INHERITANCE (FAMILY AND DEPENDANTS PROVISION) AMENDMENT BILL 2011

Second Reading

Resumed from 10 August.

HON SUE ELLERY (South Metropolitan — Leader of the Opposition) [3.38 pm]: The Inheritance (Family and Dependants Provision) Amendment Bill 2011 goes to modernising family provisions so that if somebody who is captured in the definitions in this bill believes they have not been adequately provided for in someone's will or, indeed, if no will exists, they can make a claim to the court. The bill sets out the judicial discretion to override, if it is deemed appropriate, the terms of somebody's will, or, indeed, if they are intestate. Much of the content of the bill reflects work that was done by a working group established under the previous government. Indeed, a bill in very similar terms was introduced by the previous government but was not proceeded with. This bill is different from the Victorian bill, for example, in that a relatively narrow range of people can make a claim under its provisions. The Victorians have adopted a fairly broadbrush approach, but that is not the path that Western Australia has gone down. The Inheritance (Family and Dependants Provision) Amendment Bill 2011 spells out the eligible claimants who can make a claim. That claim stands eligible if the claimant can demonstrate to the court that at the time of the person's death, the claimant was being maintained by that person.

The major change in the bill is the new rights for stepchildren. Previously, stepchildren were not taken into account in family provision in Western Australia. Indeed, Western Australia will still have the narrowest range of options available to stepchildren. Every other jurisdiction in Australia has a broader application for stepchildren. If a stepchild has been maintained by a step-parent, or if the biological parent left their provisions to the step-parent and the step-parent then dies, this bill gives the stepchild the right to make a claim and gives the court the discretion to override any will or, in the absence of a will, to make decisions about how the estate might include the stepchildren. I am advised by the government adviser that the government does not anticipate a huge number of claims from stepchildren. Some of the issues in the bill might be anticipated to arise in the case of very large estates.

The rest of the changes in this bill are administrative. The terminology for "grandchildren" has been redefined to be more simply defined. The bill allows for orders to be issued if new evidence can be provided so that the court will now have the power to revisit an original order. The bill also allows for interim orders, which is particularly important if someone is able to claim that they are in financial difficulty and were being maintained at the time of the death of the person against whose estate they were making a claim. This legislation is not retrospective. Those people who have outstanding claims and arguments among their families about how estates are to be distributed will not be given comfort by this bill. It also allows for evidence of the deceased's intention to be heard so that a court can ask for and be provided with evidentiary material that goes to the intent of the deceased person and the court can then take that into account. That may well be part of the reasoning that leads a court to decide to override something that might be explicitly spelt out in a will.

They are the essential policy provisions of the bill. This legislation was described to me as being very much a compromise in respect of the provisions relating to stepchildren in particular. As I said, the provisions in this bill are not as broad as those in some other jurisdictions in Australia. This is the second time that the Parliament has had a bill of this nature before it. We introduced it the last time and we will support it this time.

HON ALISON XAMON (East Metropolitan) [3.44 pm]: The Greens (WA) will support the Inheritance (Family and Dependants Provision) Amendment Bill 2011. We note that it is an improvement on the current intestacy and will provisions. When a person dies, the estate is distributed according to the person's will, or, if the person dies intestate, according to the provisions of the Administration Act. The Inheritance (Family and Dependants Provision) Act 1972 enables certain categories of people to apply to the Supreme Court for a greater share of the deceased's estate if either the will or the Administration Act provisions make inadequate provision for that person's proper maintenance, support, education and advancement in life. The categories of people who can apply under the Inheritance Act include the deceased's spouse, including de facto partners. A former spouse or de facto partner can also apply, but only if they were receiving or are entitled to maintenance from the deceased because they had ongoing maintenance responsibilities for children. Children and grandchildren can also apply under the Inheritance (Family and Dependants Provision) Act, but only if the grandchild was either being maintained by the deceased or if the child's parent who was the child of the deceased had already passed away. The parent of the deceased can also apply under the Inheritance (Family and Dependants Provision) Act. This bill amends the Inheritance (Family and Dependants Provision) Act to extend categories of people who can claim to also include limited claims by stepchildren. This brings the legislation more into line with our modern understanding of the family structure.

