



Western Australia

Inheritance (Family and Dependants Provision) Act 1972

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at 5 September 2003

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Inheritance (Family and Dependants Provision) Act 1972

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

1. Short title

This Act may be cited as the *Inheritance (Family and Dependants Provision) Act 1972*¹.

2. Commencement

This Act shall come into operation on a date to be fixed by proclamation¹.

3. Repeal and amendments

- (1) On the coming into operation of this Act the *Testator's Family Maintenance Act 1939-1962*, is repealed.

[(2), (3) Omitted under the Reprints Act 1984 s. 7(4)(e).]

4. Interpretation

- (1) In this Act, unless a contrary or other intention appears —
“**Administration**” has the same meaning as it has in the
Administration Act 1903;

“Administrator” means any person to whom probate of the will of a deceased person is granted, or to whom Administration is granted; and includes the Public Trustee, in any case where he is deemed to be an executor or administrator by reason of having filed an election to administer, and any Administrator appointed by direction of the Court in accordance with section 18;

“child” in relation to any person or persons includes an illegitimate child;

“Court” means the Supreme Court, or a Judge;

“grandchild” in relation to any person or persons includes an illegitimate child of a child of that person;

“will” includes a codicil and any testamentary instrument.

- (2) In any proceedings under this Act a matter of fact shall be taken to be proved if it is established to the reasonable satisfaction of the Court.
- (3) Where a provision of this Act requires the Court to be satisfied of the existence of any ground or fact or as to any other matter, it is sufficient if the Court is reasonably satisfied of the existence of that ground or fact or as to that other matter.
- (4) For the purposes of this Act, other than for the purposes of section 7(1)(e), the relationship between a parent and a child and any other relationship traced in any degree through that relationship, shall be recognised only if parentage is admitted by or established against the parent in the parent’s lifetime.
- (4a) Subsection (4) does not apply to or in relation to a relationship established by the *Artificial Conception Act 1985*.

[Section 4 amended by No. 3 of 2002 s. 80; No. 28 of 2003 s. 92.]

5. Application

- (1) The provisions of this Act apply in all cases, whether the deceased died before or after the coming into operation of this

Act, but so that no distribution of any part of the estate of a deceased person that has been made before the coming into operation of this Act shall be disturbed in favour of any person by reason of any application or order made under this Act if it could not have been disturbed in favour of that person by reason of any application or order made under the *Testator's Family Maintenance Act 1939-1962*, now repealed.

- (2) The provisions of sections 15, 16 and 17 of this Act apply to orders made before the coming into operation of this Act under section 11 of the *Guardianship of Infants Act 1920*².
- (3) Notwithstanding the repeal of the *Testator's Family Maintenance Act 1939-1962*, effected by section 3(1) of this Act —
 - (a) every order that is, under or by virtue of that Act, still in force on the coming into operation of this Act, continues to have effect as though made under this Act;
 - (b) every proceeding that has been commenced under that Act and not completed shall be continued as though this Act had been in operation when the proceeding was so commenced.

6. Claims against estate of deceased person

- (1) If any person (in this Act called “**the deceased**”) dies, then, if the Court is of the opinion that the disposition of the deceased's estate effected by his will, or the law relating to intestacy, or the combination of his will and that law, is not such as to make adequate provision from his estate for the proper maintenance, support, education or advancement in life of any of the persons mentioned in section 7 as being persons by whom or on whose behalf application may be made under this Act, the Court may, at its discretion, on application made by or on behalf of any such person, order that such provision as the Court thinks fit is made out of the estate of the deceased for that purpose.

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- (2) The Court in considering for the purposes of subsection (1) whether the disposition of the deceased's estate effected by the law relating to intestacy, or by the combination of the deceased's will and that law, makes adequate provision for the purposes of this Act shall not be bound to assume that the law relating to intestacy makes adequate provision in all cases.
- (3) The Court may attach such conditions to the order as it thinks fit, or may refuse to make an order in favour of any person on the ground that his character or conduct is such as in the opinion of the Court to disentitle him to the benefit of an order, or on any other ground which the Court thinks sufficient.
- (4) In making any such order the Court may, if it thinks fit, order that the provision may consist of a lump sum or a periodical or other payment.

