



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 2

Testator's Family Maintenance

WORKING PAPER

DECEMBER 1968

INTRODUCTION

The Law Reform Committee having now completed its first consideration of the projects on the *Testator's Family Maintenance Act* (Project No. 2) and Illegitimate Succession (Project No. 3), now issues its working papers on these matters.

The papers are being issued together because the two matters are somewhat related and the papers contain cross-references.

The papers do not represent the final views of the Committee.

Comments and criticisms should reach the Committee by the 31st of March, 1969.

Copies of the papers are being forwarded to -

The Chief Justice and the Judges of the Supreme Court

The Master of the Supreme Court

The Law School

The Law Society

The Public Trustee

The Perpetual Executors Trustee & Agency Co. Ltd., and

Other Law Reform Commissions and Committees with which this Committee is in correspondence.

The Committee may add to the above list.

The research material on which the papers are based is at the offices of the Committee and may be made available on request.

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TERMS OF REFERENCE

1. On representation from the Committee, the Minister for Justice agreed that the terms of reference as originally approved be amended. The amendments were made merely for clarification; they do not extend the scope of the inquiry. The terms of reference are now as follows:-

To report on the desirability of amending or enlarging the provisions of the *Testators Family Maintenance Act, 1939-1962*, so as to -

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

2. With regard to the matter raised in paragraph (d), it is intended to confine the comment in this paper strictly to the effect of the relevant statutory provisions. The various devices to which the Judges have resorted in some jurisdictions - reserving leave to apply and making "suspensory" or "interim" orders - will not be discussed (see Davern Wright: *Testators Family Maintenance in Australia and New Zealand*, 2nd ed., p. 148-154).

THE MOVEMENT FOR REFORM

3. By a letter dated the 17th of May, 1965, the President of the Law Society wrote to the Minister for Justice proposing that the *Testators Family Maintenance Act* should be amended in the following respects -

- (1) the definition of children to be extended to include children of a deceased child of the testator;
- (2) section 3 to be amended to permit application by the mother or father of a testator;

- (3) the purview of the Act to be extended to include intestate and partially intestate estates.

4. There was also an indication in this letter that the Society was concerned about the matter of "the assets which can be taken into account by the court in making an order".

5. The Society's proposals were not acted on at the time because the proposed reform raised for consideration the question of whether the scope of the Act should be further extended - e.g. by giving illegitimates a right to make application.

6. The matter mentioned in paragraph (d) of the terms of reference was raised in the Standing Committee of Commonwealth and State Attorneys-General in 1966. Views were then expressed both for and against widening existing powers to vary but the discussions were inconclusive.

THE LAW IN WESTERN AUSTRALIA

7. The law in Western Australia is contained mainly in the *Testators Family Maintenance Act, 1939-1962*.

In considering the proposals discussed in this paper and in the related paper on Illegitimate Succession, two things should be borne in mind.

8. Firstly, the *Testators Family Maintenance Act* does not confer any right to share in an estate; it simply confers a right to make application to the Court. The Court may refuse to make an order in favour of an applicant on the ground that his "character or conduct is such as in the opinion of the Court to disentitle him", or on "any other ground which the Court thinks sufficient" (s.3(3)).

9. Secondly, an order under the Act may be made only where the applicant can be shown to have been left without "adequate provision for (his) proper maintenance, education or advancement in life", see *Pontifical Society for the Propagation of the Faith v. Scales* (1962), 107 C.L.R. 9, and, in making an order, the Court is empowered to do no more than make such provision (s.3(1)).

The law relating to the four particular matters raised in the terms of reference is set out below.

Persons Who May Apply

10. The only persons eligible to make application are the widow, widower and children of the testator (s.3); by the definitions set out in s.2, "widow" includes any woman who has been divorced by or from her husband and who at the date of death of such husband was receiving or entitled to receive permanent maintenance from such husband by order of the Supreme Court or a Judge thereof.

