the surviving spouse and to enable the court to transfer or settle the home in family provision proceedings.⁴⁴ If

42. For the testator's 10% reserve, see para. 4.20 above.

43. Intestates' Estates Act 1952, Second Schedule.

44. Parts 1 and 3 above.

co-ownership of the matrimonial home were introduced, the survivor would have at least a half interest in the home. If, in addition, legal rights were introduced in a form which would give the survivor a life interest in the whole estate, the survivor would have a right to the home for the rest of his life in addition to his half share in the ownership of it. It therefore does not seem necessary at this stage to consider defining legal rights in terms of an interest in the home. To do so might have the effect of discriminating unfairly against spouses where there was no matrimonial home in the estate.

(f) Summary

4.31 It is the purpose of this Paper to suggest alternatives rather than to decide finally what would be the most appropriate method for calculating legal rights of inheritance. Should they be introduced perhaps the most likely methods are:

- (i) to give the survivor one-third of the estate, with a minimum of £2,000 (examples 1 - 3 above); or
- (ii) to allow the survivor to choose between (i) above and a life interest in the whole estate (examples 8 and 9 above).

The final choice might depend on whether family provision were retained and on whether any dispositions by the deceased in favour of third parties or in favour of the survivor were taken into account.⁴⁵

5 RENUNCIATION

4.32 If a system of legal rights of inheritance were introduced it would, in our view, be necessary to allow a spouse to renounce the rights, subject to formal safeguards. This is a usual feature

45. See below, para. 4.37 ff.

of systems granting legal rights of inheritance,⁴⁶ and is in accordance with the view that spouses should be free to agree their respective property rights. The power to renounce would be an important factor in allowing a spouse to arrange his affairs, for example, to avoid estate duty, or to benefit the children of an earlier marriage. Renunciation might also be a term of a separation agreement. A spouse should be able to renounce legal rights completely, or partially. The dangers of a weaker spouse being forced into a disadvantageous renunciation should be avoided. For example, it might be thought necessary to require a document signed by both spouses, and perhaps witnessed by independent solicitors for each spouse. This question would assume even greater importance if legal rights were adopted in substitution for family provision, though provisionally we do not envisage this.⁴⁷

6 BENEFITS RECEIVED FROM THE ESTATE

4.33 A system of legal rights of inheritance would ensure that a surviving spouse who had not been adequately provided for by the will of the deceased received a share of the estate. In contrast to those cases where the survivor is left nothing, there are others in which he or she has received benefits under the will or as a result of a partial intestacy. In our view it should be presumed that the testator did not intend the survivor to have benefits under the will in addition to legal rights, unless there were an express declaration to that effect.⁴⁸ In other words, legal rights and benefits under the will should not normally be cumulative.

46. Republic of Ireland: Succession Act, 1965, s. 113; Scotland: para. 4.5 (a) above. See also U.S. Uniform Probate Code, 1969, s. 2-204.

47. Paras. 4.38, 4.56 below. The right to apply for family provision cannot now be renounced. We have proposed that in certain cases the parties could make a binding agreement which, if sanctioned by the court, would bar legal rights: para. 3.68 above.

48. cf. Succession (Scotland) Act 1964, s. 13; Republic of Ireland, Succession Act 1965, ss. 114, 115; U.S. Uniform Probate Code, ss. 2-206, 2-207.

4.34 So far as bequests are concerned, there are several ways of achieving this aim:

- (i) The survivor might be required to elect between a bequest and legal rights, but could not claim both (this is Scots law).⁴⁹
- (ii) The survivor might be allowed to claim legal rights and to elect to take any bequest in partial satisfaction of legal rights (Republic of Ireland).⁵⁰
- (iii) The survivor might be required to take any specific bequest (or to reject it outright) and allowed to claim only the balance due as legal rights.

4.35 The following examples illustrate these alternative solutions. H leaves a net estate of £6,000 and makes a specific bequest to W of a piece of silver valued at £500; her legal rights are £2,000.

- (i) She must elect between the silver and the £2,000.
- (ii) She is entitled to claim £2,000 and may take the silver in partial satisfaction if she wishes.
- (iii) She may take the silver and claim £1,500 as the balance of legal rights, but if she rejects the silver she cannot claim more than £1,500.

On balance, it is our view that the second of these alternatives should apply, and that the survivor should be entitled to elect whether to take any specific bequest in partial satisfaction of legal rights.

49. Para. 4.5 (b) above.

50. Succession Act 1965, ss. 114, 115.

4.36 Where the interest left to the survivor is not a specific bequest or outright legacy, there may be cases where it is impossible or very difficult to value it precisely. For example, the survivor may be left a life interest with a power of advancement, or an interest under a discretionary trust. If the survivor wished to claim legal rights of inheritance, then, in our view, any interest of this nature should be forfeit.

7 INTER VIVOS DISPOSITIONS BY THE DECEASED

4.37 So far, we have discussed the effect of legal rights on the property forming the estate of the deceased. In a logical system of legal rights, it may sometimes be thought fair to take into account property which the deceased had disposed of during his lifetime. For example, if a deceased husband had given to a third party a substantial portion of his assets shortly before his death, perhaps with the intention of reducing legal rights, it might be unfair to his widow if this could not be taken into account and, if need be, set aside. On the other hand it might be unfair to the other beneficiaries if the survivor had received large amounts of property from the deceased during joint lives, and then claimed a further share of the deceased's assets as legal rights. In this section we deal with both aspects of this problem.

(a) Dispositions in favour of third parties

4.38 A system of legal rights would not benefit a surviving spouse unless the deceased had left at least some property in his estate. The system would be totally ineffective if the deceased could give away all his assets to third parties during his lifetime. This, as we have seen, is also a question which concerns family provision. Under present law assets disposed of by the deceased during his lifetime cannot be called upon to meet a successful application for maintenance from the estate. Proposals to give the court power to set aside certain dispositions were made in Part 3.⁵¹ If family provision law were retained, and

51. Para. 3.69 ff. above.

reinforced with measures to prevent avoidance, it might not be necessary to take into account third party dispositions in a system of legal rights. But if legal rights of inheritance were considered as a substitute for family provision,⁵² it would be important to have adequate measures to counteract attempts at avoidance: first, because a spouse who wished to disinherit the other spouse might have a stronger incentive to do so than under a system which merely entitled the survivor to claim reasonable maintenance; secondly, because a disposition might have a more substantial effect on a fixed right to inherit a proportion of the estate than on an application for family provision, where the survivor's claim to maintenance could be charged, if need be, on the whole estate.

4.39 For these reasons, it is necessary to consider whether certain dispositions of the deceased which affect the survivor's legal rights of inheritance should be brought into account for the purpose of calculating legal rights,⁵³ and whether, if the estate is insufficient to satisfy the legal rights, it should be possible to set aside the disposition in whole or in part.

4.40 In relation to family provision, it was suggested that the court should have power to intervene in respect of any transaction not for value made with the intention of defeating the claim of a dependant. It was proposed that in the case of transactions made less than three years before death this intention could be presumed, in the absence of evidence to the contrary, if the transaction had the effect of preventing, or reducing the amount of, an order for family provision.⁵⁴ The test, therefore, would be whether the

52. This question is considered below, paras. 4.56 and 4.65.

53. The gravity of the problem of transactions intended to defeat the survivor's share has been recognized in the United States: Macdonald, Fraud on the Widow's Share (1960); U.S. Uniform Probate Code, s. 2-202, para. 4.42 below.

54. Para. 3.72 above.

remaining assets were sufficient to enable the deceased to make adequate provision for the maintenance of his dependants.

4.41 A similar test is applied by the Republic of Ireland Succession Act 1965. Under section 121(2):

"If the court is satisfied that a disposition ... was made for the purpose of defeating or substantially diminishing the share of the disponent's spouse, whether as a legal right or on intestacy, or the intestate share of any of his children, or of leaving any of his children insufficiently provided for, ... the court may order that the disposition shall, in whole or in part, be deemed ... to be a devise or bequest made by him by will and to form part of his estate, and to have had no other effect."

A solution of this nature appears simple, but in our view it could give rise to difficulties, since it would be necessary to prove the intentions of the deceased and not merely the effect of the disposition. No doubt the most flagrant cases would be caught, but in others there could be doubts, disputes and protracted litigation to test the real intention of the donor. For example, if a man with assets of £10,000 gave his son £2,000 to set him up in business, how could one establish whether his main motive was advancement of the son, or reduction of the wife's legal rights? Even if there were a rebuttable presumption in respect of certain dispositions there would be uncertainty until the matter had been decided.

4.42 An alternative approach would be to provide that transactions of a certain type should be taken into account regardless of intention or effect. This is the solution adopted by the U.S. Uniform Probate Code.⁵⁵ A precedent can also be found in estate duty law,⁵⁶ though that serves a different purpose. We are concerned only with dispositions made during the marriage, and which

55. s. 2-202.

56. Finance Act 1894, s. 2(1) as amended: property passing on death includes certain dispositions which take effect at the time of death.

were not for valuable consideration. They appear to fall into two main categories:

- (a) Dispositions made by the deceased during his lifetime which did not become fully effective until his death (these would include interests under joint tenancies created by the deceased in favour of himself and another); and dispositions under which the deceased retained an interest or a power to dispose during his lifetime or by will.
- (b) Outright gifts in favour of third parties.

4.43 There are several ancillary problems to consider. As far as the first category is concerned, there would normally be an identifiable fund which could be valued as at the date of death. Since the disposition would not become fully effective until the death, there would be no need to impose a time limit on the dispositions which should be taken into account. The second category gives rise to greater difficulty. We would suggest that the precedent of estate duty law be followed,⁵⁷ i.e. that gifts of cash be taken at their face value, and that gifts of property be valued at the date of death unless they have earlier been disposed of for full cash value. As it would obviously be impractical to go back over the whole history of the marriage and to investigate every gift, however larger or small, we would further suggest that only gifts within seven years and exceeding a total of £500 in favour of any one donee be taken into account.⁵⁸ A rule could be adopted similar to the estate duty rule under which gifts are excluded if they are part of the normal expenditure of the deceased.⁵⁹

57. See Finance Act 1957, s. 38; Green's Death Duties (6th ed. 1967) p. 145 ff.

58. Finance Act 1968, s. 35(1); Finance Act 1949, s. 33.

59. Finance Act 1968, s. 37(1): to qualify for exemption, the gift must have been part of the normal (i.e. habitual) expenditure of the deceased made out of income, and the deceased must have had sufficient income left to maintain his usual standard of living.

If the surviving spouse had consented to any particular disposition in such a way as to show an intention to waive legal rights in respect of the property disposed of, that disposition should not be brought into account.

4.44 On balance, we think that a system of this type, under which certain dispositions are brought into account regardless of intention, is preferable to a more general discretionary anti-avoidance provision, which would introduce a greater measure of uncertainty. There remains the question what effect these dispositions should have on legal rights. In our view, if the deceased had made a relevant disposition, the net value of the property comprised therein should be added to the net estate,⁶⁰ and the legal rights of the survivor should be calculated as a proportion of this total. Assuming that there was a balance due to the survivor, then in our view it should be satisfied, in the first instance from the estate. It should be presumed that by making a disposition during his lifetime the deceased wished to show preference for the recipient. The beneficiaries of inter vivos dispositions should be called upon to contribute to legal rights only if the estate proved insufficient, and to the extent directed by the court, which, to avoid hardship, should be given a discretion.

(b) Dispositions in favour of the survivor

4.45 If the survivor were entitled to increase the amount due as legal rights by bringing dispositions to third parties into account, this would have the effect of reducing the share in the estate of other beneficiaries.⁶¹ It might be unfair to those other beneficiaries if the survivor did not account for similar inter vivos

60. "Net" in this context means after deduction of estate duty.

61. Since legal rights are to be satisfied from the actual estate in the first instance, the beneficiaries' share will decrease whenever a disposition in favour of a third party is taken into account.

dispositions by the deceased in his or her favour. If the survivor had to account for such dispositions it would help to ensure that claims to legal rights were made only in those cases where there had been a genuine failure to make proper provision for the survivor. Some systems require the survivor to bring certain benefits into account,⁶² though there is no general rule to this effect in Scotland.⁶³

4.46 There are, however, arguments against taking into account dispositions in favour of the survivor. It would add to the complication and would give rise to further problems, some of which are considered below. If the donor wished any particular disposition to be in satisfaction, or partial satisfaction, of legal rights, an agreement could be made to waive legal rights wholly or in part.⁶⁴

4.47 If it were decided not to take into account any dispositions in favour of the survivor, the proportion of the estate given to the survivor as legal rights might be fixed at a lower figure. For the moment we leave open this question, and go on to consider how the survivor could be called upon to account for benefits received from the deceased.

(1) Dispositions to be taken into account

4.48 One method would be to take account of all property actually owned by the survivor at the date of the deceased's death, which had derived from the deceased by way of gift. The United States Uniform Probate Code contains a rule of this nature;⁶⁵ it is

62. Republic of Ireland, Succession Act 1965, s. 116: permanent provision for a spouse is to be regarded as being made towards satisfaction of legal rights; U.S. Uniform Probate Code, s. 2-202 (3).

63. But see para. 4.5(a) above.

64. See the Scottish rule, above, para. 4.5(a). Such an agreement should be subject to the safeguards referred to earlier (para. 4.32).

65. s. 2-202(3); account is also taken of property which had been the subject of certain voluntary dispositions by the survivor.

reinforced by a list of certain categories of property (which are not exclusive) which are to be taken into account and by a rebuttable presumption that all property owned by the survivor at the death of the deceased was derived from the deceased. An alternative method would be to take account of all property which had, during joint lives, been the subject of certain specified dispositions by the deceased in favour of the survivor. The relevant dispositions would correspond roughly with the dispositions in favour of third parties which were considered above. We now consider some of the problems arising in respect of particular kinds of disposition.

Outright gifts

4.49 The effect on legal rights of an outright gift in favour of a third party would become more remote as time passed; it would also be impractical to have to trace all such gifts made during a marriage. For this reason we suggested a time limit of seven years on third party gifts.⁶⁶ Where a gift was made to the survivor, however, the question is not so much whether the deceased depleted his estate within a relatively short period before his death, but whether a share of his property had passed to the survivor. If the survivor held assets derived by gift from the deceased, it may be thought that the date of the gift is irrelevant, and that there should be no time limit. As in the case of third party gifts the property should be valued as at the date of death, except that gifts in cash should be brought in at their face value. The exemptions suggested for gifts to third parties which were part of the normal expenditure of the deceased, and gifts under £500 should also apply to gifts to the survivor.⁶⁷

66. Para. 4.43 above.

67. See para. 4.43 above, and n. 59.

Joint interests

4.50 If the survivor and the deceased were joint tenants of any property, then in our view the value of the interest accruing to the survivor should be taken into account when assessing legal rights. This rule should apply however the joint interest had been created, i.e. whether it was a transfer by way of gift by the deceased, whether it was the result of a joint purchaser, or whether it was effected by operation of the co-ownership principle discussed in an earlier part of the Paper.

