

South Australia

# Inheritance (Family Provision) Act 1972

An Act to assure to the family of a deceased person adequate provision out of his estate.

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## Legislative history

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### The Parliament of South Australia enacts as follows:

#### 1—Short title

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

#### 3—Repeal of *Testator's Family Maintenance Act 1918* and saving provision

- (1) The following Acts are repealed:
  - the *Testator's Family Maintenance Act 1918*;
  - the *Testator's Family Maintenance Act 1943*.
- (2) Any proceedings instituted in the Court pursuant to the Acts repealed by this Act and pending at the commencement of this Act may be continued and determined, and, subject to subsection (3) of this section, the law to be applied and the practice and procedure to be followed in relation to those proceedings shall be the same as if this Act had not been passed.

- (3) In any such proceedings the Court may, subject to such conditions as it thinks fit, permit an amendment of those proceedings so as to include an application for the benefit of this Act and, in relation to any such application, the provisions of this Act shall apply and have effect as if the proceedings had been instituted under this Act.

#### **4—Interpretation**

In this Act, unless the contrary intention appears—

**administration** means probate of the will of a deceased person or letters of administration of the estate of a deceased person whether with or without the will annexed and whether granted for general, special or limited purposes;

**administrator** means any person to whom administration has been granted;

**child** in relation to a deceased person includes a person who is recognised as a child of that person by virtue of the *Family Relationships Act 1975* and **parent** has a correlative meaning;

**spouse** in relation to a deceased person includes a person adjudged under the *Family Relationships Act 1975* to have been a putative spouse of the deceased either on the date of his death, or at some earlier date;

**the Court** means the Supreme Court or a judge thereof.

#### **5—Application**

- (1) Subject to subsection (2) of this section, this Act shall apply in relation to the estates of all deceased persons, whether they died before or after the commencement of this Act.
- (2) Where the whole or any part of the estate of a deceased person has been lawfully distributed before the commencement of this Act, no person shall, in respect of that estate or that part thereof, as the case may be, be entitled to claim the benefit of this Act unless he would have been entitled to the benefit of an order under the Acts repealed by this Act.

#### **6—Persons entitled to claim under this Act**

The following persons are, in respect of the estate of a deceased person, entitled to claim the benefit of this Act:

- (a) the spouse of the deceased person;
- (b) a person who has been divorced from the deceased person;
- (c) a child of the deceased person;
- (g) a child of a spouse of the deceased person being a child who was maintained wholly or partly or who was legally entitled to be maintained wholly or partly by the deceased person immediately before his death;
- (h) a child of the child of the deceased person;
- (i) a parent of the deceased person who satisfies the court that he cared for, or contributed to the maintenance of, the deceased person during his lifetime;
- (j) a brother or sister of the deceased person who satisfies the court that he cared for, or contributed to the maintenance of, the deceased person during his lifetime.

## **7—Spouse and persons entitled may obtain order for maintenance etc out of estate of deceased person**

- (1) Where—
  - (a) a person has died domiciled in the State or owning real or personal property in the State; and
  - (b) by reason of his testamentary dispositions or the operation of the laws of intestacy or both, a person entitled to claim the benefit of this Act is left without adequate provision for his proper maintenance, education or advancement in life,

the Court may in its discretion, upon application by or on behalf of a person so entitled, order that such provision as the Court thinks fit be made out of the estate of the deceased person for the maintenance, education or advancement of the person so entitled.
- (2) Notice of an application under subsection (1) of this section shall be served by the applicant on the administrator of the estate of the deceased person, and on such other persons as the Court may direct.
- (3) The Court 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 this Act, or for any other reason that the Court thinks sufficient.
- (4) The Court may, in making any order under this Act, impose such conditions, restrictions and limitations as it thinks fit.
- (5) If, in respect of an application under subsection (1) of this section, it appears to the Court that the matter would be more appropriately determined by proceedings outside the State, the Court may (without limiting the powers conferred on it by the preceding provisions of this section) refuse to make an order under this section or adjourn the hearing of the application for such period as the Court thinks fit.
- (6) 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 or a lump sum and periodic or other payments.

## **8—Time within which application to be made**

- (1) Subject to this section, an application shall not be heard by the Court at the instance of a person 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 of the estate, of the deceased person.
- (2) The Court may, after hearing such of the persons affected as the Court thinks necessary, extend the time for making an application for the benefit of this Act.
- (3) An extension of time granted pursuant to this section may be granted—
  - (a) upon such conditions as the Court thinks fit; and
  - (b) whether or not the time for making an application pursuant to subsection (1) of this section has expired.
- (4) An application for extension of time pursuant to this section shall be made before the final distribution of the estate.

- (5) Any distribution of any part of the estate made before the application for extension of time shall not be disturbed by reason of that application or any order made thereon.
- (6) An application for the benefit of this Act shall be deemed to be made on the day when the summons by which it is instituted is served on the administrator of the estate.
- (7) Where an application has been made for the benefit of this Act, the Court may, if satisfied that it is just and expedient to do so, permit at any time prior to the final determination of the proceedings, the joinder of further claimants as parties to the application.

