

TESTATOR'S FAMILY MAINTEN-  
ANCE AND GUARDIANSHIP  
OF INFANTS ACT.

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Act No. 41, 1916.

George V, An Act to assure to the widow or widower and  
No. 41. family of a testator an adequate maintenance  
from the estate of such testator; to amend  
the law relating to the guardianship of  
infants; and for purposes incidental thereto  
or consequent thereon. [Assented to, 18th  
September, 1916.]

**B**E it enacted by the King's Most Excellent Majesty,  
by and with the advice and consent of the Legis-  
lative Council and Legislative Assembly of New South  
Wales in Parliament assembled, and by the authority of  
the same, as follows:—

Short title.

**1.** This Act may be cited as the "Testator's Family  
Maintenance and Guardianship of Infants Act, 1916."

**2.**

- 2.** In this Act, unless the context otherwise requires— George V,  
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Definitions.
- “ Court ” means the Supreme Court in its equitable jurisdiction.
- “ Executor ” includes administrator with the will annexed.

*Testator's family maintenance.*

**3.** (1) If any person (hereinafter called “ the Testator ”) dying or having died since the seventh day of October, one thousand nine hundred and fifteen, disposes of or has disposed of his property either wholly or partly by will in such a manner that the widow, husband, or children of such person, or any or all of them, are left without adequate provision for their proper maintenance, education, or advancement in life as the case may be, the court may at its discretion, and taking into consideration all the circumstances of the case, on application by or on behalf of such wife, husband, or children, or any of them, order that such provision for such maintenance, education, and advancement as the court thinks fit shall be made out of the estate of the testator for such wife, husband, or children, or any or all of them. Where no adequate provision made by testator, court may make orders, &c.

Notice of such application shall be served by the applicant on the executor of the will of the deceased person.

The court may order such other persons as it may think fit to be served with notice of such application.

(2) 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 whose character or conduct is such as to disentitle him to the benefit of such an order.

(3) In making an order the court may, if it thinks fit, order that the provision may consist of a lump sum, or periodical, or other payments.

**4.** Every provision made under this Act shall, subject to this Act, operate and take effect as if the same had been made by a codicil to the will of the deceased person executed immediately before his or her death. Provision to operate as a codicil.  
Vic. Act,  
1906, s. 9 (5).

**5.**

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Time within  
which  
application  
must be made.

N.Z. Act,  
1901, No. 60,  
s. 33,  
subsec. 9.

**5.** 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, in the case of a testator who has died before the passing of this Act, within three months of the date thereof, but in all other cases within twelve months from the date of the grant or re-sealing in New South Wales of probate of the will or grant or re-sealing of letters of administration with the will annexed :

Provided that if all the children and the husband or the wife, as the case may be, shall in writing, at any time before the expiration of the said term of twelve months, agree to be bound by such will and if there be infants such agreement be confirmed by the court, then no application shall be made thereafter for maintenance under the provisions of this Act.

Contents of  
order.

Vic. Act,  
1906, No.  
2,074, s. 9.

**6.** (1) Every order making any provision under this Act shall inter alia—

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

Adjustment  
of burden of  
provision  
upon  
beneficiaries.

(2) 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 such estate :

Provided that the estates and interests of persons successively entitled to any property which is settled by such will shall not for the purposes of this subsection be separately valued, but the proportion of the provision made under this Act to be borne by such property shall be raised or charged against the corpus of such property.

Certified copy  
of order to be  
made on  
probate.

(3) The court shall in every case in which provision is made under this Act direct that a certified copy of such order be made upon the probate of the will or letters

letters of administration with the will annexed of the estate of the deceased person, and for that purpose may require the production of such probate or letters.

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Power to vary or revoke order.

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

(5) The court may make such order as to the costs of any proceeding under this Act as it deems just.

Costs.

**7.** The court may at any time 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, and may exonerate such portion from further liability, and 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 fix periodic payment or lump sum.  
N.Z. Act, No. 60, 1908 s. 33 (6).

**8.** Where the court has ordered periodic payments, or has ordered a lump sum to be invested for the benefit of any person, it may inquire whether at any subsequent date the party benefited by its order has become possessed of or entitled to provision for his proper maintenance or support, and into the adequacy of such provision, and may discharge, vary, or suspend its order, or make such other order as is just in the circumstances.

Court may make subsequent inquiries, and vary or discharge order.  
*Ibid.* subsec. (13).