Life insurance, annuities, pensions

4.51 The deceased may have provided for his spouse in such a way that benefits were payable directly to her on his death, without forming part of his estate,⁶⁸ for example: a life insurance policy which was held in trust for his spouse; a joint annuity with survivorship to the spouse; or a pension payable by his employer to his widow in return for his services or contributions during his life. All such benefits should be taken into account, provided they are capable of valuation as a present interest.

Settlements, powers of appointment

4.52 The deceased, during his lifetime, may have settled property, giving his spouse an immediate interest for life, or an interest to take effect on his death. Any such interest ought to be accounted for, whether it arose under the original settlement or as the result of the exercise of a power of appointment by the deceased. However, in view of the difficulties of valuation in such cases, especially where there was a discretionary trust, we suggest the survivor should be put to an election, that is, if she claimed legal rights she should be required to abandon for the future her interest under the settlement.

68. Whether or not liable for estate duty.

Other property

4.53 Certain other categories of property and benefits received by the survivor give rise to difficulties which are not considered here, but which would also need to be settled if a system of legal rights were introduced. These include: payments made by the deceased or his estate under a court order or maintenance agreement; and property or interests received by the survivor as a result of the exercise by the deceased of a special power of appointment.

(ii) Effect on legal rights

4.54 As in the case of dispositions in favour of third parties, the net value of the property comprised in any relevant dispositions in favour of the survivor should be added to the net estate. Assuming, for the moment, that legal rights were fixed at one-third, then if the survivor had already received one-third of the total accountable property including all relevant inter vivos dispositions, he or she would not be entitled to legal rights, whether or not anything had been received under the will. If less than one-third had been received, the survivor should be entitled to claim the difference from the estate.

(c) Conclusions concerning inter vivos dispositions

4.55 Though it may be both logical and fair to take into account certain inter vivos dispositions, this section of the Paper has shown that to do so could in some cases involve great complexity and lead to litigation which could well be bitter, expensive, and in its outcome uncertain. This, however, is likely to occur only in the case of large estates; the majority of estates are unlikely to give rise to many difficulties. Provisions dealing with inter vivos dispositions are not universal in systems of legal rights. In Scotland, for example, no account can be taken of gratuitous inter vivos dispositions by a testator, even if they were expressly made to defeat legal rights.⁶⁹

69. Para. 4.5(c) above.

4.56 We suggest that there may be a case for a simple system of legal rights, operating only in respect of the estate as it exists at the time of death. But for the reasons already given⁷⁰ such a system ought not to be proposed as a substitute for family provision law, but only as additional. Its function would be to set a minimum standard of provision for the surviving spouse and so reduce the number of applications for family provision. Family provision law would remain to deal with cases where the amount secured by legal rights was inadequate or where inter vivos dispositions had reduced the estate to the detriment of the survivor.

4.57 To summarise, it seems that, so far as inter vivos dispositions are concerned, there are three possible systems of legal rights of varying degrees of effectiveness and complexity:

- A. A simple system operating only on the estate, under which no inter vivos dispositions by the deceased would be considered; such a system would require the continuance of a family provision law to supplement legal rights where they were inadequate to support the surviving spouse.
- B. A system with anti-avoidance measures, to overcome attempts by a deceased to reduce legal rights by inter vivos dispositions in favour of third parties. This could be considered as a substitute for family provision law.
- C. A system with both anti-avoidance measures and measures under which the survivor must give credit for dispositions in his or her favour. This, too, could be considered as a substitute for family provision law.⁷¹

70. Para. 4.38 above.

71. On this see below, para. 4.66.

8 MISCONDUCT AS A BAR TO LEGAL RIGHTS

4.58 The complexities of a system of legal rights do not end with the calculation of the amount due to the surviving spouse. The next question is, should a survivor's legal rights be barred or varied on the ground of misconduct? This is a difficult question. One of the advantages claimed for a system of legal rights is its certainty; it would operate automatically, without the need to apply to the court for the exercise of its discretion. We have already indicated that the survivor's own assets and means would be irrelevant (except, possibly, insofar as they were derived from the deceased). If misconduct were to debar a spouse's claim to legal rights, a discretionary element would be introduced which could lead to delays in administration, and costs of litigation.

4.59 In certain countries a spouse guilty of misconduct can be deprived of legal rights.⁷² Clearly, the English rule of public policy under which a person who has been guilty of criminal homicide is precluded from taking any benefit under the will or intestacy of the victim⁷³ would apply to legal rights, if they were introduced. But what we have in mind is not the criminal law but the rights of a spouse who before the death of the other failed to fulfil matrimonial obligations.

4.60 The chief argument in favour of a discretionary bar is that it would be unfair to allow a spouse who had failed to fulfil matrimonial obligations to claim a share in the other's estate. If a spouse could not be deprived of legal rights, the other spouse might be forced to seek a divorce, in order to end the possible

72. E.g. Germany, Republic of Ireland. There is no such rule in Scotland, nor under the U.S. Uniform Probate Code.

73. Re Sigsworth /1935/ Ch. 89; Re Pollock /1941/ Ch. 219; Re Callaway /1956/ Ch. 559; Re Gilles, The Times, 5 May 1971, p. 8.

entitlement to legal rights.⁷⁴ On an application for family provision the court must take into account not only the means and needs of the survivor, but also his or her conduct. But, although these factors are relevant to the extent of the liability to maintain, it does not follow that they should be regarded as relevant to legal rights, which are put forward as rights of property. It can be argued that conduct is no more relevant than means or needs and that misconduct should not necessarily result in their loss; they should not be barred unless there has been a decree of divorce, nullity or judicial separation, in which case the court would have an opportunity to deal with the spouses' property in the matrimonial proceedings. Further, it might be thought particularly objectionable if, after the death of a spouse, the personal representatives or beneficiaries could make allegations of misconduct against the survivor, in order to bar or vary legal rights, especially if the parties had been living together until the death. Finally, the delays and costs of litigation must not be forgotten.

4.61 This is an important issue and one on which views will differ. If it is thought that legal rights should be barred or varied on discretionary grounds, then the system would lose its proprietary character and its advantage of certainty. Of course, there would not necessarily be recourse to the court in every case where legal rights were claimed. The onus would be on the person seeking to deprive the survivor rather than on the survivor. Nevertheless, both legal rights and family provision operate in practice where the deceased has not made proper provision for the survivor. When that occurs, there is likely to have been breakdown of marriage or at least disharmony. In that situation it cannot be

74. See above, para. 4.15. We suggest that the court should, in appropriate cases, take into account the loss of legal rights in assessing financial provision; cf. the Matrimonial Proceedings and Property Act 1970, s. 5(1)(g).

assumed that there would be fewer disputes over legal rights than there are now over family provision. In our view one advantage of legal rights is that it would not be necessary to go to court. This advantage could be lost in many cases if a discretionary element were introduced. Therefore we are of the opinion that legal rights should not be barred or varied on the ground that the surviving spouse failed to fulfil matrimonial obligations.⁷⁵

9 INTESTATE SUCCESSION

4.62 In an earlier section we considered whether legal rights could be equated with rights on intestacy. Here we consider the relationship between legal rights and intestacy. Where the estate is large the legal rights may exceed the survivor's rights on intestate succession. For example, if the estate were £60,000 after payment of all duties, the legal rights of the survivor, if defined as one-third of the estate, would be £20,000. If the deceased was survived by children then, depending on the capital value of the survivor's life interest in the estate, the rights on intestacy might be more or less than £20,000. This leads to the question, should legal rights be defined in such a way that they cannot exceed the amount which would have been due to the survivor on intestacy? Legal rights are intended to operate in cases where the testator has not made proper provision for the survivor, i.e. in cases where there is a will. In our view legal rights should not, as a general rule, give the survivor more than he or she would have received had the deceased died wholly intestate. It would, however, be necessary to make an exception to this rule, where the actual estate was not the total accountable sum for the purpose of legal rights, because certain inter vivos dispositions had to be taken into account. For example, if there had been an

75. Legal rights could be waived or varied by agreement (para. 4.32 above), and would be brought to an end by a decree of divorce, nullity or judicial separation (para. 4.15 above).

accountable disposition of £2,500 and an intestate estate of £500, the surviving spouse would take the £500 on intestacy and would be entitled to a further £500 making £1,000 (one-third of £2,500 + £500), assuming that legal rights were fixed at one-third of the estate.

4.63 If the deceased died partly testate and partly intestate the survivor would not necessarily be debarred from claiming legal rights. In such a case the amount due to the survivor on intestacy should be regarded as a bequest under the will, and then the ordinary rules concerning legal rights should come into operation. For example, if the deceased left an estate of £5,000 and was intestate as to £1,000, then, the surviving spouse would take the £1,000 under the rules of intestate succession. Assuming that he or she took nothing under the will a further £666 would be due as legal rights, to bring the total benefits to £1,666 (one-third of £5,000, assuming that legal rights were calculated in this way). On the other hand if the deceased, in the above example, had been intestate as to £4,000, this amount would go to the survivor and nothing further would be due as legal rights.

10 PROCEDURE

4.64 If a system of legal rights were introduced detailed rules would have to be provided to cover such things as the survivor's notice of election to claim legal rights, jurisdiction to determine disputes, and the procedure for bringing into account and setting aside dispositions. It is essential that in uncomplicated cases the personal representatives should be able to calculate the amount of legal rights and to pay the survivor without resort to the court. In order to achieve this, some indication should be given of the order of application of assets. A precedent for the order of application of assets to satisfy debts of the estate is already provided by the Administration of Estates Act 1925.⁷⁶ Although these rules have been criticised, and may well

76. First Schedule, Part II (section 34(3)).

need reform, it seems preferable to adopt them while they exist, rather than to devise a new set of rules. Subject to any direction to the contrary contained in the will, these rules could be adapted to the payment of legal rights of inheritance.

11 FAMILY PROVISION AND LEGAL RIGHTS

(a) Legal rights or family provision

4.65 Both legal rights of inheritance and family provision law are designed to take care of the case where a deceased has accidentally or deliberately failed to make adequate provision for the surviving spouse. What is adequate would be decided in the case of legal rights by a fixed rule, and in the case of family provision by a court exercising its discretion in the light of all the circumstances. Legal rights would have the advantage of establishing a fixed standard capable of application without resort to the court: family provision enables the court to do justice in the light of the actual circumstances of the estate and the survivor.⁷⁷

4.66 In an earlier part of the Paper we made the point that a system of legal rights could not be considered as a substitute for family provision law unless it were reinforced by anti-avoidance measures.⁷⁸ Assuming that suitable measures were included, the question remains whether the survivor's legal rights should replace the right to apply for family provision. It would lead to further complication in the administration of estates if a system of legal rights were added to the existing family provision law, and the advantage of certainty, which legal rights would otherwise secure, would be diminished. On the other hand, legal rights cannot take account of the circumstances of each case; some survivors might do

77. For arguments in favour of discretion rather than fixed shares, see Tyler, Family Provision (1971) p. 112-113; Macdonald, Fraud on the Widow's Share (1960) p.299. On the other hand see Guest (1957) 73 L.Q.R. 74, 87. See para. 4.10 above for a comparison between legal rights and family provision.

78. Paras. 4.38 and 4.56 above.

worse than under family provision; though this would to some extent depend on the proportion of the estate fixed as legal rights. Since this is a fundamental question, on which there are likely to be different views, we can do more than leave the matter open to discussion, while expressing the tentative view that a place could be found for each system in the reformed law.

(b) Effect of legal rights on other dependants

4.67 Should that part of the estate due to the surviving spouse as legal rights be chargeable with any part of an order for family provision in favour of any other dependant? At present, the only other persons who are entitled to apply for maintenance from the estate are the children⁷⁹ and any former spouse of the deceased.⁸⁰ The court may direct that the order for family provision be met out of any part of the estate and that any part of the estate be set aside for this purpose.⁸¹ This means that a bequest in favour of one dependant is potentially liable to be charged with a maintenance order in favour of another dependant. Even if one considered legal rights of inheritance as providing for the survivor a fixed proprietary interest in the estate, it would not follow that the survivor's interest should take precedence over other obligations of the deceased. For example, the needs of the minor children of the deceased ought not to be prejudiced by the introduction of a system of legal rights. The obligation to support children should be the first charge on the deceased's assets, whether or not the deceased's children are also the children of the survivor. It could also be argued that the rights of a former spouse ought not to be prejudiced by the legal rights of inheritance of a second

79. Inheritance (Family Provision) Act 1938, as amended, s. 1(1). We have considered whether the class of applicants should be extended: para. 3.47 above.

80. Matrimonial Causes Act 1965, s. 26.

81. Re Simson [1950] Ch. 38; Re Preston [1969] 1 W.L.R. 317.

spouse. Our provisional view is that legal rights should not stand in a position different from that of other bequests to the surviving spouse.

4.68 Under legal rights, the survivor would have a right to a fixed portion of the estate even if he or she owned more property than the deceased. There would probably be few cases where it would be necessary to have recourse to legal rights in order to meet applications for family provision by other dependants. But there might be cases where it would be thought, after taking into account all the circumstances, that the interests of other dependants outweighed those of the survivor. Where there is an application for family provision it seems preferable that the whole estate should go into the melting pot, and that no part of it should be exempt; no part would be exempt if the survivor were to apply for family provision. On balance, we do not think it appropriate to exempt the amount due to the survivor as legal rights from being charged with any order for family provision.

12 CONCLUSIONS AND SUMMARY

4.69 We have put forward three possible systems of legal rights:⁸² a simple system, under which no account would be taken of inter vivos dispositions by the deceased, and two more complex systems under which inter vivos dispositions in favour of third parties (and, under one of those systems, dispositions in favour of the survivor) would be taken into account. The arguments for and against each system have been set out.⁸³ In our view the survivor's right to apply for family provision could not be replaced except, possibly, by one of the more complex systems.

