INHERITANCE (FAMILY AND DEPENDANTS PROVISION) AMENDMENT BILL 2011

Second Reading

Resumed from 31 August.

MR J.R. QUIGLEY (Mindarie) [8.02 pm]: I rise to give voice to the opposition's support for the Inheritance (Family and Dependants Provision) Amendment Bill 2011. I refer to the second reading speech of the Attorney General on this bill in which he sets out the parameters of the amendments to the bill. This is fairly dry stuff for this chamber but, nonetheless, it introduces into statute law in Western Australia at least two important amendments to the Inheritance (Family and Dependants Provision) Act 1972. The first of those is to give recognition or a right of claim to stepchildren in inheritance matters. Some time ago this provision was recognised by the Standing Committee of Attorneys-General as necessary and, as the Attorney General has pointed out, a working group was drawn up from the profession in Western Australia, including representatives of the Supreme Court, academia, the Public Trustee's office, the independent bar and the legal profession of Western Australia, which reviewed the model family provision bill as recommended by SCAG. It did not entirely agree with every provision of the model family provision bill, for to do so would be to diminish the rights of some people in Western Australia, given that in some jurisdictions on the east coast the person making a claim to the court to be provided for in the testator's estate, when there had been no specific provision, had to establish a responsibility on behalf of the deceased to make provision for that person. We have seen a couple of high-profile examples of that in the eastern states dealing with the estate of the late Richard Pratt of the Visy corporation. However, in Western Australia there is an automatic eligibility to apply to the court when provision has not been made by a testator or testatrix in the will of the deceased.

The act provides for a class of people to make application without having to establish, on the balance of probabilities, that the deceased had a responsibility to provide for the applicant, and it includes spouses, de facto spouses and children, but does not include stepchildren, and this is very important. I hope that in response the Attorney General gives some indication of an answer to the question I will ask in a moment, and one that I was discussing with the Chief Justice tonight at the opening of the college of law. He said, "What's on tonight?" and I said, "The Inheritance (Family and Dependants Provision) Amendment Bill." He said, "What does that contain?" and we went down to the provision for stepchildren and blended families, of which he said, "Well, you'd know something about that." But this provision will allow for stepchildren in a blended family to make an application, especially in those circumstances in which the child's parent had died and left his or her estate to his or her spouse, as is often the case in marriages. If the husband predeceases the wife, he leaves his estate to the wife, and if she predeceases the husband—vice versa—she leaves the estate to the husband, but where does that leave the child of the first deceased; that is, the stepchild of the last of the two parents in the blended family to die? That was not included in the legislation, although the stepchild's mother or father in this blended relationship—their natural parent—might have had a considerable estate before marrying the step-parent. All of that estate then passes, on death, to the step-parent under the provisions of the will. Where does that leave the child in these blended family situations, which are very, very common in Australian society today?

The question that I was discussing with His Honour the Chief Justice was that which is contained in a note to the bill that the Attorney General cited in his second reading speech, and the note to the bill states —

> Also, a stepchild of the deceased if the deceased had received or was entitled to receive property above an amount (which will be prescribed by regulation) from the estate of a parent of the stepchild …

I do not know whether the Attorney General, by way of interjection or response to my second reading contribution, would like to say what is contemplated as the amount and how the executive will decide the amount to be prescribed by regulation before it kicks in. What is the floor?

Mr C.C. Porter: Perhaps if I respond in due course, and break the habit of a lifetime and find the answer before I respond.

Mr J.R. QUIGLEY: Perhaps one of the only queries I have is: what is the floor, because the note says "property above an amount (which will be prescribed by regulation)", which is not yet set out? I do not quite understand where the rationale fits in there to have a floor; in other words, the estate has to be worth a certain amount before the provision kicks in. That is the very important amendment being introduced to this area of survivorship and inheritance in Western Australia.