7. Persons entitled to claim

- (1) An application for provision out of the estate of any deceased person may be made under this Act by or on behalf of all or any of the following persons —
 - (a) a person who was married to, or living as the de facto partner of, the deceased person immediately before the death of the deceased person;
 - (b) a person who at the date of the death of the deceased was receiving or entitled to receive maintenance from the deceased as a former spouse or former de facto partner of the deceased whether pursuant to an order of any court, or to an agreement or otherwise;
 - (c) a child of the deceased living at the date of the death of the deceased, or then *en ventre sa mere*;
 - (d) a grandchild of the deceased who at the time of death of the deceased was being wholly or partly maintained by the deceased or whose parent the child of the deceased had predeceased the deceased living at the date of the death of the deceased, or then *en ventre sa mere*;

- (e) a parent of the deceased, whether the relationship is determined through lawful wedlock or otherwise, where the relationship was admitted by the deceased being of full age or established in the lifetime of the deceased.
- (2) No application under subsection (1) shall be heard by the Court unless —
 - (a) the application is made within 6 months from the date on which the Administrator becomes entitled to administer the estate of the deceased in Western Australia; or
 - (b) the Court is satisfied that the justice of the case requires that the applicant be given leave to file out of time.
- (3) A motion for leave to file out of time may be made at any time notwithstanding that the period specified in subsection (2)(a) has expired.

[Section 7 amended by No. 75 of 1986 s. 2; No. 3 of 2002 s. 81.]

8. Orders after distribution

- (1) On an application for an order under this Act, the Court may make an order under section 65 of the *Trustees Act 1962*, in lieu of an order under this Act, in any case where the estate of the deceased, or part thereof, has been distributed among the persons entitled under the will or intestacy.
- (2) Where the Court, in exercise of the power conferred by subsection (1), makes an order under section 65 of the *Trustees Act 1962*, it shall have the same powers in respect of that order as it has in respect of an order made under this Act.

9. Order not to be inequitable as regards assets already distributed

In determining whether, and in what way, provision ought to be made by an order, the Court shall have regard to the provisions of section 65(8) of the *Trustees Act 1962*.

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10. Order to take effect as codicil or as a devolution on intestacy

Every provision made by an order shall, subject to this Act, operate and take effect either as if the same had been made by a codicil to the will of the deceased executed immediately before his death or, in the case of intestacy, as a modification of the applicable rules of distribution.

11. Power of Administrator to distribute where immediately necessary

Where for the purpose of providing those things immediately necessary for the maintenance, support or education (including past maintenance, support or education provided after the death of the deceased) of any person who was totally or partially dependent on the deceased at the time of his death, an Administrator distributes the whole or any part of the estate to any such person, being a person entitled thereto, an action shall not lie against him in respect of such distribution and no order made under this Act or under section 65 of the *Trustees Act 1962*, shall disturb such distribution, whether or not the Administrator had notice at the time of the distribution of any application, or intention to make an application, that would affect the estate.

12. Procedure

- (1) Notice of an application under this Act shall be served by the applicant on the Administrator but it shall not be necessary to serve any notice of an application on any other person, or to make provision for the representation of any person on any application, by reason only of the person being entitled to apply, unless the Court, either at the time the direction is sought or subsequently considers that there are circumstances which render it desirable that the person be served or represented and so directs.
- (2) Where an application has been filed by or on behalf of any person, it may be treated by the Court as an application made on

behalf of all persons who might apply, and as regards the question of limitation it is to be deemed to be an application on behalf of all persons on whom notice of the application is served and all persons whom the Court has directed shall be represented by persons on whom the notice of the application is served.

13. Provision for class fund

- (1) The Court may, if it thinks fit, order that an amount specified in the order shall be set aside out of the estate and held on trust as a class fund for the benefit of 2 or more persons specified in the order, being persons for whom provision may be made under this Act.
- (2) Where an amount is ordered to be held on trust as a class fund for any persons under subsection (1), that amount shall be invested and the trustee may at his discretion, but subject to such directions and conditions as the Court may give or impose, apply the income and capital of that amount, or so much thereof as the trustee from time to time thinks fit, for or towards the maintenance, support or education (including past maintenance, support or education provided after the death of the deceased) or the advancement or benefit of those persons, or any one or more of them to the exclusion of the other or others of them in such shares and proportions and generally in such manner as the trustee from time to time thinks fit; and may so apply the income and capital of that amount notwithstanding that only one of those persons remains alive.
- (3) For the purposes of this section the term “**trustee**” means the Administrator, unless the Court appoints any other trustee, whether by the order creating the class fund or subsequently, in which case it means the trustee so appointed.
- (4) If the trustee is not the Administrator, then the Court may give such directions as it thinks fit relating to the payment to the trustee of the amount which is to be held on trust as a class fund and may exercise any power under section 89 of the *Trustees*

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Act 1962, either on the creation of the class fund or from time to time during the continuance of the trusts thereof.

