

INHERITANCE (FAMILY AND DEPENDANTS PROVISION) AMENDMENT BILL 2007

Introduction and First Reading

Bill introduced, on motion by **Mr J.A. McGinty (Attorney General)**, and read a first time.

Explanatory memorandum presented by the Attorney General.

Second Reading

MR J.A. MCGINTY (Fremantle - Attorney General) [10.10 am]: I move -

That the bill be now read a second time.

The Inheritance (Family and Dependants Provision) Amendment Bill will update and modernise the law in relation to family provision. In particular, the bill will enable a claim to be made against a deceased estate by a stepchild in two limited circumstances, and where there exists a duty to maintain a stepchild or there is a legitimate expectation.

The law relating to family provision, imported into Australian colonies from English law, has traditionally been regarded as a mechanism to override the effect of a deceased person's testamentary intentions, by way of a will or the rules of intestacy, which apply when a person dies not having left a will or an entirely effective will, in favour of a group of eligible people on certain grounds. The mechanism, found in legislation in all Australian jurisdictions, is an attempt to address the concern that some testators fail to have regard to commonly acknowledged responsibilities when organising the distribution of their estate upon their death or that the applicable intestacy rules may, in the circumstances, fail to provide adequately for someone to whom the testator owed such responsibilities. In each Australian jurisdiction other than Victoria, the family provision legislation specifies various categories of persons who are entitled to apply for provision out of the estate of the deceased person. Those categories have enlarged over the years to include individuals who would not traditionally have been regarded as family members of the deceased person. In short, family provision legislation enables the court to override the deceased individual's discretion, with a judicial discretion.

I would like to highlight some of the key changes made by the bill that modernise the law of family provision.

Stepchildren: The bill will allow for claims by stepchildren, in limited circumstances. These circumstances include where the stepchild is being wholly or partly maintained or entitled to be wholly or partly maintained immediately before the deceased's death and in circumstances in which the deceased had received or was entitled to receive property of a value greater than a minimal value - which will be prescribed by regulations - from the estate of a natural parent of the stepchild.

Ms S.E. Walker: Aren't stepchildren able to claim now?

Mr J.A. MCGINTY: Not at the moment, no.

An example of the latter, is a circumstance in which a child's natural parent remarries and, as is common, the spouses leave all of their estate to each other. There is an understanding that, on the death of the survivor of the spouses, the survivor's stepchild can expect to receive all or a substantial part, of the estate, which came to the surviving spouse from the child's natural parent. For various reasons this understanding may not be adhered to.

Kinship relationships: The Western Australian Law Reform Commission published its final report on Aboriginal customary law in September 2006 and recommended that the list of persons entitled to claim against a testator or intestate estate of an Aboriginal person and Torres Strait Islander be extended to include a person who is in a kinship relationship with the deceased that is recognised under the customary law of the deceased and who at the time of the deceased's death is being wholly or partly maintained by the deceased. This recommendation is included in the bill.

Costs: In the case of smaller estates, the cost of making an application for family provision is often prohibitive. Importantly, the bill requires that proceedings for family provision in relation to smaller deceased estates are to be conducted speedily and with as little formality and technicality as is practicable, and thereby reduce costs.

Undisclosed property: The bill allows the court to vary a previous court order for family provision if previously undisclosed property is discovered and the undisclosed property would have materially affected the result.

Interim Orders: The bill allows the court to make interim orders for maintenance pending the final determination of the family provision application.

Probate and Letters of Administration: It is recognised that there have been difficulties requiring a grant of probate for family provision purposes when a person entitled to a grant of probate has refused to take it. If there is no grant of probate there is no-one against whom an application can be made. The bill allows for

administration to be granted purely for the purpose of allowing for the making of an application for family provision and it can be made to any person who is an eligible person for family provision.

Evidence: The bill allows for oral evidence of a person to be considered by the court, for example, a statement by the now deceased to another about the potentially disqualifying conduct of an applicant. In 1991 the Standing Committee of Attorneys-General of Australia, SCAG, approved the development of uniform succession laws for all Australian states and territories, as there is little consistency between succession laws across the states and territories. The Queensland Law Reform Commission coordinated the project and, in December 1997, the national committee comprising representatives from each jurisdiction presented a final report to SCAG on the law of family provision. This report contained a model family provision bill for introduction in each jurisdiction. To date this model bill has not been adopted in any state or territory, although the matter is under active consideration in New South Wales. In any event, the benefits contained in the present family provision legislation should not be surrendered for the purpose of uniformity alone. Further, retaining categories of applicants and disallowing notional estates will provide more certainty than the model provisions, thereby reducing unnecessary litigation.

In late 2003, I established a working group comprising experts in the area drawn from the Supreme Court of WA, the legal profession, academia, the Public Trustee's Office and the independent Bar to review the law of succession including family provision. This bill largely reflects the recommendations of the working group. That working group produced a report resulting in the Wills Amendment Bill, currently before the Legislative Council. It has made recommendations for law reform in the area of intestacy and will report next year on administration.

This bill reforms and modernises the law of family provision in Western Australia. It will allow for, in limited circumstances, claims by stepchildren, recognise kinship relationships in Aboriginal and Torres Strait Islander culture and will minimise the cost to parties in small estate applications.

I commend the bill to the house.

Debate adjourned, on motion by **Mr A.J. Simpson**.