The other part of the bill that is very, very important goes to undisclosed property. There are situations in which a deceased has, prior to death, acquired property—perhaps in a trust or by some other vehicle that could not easily be identified by the trustees of the estate—and a beneficiary, or a person who fits amongst the class of claimants defined in the legislation as being able to make a claim to the Supreme Court to be provided for, subsequently discovers that such property would have materially affected what the outcome would have been had there been an application. That application can be made to the court to vary the provisions of not only the

will but also a previous order made by the Supreme Court when the Supreme Court was blind to the existence of the other testamentary estate. The legislation also provides that should this occur and the claimant can establish that, on the balance of probabilities, there is a further asset of the estate, the claimant can make application for interim orders for maintenance, pending the final determination. This can be important in situations in which, for example, a de facto spouse was dependent upon the deceased but the deceased held the property in vehicles, the existence of which the de facto spouse had no knowledge. The spouse can suddenly find himself or herself—usually herself—in a situation in which she is destitute but discovers that the estate did, in fact, have considerable assets. In such situations, the spouse can make an application, as I understand it, to the Supreme Court for interim maintenance.

In relation to other particular clauses, we note that the bill has been scrutinised by a very professional group of experts in the field and that very similar provisions were on the cusp of being introduced into this Parliament before the Labor Party was taken to an election and I would not say thrashed, but beaten by a short neck! The responsibility was then cast upon the Attorney General and the incoming government to introduce the bill. The opposition welcomes the provisions in this bill and we support its passage through this house. We do not intend to take it into the consideration in detail stage; however, we seek an explanation from the Attorney General for both the rationale behind having a floor beneath which applications by a stepchild cannot be made, and what amount is intended to be prescribed by regulations. In all respects, subject to that explanation, we support the bill.

DR A.D. BUTI (Armadale) [8.14 pm]: I have a very few comments to make; they will only take a couple of minutes. As the shadow Attorney General has already mentioned, we are supportive of the bill, but I will refer to a couple of issues. As we all know, the law of succession has been with us for a long time and is ruled by certain rules of the courts and statutes. I have a question I would like the Attorney General to think about in his response. As there are increasing divorce rates and people being married several times throughout their lifetime, the issue of stepchildren may become quite important, and this bill makes provision for that. There is, of course, a possible problem. Through my experience with the Child Support Agency—I worked there briefly on a contract basis—I found that in many cases, for whatever reason, a spouse in a subsequent marriage would often give preference to a stepchild. For example, a man might remarry and his new wife will have a child from a previous marriage; and, for whatever reason, they often seem to be more lenient towards and supportive of the stepchild than to children from their previous marriage. It may be that it is just because of the immediate circumstances that they are living in.

Mr C.C. Porter interjected.

Dr A.D. BUTI: Yes; in other words, they are more supportive and sympathetic to the stepchild than to their own biological child from a previous marriage. I am a little concerned about whether this provision may have the potential to create greater tension in family dynamics. Of course, it makes a lot of sense to make provision for a stepchild to be able to make a claim because, as I said, divorce rates are increasing, but I would like to put on record that it can possibly create greater tension in family dynamics.

MR C.C. PORTER (Bateman — Attorney General) [8.16 pm] — in reply: I thank the members for their contributions. I will answer the two questions as best I can; there is a technical answer to the first one and, member for Armadale, I guess a more philosophical answer to the second one. It is important to keep in mind the principle of testamentary freedom. As a second observation, this has been quite an interesting process of law reform under the banner of model or harmonised law reform. The model family provisions bill was presented to the Standing Committee of Attorneys-General in July 2004, and that had its genesis in the legislative program commenced by SCAG in 1991, so this has been going on for some time. The model family provisions bill adopted—if I can use the shorthand term—probably the most progressive model of family provision, which was based around the notion that anyone should be able to claim if they are able to show a relationship of responsibility to the deceased. My own view was that that was unnecessarily wide; however, we went through the process of getting this group of experts together, because I certainly am no expert in the area of testamentary law reform, inheritance, or family and dependent provisions. The experts also came to the view that that style of legislation, which allows for a claim by anyone who can show that they were in a relationship of "responsibility", was too broad. They then suggested some different options in respect of stepchildren. I must say that I looked over those in some detail and went back and spoke to some members of the committee, because as the member for Armadale has pointed out, this is a fraught area. There are already high degrees of tension between spouses, stepchildren, natural children, members of blended families, half brothers and sisters and so forth, as to who gets what in a situation in which a family member has died and one or more members of the extended family have sought to override the deceased's will.