I note that Western Australia is the only state that does not provide for claims by stepchildren at all and allows a claim to be made only if the person in question is being, or is entitled to be, maintained wholly or partly by the

deceased person immediately before their death, as is the case in South Australia and the Northern Territory. Other states allow claims to be made in broader circumstances than that. Victoria has already dispensed with claimants and liabilities based on the establishment of the responsibility of the deceased towards the applicant. Victoria has a very broad approach to who can make a claim. The bill also allows a stepchild 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 of a stepchild. That would apply in my situation. I have three children who are all biologically mine. If I pass away, I intend to leave everything to my husband. Without this change to the legislation, he would, in theory, be able to give everything to my two sons only and my daughter would not be entitled to make a claim. Although I am not anticipating that that will happen, there are people in that type of situation. This legislation will help tidy that up and it will ensure that all three of my children will be able to ultimately make a claim on my husband's estate, which would largely be my former estate. That is a really important amendment.

I note that stepchildren's claims, along with other claimants, are subject to the legislative requirements of section 6 of the Inheritance (Family and Dependants Provision) Act, which requires that a claimant has to establish that adequate provision had not been made out of the estate of a deceased person for the proper maintenance, support, education or advancement in life of any persons listed, which, under the bill, include limited claims by stepchildren. I note also that the bill allows for oral evidence of a person to be considered in a family provision application. That could be, for example, a statement by the deceased to another about the potentially disqualifying conduct of an applicant, or perhaps a member of Parliament who puts on the *Hansard* record that it is the member's intention that all three of her children will end up getting exactly the same amount for their own estates! Perhaps that will now be able to be considered! The bill allows the Supreme Court to vary a previous court order for family provision in the event that previously undisclosed property is discovered and that the undisclosed property would have materially affected the result. It also enables the court to make interim orders for maintenance, pending the final determination of the family provision application.

In December 1997, which was quite some time ago, a project coordinated by the Queensland Law Reform Commission resulted in a model bill being presented to the Standing Committee of Attorneys-General in an effort to achieve uniform succession laws. My understanding is that that came about because of recommendations that were made several years prior. Therefore, this amending legislation has been about 20 years in the making. In late 2003 the Attorney General at the time established a working group to review the succession laws in Western Australia. The members of that group included legal practitioners who work in succession law, a Public Trustee representative, a private trustee representative, a university lecturer and people with a background in law reform. I note that the recommendations of that working group were more cautious than the recommendations for the model bill. The working group did not recommend eligibility to make a claim on a deceased person's estate on the basis of the establishment of responsibility on the part of deceased persons towards the applicant, so that does not follow the Victorian model. The working group recommended instead that the current system be retained in which automatic eligibility to apply for family provision be granted to the class of persons as set out in the Inheritance (Family and Dependants Provision) Act 1972. It did not recommend provisions allowing for notional estates. By that I mean property that can be notionally added back to the estate of the deceased so that the court can use the property for distribution to an eligible person. But I note that recommendations of that working group were reflected in Hon Jim McGinty's bill, the Inheritance (Family and Dependants Provision) Amendment Bill 2007, which was passed by the Assembly, but became one of the many bills that was prorogued with the change of government. I note that the current bill is a shorter version of that 2007 bill. I particularly want to point out some of the differences between this bill and the original bill, and some of the omissions from that original bill introduced by the former Attorney General on the recommendations of that working group, bearing in mind that that in itself was a more cautious model than what was originally proposed arising from the Queensland Law Reform Commission's model bill.

