

# Testator's Family Maintenance and Guardianship of Infants Act 1916 No 41

[1916-41]



New South Wales

## Status Information

### Currency of version

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### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Notes—

- **Does not include amendments by**  
[Succession Amendment \(Family Provision\) Act 2008 No 75](#) (not commenced — to commence on 1.3.2009)

### Authorisation

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# Testator's Family Maintenance and Guardianship of Infants Act 1916 No 41



New South Wales

An Act to assure to the widow or widower and 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.

## Part 1 Preliminary

### 1 Name of Act

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

### 1A Application of Act

This Act does not apply in respect of the estate of any deceased person in relation to whom the *Family Provision Act 1982* applies.

### 2 Definitions

In this Act, unless the context otherwise requires:

**Court** means:

- (a) the Supreme Court, in relation to any matter (including a matter referred to in paragraph (b)), or
- (b) the District Court, in relation to a matter for which it has jurisdiction under section 134 of the *District Court Act 1973*.

**Executor** includes administrator with the will annexed.

**Minor** means a person under the age of eighteen years.

## Part 2 Testator's family maintenance

### 3 Where no adequate provision made by testator etc court may make orders etc

- (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.

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.

- (1A) If any person (hereinafter called **the intestate**) dies wholly intestate after the commencement of the *Conveyancing, Trustee and Probate (Amendment) Act 1938* and, in consequence of the provisions of the *Wills, Probate and Administration Act 1898*, as amended by subsequent Acts, that are applicable to the distribution of his estate as on intestacy, his widow, or children, 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, upon application made by or on behalf of such widow, 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 such person.

Notice of such application shall be served by the applicant on such persons as the court may direct.

In this subsection **children** includes children (being under the age of twenty-one years at the death of the intestate) of any child of the intestate who died before the intestate.

- (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) On an application made under this section, the court may make an interim order in favour of a person before it has fully considered the application where it is of the opinion that no less provision than that proposed to be made by the interim order would be made in favour of the person after full consideration of the application.

- (5) Where, on an application made under this section, the court has made an interim order as referred to in subsection (4), it shall, in due course, proceed to make a final determination of the application, which determination shall confirm, rescind or alter the order so made.
- (6) Where an interim order making provision is rescinded or altered pursuant to subsection (5), the court may rescind or alter any other orders made by it as a consequence of, or in relation to, the interim order to such extent as may be necessary as a result of the rescission or alteration and make such other orders (other than an order making provision) as may be so necessary.

#### **4 Operation of provision made under Act**

- (1) 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.
- (2) Any order made under subsection (1A) of section 3 in respect of the estate of a deceased person shall, subject to this Act, operate and take effect as a modification of the provisions of the *Wills, Probate and Administration Act 1898*, as amended by subsequent Acts, that are applicable to the distribution of that estate as on intestacy.

#### **5 Time within which application must be made**

- (1) 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.
  - (2) No application under subsection (1A) of section 3 shall be heard by the court unless the application is made within twelve months from the date of the grant or resealing in New South Wales of letters of administration of the estate of the deceased person.
- (2A) Notwithstanding anything in subsections (1) and (2):
- (a) the time for making an application under either of those subsections may be extended for a further period by the court, after hearing such of the parties affected as the court thinks necessary, and this power extends to cases where the time for applying has already expired, including cases where it has expired before the commencement of the *Administration of Estates Act 1954*; but every application for extension shall be made before the final distribution of the estate, and no distribution of any part of the estate made before the application shall be disturbed by reason of the application or of an order made thereon,
  - (b) if, in any case to which the provisions of subsection (1) of section 3 apply, all the

children and the widow or widower, as the case may be, shall in writing, at any time after the death of the testator, whether the testator died before or after the commencement of the *Administration of Estates Act 1954*, agree to be bound by the will of the testator and if there are minors such agreement is confirmed by the Court, then no application shall be made thereafter under that subsection,

(c) if, in any case to which the provisions of subsection (1A) of section 3 apply, all the children and the widow shall in writing, at any time after the death of the intestate, whether the intestate died before or after the commencement of the *Administration of Estates Act 1954*, agree to be bound by the provisions of the *Wills, Probate and Administration Act 1898*, as amended by subsequent Acts, that are applicable to the distribution of the intestate's estate as on intestacy and if there are minors such agreement is confirmed by the court, then no application shall be made thereafter under that subsection. In this paragraph **children** includes children (being under the age of twenty-one years at the death of the intestate) of a child of the intestate who died before the intestate.

(3) An application shall be deemed to be made on the day upon which the notice of motion or other process originating the application is filed.

## 6 Provisions relating to orders

(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.

(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.

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

(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 the administrator of the estate of the intestate 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.

#### **6A Increase in provision**

- (1) Notwithstanding any other provision of this Act, on an application made by or on behalf of a person in whose favour provision out of the estate of a deceased person has been made by an order under this Act, if the court is satisfied that there has been, since the date of the order, a substantial detrimental change in the circumstances of the person, it may make a further order under section 3 making additional provision in favour of the person.
- (2) An order made as referred to in subsection (1) shall not order that provision be made out of assets of the estate of a testator or an intestate distributed before notice of the application for increased provision is given to the executor or administrator, as the case may be, unless the court is satisfied that there are special circumstances which justify the making of such an order.
- (3) For the purposes of subsection (2), an asset of the estate of a testator or an intestate is not distributed unless the asset is vested in interest in a person.
- (4) Subsection (1) applies to any order for provision made under this Act since 18th September 1916.

#### **7 Court may fix periodic payment or lump sum**

The court may at any time fix a periodic payment or lump sum to be paid by any legatee or devisee or beneficiary, 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 or in consequence of the intestacy, 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.