14. Terms of the order

- (1) Every order in which provision is made or altered shall specify the part or parts of the estate of the deceased or, where applicable, the part or parts of the distributed estate out of which such provision shall be raised or paid, and prescribe the manner of raising and paying such provision.
- (2) Subject to subsection (3), and unless the Court otherwise orders, the burden of any provision shall, as between the persons beneficially entitled to the estate of the deceased, be borne by those persons in proportion to the value of their respective interests in such estate.
- (3) The estates and interests of persons successively entitled to any property which is settled by the will of a testator shall not, for the purposes of this section, be separately valued, but the proportion of the provision to be borne by such property shall be raised or charged against the corpus of such property.
- (4) The Court, in every case in which an order is made or altered or in which an Administrator is appointed in accordance with section 18, shall direct that a certified copy of the order or alteration be made upon the probate of the will or the letters of administration of the estate of the deceased, as the case may be, and for that purpose may require the production of the probate or letters of administration.
- (5) Upon any order being made, the portion of the estate comprised therein or affected thereby shall be held subject to the provisions of the order.
- (6) The Court may make such order as to the costs of any proceeding under this Act as it deems just.
- (7) The Court may give such consequential directions as it thinks fit for the purpose of giving effect to an order made under this Act.

15. Rescission, or suspension of order and reduction of provision

- (1) On the application by or on behalf of —
 - (a) the Administrator;
 - (b) any person beneficially entitled to or interested in the estate of the deceased; or
 - (c) a person for whom provision may be made under this Act,

and having regard to the hardship that would be caused to any person taking benefit under the order and to all the circumstances of the case, the Court may rescind or suspend any order, or reduce the provision made under it.

- (2) Notice of any application made under subsection (1) shall be served on all persons taking any benefit under the order in question and on such other persons as the Court may direct.

16. Order for increased provision

- (1) Where it would not be inequitable to grant relief having regard to all possible implications in respect to other persons, and an application for increased provision is made by or on behalf of a person in respect of whom an order has been made under this Act on the ground that since the date of that order circumstances have so changed that undue hardship will be caused if increased provision is not made, the Court may make an order for increased provision.
- (2) Notice of any application made under subsection (1) shall be served on the Administrator and on such other persons as the Court may direct.

17. Court may decide effect of order on property disposed of

Where the burden of any provision ordered to be made falls upon the portion of the estate to which any person would, apart from that order, be entitled under the will or on intestacy, the

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Court may determine that a periodic payment or a lump sum shall be set aside or appropriated to represent or in commutation of such proportion of the provision ordered to be made as falls upon that portion of the estate, and thereupon —

- (a) the Court may exonerate such portion from all or any further liability;
- (b) the Court may direct in what manner the periodic payment shall be secured and to whom any lump sum shall be paid;
- (c) the Court may give directions as to the manner in which any moneys accruing shall be invested for the benefit of the person in whose favour the provision is made.

18. Appointment of Administrator by the Court

- (1) On any application made under this Act, where it is proved to the satisfaction of the Court —
 - (a) that the executor or executors or any of them appointed by the testator;
 - (b) that any person to whom Administration has been granted or who has been appointed as an administrator or receiver under the *Administration Act 1903*; or
 - (c) that any person who has been appointed Administrator for the purposes of this Act,

is guilty of abuse of office or dereliction of duty, the Court may direct that one or more persons be appointed Administrator for the purposes of this Act either in addition to or in substitution for the person so found guilty.

- (2) Where, in accordance with subsection (1), the Court gives directions for the appointment of an Administrator the Court shall make such order as may be necessary or convenient for giving effect to those directions and, thereupon, the property, rights, powers, authorities, functions and discretions vested in the person so found guilty and the liabilities properly incurred by him in the due administration of the estate become and are

vested in and transferred to the Administrator so appointed (either jointly or severally as the case may require) without any further conveyance, transfer or assignment.