82. Para. 4.57.

83. Paras. 4.55-4.57.

4.70 Although certain important questions have been left open, enough has been said to make it possible to consider the advantages and disadvantages of a system of legal rights as a means of protecting the survivor's interest in the family assets, and to compare it with the system of community of property discussed in the next section. The community system would apply to every marriage, however it ended, and would require the family assets of the spouses to be equalised. Legal rights of inheritance, on the other hand, would come into operation only when the marriage ended by death and only if one spouse disinherited or failed accidentally to make proper provision for the other, that is, only in a small minority of cases. Because of this, although both systems would give definite property rights, legal rights would probably have much less impact than community of property. Their chief effect would be to set a fixed minimum standard of provision for the survivor. Since legal rights would operate on the whole estate of the deceased, their value might be easier to calculate than the value of rights enjoyed under a system of community of property.

4.71 On the other hand a system of legal rights would be an imprecise way of protecting the survivor's interest in the family assets. It would take no account of the fact that the bulk of the family assets might already be vested in the survivor: the survivor's assets would be irrelevant unless derived from the deceased. It would not be limited to that part of the deceased's estate which could properly be regarded as family assets, and since it would operate only on death, it would create a distinction between property rights on divorce and those on death.

Summary of propositions concerning legal rights

4.72 In order to assist readers in forming a view we set out below the main principles which we envisage as part of a system of legal rights of inheritance. This does not mean that we favour legal rights of inheritance over any other system. It merely

represents our tentative views as to how they could be applied if they were introduced. There are, of course, many matters of detail which would remain to be decided before any system could be introduced. We set out as preliminary questions the matters which we have left open.

Preliminary questions

- (i) If a system of legal rights were introduced into English law, which of the following would be best?
 - A. A simple system operating only on the estate, under which no inter vivos dispositions by the deceased would be considered.
 - B. A system with anti-avoidance measures to overcome attempts by the deceased to reduce legal rights by inter vivos dispositions in favour of third parties.
 - C. A system with both anti-avoidance measures and measures under which the survivor must give credit for dispositions by the deceased in his or her favour (para. 4.57).
- (ii) If any of the above systems were introduced, should the right of a surviving spouse to apply for family provision be abolished? (paras. 4.65-4.66).
- (iii) What proportion of the estate should be given to the surviving spouse as legal rights? (paras. 4.17-4.31).

Provisional propositions (assuming that legal rights were introduced)

- (i) The surviving spouse of a valid marriage should be entitled to legal rights of inheritance, provided there had not been a decree of divorce, nullity or judicial separation (para. 4.15).
- (ii) The children of the deceased should not be entitled to legal rights of inheritance (para. 4.16).
- (iii) A spouse should be entitled to renounce legal rights of inheritance, subject to safeguards (para. 4.32).

- (iv) If any bequest or interest in the estate were left to the surviving spouse, the survivor should be entitled to elect whether to take it in partial satisfaction of legal rights. In the absence of express declaration to the contrary, the bequest should not be in addition to legal rights (paras. 4.33-4.35).
- (v) If the survivor were left a life interest or other limited interest, the survivor should elect between this interest and legal rights of inheritance (para. 4.36).
- (vi) If it were decided that account should be taken of certain inter vivos dispositions by the deceased in favour of third parties, the net value of the property comprised therein should be added to the net estate for the purpose of calculating legal rights (para. 4.44).
- (vii) Legal rights of inheritance should be satisfied in the first instance from the estate of the deceased (para. 4.44).
- (viii) If it were decided that the survivor should account for certain inter vivos dispositions in his favour by the deceased, the net value to the survivor of the property comprised in these dispositions should be added to the net estate for the purpose of calculating legal rights (para. 4.54).
- (ix) There should be no discretionary power to bar or vary legal rights on the ground that the surviving spouse failed to fulfil matrimonial obligations (para. 4.61).
- (x) The legal rights of inheritance of a surviving spouse should not be exempt from being charged with an order for family provision in favour of a former spouse or child of the deceased (para. 4.67).

PART 5

COMMUNITY OF PROPERTY

1 INTRODUCTION

5.1 In this Paper we have considered various proposals under which a spouse could acquire fixed property rights in respect of certain assets which under present law would be regarded as belonging solely to the other spouse. For example, co-ownership of the matrimonial home (Part 1) would give each spouse an equal beneficial interest in the home irrespective of the legal title or of financial contribution; legal rights of inheritance (Part 4) would give the surviving spouse a fixed share in the assets of the deceased spouse. One objective of these proposals would be to remedy the present position under which a spouse who has no earnings or other means, and who is unable to contribute financially to the acquisition of the family assets, cannot acquire any interest in them except by a gift or bequest from the other spouse; but the proposals would apply generally, and are not limited to that situation.

5.2 We now consider another system of fixed property rights, under which the spouses would share certain of their assets on the termination of the marriage. We refer to this loosely as a system of "community of property", although it is only one example of different kinds of system called by this name. In effect, under the system outlined the spouses would own their property separately during marriage and would share at the end of the marriage. One justification for such a system can be found in the idea that marriage should be considered as a partnership, in which the spouses fulfil different, but equally important roles, and in which they share their gains and losses.¹

1. See the views of a minority group of the Morton Commission favouring community of property: paras. 5.25-5.26 below; Law Commission, Report on Financial Provision in Matrimonial Proceedings, Law Com. No.25, para. 78.

5.3 Systems of community of property can be divided into three broad categories: full community;² community of gains;² and deferred community, or participation.³ One factor common to all these systems is that, either during the marriage or on its termination, certain of the spouses' property forms a community in which each has an equal interest. Another factor common to countries where community of property applies is that the spouses are free at the beginning of the marriage (and sometimes later) to agree that the community regime should not apply to their property; they may instead choose a different regime, including that of separate property. The details of systems, even those within the same category, vary enormously, depending mainly on how they deal with each of the following questions:

- (i) Does all the property of both spouses come within the community, or do certain categories of property remain outside the community as the separate property of the spouses?
- (ii) During the marriage does the community property form a distinct fund, or do the spouses retain independent control over their property (community and separate) until the time for division of assets?
- (iii) If there is a community fund, who may exercise powers of administration over it?
- (iv) Are there any restraints on the powers of either spouse to deal with (a) the community fund; or (b) the separate property?
- (v) To what extent is a spouse liable for the debts incurred by the other spouse before and during the marriage?
- (vi) In what circumstances will the community be ended and the assets divided between the spouses?

2. See Appendix I, p. 317 below.

3. Para. 5.11 ff., below.

- (vii) When the community is ended, does either spouse have a claim to any specific assets, or only a money claim?
- (viii) Has the court any power to vary the shares of the spouses and, if so, on what grounds?

5.4 In this Paper it would be impracticable to describe all the systems of community. We have examined the development of community systems in several countries, and as a result we have come to provisional conclusions as to the type of system which we think could be considered for adaptation to English law.

5.5 Most continental countries have had systems of community for many years. Although the older systems differed, one from another, in many respects they had one feature in common: the husband had exclusive rights of administration. This can, of course, be compared with the situation in England prior to 1882. The movement for the emancipation of women brought with it in all countries pressure to reform the law of matrimonial property. In England the result was a separation of property. But countries which already had community systems did not abandon them. Instead, they sought to improve the position of married women within the framework of the community system: in particular, by extending a married woman's power to administer certain property.

Scandinavia and Germany

5.6 One significant development was the introduction by the Scandinavian countries in the 1920s of a system of community incorporating a new principle.⁴ This principle was that during marriage each spouse should have equal rights to acquire, deal and dispose of property independently of each other, but at the end of marriage each should have a half share of the total remaining

4. I.M. Pedersen, "Matrimonial Property Law in Denmark" (1965) 28 M.L.R. 137-138.

property of both spouses. The system is still in force in Sweden, Norway, Denmark, Finland and Iceland.

5.7 The old German law included a system of community: the husband enjoyed rights of administration. In 1957 the Law on Equal Rights of Men and Women introduced a new statutory regime for matrimonial property (Zugewinnngemeinschaft).⁵ As under the Scandinavian laws, each spouse retains equal and independent power to own and administer property during marriage. At the end of marriage each is entitled to half the surplus, i.e. the amount by which the total of the property owned by both of them at the end of the marriage exceeds the value of the property owned by them before the marriage. While under German and Scandinavian law spouses may contract out of the statutory system, we are informed that few do so.⁶

France

5.8 In France, the traditional system of full community under which the husband administered the property has been transformed over the years by laws allowing married women to control and manage their own earnings and savings. A major reform of the system was effected in 1965. Prior to this reform a social survey was conducted, which showed that most people thought a community regime of some sort preferable to a separate property regime.⁷ Even under the old law it seems that no more than 7 per cent of married couples contracted for a regime of separate property.⁸ The terms of the new regime, called community of acquests, were fiercely contested, particularly as regards the spouses' powers of management. The result was a compromise: the husband is the

5. Cohn, Manual of German Law, Vol.1 (2nd ed. 1968) s.510; Müller-Freienfels, "Equality of Husband and Wife in Family Law" (1959) 8 I.C.L.Q. 249.

6. Pedersen (1965) 28 M.L.R., at 139.

7. (1967) 29 Sondages: revue francaise de l'opinion publique 41-43.

8. Ibid. pp. 19, 23.

nominal head of the community with powers of management over it, but the wife's consent must be obtained for many transactions, and she is given independent power to administer her separate property.⁹ The property falling into the community is limited to that acquired during the marriage other than by gift or inheritance; but each spouse's income and earnings remain the separate property of that spouse. It has been said that the regime is more separatist than community.¹⁰ The overall effect is similar to that under the Scandinavian and German regimes.

Quebec and Ontario

5.9 Quebec has introduced reforms to its traditional matrimonial regime which was based on French law. The new regime is based on Scandinavian and German law;¹¹ it allows the spouses independent powers of ownership and management during marriage. At the end of marriage all property acquired during the marriage other than by gift or inheritance is subject to partition. Ontario, which at present has separation of property, is moving towards the Scandinavian and German systems of community. The reasons for these developments in the French and English Provinces of Canada are indicated in the Report of the Royal Commission on the Status of Women in Canada:¹²

"We recommend that those provinces and territories, which have not already done so, amend their law in order to recognize the concept of equal partnership in marriage so that the contribution of each spouse to the marriage partnership may be acknowledged and that, upon the dissolution of the marriage, each will have a right to an equal share in the assets accumulated during marriage otherwise than by gift or inheritance received by either spouse from outside sources."

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9. See Amos and Walton's Introduction to French Law (3rd ed. 1967) p. 382.
 10. Mazeaud, Lecons de Droit Civil, Tome 4, Vol.1, Régimes matrimoniaux (2nd ed. 1966) pp. 112-115.
 11. Statutes of Quebec, 1969, c.77 (in force 1 July 1970), implements the Report of the Matrimonial Regimes Committee of the Civil Code Reform Commission, 1966. According to the Report, over a 5 year period 70% of persons marrying adopted a regime different from that in force under the old law: para. 6; see also para. 9.
 12. 1970, Chapter 4, "Women and the Family", para. 89, p. 246; Recommendation No. 107, p. 410.

Israel is proceeding on similar lines. We summarise below both the Ontario and Israel proposals.¹³

5.10 Our examination of the theory and practice of foreign systems, though limited, has shown that one of the important factors affecting the development of community systems has been the desire to accord to married women independence and equality of power with their husbands. No system has found it practical to introduce joint management in respect of all property.¹⁴ The modern solution is to allow each spouse to acquire, deal with and dispose of his or her own property independently during the marriage, and to defer the sharing of property until the end of the marriage. In our view a system of community could not be considered for England unless it preserved a principle of independent management during marriage. We, therefore, propose to consider in more detail some of the modern systems which incorporate this principle.

2 SYSTEMS OF DEFERRED COMMUNITY OR PARTICIPATION

(a) Scandinavia, Germany and Holland

5.11 As we have seen, systems of deferred community were first introduced in Scandinavian countries in the 1920s to replace the traditional systems of full community.¹⁵ Western Germany made a

13. Paras. 5.21 and 5.22.

14. See Kahn-Freund (1959) 22 M.L.R. 241, 243-244; Kisch, "The Matrimonial Community: Property and Power, as illustrated by recent developments," in Festschrift für Max Rheinstein (1969) pp. 975, 984 ff. See also Amos and Walton's Introduction to French Law (3rd ed. 1967) p. 382.

15. DENMARK: Law No. 56 of March 18, 1925; I.M. Pedersen, "Matrimonial Property Law in Denmark" (1965) 28 M.L.R. 137; Danish and Norwegian Law (1963). SWEDEN: Marriage Code of 1920, Chapter VI; Friedmann, ed., Matrimonial Property Law (1955) p. 410; Sussman, "Spouses and their Property under Swedish Law" (1963-64) 12 Am.J. Comp.L. 553. A committee of experts is now undertaking a review of the whole field of Swedish family law. Among the principles under consideration is that of restricting the ambit of "community": Protocol on Justice Department Matters held before the King in Council at Sofiero on August 15, 1969; Sundberg, "Marriage or No Marriage: the Directives for the Revision of Swedish Family Law" (1971) 20 I.C.L.Q. 223. NORWAY: Law of May 20, 1927; for an account in English, see Ontario Law Reform Commission, Family Law Project, Property Subjects, Vol. II, p. 306. FINLAND: The Finnish Legal System (1963).

similar change in 1957.¹⁶ The Dutch system, introduced in 1956, is in effect a system of deferred community, though it is in some ways different.¹⁷ Under all these systems each spouse has the right to acquire and dispose of his or her own property during the marriage. At the termination of the marriage the spouses share or "participate" in certain assets. Since the right to share is "deferred" until the end of the marriage, the term "community", which may imply the existence of a common fund of property, is somewhat misleading. All these systems are legal regimes, that is to say, they apply where the spouses have not agreed on a different (contractual)¹⁸ regime, such as a regime of separate property. The spouses may also agree to vary the legal regime in certain respects. Our illustrations in the following paragraphs concentrate on the Danish, German and Dutch systems.