Estates From Which Provision May Be Made

11. Relief may be provided only from estates which are subject to a will.

Disturbing Distributions Already Made

12. The relevant provisions are ss. 8A and 9A of the *Testators Family Maintenance Act* and s.65 of the *Trustees Act, 1962*. The first and last mentioned provisions go together and appear relatively straightforward. However, doubts arise with regard to s.9A of the *Testators Family Maintenance Act*. Not only does it protect the executor, but it also provides that the distribution made is not to be disturbed.

13. Under s.9A(1) there can be no order made pursuant to s.8A, if -
"the distribution was properly made by the executor for the purpose of providing for the maintenance, support or education of any person who was totally or partially dependent on the testator immediately before the death of the testator, whether or not the executor had notice at the time of distribution of any application, or intention to make an application that would affect the estate."

And s.9A(4) provides:

"For the purposes of this section, a distribution by an executor of any part of the estate shall be deemed to be properly made, if it is made in accordance with any trust, power or authority that is subsisting when the distribution is made and that would justify the distribution if any application made under this Act (being an application on which no order has been made prior to the distribution) were disallowed by the Court; but nothing in this subsection restricts the requirements in sub-section (3) of this section

that the distribution shall have been made without notice of the matters specified in that sub-section."

14. Prima facie, the provisions of the section seem unnecessarily wide in scope and, so far as sub-s. (4) is concerned, uncertain in meaning.

Courts Power to Vary Orders

15. The relevant provisions of the Act are –

s.5(4) -

The Court may at any time-and from time to time, on the application by motion of the executor or of any person beneficially entitled to or interested in any part of the estate of the testator, rescind or alter any order. Notice of such motion shall be served on all persons taking any benefit under the order sought to be rescinded or altered.

and

s.8 -

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

16. It appears that the latter of these provisions relates only to circumstances in which the benefit conferred by an existing order may be reduced. Furthermore, it has been held that the power to "rescind or alter", given by s.5(4), does not extend to authorising an increase in any benefit awarded upon an original application: *Jenkinson v. Duffield* (1952), 54 W.A.L.R. 22; see also the decisions on the equivalent New South Wales and Victorian provisions cited in Davern Wright: op. cit. p.156 et seq.

THE LAW IN OTHER PLACES

17. The following statutory provisions have been considered -

United Kingdom:
New Zealand:

The Inheritance (Family Provision) Act, 1938.
Family Protection Act, 1955-1968.

New South Wales:	<i>Testators Family Maintenance and Guardianship of Infants Act, 1916-1954.</i>
Victoria:	<i>Administration and Probate Act, 1958.</i>
Queensland:	<i>The Succession Act, 1867 to 1968.</i>
South Australia:	<i>Testators Family Maintenance Act, 1918-1943.</i>
Tasmania:	<i>The Testators Family Maintenance Act, 1912, as amended.</i>
Australian Capital Territory:	<i>Administration and Probate Ordinance, 1929-1953.</i>
Northern Territory:	<i>Testators Family Maintenance Ordinance, 1929-1931.</i>

In this paper these provisions are cited by reference to the place of enactment.

Persons Who May Apply

18. Grandchildren

Orders in favour of grandchildren of the deceased may be made in New Zealand (s.3(1) (c)) and New South Wales (s .3 (1) and (1A)).

19. In New Zealand an order may be made in favour of grandchildren of the deceased living at his death, being children (whether legitimate or illegitimate) of any child (whether legitimate or illegitimate) of the deceased. The New Zealand provision states that in considering any application by a grandchild of any deceased person, the Court, in considering the moral duty of the deceased at the date of his death, shall have regard to all the circumstances of the case, and in particular to the principles that:

- (a) in general a child of the deceased shall have preference over the children of that child; and
- (b) in general the deceased has no moral duty to make provision for the maintenance and support of any grandchild of his, if at the date of the death of the deceased the grandchild is being properly maintained and supported by his parents or either of them and it is reasonably probable that the grandchild will continue to be so maintained and supported.