#### **8 Court may make subsequent inquiries, and 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 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.

#### **9 Permission of court etc necessary to mortgage**

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.

#### **10 Duty on estate, how computed**

- (1) Where an order is made by the court under this Act, all probate duties payable under the will of the testator or in consequence of the death of the deceased person shall be computed as if the provisions of the order had been part of the will.
- (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 or administrator, and by him remitted to the person entitled to receive the same.

#### **11 Distribution of assets**

- (1) Where an executor or administrator of the estate of a testator or an intestate has published notices in or to the effect of the form prescribed by rules of court requiring the claims of beneficiaries (including children conceived but not yet born at the death of the testator or intestate), creditors and other persons in respect of the assets of that estate to be submitted to the executor or administrator by or on behalf of those beneficiaries or by those creditors or other persons, the executor or administrator may, at the expiration of the period for submitting those claims specified in the notices or, as the case may be, specified in the last of the notices, distribute the assets, or any part of the assets, of that estate among the persons entitled, having regard to any applications under this Act of which the executor or administrator has notice at the time of the distribution.
- (2) An executor or administrator who distributes the assets or any part of the assets of the estate of a testator or an intestate in accordance with subsection (1) is not liable in respect of those assets or that part of those assets to any person of whose application under this Act he did not have notice at the time of the distribution.
- (3) This section does not prevent the court from making an order directing that provision under this Act be made out of assets that have been distributed in accordance with subsection (1).

#### **12 Executor not liable for assets legally distributed**

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.

## **Part 3 Guardianship of minors**

### **13 Rights of surviving parent as to guardianship**

- (1) On the death of the father of a minor, the mother, if surviving, shall, subject to the provisions of this Act, be guardian of the minor, either alone or jointly with any guardian appointed by the father.

Where no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is or are dead or refuses or refuse to act, the court may, if it thinks fit, appoint a guardian to act jointly with the mother.

- (2) On the death of the mother of a minor, the father, if surviving, shall, subject to the provisions of this Act, be guardian of the minor, either alone or jointly, with any guardian appointed by the mother.

Where no guardian has been appointed by the mother, or if the guardian or guardians appointed by the mother is or are dead or refuses or refuse to act, the court may, if it thinks fit, appoint a guardian to act jointly with the father.

### **14 Power of mother and father to appoint guardians**

- (1) The father of a minor may by deed or will appoint any person to be guardian of the minor after his death.
- (2) The mother of a minor may by deed or will appoint any person to be guardian of the minor after her death.
- (3) Any guardian so appointed shall act jointly with the mother or father, as the case may be, of the minor so long as the mother or father remains alive, unless the mother or father objects to his so acting.
- (4) If the mother or father so objects, or if the guardian so appointed considers that the mother or father is unfit to have the custody of the minor, the guardian may apply to the court.

The court may either refuse to make an order (in which case the mother or father shall remain sole guardian) or make an order that the guardian so appointed shall act jointly with the mother or father, or that he shall be sole guardian of the minor.

Where the court makes an order that the guardian so appointed shall be the sole guardian of the minor, the court may make such order regarding the custody of the minor and the right of access thereto of its mother or father as, having regard to the welfare of the minor, the court may think fit, and may further order that the mother or father shall pay to the guardian towards the maintenance and education of the minor such weekly or other periodical sum as, having regard to the means of the mother or

father, the court may consider reasonable.

The powers conferred by this subsection may be exercised at any time and shall include power to vary or discharge any order previously made in virtue of those powers.

- (5) Where guardians are appointed by both parents, the guardians so appointed shall, after the death of the surviving parent, act jointly.
- (6) If under the preceding section a guardian has been appointed by the court to act jointly with a surviving parent, he shall continue to act as guardian after the death of the surviving parent; but if the surviving parent has appointed a guardian, the guardian appointed by the court shall act jointly with the guardian appointed by the surviving parent.

#### **15, 16 (Repealed)**

#### **17 Guardians may apply to court for directions**

- (1) In the event of guardians being unable to agree upon a question affecting the welfare of a minor, 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.
- (2) The power conferred by the foregoing provisions of this section shall include power to vary or discharge any order made under this section or made by any court under the *Infants' Custody and Settlements Act 1899-1934* and, where one of the guardians is the mother or father of a minor, shall also include power:
  - (a) to make such orders regarding the custody of a minor and the right of access thereto as, having regard to the welfare of a minor, the court may think fit, and
  - (b) to order the mother or father to pay towards the maintenance or education of a minor such weekly or other periodical sum as, having regard to the means of the mother or father, the court may consider reasonable.

#### **18 Power of court to remove guardian**

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

The powers of the court under this section extend to the removal of either parent from guardianship under this Act.

#### **19 Powers of guardians**

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 a minor, as any guardian appointed by will or

otherwise now has.

## **20 Savings**

Subject to section 20A, this Act does not restrict or affect the jurisdiction of the court to appoint or remove guardians in respect of infants.

### **20A Guardianship to end at 18 years**

- (1) Guardianship of the person or of the estate of a minor, whether under an appointment by the court or otherwise, shall cease upon the minor reaching the age of eighteen years.
- (2) Where a minor has been made a ward of court, the wardship shall not continue after he reaches the age of eighteen years.
- (3) A guardian shall not be appointed, by the court or otherwise, of the person or of the estate of a person who has reached the age of eighteen years.
- (4) The court shall not make a person aged eighteen years or upwards a ward of court.

## **21 Court may order access by grandparents**

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

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

## **Part 4 General**

### **22 Rules**

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.