5.12 The systems differ as to the property which is shared at the end of the marriage. In Denmark and Holland, all the property of each spouse falls into the community, with the exception of certain personal rights and property acquired by gift or inheritance with a stipulation that it should remain outside the community.¹⁹ In Germany, on the other hand, the right to

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16. BGB 1363 ff. (law of 18 June 1957, effective on 1 July 1958) (Zugewinnngemeinschaft); Cohn, Manual of German Law (2nd ed. 1968) Vol. I, s. 515 ff.; Ontario Law Reform Commission, Family Law Project, Property Subjects, Vol. II, p. 246; Kahn-Freund (1959) 22 M.L.R. 241, 254-257. A similar system has recently been introduced in Quebec: See the Civil Code Reform Commission: Report of the Matrimonial Regimes Committee, 1966; Statutes of Quebec, 1969, c. 77 (in force 1 July 1970).
17. Law of 14 June 1956 (in force 1 Jan. 1957); Les Régimes Matrimoniaux, Bibliothèque de la Faculté de Droit de l'Université Catholique de Louvain III (1966) p. 247 ff; H.U. Jessurun d'Oliveira, "Pays-Bas" (1965) 17 Rev. Int. de Droit Comparé 683; Ontario Law Reform Commission, Family Law Project, Property Subjects, Vol. II, p.279.
18. In countries with community of property it is often the case that the spouses may adopt by name a contractual regime the terms of which are laid down by law. In the absence of agreement the legal regime applies.
19. The spouses may, in general, agree to exclude certain property.

participate in the community is a right to share the "surplus", that is, the increase in the value of the assets of each spouse during the marriage.

5.13 Although each spouse is free to administer his or her own property during the marriage there are provisions under all three systems to protect one spouse from abuse of power by the other. Some provisions are designed to protect a spouse's interest in the ultimate division of the community: for example, if the abuse of power has caused or risked a serious loss of assets, the other spouse may have a right to claim compensation, or to call for the community to be dissolved prematurely. Other provisions protect a spouse's present interests; for example, under Danish law the matrimonial home and furniture cannot be sold or mortgaged by the owner spouse without the consent of the other spouse.²⁰

5.14 The participation, or equalisation, is effected at the termination of the marriage by death, divorce or legal separation, or on earlier dissolution of the community on special grounds. The total assets of each spouse are then calculated. In Germany the value of pre-marriage property or gifts must also be calculated and deducted from the total of the spouse concerned; it is assumed that in the absence of an inventory of such property there is none to be deducted.²¹

5.15 In all three countries, the debts of a spouse are deducted in determining the total assets. In Holland, the spouses share liability for each other's debts. If a spouse's debts exceed his assets at the end of the marriage, he can call on the other spouse to contribute up to half the amount of the debts, as well as

20. Pedersen (1965) 28 M.L.R. 137, 140-141.

21. BGB 1377.

claiming a half share in the balance of the other spouse's assets.²² In Denmark and Germany, on the other hand, an insolvent spouse cannot claim more than half the other spouse's net assets.²³ The difference is important only where one spouse is insolvent at the time of division. The sharing rules do not, of themselves, in any of the above countries impose on a spouse direct liability to a third party for the other spouse's debts; however such liability may arise out of the marriage relationship itself, in respect of certain household debts,²⁴ regardless of the property regime applicable to the parties.

5.16 In Denmark and Holland when the total net assets of each spouse have been calculated, the property is distributed equally between the spouses. A spouse may be able to claim certain specific articles in satisfaction of his or her share. For example, in Holland each spouse may keep his or her clothing and personal possessions at a value agreed or fixed independently. In Denmark, if both spouses want the same article on divorce, the claim of the spouse who originally acquired the article will, in general, be preferred, although the court has a discretion in respect of the home, the furniture and the family business.²⁵ If the value of an item of property awarded to a spouse exceeds that spouse's share, the court may order that spouse to pay the difference to the other. In practice, however, distribution on divorce is usually effected by private agreement. On death, the surviving spouse's claim to a specific item prevails over other beneficiaries.²⁶

22. Arts. 176, 183-188 B.W.; Les Régimes Matrimoniaux, pp. 256 ff., 260-261. There is a right to renounce altogether any interest in the community.

23. Germany: BGB 1375 I; Pedersen (1965) 28 M.L.R. 137, 140, 144-145.

24. Pedersen, at 140; see also Pedersen, "Recent Trends in Danish Family Law and their Historical Background" (1971) 20 I.C.L.Q. 332, 334; cf. the wife's presumed agency to contract household debts binding on the husband under English common law.

25. Pedersen (1965) 28 M.L.R. 137, 150-151.

26. Pedersen, at 151.

5.17 In Germany there is no distribution in specie. The spouse with the smaller net estate may claim from the other spouse an amount in cash sufficient to equalise the two net estates (i.e. the balance after deduction of debts, pre-marriage assets, gifts etc.). A spouse has no right to claim a specific asset from the other spouse in settlement of the balance due except that, where in all the circumstances it is necessary to avoid hardship, the other spouse may be ordered to deliver specific property at a value to be fixed.²⁷

5.18 In certain instances there is power to depart from the principle of equal shares. On divorce, the Danish court may vary the shares where:

- (a) the assets of the community have been acquired mainly by one of the spouses before marriage or by gift or inheritance during the marriage; and
- (b) division into equal shares would be clearly unjust.²⁸

But the court may not deprive a spouse of his half share of property acquired by the work and thrift of one or both spouses during the marriage. Variation is intended to be used mainly in cases of short marriages. German law allows a spouse to refuse to pay a half share if equalisation would be grossly inequitable, for example, where the other spouse had failed to fulfil the financial obligations arising out of the marriage.²⁹

5.19 Where the marriage ends in death the survivor's equalisation claim has to be considered in conjunction with rights of succession. For example, in Denmark the survivor has succession rights on intestacy, or legal rights of inheritance in the case of a will, in addition to his or her share of the community. If the value of

27. BGB 1383.

28. Pedersen, at 147.

29. BGB 1381; Pedersen, at 148.

these rights, together with any sums inherited and his or her separate property, is less than Kr.12,000 (about £660) the survivor is entitled to make up this amount from the estate.³⁰ If the other heirs are children, the survivor may take over the whole community estate for life, the distribution being postponed till the death of the survivor.³¹

5.20 In Germany, the position on death is completely different from that on divorce. On intestacy, there is no calculation of the community of surplus. The surviving spouse's interest under the intestacy is increased by a further quarter of the estate, whether or not there was a surplus owing from the deceased.³² If there is a will, the survivor can elect against it and claim legal rights of inheritance.³³ In this case there is a calculation of the community of surplus and the balance owing to the survivor is added to the legal rights of inheritance.

(b) Ontario proposals

5.21 The present law of matrimonial property in Ontario is based on English law, i.e. separate property.³⁴ The Family Law Project of the Ontario Law Reform Commission have proposed that a new regime be introduced.³⁵ The new regime is not described as a community of property regime, because at no time does any property

30. Pedersen, at 148.

31. Pedersen, at 148-149.

32. BGB 1371; Cohn, Manual of German Law, s. 518.

33. The proportion due as legal rights of inheritance varies according to whether there are other heirs, and their relationship to the deceased.

34. Dower and curtesy still apply: Ontario Law Reform Commission, Family Law Project, Property Subjects, Vol. I, pp. 177 ff. and 157 ff.

35. Property Subjects, Vol. III, p. 543 ff. (rev.). A final Report is due in 1971. The Royal Commission on the Status of Women in Canada recommended that upon dissolution of marriage each spouse should have the right to an equal share of the assets accumulated during marriage: see para. 5.9 and n. 12 above.

pass into community ownership by virtue of the marriage. It is defined as:³⁶

"a separation of property-type régime, subject to an equalizing claim payable in certain circumstances by one spouse or a spouse's estate to another, either on an application to the court or on the death of a spouse."

The regime described bears many points of similarity to the legal regimes of Scandinavia, Holland and Germany; if adopted, it would have an effect comparable with the new Quebec regime.³⁷

It combines the two principles common to all those regimes: the freedom of the spouses to deal with their property independently during the marriage; and the ultimate sharing or equalisation of assets at the end of the marriage.

(c) Israel: Spouses (Property Relations) Bill 1969³⁸

5.22 In recent years the Israeli courts developed the concept that property acquired during marriage by the joint efforts of the spouses was presumed to belong to them in equal shares in the absence of evidence to the contrary. This concept is comparable with that of family assets which was developed in English law in cases such as Rimmer v. Rimmer but which has now been rejected by the House of Lords in Pettitt v. Pettitt and Gissing v. Gissing.³⁹ The Israeli development has been halted with regard to immoveables by the Land Law, 1969. However, the Spouses (Property Relations) Bill, which was submitted to the Knesset in 1969, provides for a system similar to the deferred community systems outlined above. During the marriage, each spouse would have independent power to deal with his or her property, but at the termination of the marriage, whether by divorce or death, the spouse whose property

36. Property Subjects, Vol. III, p. 546 (rev.).

37. See n. 16 above.

38. The following summary is taken from Yadin, "The Matrimonial Partnership (Matrimonial Property Relations) Bill, 1969" (1971) 6 Israel Law Review 106.

39. See paras. 1.36-1.37 above.

was less than that of the other spouse would have an equalisation claim to half the difference.

3 PREVIOUS CONSIDERATION OF COMMUNITY OF PROPERTY IN ENGLAND

(a) The Morton Commission

5.23 The Morton Commission recognised "that marriage should be regarded as a partnership in which husband and wife work together as equals, and that the wife's contribution to the joint undertaking, in running the home and looking after the children, is just as valuable as that of the husband in providing the home and supporting the family". Despite this they were divided on the question of community.⁴⁰ A majority of twelve rejected community except in relation to savings from the housekeeping.⁴¹ Seven were in favour of some form of community: of these, one thought it should be limited to the contents of the home, three favoured community of the home and its contents, and three would have favoured the introduction of community generally.

5.24 The reasons given by those twelve members who were opposed to the introduction of community of property were as follows:⁴²

- (a) It would be too striking a departure from the traditional law and its unfamiliarity would be a handicap.
- (b) It takes no account of the natural and normal desire in people to acquire property of their own; many people would be put to the trouble of taking steps to exclude it.
- (c) It would be extremely complicated and much more difficult to operate than a system of separate property.

40. Royal Commission on Marriage and Divorce, Report 1951-1955, Cmd. 9678, paras. 644, 650-653, pp. 175-178; Appendix III(2) pp. 390-393 summarises community of property systems in the following countries: Southern Rhodesia; France; Norway; Louisiana. See also Kahn-Freund (1959) 22 M.L.R. 241, 242-247.

41. Para. 701; this recommendation was implemented by the Married Women's Property Act 1964.

42. Para. 651.

- (d) The sum total of injustice would be far greater than under separate property; it would be unfair if a lazy spouse could claim a share in what the other had acquired by work and thrift.

5.25 The three members of the Commission who supported the introduction of community of property as a general principle took a view directly opposite to that of the majority on two points.⁴³ First, they thought that community of property would introduce a much greater measure of fairness into married life, in that it would ensure that husband and wife shared equally in the profits and losses of the partnership. Secondly, they thought that the difficulties in the operation of community of property were exaggerated, and that a system similar to the Scandinavian ones could be made to operate satisfactorily. The German system of 1958 had not then been introduced, and was not considered.

5.26 The main reason given in support of the minority view in favour of community of property was as follows:⁴⁴

"A married woman may spend years of her life looking after and improving the home. Yet often the house and its furniture are the sole property of the husband and he may dispose of them without her consent or he may leave them by will to someone else. The woman may have been earning an independent livelihood before marriage and had she remained single could have set up her own home. If, on marriage, she gives up her paid work in order to devote herself to caring for her husband and children, it is an unwarrantable hardship when in consequence she finds herself in the end with nothing she can call her own."

Despite improvements in the position of married women since 1956 this plea remains valid, and it is, indeed, the starting point of calls to reform the law of family property.

43. Para. 653.

44. Para. 652.

(b) The Matrimonial Property Bill

5.27 On 24 January 1969 the House of Commons, by a majority of 86 to 32, gave a second reading to the Matrimonial Property Bill, the text of which is reproduced below.⁴⁵ The principle of the Bill was that on divorce, nullity or judicial separation (but apparently not on death) the spouses' property should be equally divisible between the spouses. Property owned before marriage, or acquired by gift or inheritance thereafter, would be excluded from sharing. The Bill was withdrawn before the Committee stage; it was accepted that it did not deal adequately with all the problems which would have to be solved if a community system were to be introduced.

4 PROPOSALS FOR A SYSTEM OF COMMUNITY
OR SHARING OF ASSETS

5.28 Much of the pressure for reform of English family property law comes from the fact that a wife who has no earnings and no private means cannot acquire any property rights except such as her husband may choose to confer on her. A system of deferred community, such as those considered above, would overcome this by ensuring that at the termination of the marriage there would be a sharing of assets (and possibly liabilities) between the spouses, and would give practical effect to the view that marriage is a partnership. In this section, we consider how a system of community could be adapted to English law.⁴⁶

5.29 Such a system would allow each spouse to deal with his or her property during marriage, while providing for sharing of assets

45. House of Commons Official Report, 24 January 1969, Vol. 776, cols. 801-896. The Bill was introduced by Mr Edward Bishop M.P. as a Private Member's Bill. See page 319 below, Appendix II.

46. Kahn-Freund, "Matrimonial Property - Some Recent Developments" (1959) 22 M.L.R. 241 discusses some aspects of applying a system of community of surplus in England.

on the termination of the marriage. The basic structure would be as follows:

- (a) During the marriage, each spouse would be free to acquire and dispose of his or her own property, subject only to such restraints as are necessary to protect the other spouse and the family.
- (b) At the termination of the marriage, or in other special circumstances, there would be a sharing of the spouses' assets.
- (c) The principle of sharing would be that the spouse with less assets would have a money claim against the other spouse or his estate for an amount sufficient to equalise the value of the spouses' assets.

(a) Application of the system

5.30 Throughout the Paper we have applied the principle that, so far as is compatible with matrimonial obligations, spouses should be free to agree on their respective property rights.⁴⁷ In accordance with this principle, it is our view that if a system of community were introduced, the spouses should be free to contract out of the system by an agreement in writing. Additional safeguards, such as the requirement that the signatures be witnessed by a legal adviser, may be thought necessary for the protection of the weaker spouse; we leave this question open for further consideration. In principle the freedom to contract out or vary the system should continue throughout the marriage, so long as third party interests were not prejudiced.⁴⁸

5.31 If a community system such as that which we have discussed were ever adopted, then, in our view, provided that the spouses did not contract out, it should apply to all marriages, including those in existence on the date when it came into force. Proper

47. E.g. paras. 1.86 (contracting out of co-ownership), and 4.32 (renunciation of legal rights of inheritance).

48. See below, para. 5.57 ff.

transitional provisions would be required to avoid possible unfairness in the case of existing marriages. The spouses would, of course, be able to contract out, but it might be necessary to go further, for example, by allowing either party unilaterally to exclude community during a prescribed period after the new law came into force. Besides transitional provisions there are many other problems which we do not consider at this stage, but which would have to be settled before a community system could be introduced. Among these are questions concerning the application of the system to people from abroad and to assets abroad.