19. Mortgages etc. of provision under orders

No mortgage, charge, or assignment of any kind whatsoever which is given of or over any provision out of the estate of any deceased person granted by any order of the Court under this Act and which is given before the order of the Court is made shall be of any force, validity or effect; and no such mortgage, charge, or assignment given after the order of the Court is made shall be of any force, validity, or effect unless it is given with the permission of the Court or the Court at the time of making the order otherwise directs.

20. Power of Administrator to distribute

- (1) No action shall lie against the Administrator by reason of his having distributed any part of the estate, if the distribution was properly made without notice of any application or intended application under this Act in respect of the estate.
- (2) For the purposes of the administration or distribution of any estate or any property no executor or administrator or trustee shall be under any obligation to inquire as to the existence of any person who could claim an interest in the estate or the property by virtue only of the provisions of this Act.
- (3) No action by any person whose relationship to the deceased is not determined through lawful wedlock or adoption shall lie against the Administrator, or any trustee appointed pursuant to this Act, by reason of his having prejudiced any claim of that person under this Act by distributing any part of any estate, or any property, if the distribution was made without notice of any application or intended application by that person under this Act in respect of that estate or property.

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- (4) A person who makes or is entitled to make an application under this Act and who, being of full legal capacity, advises the Administrator in writing that he —
- (a) consents to a proposed distribution; or
 - (b) does not intend to make any application under this Act that would affect a proposed distribution,

shall not bring an action against the Administrator by reason of his having thereafter distributed any part of the estate.

- (5) Notice to an Administrator of an intended application shall lapse and shall be incapable of being renewed, and the Administrator may Act as if he had not received the notice, if, before the expiration of three months after the date on which he first receives notice of the intention to make the application or before the sooner expiration of 12 months from the date on which the Administrator became entitled to administer the estate of the deceased in Western Australia, the Administrator does not receive notice that the application has been made to the Court; but nothing in this subsection shall prevent the subsequent making of the application.

21. Rules

The powers to make, alter, and annul rules conferred by Part X of the *Supreme Court Act 1935*, shall be read as including power to make such rules as may be necessary or convenient for regulating the practice and procedure of the Supreme Court to be adopted for the purposes of this Act, and to alter and annul any such rules.

[Schedule omitted under the Reprints Act 1984 s. 7(4)(e).]

Notes

- ¹ This reprint is a compilation as at 5 September 2003 of the *Inheritance (Family and Dependants Provision) Act 1972* and includes the amendments made by the other written laws referred to in the following table. The table also contains information about any reprint.

Compilation table

Short title	Number and year	Assent	Commencement
<i>Inheritance (Family and Dependants Provision) Act 1972</i>	57 of 1972	31 Oct 1972	1 Jan 1973 (see s. 2 and <i>Gazette</i> 17 Nov 1972 p. 4379)
<i>Inheritance (Family and Dependants Provision) Amendment Act 1986</i>	75 of 1986	4 Dec 1986	1 Jan 1987
<i>Acts Amendment (Lesbian and Gay Law Reform) Act 2002 Pt. 13</i> ³	3 of 2002	17 Apr 2002	21 Sep 2002 (see s. 2 and <i>Gazette</i> 20 Sep 2002 p. 4693)
<i>Acts Amendment (Equality of Status) Act 2003 Pt. 32</i>	28 of 2003	22 May 2003	1 Jul 2003 (see s. 2 and <i>Gazette</i> 30 Jun 2003 p. 2579)
Reprint 1: The <i>Inheritance (Family and Dependants Provision) Act 1972</i> as at 5 Sep 2003 (includes amendments listed above)			

- ² Repealed by the *Guardianship of Children Act 1972* which was repealed by the *Family Court Act 1975* (as amended by the *Family Court Act Amendment and Acts Repeal Act 1979*) which was repealed by the *Family Court Act 1997*.

- ³ The *Acts Amendment (Lesbian and Gay Reform) Act 2002* s. 82 reads as follows:

“

82. Applications regarding the estates of persons who died before the commencement of this Part

An application under the *Inheritance (Family and Dependants Provision) Act 1972* for provision out of the estate of a person who died before the commencement of this Part is to be dealt with under that Act as if this Part had not commenced.

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