20. In New South Wales, the odd position exists that grandchildren can be catered for only out of the estate of an intestate, and not where the deceased left a will.

21. In New South Wales the only grandchildren in whose favour an order can be made are those who are children of a child of the intestate who died before the intestate.

Parents

22. Orders in favour of parents may be made in New Zealand (s.3(1)(e)) and Tasmania (s.3A).

In both jurisdictions an order can be made in favour of a parent only where there is no surviving spouse or children, but, in New Zealand, the restriction does not apply if the parent was being wholly or partly maintained by the deceased immediately before his death.

Illegitimate Children

23. Orders in favour of illegitimates may be made in New Zealand (s.3(1)(b)), Victoria (s.91), Queensland (s.89), South Australia (s.2) and Tasmania (s.2(2)).
24. In Tasmania, an order may be made only against the estates of persons who die unmarried and without having been married (s.2(2)).
25. In several jurisdictions the right of the illegitimate to have an order made in his favour is subject to special stipulations as to proof of relationship. These stipulations are set out below.
26. **N.Z.** an illegitimate relationship between a parent and child is not to be recognised unless the Court is satisfied that the paternity or maternity of the parent has been admitted by or established against the parent while both the parent and child were living (s.2(3));
27. **VIC.** an order may be made only in favour of such illegitimate children of the deceased as were totally or partially dependent on or supported by the deceased immediately before his death or in respect of whom there was in

force against the deceased any order for the payment of maintenance or confinement expenses (s.91);

28. **S.A.** orders may be made in favour of illegitimate children -
- (i) of whom the testator is the mother or has by an affiliation order been adjudged the father, or
 - (ii) whom the testator either has by a Court been ordered to wholly or partially maintain or has in writing agreed to wholly or partially maintain, or
 - (iii) who in the lifetime of the testator lived with and were maintained by the testator (s.2);
29. **TAS.** where a claim is made by any person as the illegitimate child of -
- I. A male (deceased person) proof -
 - (a) that an order has been made against (the deceased person) for the maintenance of the claimant; or
 - (b) of the paternity of the claimant, and sufficient reason why such order for maintenance has not been obtained; and
 - II. In any other case if the beneficiaries (in the estate of the deceased person) dispute the claimant's maternity, proof of such maternity - shall be given before any order is made (s.8(3)).

Stepchildren

30. Orders in favour of stepchildren may be made in New Zealand (s.3(1)(d)), Queensland (s.89) and Tasmania (s.2).
31. In New Zealand a stepchild may apply only where he is maintained wholly or partly or is legally entitled to be maintained wholly or partly by the deceased immediately before his death.

Adopted Children

32. Only Queensland (s.89, definition of "child") and Tasmania (s.2, definition of "child") specifically confer rights on adopted children.
33. However, in jurisdictions where the adopted child is decreed by statute to have all the rights of a child born in lawful wedlock (s.7 of our *Adoption of Children Act, 1896-1964*), no such specific provision would seem to be necessary; see *In Re A.M. McKenzie dec'd* (1951), 51 S.R. N.S.W. 293 and *In Re Pratt*, [1964] N.S.W.R. 105.

Others Not Related By Blood

34. Except in regard to spouses, stepchildren and adopted children, none of the legislation here being considered gives rights to anyone except persons closely related by blood.
35. Note, however, the *Law Reform (Testamentary Promises) Act, 1949*, of New Zealand. It has been held that near relatives who have rendered valuable services to a deceased person should not be refused relief under this Act simply on the ground that they may have been influenced in part by feelings of personal responsibility, *Jones v. Public Trustee* [1962] N.Z.L.R. 363.