(b) Separate powers

5.32 The system would not of itself directly impose any restriction on the power of each spouse to acquire, to dispose of or otherwise to deal with his or her property. In other words, during the marriage, each spouse would have independent and equal power as under separation of property. This general rule must, however, be subject to qualifications. Even under the present law there are certain restrictions on a spouse's power to deal freely with his or her assets. For example, the spouse who owns the matrimonial home can be prevented from dealing with it in such a way as to defeat the other spouse's rights of occupation. We have in the Paper, considered other proposals which would restrict a spouse's liberty to deal with the home and household goods, in the interests of the other spouse and the family. Restrictions of this kind would, in our view, remain essential, whether the present system continued or whether a system of community were introduced. The need for restraint arises from the mutual obligations of the spouses, not from any particular property system.

5.33 A different kind of restraint on the spouses' independent power arises from the community system itself. Under the principle of sharing, the spouse with less assets at the termination of the marriage would be entitled to claim half the difference between his assets and those of the other spouse. This potential

equalisation claim carries a corresponding obligation on a spouse not to abuse his independent power by dealing with his property in a wasteful or reckless manner as a result of which his own assets might be substantially reduced. We shall consider the question of abuse of power later.⁴⁹

(c) The property to be shared

(i) All the property of the spouses

5.34 A system under which all the property of both spouses was shared at the termination of the marriage would be the simplest to operate, since complicated accountancy and identification of funds would be avoided.⁵⁰ Such a rule might, however, be thought unfair, particularly where the marriage had been short, and one spouse had substantial assets before the marriage. It is true that where there were special circumstances the spouses could contract out. Nevertheless, in our view, the case for introducing a system of community does not necessarily justify a principle under which property owned by the spouses before the marriage must be shared.

(ii) The family assets

5.35 Another way of defining the property to be shared would be to limit it to the "family assets". This term has been used in the Paper to refer to property in which, it seems reasonable to argue, both spouses should have some interest either because of the way in which it was acquired or because of the manner in which it is used.⁵¹ Is it capable of a more precise definition? It has been suggested that family assets should be identified by reference to their purpose.⁵² To many it would seem obvious that the

49. See below, para. 5.53 ff.

50. This is the general rule in Holland, and in Scandinavian countries, see above, para. 5.12.

51. General Introduction, para. 0.24.

52. Kahn-Freund, Matrimonial Property: where do we go from here? (Josef Unger Memorial Lecture, University of Birmingham Faculty of Law, 1971) p. 23: "I should ask: what object are they intended to serve? Are they assets for investment, acquired and held for the income they produce or the profit they may yield on resale? Or are they household assets, family assets, which form the basis of the life of husband, wife and children?"

matrimonial home and its contents should be regarded as a family asset. In some cases they would be the only substantial asset, but often they would be supplemented by other property. For example, savings or investments which are intended to be used for repairs, redecoration, replacement of furniture, or even for the purchase of a future home, would appear to be as much a family asset as the present home and its contents. But it would seldom be possible to decide which part of the spouses' savings or investments had been intended for such a purpose. Taking the matter a step further, if the income from a spouse's investments or the profits of a spouse's private business, were used by the family to pay their normal living expenses, could the investments or business be regarded as family assets? If so, then the term "family assets" seems capable of almost unlimited extension. If not, then if one spouse owned a home and the other owned investments of an equal value, the former would be shareable and the latter would not. For these reasons it does not seem practicable to attempt to define the property to be shared in terms of specific assets, such as the home and its contents, or in terms of property used for the benefit of the family.

(iii) The value of the assets acquired by the spouses' efforts during the marriage

5.36 In our view the assets to be shared at the termination of the marriage should represent, as far as possible, the property built up by the efforts of the spouses during the marriage. The simplest way of achieving this would be to adopt a rule similar to the German one, under which the value of property owned by a spouse before the marriage, or acquired thereafter by gift or inheritance, would be deducted from the value of the assets owned at the end of the marriage.⁵³ The balance would be the shareable property.

53. BGB 1377, para. 5.12 above. This principle is also proposed by the Ontario Law Reform Commission, Family Law Project, Property Subjects, Vol. III, pp. 549-550 (rev.); cf. Partnership Act 1890, s. 44.

Problems concerning valuation will be considered below.

5.37 To avoid the need to investigate the source of each item of property, German law has a further rule, under which it is presumed, unless the contrary is shown, that all the property of each spouse is shareable.⁵⁴ We would favour the adoption of a similar rule. It would make for simplicity and would encourage a spouse to waive deductions where the amounts involved were negligible, and to make a record of pre-marriage assets if he did not want them to be shared.

5.38 The exclusion from sharing of property acquired by way of gift during the marriage should be limited to third party gifts, in our view. For example, if a husband bought a home and put it into joint names, it would obviously be inequitable for the wife to keep her share exclusively for herself at the end of the marriage and ask that the husband's share be divided. A spouse should not be entitled to deduct the value of a gift received from the other spouse unless this had been agreed between the spouses. Since, in our view, the spouses should be free to contract out of the system altogether, they should also be free to agree to exclude any specific item of property from sharing, irrespective of whether it was a gift from one to the other. Formal safeguards might be required for such an agreement,⁵⁵ and the interests of creditors should not be prejudiced.⁵⁶

5.39 We make no specific proposals at this stage as to whether any other categories of property should be excluded from sharing.

54. BGB 1377 II: there is provision for a joint inventory, in the absence of which it is assumed there are no deductions. In our view a spouse should be entitled to prove an allowable deduction even in the absence of an inventory.

55. Para.5.30 above.

56. See below, para. 5.57 ff.

If a community system were introduced there are certain categories to which special attention might need to be given, for example, damages for personal injuries. As far as personal chattels are concerned, since the system we envisage would involve the sharing of "values" rather than the redistribution of items of property, there would be no reason to exclude an item from valuation merely because it was personal. If it had been acquired by gift or inheritance its value could be deducted from the assets of the spouse.

(d) Specific applications of the sharing rules

5.40 In calculating the value of a spouse's assets it is of course the beneficial interest of a spouse which must be taken into account. If a spouse held property on trust for a third person that would be disregarded. But if the spouse had a beneficial interest in a trust, that would have to be valued and brought into account. The first problem, therefore, is to identify all property in which either spouse has a beneficial interest, and to determine the value of the interest. The effect of the community might well be to reduce the number of disputes as to the extent of each spouse's interest in a particular item, since the total value of the spouse's property (less any deductions) would be shared. We now consider how the sharing rules would apply in certain situations; those considered are by no means exhaustive.

(i) Property owned by a spouse at the date of the marriage

5.41 Earlier, we proposed that the value of property owned by a spouse before the marriage (or acquired thereafter by gift or inheritance) should be deducted from the value of the assets owned at the end of the marriage, and that the balance should be the shareable assets of that spouse.⁵⁷ The simplest way of doing this would be to calculate the net value of a spouse's assets at the

57. Para. 5.36 above.

date of the marriage, after deducting the value of any outstanding debts, and to deduct this amount from the value of the assets owned by that spouse at the time of the division. Although we favour this general rule, it might not in practice always lead to the expected result. For example, if one spouse owned a house worth £5,000 at the time of the marriage, and this house was the only substantial asset of that spouse throughout the marriage, then if it had increased in value to £7,000 at the end of the marriage, there would be in principle a balance of £2,000 to be shared between the spouses. However, in real terms the original owner of the house would have no more than at the date of the marriage.

5.42 The situation just described has led us to consider a possible exception, under which a specific asset could be excluded from sharing as such if it had been owned throughout the marriage. For example, if one spouse had owned a diamond brooch or a house before the marriage, that item would not be included in that spouse's assets on termination of the marriage. However, the exception itself could lead to further anomalies unless it could be confined to cases where no outstanding mortgage or other secured or unsecured debt had been incurred in connection with the property. Under the general rule proposed above the value of debts outstanding at the time of the marriage should be taken from the value of the pre-marriage property of a spouse. Taking the example of a house owned before marriage, if there had been an outstanding mortgage, the pre-marriage value of the house should be the spouse's equity in it at the date of the marriage. If there had been an unsecured debt, whether incurred in connection with the house or not, the amount of the debt should be deducted from the pre-marriage value of the home. But if the house itself were to be excluded from sharing on the basis that it had been owned throughout the marriage, it would be difficult to decide how far the outstanding debt or mortgage should be taken into account. Our provisional

view is that it would lead to great complication and uncertainty to introduce rules for excluding specific items of property owned throughout the marriage. The matter should be left to the agreement of the spouses.

(ii) Property acquired by gift or inheritance during the marriage

5.43 Property acquired by a spouse during the marriage by way of gift or inheritance should be assessed in a similar way to pre-marriage property, that is by taking its value at the date of receipt. It would be a question of fact in each case whether a particular gift had been to one spouse or both; this would, as now, depend on the intention of the donor.

(iii) Limited interests, insurances, pensions and annuities acquired during marriage

5.44 In principle, where a spouse has acquired during marriage an interest under an insurance policy, pension or annuity otherwise than by gift, the interest should be valued and included in that spouse's shareable property. It might sometimes be difficult to arrive at a valuation where the interest had not matured at the date of sharing; for example, the surrender value of an interest in a pension scheme could not always be readily calculated. Nevertheless some value would have to be estimated. Similar rules should apply to an interest under a settlement created by either spouse during the marriage or under a Married Women's Property Act policy (these are examples of gifts between spouses which remain shareable property).

5.45 As far as social security pensions are concerned, these could possibly be ignored, on the basis that the State has made provision for each spouse to get at least something, and that the contributions and payments are largely flat rate.⁵⁸ A different

58. For comment on the Swedish rules concerning pensions, see Sundberg, "Marriage or No Marriage: the Directives for the Revision of Swedish Family Law" (1971) 20 I.C.L.Q. 223, 227-8.

view might be taken of an earnings related scheme. We express no firm view at this stage; all these problems need detailed examination.

(iv) Limited interests and annuities owned before marriage or acquired by gift or inheritance

5.46 If a limited interest had been owned by a spouse before the marriage, or if it had been acquired by gift or inheritance during the marriage, valuation would present even greater problems, particularly in the case of discretionary trusts. The purpose of the valuation is to enable a deduction to be made from the final assets of a spouse, in order to arrive at the shareable assets. Our provisional view is that such interests should be ignored altogether; in other words, they should be excluded from the final assets and disregarded as a deduction, on the assumption that the spouse had no more at the end of the marriage than he or she had at the beginning (or date of the settlement).

(e) Debts

(i) Pre-marriage debts

5.47 There is no justification for imposing on one spouse liability for debts incurred by the other spouse before the date of the marriage. Under Scandinavian, German and French law neither spouse is liable to contribute to the pre-marriage debts of the other spouse,⁵⁹ and in our view this is the right solution. In practical terms, the value of the pre-marriage assets of a spouse should be calculated after deducting debts outstanding at that time. If the debts exceed the pre-marriage assets, the latter should be assessed as nil.

(ii) Debts incurred during marriage

5.48 As a general rule, only the net assets of a spouse should be shared. All debts of a spouse outstanding at the time of the division should be deducted in order to find the net assets.

59. Pedersen (1965) 28 M.L.R. 137, 144; BGB 1374 I; C.C. 1410.

There is a possible exception to this rule where a spouse had made dispositions or contracted debts in a manner prejudicial to the other spouse.⁶⁰ Since only money and assets which had not been spent or charged would remain to be shared, the effect would be that the spouses would "share" debts where each had a surplus of assets. For example, if a husband's final assets were £2,000 and he had outstanding debts of £800, his final shareable net assets would be £1,200.

5.49 A more difficult problem would arise where one spouse's debts exceeded his assets at the time of division. For example, if at the end of the marriage H owed debts of £1,000 and had no assets to meet them, and W had £2,000 net assets, could H require that W meet any part of this liability before the balance of her net assets was shared, or should his claim be limited to a half share of her assets? In the first case he would be entitled to £1,500 (£1,000 to meet the debts, and £500 as half the balance):⁶¹ in the second he could claim only £1,000 (half W's net assets) all of which would have to go towards his debts.⁶² The first result is sometimes referred to as sharing "negative" estates, since H's debts are brought into the pool as a "minus" figure. The latter rule is sharing positive net estates, H's being estimated as nil.

5.50 The case for requiring a spouse not only to share his or her net assets with the other spouse, but also to make a contribution to the other spouse's debts is that some of the debts may have been incurred for the benefit of both spouses or of the family.

60. See below, para. 5.53 ff.

61. These figures are calculated on the basis that W must pay the whole of the outstanding debt. An alternative would be to provide that W should pay $\frac{1}{2}$ H's debt (£500) and share her balance; H would then be entitled to £1,250 from W (£500 + $\frac{1}{2}$ £1,500). This can be compared with the Dutch law, para. 5.15 above.

62. This is the Scandinavian and German law, para. 5.15 above.

If, for example, the assets were vested in one spouse, while the family liabilities had been undertaken in the name of the other, the absence of any rule concerning contribution would mean that on termination of the marriage a creditor would have recourse to no more than half the joint assets. It could be argued that, in principle, he might be better off than under the present law, since a creditor cannot normally have recourse to any of the assets of the debtor's spouse during or on termination of marriage. But if community is a partnership, is it fair to share only the profits and not the partnership debts? Further, may a spouse not be tempted to put assets in the name of the other spouse knowing that, if things go well, he can claim back half on termination of the marriage, but that if things go badly, his creditors can have recourse to no more than half? Not all such cases could be dealt with under section 42 of the Bankruptcy Act 1914.

5.51 It seems that there are two possible solutions to this problem; they are not necessarily exclusive of each other. The first would be to introduce a principle of joint liability of husband and wife in respect of certain household and family debts. These debts would, in effect, be regarded as partnership debts, and each spouse would be liable to the creditors. The second solution would apply only at the time of sharing and would make both spouses contribute equally to the household or family debts outstanding at that time, irrespective of which spouse had contracted those debts. This would be a right of contribution between the spouses, but would not give the creditor of one spouse direct rights against the other spouse.

5.52 In order to avoid injustice to the spouses and to third parties some solution should be found to the problem of family debts. The task of defining such debts should not be insuperable, since they would, in principle, be the same as those for which a wife under the present law is presumed to have authority to pledge her husband's credit. Our provisional view is that the second

solution outlined above would be fairer than a rule under which only positive net estates were shared. Nevertheless, we think that in due course the question of direct joint liability of the spouses for household debts should be considered in detail.