**9.** No mortgage, charge, or assignment of any kind whatsoever over any interest dependent on any order of the court under this Act, whether before or after such order is made, shall be of any force, validity, or effect, unless made with the permission of the court or the Master in Equity first had and obtained.

Permission court, &c., necessary to mortgage.

**10.** (1) Where an order is made by the court under this Act, all probate duties payable under the will of the testator shall be computed as if the provisions of the order had been part of the will.

Duty on estate, how computed.  
*Ibid.* s. 31.

(2)

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No. 41.** (2) Any duty paid in excess of the amount required to be paid under this section shall, on application, and without further appropriation than this Act, be returned by the Colonial Treasurer to the executor, and by him remitted to the person entitled to receive the same.

Distribution  
of assets.  
Wills, Probate  
and Admin-  
istration  
Act, 1898,  
s. 92.

**11.** (1) Where an executor has given such or the like notices as in the opinion of the court before which an application under this Act is made would have been given by the Supreme Court in its equitable jurisdiction in an administration suit for creditors and others to send in to the executor their claims against the estate of the testator, such executor may, at the expiration of the time named in the said notices, or the last of the said notices, for sending in such claims, distribute the assets of the testator, or any part thereof, amongst the persons entitled thereto, having regard to any applications under this Act of which such executor has then notice.

(2) Such executor shall not be liable for the assets, 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 any assets so distributed.

Executor not  
liable for  
assets legally  
distributed.

**12.** 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.

*Guardianship of infants.*

On death of  
father,  
mother to be  
guardian.  
Eng. Act, 49  
and 50 Vic.,  
ch. 27, s. 2.

**13.** On the death of the father of an infant, and in case the father has died prior to the passing of this Act then, from and after the passing of this Act, the mother (if surviving) shall, subject to the provisions of this Act, and notwithstanding any appointment by deed or will made by the father, be the guardian of such infant.

**14.**

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**14.** The court may on the application of any person, on being satisfied that it is for the welfare of the infant, remove the mother from such guardianship and appoint another guardian in her place, or it may continue the mother in office as guardian and appoint another guardian to act jointly with her.

Court may remove mother from guardianship or appoint joint guardian.

**15.** The mother of any infant may by deed or will appoint any person to be guardian of such infant after the death of herself and the father of such infant (if such infant be then unmarried).

Mother may appoint guardian in certain cases. Eng. Act, 49 and 50 Vic., ch. 27, s. 3 (1).

The guardian so appointed shall act as sole guardian, unless the father has also appointed a guardian, in which case they shall act jointly.

**16.** The mother of any infant may, by deed or will, provisionally nominate some fit person to act as guardian of such infant after her death jointly with the father of such infant, and the court after her death, if satisfied that the father is for any reason unfitted to be the sole guardian of his children, may confirm the appointment of such guardian, or make such other order in respect of the guardianship as the court may think right.

Mother may appoint joint guardian with the father. *Ibid.* s. 3 (2).

**17.** In the event of guardians being unable to agree upon a question affecting the welfare of an infant, any of them may apply to the court for its direction, and the court may make such order regarding the matters in difference as it may think proper.

Guardians may apply to court for directions. *Ibid.* s. 3 (3).

**18.** The court may, in its discretion, on being satisfied that it is for the welfare of the infant, remove from his office any testamentary guardian, or any guardian appointed or acting by virtue of the Act, and may also, if they shall deem it to be for the welfare of the infant, appoint another guardian in place of the guardian so removed.

Power of court to remove guardian. *Ibid.* s. 6.

**19.** Every guardian under this Act shall have all such powers over the estate and the person, or over the estate (as the case may be) of an infant, as any guardian appointed by will or otherwise now has.

Powers of guardians. *Ibid.* s. 4.

**20.** Nothing in this Act shall restrict or affect the jurisdiction of the court to appoint or remove guardians in respect of infants.

Saving clause. *Ibid.* s. 13.

**21.**

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Court may  
order access  
by grand-  
parents.

**21.** In the event of the death before or after the passing of this Act of the parents or of one of the parents of an infant the court may order that the maternal or paternal grandparents of such infant or any one of them shall have access to such infant at such times and places as the court shall deem proper :

Provided that applications under this section shall be heard in camera.

*General.*

Rules.

**22.** The court may make rules for regulating the practice and procedure in any applications and proceedings under this Act, and prescribe the forms in such proceedings.

Any application under this Act shall be made in accordance with such rules.

Until such rules are made, any application under this Act shall be by motion, and the practice of the Equity Court shall apply thereto.