Estates From Which Provision May be Made

36. Orders may be made against the estate of intestates in the United Kingdom (s.1), New Zealand (s.4), New South Wales (s.3(1A)), Queensland (s.90), Tasmania (s.3) and the Australian Capital Territory (s.110(3)).
37. In the United Kingdom no application may be made on behalf of any person in any case where the disposition (either by will or on intestacy) of the deceased's estate is such that the surviving spouse is entitled to not less than two-thirds of the income of the net estate and where the only other dependant or dependants, if any, is or are a child or children of the surviving spouse (proviso to s.1(1)). See *Re Pugh, Pugh v. Pugh* [1943] Ch. 387, at p.392.

38. In the A.C.T. an order may be made only in the case of complete intestacy and only in favour of a widow or widower.

Disturbing Distributions Already Made

39. It would seem that in all jurisdictions an order may be made for provision out of assets already distributed. In some cases this is stated specifically, e.g.

N.S.W.	s.11(3)
S.A.	s.10(3)
A.C.T.	s.117 (3)

40. However, in several jurisdictions, there are important qualifications to this power. These qualifications are of two kinds.

41. Firstly, there are the provisions which, in cases where there has been a "final distribution", preclude any extension of the time within which application may be made and, where an extension is granted, safeguard any distribution which has been made prior to the application for such extension.

N. Z.	s. 2 (2) (and s.33 (9) of the repealed <i>Family Protection Act, 1908</i>)
VIC.	s.99
S.A.	s.4, proviso (c)
TAS.	s.11 (4)

42. Secondly, there are the provisions equivalent to s.9A(1) of our own Act:-

N.Z.	s.30A of the <i>Administration Act, 1952-1960</i>
VIC.	s.99A
QLD.	s.93

43. Neither the Victorian nor Queensland Acts contain any provision equivalent to our s.9A(4).

Courts Power to Vary Orders

44. Only in New Zealand (s.12(1)) and Queensland (s.91) is there express power to increase as well as to reduce the provision previously granted to an applicant.

Most Australian jurisdictions have provisions similar to our s.5(4):-

N.S.W.	s.6
VIC.	s.97(5)
S.A.	s.5(4)
A.C.T.	s.113(5)
N.T.	s.9

45. Tasmania has a provision of like effect, but here the power to "alter" is specifically limited to reducing the provision already made (s.9(5)).

46. Several jurisdictions also have provisions equivalent to our s.8.

N.S.W.	s.8
S.A.	s.8
A.C.T.	s.115
N.T.	s.14

Other Jurisdictions - Generally

47. Testator's Family Maintenance type legislation also exists, in some form or other, in every Canadian Province except Prince Edward Island. Our information as to the law in these places is, as yet, second hand and incomplete, but it does seem that in four Provinces, namely Alberta, Manitoba, Newfoundland and Saskatchewan, provision maybe made from the estate of an intestate, and that in four Provinces, namely British Columbia, Manitoba, Nova Scotia and Saskatchewan, illegitimates may apply for an order to be made in their favour (see study prepared for the Family Law Project of the Ontario Law Reform Commission (1967), vol. III, p.470; International and Comparative Law Quarterly, .vol. 15, part 2, p. 516-517).

48. It is also known that in civil law jurisdictions the law gives the illegitimate child various rights against the estate of the putative father, or, in some cases, the estates of both parents, e.g. South Africa, France, the Netherlands, West Germany, Italy, Switzerland and Sweden (see *International and Comparative Law Quarterly*, vol. 15, part 2, p.517-518).

PROPOSALS FOR REFORM THAT HAVE BEEN MADE IN OTHER PLACES

49. The report of the United Kingdom Committee on the Law of Succession in relation to Illegitimate Persons (which report is referred to hereafter, and in our report on Illegitimate Succession, as "the Russell Report") recommended that illegitimates should have the same right as a legitimate child to apply in the estate of either parent under the *Inheritance (Family Provision) Act, 1938* (England and Wales) (see paragraph 29 and 46 of the Russell Report). Neither this nor any of the other recommendations of the Russell Committee has yet been implemented in England or Wales. However, a Law Reform (Miscellaneous Provisions) Scotland Bill has been introduced into the United Kingdom Parliament and this will have the effect, if passed, of giving the illegitimate the same rights to legitim as pertain to a legitimate child (see paragraphs 15 and 16 of the Russell Report and report in "The Times" of Wednesday, July 17, 1968).