Omitted from the current bill is the recognition of Aboriginal and Torres Strait Islander kinship. The 2007 bill provided that Aboriginal and Torres Strait Islander people, both in a kinship relationship with the deceased and being maintained by the deceased, be also entitled to make a claim. This stemmed from findings by the WA Law Reform Commission's Aboriginal customary laws final report, which included some recommendations relevant to succession. This inheritance bill before the Council omits this provision. When I asked about this in the policy briefing I was advised that it was a policy decision taken by the current government to remove that provision. I know there are gaps in the interaction between customary law and current WA legislative provisions, but I note that the New South Wales legislation allows the court when making decisions about family provision to consider any relevant Aboriginal or Torres Strait Islander customary law. In his reply to this debate I would like the parliamentary secretary representing the Attorney General to explain why the government chose to omit this provision and whether the government supports any of the Law Reform Commission recommendations in its Aboriginal customary laws final report.

Other issues concern stepchildren. The definition in clause 5 of the bill refers to a child of the deceased's spouse or de facto partner—if the de facto partner is one in whose favour an order can be made under the act—who was living when the deceased entered that marriage–de facto relationship and who is not a child of the deceased. Clause 9 of the bill provides for stepchildren to claim in either of two situations. The first is if they were, or were entitled to be, partly or wholly maintained by the deceased immediately before the deceased's death. The second is if the deceased was the beneficiary of the estate of the stepchild's parent and that share was worth more than the prescribed amount, otherwise than as a creditor of the deceased parent's estate. The latter addresses the situation in which a step-parent, having benefitted from a child's parent's estate, leaves his or her own estate to only his or her natural children and cuts out the stepchildren. That could apply to my family, as I indicated earlier, but I am sure would never occur. I understand that this is something that, unfortunately, happens frequently. I personally know of people who have lost natural parents and subsequently fallen out with the step-parent, and that step-parent has then made a unilateral decision to cut that child out of any future will, even though that step-parent had been the beneficiary of that child's parent's estate. I do not think anyone here would agree that that is fair or just. It is good to see that those situations now have some capacity to be resolved. However, I do note that this provision is limited in its operation and addresses only the worst cases. It will not apply if that prescribed amount is not reached, nor would it assist stepchildren with assets held by the child's parent and the deceased as joint tenants; for example, the matrimonial home, which could easily be the primary asset. This is because on the death of a joint tenant, the asset automatically goes to the survivor without forming part of the estate. This clause does not operate in that situation. I understand that the working group was unable to come up with a solution to this, partly because laws other than succession law apply also to joint tenants, and partly because of potential problems arising from inventing a notional estate; for example, if the actual value is less than the notional value. The best option therefore seems to be public education so that parents who repartner can make informed decisions about their property arrangements. For example, if they choose to own property together, they may opt for a tenancy in common arrangement rather than joint tenancy. According to the briefing I received, stepchildren are not entitled to claim under the family and dependants' provision following a divorce, unless they were being, or were entitled to be, maintained by the deceased immediately prior to the deceased's death. I assume that in those instances the biological parent will have already received their share of the estate via the split-up of the assets following the divorce.

No change is proposed in the bill to the provisions affecting grandchildren, although some wording is amended. Grandchildren can apply only if they were either being maintained by the deceased immediately before the death or if one of their parents who was the deceased's child died before the grandparent did. We know that sometimes children move back and forth between the care of the grandparents and the care of parents, and if the grandparent's death occurred while the child was in the care of the parents, the situation may well fall outside this provision. However, the organisation Grandparents Rearing Grandchildren WA says that grandparents who are raising their grandchildren are usually doing so because the parents cannot, and they cite the main reasons for that are issues of drug addiction, and they are very careful to make arrangements when they die for the support of their grandchildren. Such arrangements might be in the form of a will or might involve making the grandchild a joint tenant of the grandparent's home so that the home passes to the child automatically on the death of the grandparent. It therefore seems that it is not necessarily a priority to extend the provisions in respect of grandchildren at this point.