(f) Abuse of powers: right to claim sharing

5.53 It is a basic element of the community system under discussion that during the marriage each spouse should be free to deal with his or her property, subject only to such restraints as are necessary, even under a system of separate property, to protect the other spouse and family. It must, however, be recognised that independence during marriage, when coupled with the right to share on termination of the marriage, could increase the danger of abuse. A spouse might, for example, squander his assets, or give them away, even to the point of insolvency, and then ask to share the other spouse's final assets.

(i) Compensation and setting aside

5.54 Several systems have provisions covering adverse dealings. Under German law, for example, the final or shareable assets of a spouse, called the "surplus", are deemed to include the amount by which the spouse had decreased his assets by any of the following means:⁶³

- (1) dispositions by way of gift, unless made in satisfaction of moral obligations;
- (2) dissipation of assets;
- (3) transactions intended to deprive the other spouse of benefits.

Only transactions made within the previous 10 years and without the consent of the other spouse are taken into account. The

63. BGB 1375 II, III. Scandinavia and Holland have comparable rules to deal with abuse of power: Pedersen (1965) 28 M.L.R. 137, 141-142.

German rule can be illustrated by the following example: H has assets of £2,000 at the end of the marriage; during the marriage he has given away or squandered £4,000. His final shareable assets are therefore calculated as £6,000. Assuming the wife had no assets at the end of the marriage, she would prima facie be entitled to £3,000. This is subject to the rule that the other spouse's claim is limited to the assets actually available.⁶⁴ In the above example, only £2,000 is actually available, so this would be the extent of the wife's claim. The husband would be left with nothing.

5.55 There is a further German rule under which a spouse, whose equalisation claim has not been satisfied because the other spouse's available assets are insufficient, is entitled to make up the deficit by claiming it directly from a third party to whom the other spouse has made a voluntary disposition with the intention of defeating the claim.⁶⁵ This rule can be compared with section 16 of the Matrimonial Proceedings and Property Act 1970, under which an application may be made to the court dealing with financial provision for an order restraining or setting aside certain transactions. The court has power to order repayment and transfer of property by a third person, other than a bona fide purchaser for value. It is clear that power for the court to investigate transactions, and if necessary to set them aside, would be essential under a system of community. Such a rule would impress upon spouses the duty to have regard to the interests of the other spouse and children. A rule similar to section 16 could be adapted for this purpose.

(ii) Right to claim a sharing

5.56 When the abuse of power by one spouse is a serious threat to the interests of the other spouse there is, in some countries, not only a right to compensation when the spouses' assets are

64. BGB 1378 II.

65. BGB 1390 I.

shared at the end of the marriage, but also a right to apply for an earlier sharing.⁶⁶ It could be argued that any of the following situations should give a spouse the right to apply before the end of the marriage for the community (which up to then has been "deferred") to be implemented and the assets to be shared:

- (a) Where the other spouse has wasted his assets in a way which puts the first spouse's equalisation claim in substantial jeopardy.
- (b) Where the other spouse has abused his power by dealing with his assets in a manner inconsistent with his matrimonial obligations, e.g. by sale of the matrimonial home without consent.
- (c) Where the other spouse has become bankrupt.
- (d) Where the spouses have separated without prospect of reconciliation; in this case the application could be made by either spouse.

In our view, rules would be needed under which a spouse could apply for an earlier sharing in certain circumstances. Once there had been a sharing, the spouses would revert to separation of property and there would be no further sharing.

(g) Third parties: bankruptcy

5.57 Subject to what has been said about the possibility of imposing joint liability towards third parties in respect of certain household or family debts, the community system would not alter the position of third parties during the subsistence of the marriage. On termination of the marriage or upon earlier sharing, the claim of the creditors of one spouse would have priority over the equalisation claim of the other since only the balance left after deducting sufficient to meet outstanding debts would be

66. E.g. Denmark, Germany and Holland: see Pedersen (1965) 28 M.L.R. 137, 141-142; BGB 1386.

shared between the spouses. A spouse's equalisation claim could increase the assets available to meet his debts.

5.58 We suggested above that if one spouse became bankrupt, the other spouse should have the right to call for a sharing of assets. The object of this is to protect his or her interest in future acquired assets. A spouse should not be obliged to apply, and if he did not then, in our view, neither the bankrupt spouse nor his trustee in bankruptcy should have the right to claim a premature sharing (except by agreement with the other spouse). In effect this would mean that if the husband became bankrupt the wife would be entitled to claim or to agree on a sharing of assets. If she did, the trustee in bankruptcy would take over the husband's equalisation claim. If she did not claim or agree to a division, neither the husband nor the trustee could apply for a sharing until the termination of the marriage or unless there were other special circumstances.⁶⁷

5.59 Although a bankrupt spouse should not be allowed to call for a premature sharing of assets, he should not, on the other hand, be entitled to waive his possible future equalisation claim by agreement with the other spouse or otherwise, if this would prejudice his creditors. Such a waiver would be in effect a disposition in favour of the other spouse, and ought to come within the class of voluntary transfers which may be avoided under section 42 of the Bankruptcy Act 1914.

(h) Sharing of assets:

(i) General summary

5.60 The spouses' assets should be shared on the happening of any of the following events:

67. See above, para. 5.56.

- (a) Divorce;
- (b) Judicial separation;
- (c) Nullity;
- (d) Death of one spouse;
- (e) A successful application for an earlier sharing in certain cases;
- (f) By agreement.

5.61 Each spouse's shareable assets should then be calculated as follows:

- (a) His total assets should be valued.
- (b) The value of any gifts or other dispositions made in abuse of power should be added.
- (c) Outstanding debts should be deducted. In the case of any debts for which spouses shared responsibility, contribution could be claimed. This would affect the result only where the spouse who was liable to pay the third party had, or might have, a negative balance.
- (d) The value of pre-marriage property and property acquired by gift or inheritance during the marriage should be deducted.
- (e) The balance, if any, would be shareable.

Subject to what has been said about the claim for contribution to joint debts, a negative balance would not be taken into account. The spouse whose balance of shareable assets was less than that of the other spouse would be entitled to a balancing or equalisation claim to bring his share up to half the total assets of both spouses. Subject to provisions concerning the right to claim specific assets,⁶⁸ the claim would give rise to a money debt.

68. Below, paras. 5.72-5.75.

E X A M P L E

	H	W
Total assets on termination of marriage	£10,000	£1,000
<u>Add:</u> dispositions to 3rd parties	+ 2,500 £12,500	
<u>Deduct:</u> outstanding debts	- 2,000 £10,500	- 500 £500
<u>Deduct:</u> pre-marriage property, gifts and property inherited from third parties	- 3,000 £7,500	- £500
W has an equalisation claim to £3,500	-£3,500 £4,000	+£3,500 £4,000

(ii) Divorce, nullity or judicial separation

5.62 In proceedings for divorce, nullity or judicial separation either spouse should be entitled to apply for a sharing of assets. For this purpose, the final assets and debts would be valued as at the date of the final decree, though the right to apply might, with leave, be exercisable thereafter. If no application were made it would be assumed that each was content with the status quo, i.e. that no equalisation payment was needed in order to effect an equal sharing of their assets.

5.63 Should the court have power to vary the spouses' shares? Some countries provide for a limited power of variation.⁶⁹ In England the question of variation is closely linked to the court's power to award financial provision. On a decree of divorce, nullity or judicial separation, the court has wide powers to make any of the following orders in favour of a spouse or child of the family:⁷⁰

- (a) periodical payments, secured or unsecured;
- (b) lump sum payments;

69. See para. 5.18 above.

70. Matrimonial Proceedings and Property Act 1970, ss.2-4; see Appendix III, p. 323 below.

- (c) transfers or settlements of any property of either spouse;
- (d) variation of any ante-nuptial or post-nuptial settlement.

In exercising these powers the court must have regard, inter alia, to the means (including property) and needs of the parties, the length of the marriage, the contributions made by each party to the welfare of the family, and the loss of any benefits such as a pension as a result of the divorce.⁷¹ The court must exercise its powers "to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other."⁷²

5.64 These powers are far wider than those in the countries whose community systems we have considered in the Paper. Nevertheless, in our view they should not be abandoned if a system of community were introduced here. We envisage that in the majority of cases a spouse would apply for both a division of property and financial provision. The equalisation claim would be calculated (by agreement or by the court) before the court considered whether any order for financial provision should be made. In some cases, however, a spouse might not wish to claim equalisation, e.g. where there was no property, or where the assets of each spouse were equal. Failure to make an equalisation claim would not prevent a spouse from applying for financial provision: but, having elected not to claim, a spouse could not later claim equalisation, e.g. if dissatisfied with the order for family provision. In other cases a spouse might elect to apply for equalisation without asking for financial provision, e.g. where that spouse was largely to blame for the breakdown.

71. s.5(1).

72. Ibid.

5.65 To summarise, under the system we envisage, either spouse should be entitled to apply for a sharing of assets or for financial provision or for both. The time limit for applying would be the same. The court would exercise its powers to award financial provision in the light of the parties' financial position adjusted as a result of any order made on the equalisation claim. The principles on which the court's powers are at present exercised might have to be reconsidered in the light of the principles of sharing, but in general we envisage that the court would retain broad powers to order financial provision. In view of this, it would be unnecessary to consider introducing a general power to vary the spouses' shares, since the principles upon which such a power would be exercised would not vary materially from those now applied in assessing financial provision. For example, under its present powers the court can consider such things as the duration of the marriage and the contribution of each spouse to the welfare of the family. Where there was an application for a division independent of any other matrimonial proceedings it would have to be considered whether a special power of variation was required. We leave this question open.

(iii) Death

5.66 On the death of a spouse, the equalisation claim would affect the surviving spouse and the beneficiaries of the deceased under his will or intestacy. In contrast with the position where a marriage is ended by a decree, litigation between the parties would not normally be in progress, and every effort should be made to avoid it. Hence, the rules for sharing on the death of a spouse should be framed so as to allow the equalisation claim to be ascertained by the survivor and the personal representatives without resort to the court. There are certain special problems, which should be considered.

Balance owing by the survivor to the estate

5.67 In some cases the survivor's shareable assets may exceed those of the deceased. The Family Law Project of the Ontario Law Reform Commission has suggested that the survivor should never be called upon to make a balancing payment into the estate.⁷³ German law goes further and assumes that the survivor is always entitled to a fixed "equalisation" claim of one-quarter of the deceased's estate.⁷⁴ If no equalisation claim were allowed on behalf of the estate, the deceased would be deprived, by the accident of dying first, of bequeathing to his or her dependants or relatives (e.g. children of an earlier marriage) the amount which would have been due. The claims of dependants of the deceased for family provision from the estate would also be restricted to what the deceased actually owned at the time of death. On the other hand, looking at the matter from a practical point of view, if the deceased spouse died intestate, the survivor would in most cases receive the bulk of the estate; it seems pointless to consider whether the estate should be increased by means of a balancing claim against the survivor, when most of it is going to the survivor. The question of a balancing claim in favour of the estate is likely to be of practical importance only in those cases where the deceased made a will leaving substantial bequests to third parties. If, in such cases, the estate could make a balancing claim against the survivor the latter might have to surrender his or her assets for the benefit of a stranger. This would appear to be inconsistent with one of the general aims of the Paper - i.e. to ensure that a surviving spouse has a reasonable share of the family assets. It would apply the principle of sharing between spouses for the benefit of third parties. On balance, it

73. Property Subjects, Vol. III, pp. 560-561, 563 (rev.).

74. BGB 1371; Cohn, Manual of German Law, Vol. I, s. 518. Only if the survivor claims legal rights of inheritance is the actual balancing claim calculated.

is our provisional view that a survivor should not be required to make an equalisation payment into the estate.

Intestacy

5.68 The obligation of the estate to meet the survivor's equalisation claim should in principle be considered as an obligation independent of any rights the survivor may have on intestacy. The rules of intestate succession should, therefore, apply only to the balance of the estate. The present rules of intestate succession, framed in the absence of any system of community, give the surviving spouse an extensive interest in the estate of the deceased. It is clear that if a system of community were introduced in England, the rules of intestate succession would have to be reconsidered, in order to take into account the possible rights a survivor might have to an equalisation claim. It would, of course, be inconvenient to have different rules of intestacy according to whether the parties were governed by the community system or had contracted out. One simple solution would be to regard the survivor's share of the community assets as being in partial (or full) satisfaction of the rights due on intestacy. Another solution would be to provide that on an intestacy the survivor should have no equalisation claim, the intestacy rules being drawn in a way sufficiently favourable to the surviving spouse to cover any such claim. This matter, while requiring detailed consideration, does not really present any great difficulty.

Estate duty

5.69 Should the balance owed by the estate to the survivor be regarded as property passing on death? In our view, the equalisation of the spouses' assets on the termination of the marriage ought to be regarded as a property right, rather than as a right of succession. In other words, the beneficial interest of the spouse entitled to the equalisation should be considered to have been already in existence, in an inchoate form, though it could not be directly enforced. In accordance with this

principle, our provisional view is that the amount due to the survivor should not be regarded as property passing on death.⁷⁵

Family provision

5.70 Our provisional view is that even if a community system were introduced, it would be necessary to retain family provision law. The right of the survivor to apply for family provision from the estate is founded on the continuing obligation of each spouse to maintain the other, an obligation which is not necessarily brought to an end on the termination of the marriage by divorce or by death. The court should, in our view, retain its powers to order family provision for a surviving spouse. The number of applications might, of course, be reduced by the introduction of a community system, since a surviving spouse whose assets were less than those of the deceased would be entitled to make an equalisation claim. The surviving spouse should, in our view, be entitled to apply either for a sharing of assets or for family provision from the estate or for both.

Variation

5.71 Where a surviving spouse makes an equalisation claim against the estate, should there be any power to vary the amount due apart from the power to award family provision to the survivor? For example, if other dependants of the deceased apply for family provision should their claim be limited to the deceased's share of the joint assets, or should it be possible to reduce the survivor's share for their benefit? The survivor's equalisation claim would not normally exceed half the net assets,⁷⁶ so that the estate

75. In Unhappy Families, the report of a Working Party set up by the Women's National Advisory Committee of the Conservative and Unionist Party, it was recommended that a lower rate of duty should apply between husband and wife (No.34 p.42), and that estate duty on the matrimonial home should be postponed during the life of the surviving spouse (No.35, p.42). See also H.C. Official Report, Vol.816, 4 May 1971, col.317, para. 1.63 n.138 above.