50. As to the intentions of the United Kingdom with regard to the recommendations in the Russell Report, see paragraph 23 of the working paper on Project No. 3 - Illegitimate Succession.

51. The study prepared in 1967 for the Family Law Project of the Ontario Law Reform Commission recommends that the legislation in that Province which is equivalent to our *Testators Family Maintenance Act*, be amended to extend its provisions to total intestacies. It also contains a recommendation that "persons who were being supported by the deceased at the time of his death, whether relatives or not, should be able to apply to the Court to have support continued out of the estate" (vol. III, p.536-537). As explained in the working paper on illegitimate succession the Ontario Law Reform Commission has not yet adopted, or rejected, any of the recommendations in this study.

52. In 1965, the then Labour Government in South Australia, with the support of the Law Society and Judges of that State, introduced a bill for an "Inheritance (Family Provision) Act",

to replace its *Testator's Family Maintenance Act of 1918-1943*. The main innovations to be made by this measure would have been -

- (1) to extend the scope of the legislation to cases of complete or partial intestacy, and
- (2) to entitle parents to apply, though only where the deceased had died without leaving a spouse or children, and, where the deceased was illegitimate, restricting the entitlement to the mother.

Many amendments were made in the Legislative Council and, the Government being unwilling to accept all of these amendments, the bill eventually lapsed.

53. As to the recent New Zealand Bill for a *Status of Children Act, 1968*, see paragraph 26 of the working paper on Project No. 3 - Illegitimate Succession.

THE CASE FOR REFORM AND THE POSSIBLE FORM OF INFORMING LEGISLATION

Persons Who May Apply

54. The Policy of all testators family maintenance type legislation seems to be to permit applications only by those who, in the normal course of human affairs, might be expected to have had such a close personal relationship with the deceased as to leave the latter, at the time of his death, under some moral obligation to make provision for their maintenance, education or advancement in life. Sometimes the blood tie is involved - as with children; sometimes not - as in the case of a widow.

Grandchildren and Parents

55. On this principle, it seems that grandchildren and parents might well be given the right to claim.

56. With particular regard to grandchildren, when, in 1965, this matter was under discussion between the Law Society's Law Reform Committee and the Crown Law Department, it was agreed that the right to make application should be confined to those grandchildren whose relating parent had predeceased the testator, or intestate

(i.e. the grandparent). A contrary rule, it was said, would introduce too much uncertainty because the class of persons entitled to claim would be unknown, a grandchild whose parent was alive becoming eligible only if the parent died within the period limited for applications (in Western Australia, six months - s.4).

This is an argument of convenience only and should, perhaps, not be allowed to prevail against the principle.

Illegitimates

57. It may be thought that there is an even stronger case for giving the same right to illegitimate children of the deceased.
58. Reasons commonly advanced for opposing such a reform are -
 - (1) it would invite fraudulent claims;
 - (2) it would make it possible for illegitimate children to defeat the expectations of their legitimate siblings;
 - (3) it would undermine the social institution of marriage.
59. It has also been suggested that cases of illegitimates with the necessary moral claim do not arise.
60. There are already many areas in which illegitimates have been given statutory right to claim particular material benefits (e.g. in the case of fatal accident claims and workers compensation). There is no indication that impersonation has caused a particular problem in any of these areas.
61. If an illegitimate has the superior moral right, why should he not defeat the expectation of illegitimate sibling?
62. Information which the Committee has obtained from the Public Trustee and the private trustee companies, indicates that there have been cases in which the fact of illegitimacy has worked hardship. Such cases may arise because of the parent dying

intestate, or because he makes a will in the belief that a gift to "children" is a gift to children.