That brings me back to the first point: I do not consider that we should in any way ascribe too little importance to the notion of testamentary freedom. People will say that this or that should be done, or that this person should

have left money here or there, but one of the fundamental freedoms we all enjoy in a western democratic society is that we can amass a certain level of wealth throughout our lifetime and we can have, within fairly broad parameters, freedom to determine where that money goes. Of course, this legislation seeks to prevent gross choices being made that disadvantage the living to an extent that Parliament determines is unfair. For those people who are not experts in this area, and there is no reason to expect that everyone is, if a deceased person left a sizeable estate to the Cat Haven, for instance, and did not make any provision for their surviving wife or natural children, there would be a view that that was somehow a misuse of their testamentary freedom, and their testamentary freedom would be necessarily impinged upon by the terms of legislation such as that which we are discussing. Like all freedoms, testamentary freedom has its limits and it is liable to be overridden in certain circumstances by legislation.

The question then became: how far do we allow acts of this Parliament to eat into that testamentary freedom, which, generally speaking, is a relatively broad freedom? We determined not to go as far as having anyone who is in a relationship of responsibility being able to apply under the Inheritance (Family and Dependants Provision) Act because we thought that was too great an impingement on testamentary freedom. However, the situation with stepchildren is qualitatively different. Most of us—there is bipartisan support for this legislation—would view the fact that, with a greater number of blended families, there should be some ability for a stepchild to make a claim in circumstances in which they have not been provided for. What we had to do was determine, if you like, where that line should be drawn, because, again, the view was taken that simply allowing stepchildren to make application when the deceased has not chosen to leave anything to the stepchildren in their will in any and all circumstances would be too great an inroad into testamentary freedom. The line was drawn in two areas. First of all, it was to limit the ability of stepchildren to make a claim to circumstances in which the stepchild had been maintained wholly or partly, or was entitled to be maintained wholly or partly, by the deceased immediately before the deceased's death. Obviously, the situation we are talking about is juvenile stepchildren whose stepfather dies and, prior to the death, the stepfather was looking after those stepchildren. In those circumstances, it was unfair if the stepfather had not left money to the stepchildren but, indeed, had left money pursuant to his will to other persons or institutions, because those stepchildren, in effect, had no-one to look after them and no source of income. The second area was when a stepchild of the deceased would be able to claim if the deceased had received, or was entitled to receive, property with a value greater than the prescribed amount from the estate of a parent or stepchild. In answer to the member for Mindarie's question, I understand that we will adopt a similar system to that which exists in other states; that is, that the point at which the person will be able to claim is if the amount that is left to the deceased is greater than the median house price, which at the moment is about $400 000 in Western Australia. When the regulation is made, we will check exactly what the median house price is. That is the system that has existed in the other states that have similar provisions for stepchildren. The rationale for that, as I understand it, is that to simply allow a stepchild to make a claim under the Inheritance (Family and Dependants Provision) Act 1972 in any circumstance in which their natural parent has left moneys upon their death to the step-parent, "any moneys" would mean that there would be a very broad inroad into testamentary freedom. If, for instance, mum had died and had left a piece of jewellery of modest value to her husband, who is the stepfather of the mother's child in the relationship, the child's rights would be activated by virtue of a very modest amount being left by the woman to the man in the relationship. The question is: what is the right amount? There is probably no perfect answer to that, but what seems to have worked in the jurisdictions that have this system is dependent on the median house price. The idea is that it seems unfair if, for example, the woman died and left her house or something of similar value to her husband, and then the husband failed to make any kind of provision in his will upon his death to the natural child of the mother from whom he had inherited a sizeable asset, such as a house. And so it has been pegged to the median house price. That is the answer to that question.

The member for Armadale's question was: in these circumstances, is it possible that greater tensions arise because there is some form of psychology operating that sees the parent, who we assume has deceased, favouring stepchildren over their natural children? I have not had experiences —

Dr A.D. Buti: That's testamentary freedom.

Mr C.C. PORTER: Yes, and that is it, is it not? At the end of the day, what they determine to do with their assets upon their death is a matter for them, except in limited circumstances. I suggest that these are tense times, irrespective of what laws we bring in here. But this is probably about the right balance. It may be that in future we will need to consider again the issue about responsible relationships as family and domestic relationships evolve and change in the future. I hope that answers my friends' questions on these issues. That certainly brings to bear my second reading response.

Question put and passed.

Bill read a second time.

Leave granted to proceed forthwith to third reading.

Third Reading

Bill read a third time, on motion by **Mr C.C. Porter (Attorney General)**, and passed.