

## TESTATOR'S FAMILY MAINTENANCE.

3° and 4° Geo. VI., No. XLIV.

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### No. 44 of 1939.

[As amended by Act No. 10 of 1944, assented to 30/10/44, and reprinted pursuant to the Amendments Incorporation Act, 1938.]

### **AN ACT to provide maintenance for widows, widowers, and children of Testators.**

[Assented to 20th December, 1939.]

**B**E it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of Western Australia, in this present Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited as the *Testator's Family Maintenance Act, 1939-1944.*

Short title.  
Amended by  
No. 10 of 1944,  
s. 3.

2. In this Act, unless some other meaning is clearly intended—

Interpretation.

“Court” means the Supreme Court or a Judge thereof.

“Executor” means executor of the will of the testator; and includes administrator with the will.

“ Order ” means order made by the Court under section three.

“ Widow ” includes any woman who has been divorced by or from her husband and who at the date of death of such husband was receiving or entitled to receive permanent maintenance from such husband by order of the Court.

Where no adequate provision made by testator for family, Court may make order.  
Amended by No. 10 of 1944, s. 2.

3. (1) If any person (in this Act called “ the testator ”) disposes of or has disposed of his property by will in such a manner that the widow, widower, or children of the testator or any of them are left without adequate provision for their proper maintenance, education, or advancement in life, the Court may at its discretion, on application by or on behalf of the said widow, widower, or children, or any of them, order that such provision as the Court thinks fit shall be made out of the estate of the testator for the maintenance, education, and advancement of such widow, widower, or children or any of them.

(2) Notice of such application shall be served by the applicant on the executor, and on such other persons as the Court may direct.

(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 the order the Court may, if it thinks fit, order that the provision shall consist of a lump sum or periodic or other payments.

(5) On an original application under this section, or upon a subsequent application made by any person beneficially entitled to any part of the estate of the testator, the court may if it is proved to the satisfaction of the court that the executor or executors or any of them appointed by the testator has or have been guilty of abuse of their office or other dereliction of duty, direct that one or more persons be appointed executor or joint executor of the Will either in addition to or in substitution for the person appointed by the testator as executor. In this event the court shall

make such order as may be necessary to carry out its direction. Thereupon the property rights, powers, authorities, functions and discretions vested in and the liabilities properly incurred in the due administration of the estate by the original executor shall become and be vested in and transferred to the executor so appointed (either jointly or severally as the case may be) without any conveyance, transfer or assignment.

4. No application shall be heard by the Court at the instance of a party claiming the benefit of this Act unless the application is made within six months from the date of the grant in this State of probate of the will, or letters of administration with the will annexed of the estate of the testator : Provided that, in any case where the testator has died within three months immediately prior to the date of the passing of this Act, such application may be heard, if made within six months from the date of the passing of this Act or of the grant in this State of such probate or letters of administration as aforesaid, whichever of such dates is the later : Provided further, that the court may extend the time for making an application as the justice of the case may require although such application be not made until after the expiration of the time appointed.

Application to be made within six months.

5. (1) Every order shall, inter alia :—

- (a) specify the amount and nature of the provision thereby made ;
- (b) specify the part or parts of the estate of the testator out of which such provision shall be raised or paid, and prescribe the manner of raising and paying such provision ; and
- (c) state the conditions, restrictions, or limitations imposed by the Court.

Matters to be stated in the order.

(2) Unless the Court otherwise orders the burden of any such provision shall, as between the persons beneficially entitled to the estate of the testator, be borne by those persons in proportion to the values of their respective interests in such estate : Provided that the estates and interests of persons successively entitled to any property which is settled by the will of the testator shall not for the purposes of this subsection 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.

(3) The Court shall, in every case in which an order is made, direct that a certified copy of such order be made upon the probate of the will or letters of administration with the will annexed of the estate of the testator, and for that purpose may require the production of such probate or letters of administration.

(4) The Court may at any time and from time to time, on the application by motion of the executor or of any person beneficially entitled to or interested in any part of the estate of the testator, rescind or alter any order. Notice of such motion shall be served on all persons taking any benefit under the order sought to be rescinded or altered.

(5) Upon any order being made under this Act, 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.

Order to  
take effect as  
a codicil.

6. Every provision made by an order shall, subject to this Act, operate and take effect as if the same had been made by a codicil to the will of the testator executed immediately before his death.

Court may  
decide effect  
if order on  
property  
disposed of.

7. The Court shall have power at any time to fix a periodic payment or lump sum to be paid by any legatee or devisee to represent or in commutation of such proportion of the sum ordered to be paid as falls upon the portion of the estate to which he is entitled under the will of the testator, and to exonerate such portion from further liability, and to direct in what manner such periodic payment shall be secured, and to whom such lump sum shall be paid, and in what manner it shall be invested for the benefit of the person to whom the commuted payment was payable.

Court may  
discharge or  
vary order.

8. Where the Court has ordered periodic payments, or has ordered a lump sum to be invested for the benefit of any person, it shall have power to inquire whether at any subsequent date the party benefited by the order has otherwise become possessed of or entitled to

provision for his proper maintenance, education, and advancement and into the adequacy of such provision, and may discharge, vary, or suspend the order, or make such other order as is just in the circumstances.

9. No mortgage, charge, or assignment of any kind whatsoever of or over the provision made by an order under this Act and made before the making of the order, shall be of any force, validity, or effect; and no such mortgage, charge, or assignment made after the making of the order shall be of any force, validity, or effect unless made with the permission of the Court.

Mortgages, etc., of provision illegal, and after order only by leave of Court.

10. (1) Where an executor has given notice pursuant to section forty-seven of the Administration Act, 1903-1934,<sup>1</sup> such executor may at the expiration of the time named in the said notice for sending in such claims, distribute the estate of the testator or any part thereof amongst the persons entitled thereto, having regard only to any applications under this Act of which such executor has then notice.

Executor may distribute after notices to creditors.

(2) Such executor shall not be liable for the estate or any part thereof so distributed to any person of whose application under this Act he has not had notice at the time of such distribution.

(3) Nothing in this section shall prevent the Court from ordering that any provision under this Act shall be made out of the estate or any part thereof so distributed.

(4) An executor of a testator who has died prior to the passing of this Act shall not under any circumstances be liable to any person claiming under this Act in respect of any assets which such executor has lawfully distributed prior to the passing of this Act.

11. Section five, subsection (4), and sections seven and eight of this Act shall apply to orders heretofore made under section eleven of the Guardianship of Infants Act, 1920,<sup>2</sup> prior to the commencement of this Act.

<sup>1</sup> Now Administration Act, 1903-1959.

<sup>2</sup> Now Guardianship of Infants Act, 1920-1939.

Curator of  
Intestate  
Estates  
deemed an  
executor.

12. Where an order has been made under the Curator of Intestate Estates Act, 1918,<sup>1</sup> authorising the Curator to administer the estate of a deceased person who has died leaving a will, then for the purposes of this Act :—

- (a) the Curator shall be deemed to be the executor of such person ; and
- (b) such order shall be deemed to be the grant of probate of the will or letters of administration with the will annexed of the estate of such deceased person.

Court may  
make rules.

13. The powers to make, alter, and annul rules conferred by Part X. of the Supreme Court Act, 1935,<sup>2</sup> 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 or annul any such Rules.

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<sup>1</sup> See now Public Trustee Act, 1941-1953.

<sup>2</sup> Now Supreme Court Act, 1935-1957.