63. Of course, if the law of succession should be altered to place illegitimate issue on the same footing as legitimates, the present problems would, in part, be avoided (see the working paper on Project No. 3 - Illegitimate Succession). There would still be the need to cater for the case of the illegitimate child who is not adequately provided for by the terms of a parent's will, or is omitted from such will altogether.
64. The argument about the undermining of marriage, in so far as it involves the proposition that those disposed to cohabit outside marriage are presently induced to marry because of the fear that their illegitimate children will have no right to claim for provision from their estates, carries little weight.
65. If illegitimates are to be given the right to apply, it is thought that the right should not be limited to those whose relationship to the deceased (the testator or intestate) has been acknowledged by the latter during his lifetime, or, alternatively, established by the finding of a court. Many other jurisdictions impose some such requirement. The courts should, perhaps, be free to decide the issue of relationship on any evidence available (see the comments on this matter in the working paper on Project No. 3 - Illegitimate Succession, para 37).

Others Not Related By Blood

66. Bearing in mind that all that is being conferred is a right to claim, 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". Such a formula would cover the case of the deserving de facto wife.

67. Of course, there are possible qualifications and requirements which it might be thought desirable to apply to particular categories of permitted applicants. Most of these are indicated in - or suggested by - the particular references which are made in this paper to the legislation of the United Kingdom, New Zealand and the other parts of Australia.

Intestate Estates

68. The same general principles as justify interference with a disposition by will, would seem to justify a power to vary the ordinary rules governing distribution on intestacy. However, regard should be had to the policy underlying the proviso to s.1 (1) of the Act of the United Kingdom and s.110(3) of the Ordinance of the Australian Capital Territory (as to these provisions see paras. 37 and 38). Here there is an obvious reluctance to permit interference with the rights provided by the ordinary rules for succession on intestacy.

69. If the Act is to apply to intestate estates its name will have to be altered.

Disturbing Distributions Already Made

70. The question of which assets may be taken into account and of what power there should be to increase an order, both raise the same basic problem - that is, to what extent should there be power to make provision from assets already distributed?

71. As has been pointed out (para. 16), the present position is that, whilst, in making an original order, resort may be had to assets already distributed, and an original order, theoretically at least, may be made at any time after the date of the grant - there is no power at all to increase an order once it is made (inter alia, see definition of "order" in s.2 and relate this to s.8A).

72. With regard to the matter of resorting to distributed assets in the making of an original order, the immediate questions are those that arise from an examination of our s.9A. The questions are as follows:-

- (1) Are there any other circumstances in which distributions should not be disturbed?

- (2) Does sub-section (1) provide a way in which an unscrupulous executor could act to defeat intending claimants?
- (3) If the answer to question (2) is in the affirmative, would the position be otherwise if we repealed sub-section (4)?

73. As to the matter of varying an order by increasing the provision that it makes, the inadequacy of the present provisions is best demonstrated by taking a hypothetical case: In 1948 an order is made in favour of a widow for an annuity of \$750 per year, with a right to reside in a house, rent free, the widow to pay rates, taxes, insurance and keep the house in repair. By 1968 the area in which the house is situated has become highly developed; land values have soared and so have rates, taxes and other outgoings – the outgoings, in fact, now exceed the annuity. In the same time, the capital value of the estate has more than doubled and it is now worth some \$100,000. As things stand, it would seem that the Court can do nothing to give relief to the widow.

74. Here, of course, the problem could be met without too much upset to other beneficiaries. The real difficulty arises when all the assets have been distributed.

75. Obviously, there will be many cases where it would be unfair to exact payment from persons who have benefited from a distribution already made. However, there will be other cases where it would not. If there is a feasible solution, it probably lies in leaving the Court with a discretion to order increased provision, with a stipulation that no such order is to be made that would have the effect of bearing unreasonably on those who have already benefited from distribution.