76. Except where there had been a transaction in abuse of power, or where the deceased's estate was liable to contribute to any debts incurred by the survivor, the equalisation claim could not exceed 50% of the net estate.

could never be reduced by more than half. It seems to us that the interest of the survivor in the equalisation claim should be regarded as a proprietary right which takes precedence over the deceased's obligations to other dependants. For this reason our view is that the survivor's equalisation claim should not be reduced when other dependants apply for family provision,⁷⁷ nor should there be any other power to vary the amount due to the survivor on the equalisation claim.

(j) Settling the claim: specific assets

(i) Division other than on death

5.72 In principle, the equalisation claim would not attach to any specific item but should be settled by a money payment. There might be cases where an immediate cash payment would cause hardship to the payer, for example, where the only substantial asset consisted of shares in a private company. In such cases the court should have power to order payment by instalments on whatever terms seemed reasonable, or by the creation of a charge or mortgage. The interests of both spouses should be considered. This power would be of particular importance in the case of an application for a division before the end of the marriage, as in this case the court's powers to order financial provision would not come into operation.

5.73 In other cases it might be in the interests of the payee spouse to have a specific item of property (for example, the matrimonial home) rather than a lump sum payment. The court already has power to transfer and settle the property of the spouses on a divorce, judicial separation or nullity.⁷⁸ The interrelation of these powers and the power to allocate specific items

77. This can be contrasted with our provisional view concerning legal rights: see paras. 4.67-4.68 above.

78. Matrimonial Proceedings and Property Act 1970, ss. 4 and 5.

in settlement of an equalisation claim would have to be considered; our provisional view is that similar principles should apply to each power. If the value of a specific asset allocated to a spouse exceeded the amount of that spouse's equalisation claim (and could not be independently justified under present powers) the court should have power to allocate on terms as to repayment of the balance by that spouse.

(ii) Death

5.74 For a community system to be workable, it should, as with legal rights, in most cases be possible for the equalisation claim to be settled between the survivor and the personal representatives without resort to the court. Although we have not considered the matter in detail, our provisional view is that if the deceased had made a specific bequest to the survivor, this should not be regarded as part of the amount due under the equalisation claim unless there were an express declaration to that effect.⁷⁹ The survivor should be entitled to take the bequest in addition to the equalisation payment. Unless the deceased gave instructions, the balance due to the survivor should be met by applying assets in the order laid down by the Administration of Estates Act 1925.⁸⁰ On intestacy there should not be any problems, since the survivor's rights would usually exceed the equalisation claim, if any such claim were allowed.⁸¹

5.75 It is our view that, as a general rule, the survivor should not be entitled as of right to any specific item forming part of the estate in preference to other beneficiaries. There are two possible exceptions. The first is that if the survivor already shared the beneficial interest in any property, he or she should be entitled to take that item in satisfaction of the

79. This can be contrasted with the rule we suggested for legal rights, para. 4.33 above.

80. First Schedule, Part II; this was suggested in connection with legal rights: above, para. 4.61.

81. See above, para. 5.68.

equalisation claim. If the deceased's interest in that item exceeded the survivor's equalisation claim, the survivor should be entitled to pay the balance into the estate. The other exception would arise where the survivor made an application for family provision. The court would then have power to direct that the order for family provision or the equalisation claim be met by the transfer of specific assets.

5 CONCLUSIONS AND SUMMARY

(a) General

5.76 The main advantage of a community system is that it would operate on fixed principles; the spouse with fewer assets would not have to depend on the court's discretionary power to obtain property rights on the termination of marriage. A community system would give practical effect to the proposition that marriage is a partnership, and should to some extent reduce disputes as to the ownership of property, by achieving equality of assets at the end of marriage.

5.77 On the other hand, a system which operates on fixed principles cannot take account of the special circumstances of each case. A community system might give an undeserved benefit to a spouse whose contribution to the marriage had been nil, and who had failed to fulfil his or her matrimonial obligations. Although it would not be essential for spouses to keep detailed records of their property transactions, the system might work unfairly to the disadvantage of a spouse who had not done so. A system of community would not replace the present laws of financial provision and family provision, which depend on discretionary factors. Nor would it eliminate, but might tend to increase, enquiries by the court into transactions which may prejudice a spouse's interest in the shareable assets.

(b) Relation between a community system and other matters considered

(i) Co-ownership of the matrimonial home

5.78 A system of co-ownership of the matrimonial home would be compatible either with a system of separate property, or with a system of community of property. One difference in effect between community and co-ownership would be that co-ownership would give the non-owner spouse an immediate interest in the home, whereas a community system of the type discussed would give the non-owner a deferred equalisation claim. Where the home was the only asset, co-ownership would have the effect of an immediate community.

5.79 Another difference between co-ownership and community would be that under co-ownership the spouses would share just one asset, whereas under community they would share the value of the assets acquired during the marriage. Where there were no substantial assets other than the home the effect would be similar, except that under co-ownership the sharing would be immediate and not delayed as under community. But where there were other assets a principle of sharing limited to just one asset could lead to anomalies (e.g. where one spouse owned assets of similar value which did not have to be shared). A wider principle of sharing might appear fairer in such cases, but would involve a more complicated and novel system of rules.

(ii) Occupation of the matrimonial home: use and enjoyment of the household goods

5.80 In parts 1 and 2 of the Paper we considered ways in which the law could protect the right of the non-owner spouse to occupy the matrimonial home and to retain the use of the household goods. The system of community we have discussed would not alter the ownership of property during the marriage, and would not eliminate the need for the improved systems of protection which we have proposed.

(iii) Legal rights of inheritance

5.81 A system of legal rights was put forward as an alternative to a system of community of property as a means of sharing assets on the death of a spouse. There are several important differences: community would take into account the assets of both spouses acquired during the marriage, whereas legal rights of inheritance would operate on the deceased's estate, irrespective of when it was acquired, and would take no account of the survivor's assets (except, possibly, where they were derived from the deceased); the community system would leave the survivor with at least half the value of the assets acquired during the marriage, whereas legal rights would give the survivor a share of the deceased's estate which might leave him with more or less than half; community would operate on death and on divorce, whereas legal rights would operate only on death.

5.82 The above comparison may suggest that a community system would be fairer than a system of legal rights. However, if one considers the relative merits of each system as a measure to overcome disinheritance, the balance in favour of community is less strong. The community system would make it necessary to work out the equalisation claim whenever a marriage terminated in death and accordingly, to value the assets of both spouses. On the other hand, since the number of cases of disinheritance is small, legal rights of inheritance would be relied on in comparatively few cases; only one estate, that of the deceased, would need to be valued, and this would have to be done in any event.

(iv) Financial provision and family provision

5.83 We have already indicated that in our view a system of community of property could not at present replace the law of financial provision after a divorce, judicial separation or nullity, or the law of family provision, amended in accordance with our proposals. The community system would provide for the

equalisation of the assets acquired during the marriage in accordance with fixed principles. The fact that the share received by a spouse would not be determined by reference to discretionary factors may be seen as the special advantage of community. But the amount due to a spouse on an equalisation claim may be more or less than would have been awarded as maintenance, and in cases in which the spouses had contracted out there would be no equalisation. As we have seen, the discretionary powers to award financial provision or family provision could operate so as to vary, in effect, the fixed rights of the community system.

(c) Conclusions

5.84 The system of community or sharing of assets which we have outlined in this part of the Paper is based on tentative views as to how such a system could operate in the fairest and simplest way possible in the light of present law and social attitudes. But such a system is inevitably complex, and many details would remain to be settled or varied in the light of consultation and comment. There are many practical arguments which could be put forward against a system of community. It would, as the Morton Commission pointed out, be an unfamiliar and novel concept in England. Many people might have to take legal advice at the time of marriage who would not now think of doing so. On the other hand it could be made to work, and it does work in other countries. In the last resort, the main question to be decided is whether it would lead to a greater measure of justice to give effect to the idea that marriage is a partnership, by sharing the assets acquired during the marriage, regardless of which spouse contributed financially to their acquisition. This question cannot be avoided on the ground that community is too difficult.

5.85 There is, of course, a case for saying that discretionary powers are all that is needed when a marriage ends in divorce, nullity or judicial separation. But the relative advantages and disadvantages of a system of fixed shares, such as community, and

a system of discretionary powers should not be considered only in legal terms. It is important not to forget the advantages of security and status which a community system would give to the spouse who, because of marital and family ties, is unable to acquire an interest in the assets by a financial contribution. Instead of being, as now, regarded as a dependant, who must apply to the court, such a spouse would become an equal partner in marriage, entitled at the end of the marriage to claim an equal share in the net assets acquired during the marriage. The pattern of social development in the future may be that on the end of a marriage an able-bodied spouse would be expected to become self-reliant and independent as soon as possible, rather than to look to the former marriage partner as a source of support for life. A system of sharing on fixed principles may be more in harmony with this idea than the present system of separate property, reinforced, in certain situations, by the enforcement, possibly over a long period, of maintenance obligations determined with regard to discretionary factors. These are matters on which many will have views, and we shall welcome them.

(d) Summary of proposals for a possible system of community

Basic pattern of the system (para. 5.29)

- 5.86 (i) During the marriage, each spouse would be free to acquire and dispose of his or her own property, subject only to such restraints as are necessary to protect the other spouse and the family.
- (ii) At the termination of the marriage, or in other special circumstances, there would be a sharing of the spouses' assets.
- (iii) The principle of sharing would be that the spouse with less assets would have a money claim against the other spouse or his estate for an amount sufficient to equalise the value of the spouses' assets.

Application of the system

- (iv) The spouses should be free to agree that the system should not apply to their property. Unless they expressly agreed that it was not to apply, it should apply (para. 5.30).
- (v) All the property of each spouse should be shareable, with the exception of property owned at the date of the marriage, property acquired by inheritance or by gift from a third party, and property which the spouses agreed to exclude from sharing (paras. 5.36-5.37).
- (vi) It should be presumed that all the property owned by each spouse at the date of sharing was shareable property unless the contrary was proved (para. 5.37).
- (vii) The value of property excluded from sharing should be deducted from the value of the assets of each spouse at the date of sharing to ascertain the value of the shareable assets. Certain special problems relating to valuation are discussed in paras. 5.40-5.46
- (viii) Neither spouse should be liable to contribute to the pre-marriage debts of the other spouse (para. 5.47)
- (ix) Spouses should be entitled to deduct outstanding debts from the value of their shareable assets; a spouse whose debts exceeded his or her assets would be deemed to have no assets, and would not be entitled to claim more than half the other spouse's net assets except where there was a right to claim contribution from the other spouse in respect of an obligation which should be shared jointly (paras. 5.48-5.52).
- (x) If a spouse abused his or her independent power to deal with property by entering into transactions not for value in a manner prejudicial to the other spouse's equalisation claim, the court should be empowered to add the value of property comprised in such transactions to that spouse's net assets in calculating

the equalisation claim and, in certain circumstances, to avoid the transaction (paras. 5.54-5.55).

- (xi) A spouse should be entitled to apply for a sharing of assets in certain circumstances: e.g. where the other spouse had wasted his assets, abused his powers or become bankrupt, or where the parties had separated without prospects of reconciliation (para. 5.56).
- (xii) Either spouse should be entitled to apply for a sharing of assets whenever the court grants a decree of divorce, judicial separation or nullity (para. 5.60).
- (xiii) Where the marriage terminates in the death of a spouse, only the survivor should be entitled to apply for a sharing of assets; no equalisation claim should be allowed on behalf of the deceased's estate (para. 5.67).
- (xiv) Where the court grants a decree of divorce, judicial separation or nullity a spouse should be entitled to apply either for a sharing of assets or for financial provision or for both (para. 5.65).
- (xv) Where the marriage terminates in death the survivor should be entitled to apply either for a sharing of assets or for family provision from the estate or for both (para. 5.70).
- (xvi) Where the court grants a decree of divorce, nullity, or judicial separation, or where there was an application for a division of assets before the termination of the marriage, the court should have power to direct how the equalisation claim should be settled, and should have power to order transfers of specific assets from one spouse to the other in satisfaction of the claim (paras. 5.72-5.73).
- (xvii) Where the marriage terminates in death, the survivor should not, in general, be entitled to claim any specific asset in satisfaction of the equalisation claim unless the survivor already had an interest in that asset; on a successful application for family

provision the court should have power to deal with specific assets forming part of the estate (para. 5.75).

Part of the Official Text of the Uniform Probate Code of the United States of America and Part of the Official Commentary on that Code.

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PART 2

ELECTIVE SHARE OF SURVIVING SPOUSE

GENERAL COMMENT

The sections of this Part describe a system for common law states designed to protect a spouse of a decedent who was a domiciliary against donative transfers by will and will substitutes which would deprive the survivor of a "fair share" of the decedent's estate. Optional sections adapting the elective share system to community property jurisdictions were contained in preliminary drafts, but were dropped from the final Code. Problems of disinheritance of spouses in community states are limited to situations involving assets acquired by domiciliaries of common law states who later become domiciliaries of a community property state, and to instances where substantially all of a deceased spouse's property is separate property. Representatives of community property states differ in regard to whether either of these problem areas warrant statutory solution.

Almost every feature of the system described herein is or may be controversial. Some have questioned the need for any legislation checking the power of married persons to transfer their property as they please. See Plager, "The Spouse's Nonbarrable Share: A Solution in Search of a Problem", 83 Chi.L.Rev. 681 (1968). Still, all common law states except the Dakotas appear to impose some restriction on the power of a spouse to disinherit the other. In some, the ancient

concept of dower continues to prevent free transfer of land by a married person. In most states, including many which have abolished dower, a spouse's protection is found in statutes which give a surviving spouse the power to take a share of the decedent's probate estate upon election rejecting the provisions of the decedent's will. These statutes expand the spouse's protection to all real and personal assets owned by the decedent at death, but usually take no account of various will substitutes which permit an owner to transfer ownership at his death without use of a will. Judicial doctrines identifying certain transfers to be "illusory" or to be in "fraud" of the spouse's share have been evolved in some jurisdictions to offset the problems caused by will substitutes, and in New York and Pennsylvania, statutes have extended the elective share of a surviving spouse to certain non-testamentary transfers.

Questions relating to the proper size of a spouse's protected interest may be raised in addition to those concerning the need for, and method of assuring, any protection. The traditions in both common law and community property states point toward some capital sum related to the size of the deceased spouse's holdings rather than to the needs of the surviving spouse. The community property pattern produces one-half for the surviving spouse, but is somewhat

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misleading as an analogy, for it takes no account of the decedent's separate property. The fraction of one-third, which is stated in Section 2-201, has the advantage of familiarity, for it is used in many forced share statutes.

