

THE INHERITANCE (FAMILY AND DEPENDANTS PROVISION) BILL
2011

CLAUSE NOTES

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 2011 (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 remainder of the *Family Provision Act 1972 (WA)* will apply on a day fixed by proclamation and different days may be fixed for different provisions.

Part 2 – Inheritance (Family And Dependants Provision) Act 1972 Amended

Clause 3. The Act amended

Clause 3 provides that the amendments in the Bill are to the *Inheritance (Family and Dependants Provision) Act 1972 (WA)*.

Clause 4. Short title amended

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

Clause 5. Section 4 amended

Section 4 is amended by providing a definition for 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 the Supreme 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 7A inserted

The Supreme 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 (taking into account past maintenance, support or education provided after the death of the deceased).

Clause 9. Section 7 amended

"En ventre sa mere" has been deleted in favour of the plain English definition - "born within 10 months after the deceased's death".

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

Western Australia is the only state or territory that does not provide for stepchildren claims at all. 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 parent of the stepchild can make a claim for family provision. An example of a stepchild's claim is where a child's 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 parent. However, for various reasons these understandings may not be adhered to.

The clause also modernises the language by changing "a lawful wedlock" to "legal marriage".

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 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 12. Section 20 amended

The term "lawful wedlock" is again updated.

Clause 13. Sections 21A and 21B inserted

Clause 13 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 for stepchildren.

Part 3 – Other Acts Amended

Clauses 14 and 16

The clause also deals with references in the *Trustees Act 1962* (WA) and *Administration Act 1903* (WA) to the earlier Act and takes account of the name change.

Clause 15. Trustees Act 1962 amended

Clause 15 deals with issues arising from two 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).