The bill contains omissions regarding costs. I note that the original McGinty bill contained the following provision amending section 12, which reads —

> Proceedings under this Act in relation to a deceased's estate with a value less than the prescribed amount are to be conducted speedily and with as little formality and technicality as is practicable, and so as to minimise the costs to parties.

The current bill does not include a similar provision for the court to make orders regarding costs, although section 14(6) of the principal act provides that the court may make such an order regarding costs if it deems that that is just. Practice direction 4 of 2008 provides that the court will ensure that the principle of proportionality applies. By that I mean that the court will consider capping costs of a successful claim to an estate worth under half a million dollars and consider whether costs should follow the event rather than be awarded from the estate, although I understand that these directions are not binding.

I would like to raise the concern that with the extension of the people who can claim, there is the possibility that increased claims could lead to increased costs. It is regrettable that the question of costs has not been dealt with. I would not like to see this result in estates being left virtually bankrupt because of legal fees paid out of the estate. Unfortunately, the nature of wills and the vitriol that can be associated with contested wills means that those sorts of scenarios are always possible. I would like to ask the government why it has chosen to not include this earlier provision. I understand that New South Wales, for example, has imposed a cap on how much a person who challenges an estate can claim in costs.

Although I have those few points I would like to get some clarification on, I feel that the Inheritance (Family and Dependants Provision) Amendment Bill 2011 is, overall, going in the right direction. I think many other provisions could have been included that would have made it even better, but it certainly recognises the complexities that can arise with different family structures. On that note, the Greens (WA) will be supporting this legislation.

HON NICK GOIRAN (South Metropolitan) [4.01 pm]: I had not intended speaking on the Inheritance (Family and Dependants Provision) Amendment Bill 2011 when I arrived today; however, noting that it is now on the notice paper and up for discussion, I wanted to raise one matter. It seems that there is broad support on this matter, and I do not believe there is a supplementary notice paper for this bill, so it may well be the case that the matter will not go to committee. I wanted to seek a point of clarification from the parliamentary secretary on one issue, if he might be good enough to provide an answer during his summing-up of the second reading debate. It is a matter that I brought to the attention of the Attorney General some time ago, and as recently as Friday I understood from the Attorney General that a response would be coming to me. As at this moment in time I do not have that response, hence I feel obligated to raise it now. It would be somewhat pointless to get the answer after the matter has been passed by the house, should that occur.

I hope the issue I want to raise is quite a minor one. It is related to statements made in the second reading speech delivered by the parliamentary secretary representing the Attorney General. The speech reads —

> In this state, a working group comprising experts in the area drawn from the Supreme Court of Western Australia, academia, the Public Trustee's office, the independent bar and the legal profession has reviewed the model Family Provision Bill.

The speech then explains what the expert working group did, and in particular it focuses on certain aspects of the model Family Provision Bill that the working group did not support.

The matter that is not abundantly clear to me at the moment is that the bill before us has obviously been approved by the government and its cabinet, and I think it would be helpful for the house to know whether there were any aspects of the review by the expert working group that were not agreed to by the Attorney General and the government in bringing this bill before the house. As I say, I understand, from informal discussions I have had with the Attorney, that one minor matter was not agreed to by the Attorney, but at present I am unsure what that minor matter is. If it is at all possible, without the need to go into committee, it might be helpful if that matter could be addressed in the summing-up. It is regrettable that I have had to raise it at this time, but as I say it would be somewhat pointless in me continuing to pursue that line of inquiry outside this place once the matter passes before the house.

With those comments, I certainly do not propose to oppose the bill, but it would be nice to know the answer to that question.

HON MICHAEL MISCHIN (North Metropolitan — Parliamentary Secretary) [4.04 pm]: — in reply: I thank the opposition and the Greens (WA) for their support for the bill.