Although the system described herein may seem complex, it should not complicate administration of a married person's estate in any but very unusual cases. The surviving spouse rather than the executor or the probate court has the burden of asserting an election, as well as the burden of proving the matters which must be shown in order to make a successful claim to more than he or she has received. Some of the apparent complexity arises from Section 2-202, which has the effect of compelling an electing spouse to

allow credit for all funds attributable to the decedent when the spouse, by electing, is claiming that more is due. This feature should serve to reduce the number of instances in which an elective share will be asserted. Finally,

Section 2-204 expands the effectiveness of attempted waivers and releases of rights to claim an elective share. Thus, means by which estate planners can assure clients that their estates will not become embroiled in election litigation are provided.

Uniformity of law on the problems covered by this Part is much to be desired. It is especially important that states limit the applicability of rules protecting spouses so that only estates of domiciliary decedents are involved.

Section 2-201. [Right to Elective Share.]

(a) If a married person domiciled in this state dies, the surviving spouse has a right of election to take an elective share of one-third of the augmented estate under the limitations and conditions hereinafter stated.

(b) If a married person not domiciled in this state dies, the right, if any, of the surviving spouse to take an elective share in property in this state is governed by the law of the decedent's domicile at death.

COMMENT

See Section 2-202 for the definition of "spouse" which controls in this Part.

Under the common law a widow was entitled to dower, which was a life estate in a fraction of lands of which her husband was seized of an estate of inheritance at any time during the marriage. Dower encumbers titles and provides inadequate protection for widows in a society which clas-

sifies most wealth as personal property. Hence the states have tended to substitute a forced share in the whole estate for dower and the widower's comparable common law right of curtesy. Few existing forced share statutes make adequate provisions for transfers by means other than succession to the surviving spouse and others. This and the following sections are

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designed to do so. The theory of these sections is discussed in Fratcher, "Toward Uniform Succession Legislation," 41 N.Y.U. L.Rev. 1087, 1050-1064 (1956). The existing law is discussed in MacDonald, Fraud on the Widow's Share (1960). Legislation comparable to that suggested here became effective in New York on Sept. 1, 1966. See Decedent Estate Law, § 18.

Section 2-202. [Augmented Estate.]

The augmented estate means the estate reduced by funeral and administration expenses, homestead allowance, family allowances and exemptions, and enforceable claims, to which is added the sum of the following amounts:

(1) The value of property transferred by the decedent at any time during marriage, to or for the benefit of any person other than the surviving spouse, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer, if the transfer is of any of the following types:

(i) any transfer under which the decedent retained at the time of his death the possession or enjoyment of, or right to income from, the property;

(ii) any transfer to the extent that the decedent retained at the time of his death a power, either alone or in conjunction with any other person, to revoke or to consume, invade or dispose of the principal for his own benefit;

(iii) any transfer whereby property is held at the time of decedent's death by decedent and another with right of survivorship;

(iv) any transfer made within two years of death of the decedent to the extent that the aggregate transfers to any one donee in either of the years exceed \$3,000.

(2) Any transfer is excluded if made with the written consent or joinder of the surviving spouse. Property is valued as of the decedent's death except that property given irrevocably to a donee during lifetime of the decedent is valued as of the date the donee came into possession or enjoyment if that occurs first. Nothing herein shall cause to be included in the augmented estate any life insurance, accident insurance, joint annuity, or pension payable to a person other than the surviving spouse.

(3) The value of property owned by the surviving spouse at the decedent's death, plus the value of property transferred by

the spouse at any time during marriage to any person other than the decedent which would have been includible in the spouse's augmented estate if the surviving spouse had predeceased the decedent, to the extent the owned or transferred property is derived from the decedent by any means other than testate or intestate succession without a full consideration in money or money's worth. For purposes of this subsection:

(i) Property derived from the decedent includes, but is not limited to, any beneficial interest of the surviving spouse in a trust created by the decedent during his lifetime, any property appointed to the spouse by the decedent's exercise of a general or special power of appointment also exercisable in favor of others than the spouse, any proceeds of insurance (including accidental death benefits) on the life of the decedent attributable to premiums paid by him, any lump sum immediately payable and the commuted value of the proceeds of annuity contracts under which the decedent was the primary annuitant attributable to premiums paid by him, the commuted value of amounts payable after the decedent's death under any public or private pension, disability compensation, death benefit or retirement plan, exclusive of the Federal Social Security system, by reason of service performed or disabilities incurred by the decedent, and the value of the share of the surviving spouse resulting from rights in community property in this or any other state formerly owned with the decedent. Premiums paid by the decedent's employer, his partner, a partnership of which he was a member, or his creditors, are deemed to have been paid by the decedent.

(ii) Property owned by the spouse at the decedent's death is valued as of the date of death. Property transferred by the spouse is valued at the time the transfer became irrevocable, or at the decedent's death, whichever occurred first. Income earned by included property prior to the decedent's death is not treated as property derived from the decedent.

(iii) Property owned by the surviving spouse as of the decedent's death, or previously transferred by the surviving spouse, is presumed to have been derived from the decedent except to the extent that the surviving spouse establishes that it was derived from another source.

COMMENT

The purpose of the concept of augmenting the probate estate in computing the elective share is twofold: (1) to prevent the owner of wealth from making arrangements which transmit his property to others by means other than probate deliberately to defeat the right of the surviving spouse to a share, and (2) to prevent the surviving spouse from electing a share of the probate estate when the spouse has received a fair share of the total wealth of the decedent either during the lifetime of the decedent or at death by life insurance, joint tenancy assets and other nonprobate arrangements. Thus essentially two separate groups of property are added to the net probate estate to arrive at the augmented net estate which is the basis for computing the one-third share of the surviving spouse. In the first category are transfers by the decedent during his lifetime which are essentially will substitutes, arrangements which give him continued benefits or controls over the property. However, only transfers during the marriage are included in this category. This makes it possible for a person to provide for children by a prior marriage, as by a revocable living trust, without concern that such provisions will be upset by later marriage. The limitation to transfers during marriage reflects some of the policy underlying community property. What kinds of transfers should be included here is a matter of reasonable difference of opinion. The fine-spun tests of the Federal Estate

Tax Law might be utilized, of course. However, the objectives of a tax law are different from those involved here in the Probate Code, and the present section is therefore more limited. It is intended to reach the kinds of transfers readily usable to defeat an elective share in only the probate estate.

In the second category of assets, property of the surviving spouse derived from the decedent and property derived from the decedent which the spouse has, in turn, given away in a transaction that is will-like in effect or purpose, the scope is much broader. Thus a person can during his lifetime make outright gifts to relatives and they are not included in this first category unless they are made within two years of death (the exception being designed to prevent a person from depleting his estate in contemplation of death). But the time when the surviving spouse derives her wealth from the decedent is immaterial; thus if a husband has purchased a home in the wife's name and made systematic gifts to the wife over many years, the home and accumulated wealth she owns at his death as a result of such gifts ought to, and under this section do, reduce her share of the augmented estate. Likewise, for policy reasons life insurance is not included in the first category of transfers to other persons, because it is not ordinarily purchased as a way of depleting the probate estate and avoiding the elective share of the spouse; but life insurance proceeds payable to

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the surviving spouse are included in the second category, because it seems unfair to allow a surviving spouse to disturb the decedent's estate plan if the spouse has received ample provision from life insurance. In this category no distinction is drawn as to whether the transfers are made before or after marriage.

Depending on the circumstances it is obvious that this section will operate in the long run to decrease substantially the number of elections. This is because the statute will encourage and provide a legal base for counseling of testators against schemes to disinherit the spouse, and because the spouse can no longer elect in cases where substantial provision is made by joint tenancy, life insurance, lifetime gifts, living trusts set up by the decedent, and the other numerous nonprobate arrangements by which wealth is today transferred. On the other hand the section should provide realistic protection against disinheritance of the spouse in the rare case where decedent tries to achieve that purpose by depleting his probate estate.

The augmented net estate approach embodied in this section is relatively complex and assumes that litigation may be required in cases in which the right to an elective share is asserted. The proposed scheme should not complicate administration in well-planned or routine cases, however, because the spouse's rights are freely releasable under Section 2-204 and because of the time limits in Section 2-206. Some legislatures may wish to consider a simpler approach along

the lines of the Pennsylvania Estates Act provision reading:

"A conveyance of assets by a person who retains a power of appointment by will, or a power of revocation or consumption over the principal thereof, shall at the election of his surviving spouse, be treated as a testamentary disposition so far as the surviving spouse is concerned to the extent to which the power has been reserved, but the right of the surviving spouse shall be subject to the rights of any income beneficiary whose interest in income becomes vested in enjoyment prior to the death of the conveyor. The provisions of this subsection shall not apply to any contract of life insurance purchased by a decedent, whether payable in trust or otherwise."

In passing, it is to be noted that a Pennsylvania widow apparently may claim against a revocable trust or will even though she has been amply provided for by life insurance or other means arranged by the decedent. Penn. Stats. Annot. title 20, § 301.11(a).

The New York Estates, Powers and Trusts Law § 6-1.1(b) also may be suggested as a model. It treats as testamentary dispositions all gifts causa mortis, money on deposit by the decedent in trust for another, money deposited in the decedent's name payable on death to another, joint tenancy property, and transfers by decedent over which he has a power to revoke or invade. The New York law also expressly excludes life insurance, pension plans, and United States savings bonds payable to a designated

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person. One of the drawbacks of the New York legislation is its complexity, much of which is attributable to the effort to prevent a spouse from taking an elective share when the deceased spouse has followed certain prescribed procedures. The scheme described by Sections 2-201 et seq. of this draft, like that of all states except New York, leaves the question of whether a spouse may or may not elect to be controlled by the economics of the situation, rather than by conditions on the statutory right. Further, the New York system gives the spouse election rights in spite of the possibility that the spouse has been well provided for by insurance or other gifts from the decedent.

Section 2-203. [Right of Election Personal to Surviving Spouse.]

The right of election of the surviving spouse may be exercised only during his lifetime by him. In the case of a protected person, the right of election may be exercised only by order of the court in which protective proceedings as to his property are pending, after finding that exercise is necessary to provide adequate support for the protected person during his probable life expectancy.

COMMENT

See Section 5-101 for definitions of protected person and protective proceedings.

Section 2-204. [Waiver of Right to Elect and of Other Rights.]

The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement or waiver signed by the party waiving after fair disclosure. Unless it provides to the contrary, a waiver of "all rights" (or equivalent language) in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights to elective share, homestead allowance, exempt property and family allowance by each spouse in the property of the other and a renunciation by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement.

COMMENT

The right to homestead allowance is conferred by Section 2-401, that to exempt property by Section 2-402, and that to family allowance by Section 2-403. The right to renounce interests passing by testate or intestate succession is recognized by Section 2-801. The provisions of this section, permitting a spouse or prospective spouse to waive all statutory rights in the other spouse's property seem desirable in view of the common and commendable desire of parties to second and later marriages to insure that property derived from prior spouses passes at death to the issue of the prior spouses instead of to the newly acquired spouse. The operation of a property settlement as a waiver and renunciation takes care of the situation which arises when a spouse dies while a divorce suit is pending.

Section 2-205. [Proceeding for Elective Share; Time Limit.]

(a) The surviving spouse may elect to take his elective share in the augmented net estate by filing in the Court and mailing or delivering to the personal representative a petition for the elective share within 6 months after the publication of notice to creditors for filing claims which arose before the death of the decedent. The Court may extend the time for election as it sees fit for cause shown by the surviving spouse before the time for election has expired.

(b) The surviving spouse shall give notice of the time and place set for hearing to persons interested in the estate and to the distributees and recipients of portions of the augmented net estate whose interests will be adversely affected by the taking of the elective share.

(c) The surviving spouse may withdraw his demand for an elective share at any time before entry of a final determination by the Court.

(d) After notice and hearing, the Court shall determine the amount of the elective share and shall order its payment from the assets of the augmented net estate or by contribution as appears appropriate under Section 2-207. If it appears that a fund or property included in the augmented net estate has not come into the possession of the personal representative, or has been distributed by the personal representative, the Court nevertheless shall fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise. The proceeding may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any

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greater amount than he would have been if relief had been secured against all persons subject to contribution.

(e) The order or judgment of the Court may be enforced as necessary in suit for contribution or payment in other courts of this state or other jurisdictions.

Section 2-206. [Effect of Election on Benefits by Will or Statute.]

(a) The surviving spouse's election of his elective share does not affect the share of the surviving spouse under the provisions of the decedent's will or intestate succession unless the surviving spouse also expressly renounces in the petition for an elective share the benefit of all or any of the provisions. If any provision is so renounced, the property or other benefit which would otherwise have passed to the surviving spouse thereunder is treated, subject to contribution under subsection 2-207(b), as if the surviving spouse had predeceased the testator.

(b) A surviving spouse is entitled to homestead allowance, exempt property and family allowance whether or not he elects to take an elective share and whether or not he renounces the benefits conferred upon him by the will except that, if it clearly appears from the will that a provision therein made for the surviving spouse was intended to be in lieu of these rights, he is not so entitled if he does not renounce the provision so made for him in the will.

COMMENT

The election does not result in a loss of benefits under the will (in the absence of renunciation) because those benefits are charged against the elective share under Sections 2-201, 2-202 and 2-207(a).

Section 2-207. [Charging Spouse With Gifts Received; Liability of Others For Balance of Elective Share.]

(a) In the proceeding for an elective share, property which is part of the augmented estate which passes or has passed to the surviving spouse by testate or intestate succession or other means and which has not been renounced, including that described in Section 2-202(3), is applied first to satisfy the elective share and to reduce the amount due from other recipients of portions of the augmented estate.

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(b) Remaining property of the augmented estate is so applied that liability for the balance of the elective share of the surviving spouse is equitably apportioned among the recipients of the augmented estate in proportion to the value of their interests therein.

(c) Only original transferees from, or appointees of, the decedent and their donees, to the extent the donees have the property or its proceeds, are subject to the contribution to make up the elective share of the surviving spouse. A person liable to contribution may choose to give up the property transferred to him or to pay its value as of the time it is considered in computing the augmented estate.

COMMENT

Sections 2-401, 2-402 and 2-403 have the effect of giving a spouse certain exempt property and allowances in addition to the amount of the elective share.

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