

# ***INHERITANCE (FAMILY AND DEPENDANTS PROVISION) BILL 2007***

## **EXPLANATORY MEMORANDUM**

An Act to make provision for the maintenance and support of the family and dependants of the deceased persons out of the assets of the deceased's estate.

### **PART 1 – PRELIMINARY**

#### **Clause 1. Short title**

Clause 1 provides that the Bill is to be known as the *Inheritance (Family and Dependants Provision) Amendment Act 2007* (WA).

#### **Clause 2. Commencement**

Clause 2 makes provision for the commencement of the *Family Provision Act 1972* (WA). Sections 1 and 2 commence on assent, whilst the rest of the *Family Provision Act 1972* (WA) will apply on a day fixed by proclamation and different days may be fixed for different provisions.

#### **Clause 3. The Act amended**

Clause 3 provides that the amendments in the Bill are to the *Inheritance (Family and Dependents Provision) Act 1972* (WA), unless otherwise indicated.

### **PART 2 – INHERITANCE (FAMILY AND DEPENDENTS PROVISION) ACT 1972 AMENDED**

#### **Clause 4. Short title amended**

This clause renames the *Inheritance (Family and Dependents Provision) Act 1972* (WA) the *Family Provision Act 1972* (WA).

#### **Clause 5. Section 4 amended**

Section 4 is amended by providing definitions for Aboriginal person, Torres Strait Islander and stepchild; as the *Family Provision Act 1972* (WA) will deal with these claimants – see Clause 9.

#### **Clause 6. Section 5A inserted**

Clause 6 provides that the State is bound in all its capacity.

#### **Clause 7. Section 6 amended**

Clause 7 allows a Court to revoke or alter an order that was made or could have been made in favour of a person; if the evidence before the Court about the nature and extent of the deceased person's estate did not reveal the existence of the undisclosed property and the value of the undisclosed property would have materially affected the provision that the Court ordered or could have ordered.

The clause also deals with procedural matters in relation to such an application.

### **Clause 8. Section 6A inserted**

The Court will have power, pending the final determination of a family provision application to make interim orders and the power is tied to the immediate needs of the applicant – being maintenance, support or education (including past maintenance, support or education provided after the death of the deceased).

### **Clause 9. Section 7 amended**

The extent to which a grandchild is entitled to claim for family provision has been redrafted for clarity; however the effect of the clause will not change the grandchild's entitlement.

A stepchild can now claim in limited circumstances. A stepchild of the deceased who was being maintained wholly or partly or was entitled to be maintained wholly or partly by the deceased immediately before the deceased's death is entitled to make a claim. 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 natural parent of the stepchild can make a claim for family provision. An example of the latter stepchild claim would be where a child's natural parent re-partners and, as is common, the partners leave all of their estate to each other. In these situations there may be an understanding, that on the death of the survivor of the partners, the survivor's stepchild can expect to receive all, or a substantial part of the estate which came to the surviving partner from the child's natural parent. For various reasons these understandings may not be adhered to.

The Western Australian Law Reform Commission in its report *Aboriginal Customary Laws – Final Report* recommended that the list of persons entitled to claim against a testate or intestate or estate of an Aboriginal person or Torres Strait Islander be extended to include a person who is in a kinship relationship with the deceased which is recognised under the customary law of the deceased and who immediately before the deceased's death was wholly or partly maintained by the deceased. This recommendation has been adopted herein.

The clause amends to modernise and simplify the language in the section, in particular, "*en ventre sa mere*" and lawful wedlock.

### **Clause 10. Section 11 amended**

This clause changes the term "at the time of his death" to avoid an argument that the term should be interpreted literally. Literally, at the time of the death of the deceased, the deceased can only be supporting another through their will, whether that person is being supported wholly or partly. Many claims under the Act arise because an applicant is not being supported through the deceased's will.

### **Clause 11. Section 12 amended**

All claims under the family provision legislation are determined in the Supreme Court jurisdiction. One significant problem with family provision schemes is the question of cost. In the case of smaller estates the cost of making an application for family provision is often prohibitive. Clause 10 ensures that the costs in relation to applications under the *Family Provision Act 1972* (WA) for smaller estates are to be

conducted speedily and with as little formality and technicality as is practicable, and thereby minimises the costs to the parties.

#### **Clause 12. Section 19 amended**

Clause 11 deals with the present requirement to obtain Court approval to assign or charge an interest arising from an order of the Court in all instances. The clause provides that there should not be a requirement to obtain a Court order if the Court makes a final order and beneficial title to property is vested in the applicant following the order, as the applicant has the same rights as any beneficial title owner and can do as he or she pleases with the property. Thus if the matrimonial home is ordered by the Court to be transferred to the surviving partner without limitation, the surviving partner is not prevented from selling or mortgaging the home. However, if the Court creates a trust of which the applicant is a life tenant, the applicant cannot assign or charge the life interest without the consent of the Court.

#### **Clause 13. Sections 20A and 20B inserted**

Clause 12 deals with evidence of character and conduct and the admissibility of statements of the deceased in relation to family provision claims. This clause is based on a New South Wales provision and will allow the Court to consider previous oral representations of the deceased in family provision claims.

The clause also provides for regulations to prescribe amounts as required.

### **PART 3 – OTHER ACTS AMENDED**

#### **Clause 14. Administration Act 1903 amended**

Clause 13 deals with the need for a grant of probate prior to making the application for family provision. The clause allows for administration to be granted purely for the purposes of making an application for family provision and it can be made to any person who is an eligible person. The amendment addresses the difficulties experienced in requiring a grant of probate for family provision purposes where a person entitled to a grant of probate has refused to take it. If there is no grant there is no one to bring an application against. This clause is based on a New South Wales provision.

#### **Clause 15. Trustees Act 1962 amended**

Clause 14 deals with issues arising from two recent Supreme Court decisions in *Pugh v Bernard John Delgado as Executor of the Estate of the late Audrey May Hamilton, the Administrator of the Estate of Ronald Wilson Hamilton (dec)* [2006] WASC 267 and *Bickford v Bickford* [2006] WASC 268. Whilst it may be said that the law is now settled the clause makes it clear, in line with the above decisions, that the effect of section 65(5) of the *Trustees Act 1962* (WA) is that an order can be made under section 65 where the application is made within the time specified in section 7(2)(a) of the *Family Provision Act 1972* (WA) or within any extended period of time allowed by the court under section 7(2)(b).

The clause also deals with references in the *Trustees Act 1962* (WA) to the earlier Act and takes account of the name change.