I will not go over all the material that has been canvassed so far, but I might just deal with Hon Nick Goiran's contribution to the debate. I regret that I was not able to take note of much of what he was concerned about, and I certainly do not have a list before me of the various things that were canvassed by the working group established to look into the model Family Provision Bill, and its recommendations. I do not have those to hand, but I can provide them to him at some stage if he wishes to know more detail about that. It does not, with respect, seem germane to the merits of the particular bill before the house anyway, but I am happy to look into the issues he has raised, and provide that information at some later time.

I will briefly deal with the two issues raised by Hon Alison Xamon. First was the question of the costs and the speedy resolution of proceedings. Under the Inheritance (Family and Dependants Provision) Amendment Bill 2007, that was addressed under a proposed amendment to section 12 of the principal act, and would have inserted a subsection (3) to the following effect —

> Proceedings under this Act in relation to a deceased's estate with a value less than the prescribed amount are to be conducted speedily and with as little formality and technicality as is practicable, and so as to minimise the costs to the parties.

In the brief opportunity I have had to inquire into that, I do not believe a cap was actually specified in the legislation.

Hon Alison Xamon: That is correct.

Hon MICHAEL MISCHIN: The only effect of the provision would have been to encourage the court to proceed with expedition and with as little formality as possible, in order to save costs. That has not been included

in the current bill; however, it is the subject of practice directions issued by the Supreme Court. One may argue about whether it is helpful or not to have such a provision in legislation, but I would have thought that, really, it is a matter for the courts to determine in any case by way of practice directions. My understanding is that practice directions have been issued that are much to the same effect, in any event, and so there is no need for legislative intervention in that regard. It is also a matter that will require some flexibility on behalf of the court. The proposed provision provided that the proceedings be conducted speedily and with as little formality and technicality as is practicable, with the particular aim of reducing costs. What may be practicable and what may be necessary in a particular case is a matter for the judicial officer seized of that case at the time. I do not think the bill suffers for not having that provision included.

As for the recognition of kinship and the like, it is my understanding that the working group did not recommend anything on that. I may be wrong about that, but at any rate the decision to not include broader categories such as that of Aboriginal kinship and the like was a policy decision. I am not privy to the rationale behind that decision, but I do see, however, some prima facie difficulties with it. We are looking at a question of who may claim under a will for provision as a dependent or otherwise. Some certainty as to the nature of the relationship between the deceased and likely beneficiaries is required to determine who ought to be able to interfere with the ordinary course of testamentary disposition and property rights concerned with that. So there is the potential, with the arguable, or perhaps debatable, nature of kinship relationships, that uncertainty will arise about whether a person ought to be included in that list of claimants. Dependent stepchildren and natural children and the like are a fairly certain subset of people to be included, but when we start talking about what may be regarded as kinship relationships there is a much broader group of people who may be involved. I confess that I do not know the detail of those circumstances, so I cannot speak authoritatively on it. But at the end of the day, it was a policy decision to not include that in the amendments proposed by the bill at this time, although, of course, if a case can be made, some future amendment may very well accommodate those sorts of issues. Other than that, I again commend the bill to the house as a worthwhile amendment to the current situation.

Just to go back to one other aspect, and that is the evidentiary issue that Hon Alison Xamon raised, there will now be the option of considering a range of evidence that might not otherwise have been made available to a court in determining what the testamentary intention was and the like.

Hon Alison Xamon: Such as declarations in *Hansard*.

Hon MICHAEL MISCHIN: Well, that is the part that I was going to raise. I am not sure whether that might not still run into problems with parliamentary privilege and the use of material in Parliament as evidence one way or the other, so I would not be so dogmatic about it. But, at any rate, the scope of the evidence that is available will be broadened, although whether quite as extensively as what Hon Alison Xamon might, in a rush of blood to the head, say in the house, I do not know. I commend the bill to the house.

Question out 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 **Hon Michael Mischin (Parliamentary Secretary)**, and transmitted to the Assembly.