## **9—Contents or order**

- (1) Every order that provision be made for the maintenance, education or advancement of any person out of the estate of a deceased person must, *inter alia*—
  - (a) specify the amount and nature of the provision thereby made; and
  - (b) specify the part or parts of the estate of the deceased person out of which that provision shall be raised or paid, and prescribe the manner of raising and paying that provision; and
  - (c) state the conditions, restrictions or limitations imposed by the Court.
- (2) Subject to subsection (3) of this section and unless the Court otherwise orders, the burden of any such provision shall, as between the persons beneficially entitled to the estate of the deceased person, be borne by those persons in proportion to the values of their respective interests in the estate.
- (3) Where the deceased person died leaving a will under which two or more persons are successively entitled to any property, the successive interests shall not, unless the Court otherwise orders, be separately valued for the purposes of subsection (2) of this section, but the proportion of the provision to be borne by that property shall be raised or charged against the *corpus* thereof.
- (4) The Court shall, in every case in which an order is made, direct that a certified copy of the order be made upon the probate of the will, or letters of administration of the estate, of the deceased person, and for that purpose may require the production of the probate or letters of administration.
- (5) The Court may at any time, and from time to time, on the application of the administrator or of any person beneficially entitled to or interested in any part of the estate of the deceased person, rescind or alter any order.
- (6) Notice of an application under subsection (5) of this section must be served upon all persons entitled to any benefit under the order in respect of which the application is made.
- (7) Upon any order being made under this Act, the portion of the estate affected by the order shall be held subject to the provisions of the order.
- (8) The Court may make such order as to the costs of any proceeding under this Act as it considers just.

## **10—Order to operate as will or codicil**

Every provision made by an order shall, subject to this Act, operate and take effect as if it had been made—

- (a) if the deceased person died leaving a will, by a codicil to that will executed immediately before his death; or
- (b) if the deceased person died intestate, by a will executed immediately before his death.

## **11—Court may fix periodic payment or lump sum**

- (1) The Court shall have power at any time to fix a periodic payment, or lump sum, or a periodic payment and a lump sum, to be paid by any person, to represent, or in commutation of, the proportion of the sum ordered to be paid that falls upon the portion of the estate to which he is entitled, and to exonerate that portion of the estate from further liability.
- (2) The Court may give incidental directions as to the payment or investment of the lump sum or the manner in which the periodic payments are to be made or secured.

## **12—Court may vary or discharge order**

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 that provision, and may discharge, vary, or suspend the order, or make such other order as is just in the circumstances.

## **13—Mortgage or assignment of provision invalid**

No mortgage, charge, or assignment of any kind whatsoever of or over the provision made by an order under this Act shall, unless made with the prior permission of the Court, be of any force, validity, or effect.

## **14—Liability of administrators after distribution of estate**

- (1) An administrator of the estate of a deceased person who has lawfully distributed the estate or any part thereof shall not be liable to account for that estate or that part thereof, as the case may be, to any person claiming the benefit of this Act, unless the administrator had notice of the claim at the time of the distribution.
- (2) For the purposes of this section, notice of the claim—
  - (a) shall be in writing signed by the claimant or his solicitor; and
  - (b) shall lapse and be incapable of being renewed unless, before the expiration of three months after the administrator receives notice of the claim a copy of an application by the claimant for the benefit of this Act has been served on him.
- (3) Subsection (1) of this section shall not prevent the Court from ordering that any provision under this Act be made out of the estate, or any part thereof, after it has been distributed.

### **15—Method of apportioning duty on estate**

- (1) For the purpose of apportioning the duty payable on the estate of the deceased person, any provision made under this Act by an order of the Court shall be deemed to be a bequest made by the deceased person—
  - (a) if he died leaving a will, by a codicil to that will executed immediately before his death; or
  - (b) if he died intestate, by a will executed immediately before his death.
- (2) Notwithstanding the provisions of any other Act, where an order is discharged, rescinded, altered or suspended, a due adjustment of the duty payable on the estate of the deceased person shall be made.

### **16—Public Trustee deemed to be administrator where order has been made authorising him to administer estate**

Where an order has been made under the *Administration and Probate Act 1919* as amended, authorising the Public Trustee to administer the estate of a deceased person who has died leaving a will, then, for the purposes of this Act—

- (a) the Public Trustee shall be deemed to be the administrator of the estate of the deceased person; and
- (b) the 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 the deceased person.

### **17—Rules of Court**

- (1) The judges of the Court may, subject to and in accordance with the *Supreme Court Act 1935* as amended, make such rules as may be necessary or expedient for regulating the practice and procedure of the Court to be adopted for the purposes of this Act.
- (2) Until rules are made in pursuance of this section the general practice and procedure of the Court shall, so far as applicable and not inconsistent with this Act, apply to all proceedings of the Court under this Act.

## Legislative history

### Notes

- Amendments of this version that are uncommenced are not incorporated into the text.
- For further information relating to the Act and subordinate legislation made under the Act see the Index of South Australian Statutes or [www.legislation.sa.gov.au](http://www.legislation.sa.gov.au).

### Principal Act and amendments

New entries appear in bold.

Year	No	Title	Assent	Commencement
1972	32	<i>Inheritance (Family Provision) Act 1972</i>	13.4.1972	1.6.1972 ( <i>Gazette 1.6.1972 p2163</i> )
1975	91	<i>Inheritance (Family Provision) Act Amendment Act 1975</i>	20.11.1975	29.1.1976 ( <i>Gazette 29.1.1976 p356</i> )
1983	72	<i>Inheritance (Family Provision) Act Amendment Act 1983</i>	3.11.1983	3.11.1983
2006	43	<i>Statutes Amendment (Domestic Partners) Act 2006</i>	14.12.2006	Pt 47 (ss 129—131)—1.6.2007 ( <i>Gazette 26.4.2007 p1352</i> )

### Provisions amended since 3 February 1976

- Legislative history prior to 3 February 1976 appears in marginal notes and footnotes included in the consolidation of this Act contained in Volume 5 of The Public General Acts of South Australia 1837-1975 at page 178.

New entries appear in bold.

Entries that relate to provisions that have been deleted appear in italics.

Provision	How varied	Commencement
s 2	<i>omitted under Legislation Revision and Publication Act 2002</i>	
s 6	amended by 72/1983 s 2	3.11.1983