



ANALYSIS

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1955, No. 88

AN ACT to consolidate and amend certain enactments of the General Assembly relating to claims for maintenance and support out of the estates of deceased persons. Title.
[26 October 1955]

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as the Family Protection Act 1955. Short Title.

2. (1) In this Act, unless the context otherwise requires,—
 “Administration” and “administrator” have the same meanings as they have in the Administration Act 1952: Interpretation.
1908, No. 60,
s. 32 (Reprint
of Statutes,
Vol. III, p. 292)
1939, No. 39,
s. 23
1952, No. 56

“Application” means an application made under this Act:

“Court” means the Supreme Court:

“Stepchild”, in relation to any deceased person, means any child by a former marriage of the deceased’s husband or wife; and includes any illegitimate child of the deceased’s husband or wife who was living at the date of the marriage of the husband or wife to the deceased.

(2) This Act shall apply in all cases, whether the deceased person died before or after the commencement of this Act:

Provided that no distribution of any part of the estate of a deceased person that has been made before the commencement 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could not have been disturbed in favour of that person by reason of any application or order made under the enactments repealed by this Act.

(3) For the purposes of this Act an illegitimate relationship between a parent and child shall not be recognized unless the Court is satisfied that the paternity or maternity of the parent has been admitted by or established against the parent while both the parent and child were living.

(4) For the purposes of this Act no real or personal property that is held upon trust for any of the beneficiaries in the estate of any deceased person who died after the seventh day of October, nineteen hundred and thirty-nine (being the date of the passing of section twenty-three of the Statutes Amendment Act 1939) shall be deemed to have been distributed or to have ceased to be part of the estate of the deceased by reason of the fact that it is held by the administrator after he has ceased to be administrator in respect of that property and has become trustee thereof, or by reason of the fact that it is held by any other trustee.

(5) For the purposes of this Act the estate of any deceased person shall be deemed to include all property which is the subject of any *donatio mortis causa* made by the deceased:

Provided that—

- (a) No claim in respect of any property to which this subsection relates shall lie against the administrator by any person who (under any order of the Court under this Act) becomes entitled to the property or to any benefit therefrom; and
- (b) In all other respects the provisions of this Act shall apply in respect of that property in the same manner as those provisions would apply to the property if it were part of the estate of the deceased which was properly distributed by the administrator immediately after the expiration of six months from the date of the grant in New Zealand of administration in the estate of the deceased without notice of any application or intended application under this Act in respect of the estate, whether the order of the Court is made before or after the expiration of the said six months.

3. 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) The wife or husband of the deceased:
- (b) The children of the deceased, whether legitimate or illegitimate:
- (c) The grandchildren of the deceased, being children (whether legitimate or illegitimate) of any child (whether legitimate or illegitimate) of the deceased:

Persons entitled to claim under Act.

1908, No. 60, s. 33 (1)

1936, No. 58, s. 26

1939, No. 39, s. 22

1943, No. 20, s. 14

1947, No. 60, s. 15

Provided that no claim under this Act may be made by any such grandchild of the deceased, unless—

- (i) The parent through whom he is related to the deceased has died (whether in the lifetime of the deceased or subsequently); or
- (ii) That parent has deserted or failed to maintain the grandchild; or
- (iii) The grandchild and the persons (if any) who have custody of the grandchild do not know the whereabouts of that parent; or
- (iv) That parent is an undischarged bankrupt; or

See Reprint
of Statutes,
Vol. V, p. 743

(v) That parent is a mentally defective person within the meaning of the Mental Health Act 1911:

- (d) The stepchildren of the deceased who were being maintained wholly or partly or were legally entitled to be maintained wholly or partly by the deceased immediately before his death:
- (e) The parents of the deceased, whether their relationship is legitimate or illegitimate:

Provided that no claim under this Act may be made by any such parent, unless—

- (i) The parent was being maintained wholly or partly or was legally entitled to be maintained wholly or partly by the deceased immediately before his or her death; or
- (ii) At the date of the claim, no wife or husband or legitimate child of the deceased is living.

Claims against
estate of
deceased person
for
maintenance.
1908, No. 60,
s. 33 (1),
(7), (10)
1952, No. 56

4. (1) Notwithstanding anything to the contrary in the Administration Act 1952, if any person (in this Act referred to as the deceased) dies, whether testate or intestate, and in terms of his will or as a result of his intestacy adequate provision is not available from his estate for the proper maintenance and support thereafter of the persons by whom or on whose behalf application may be made under this Act as aforesaid, the Court may, at its discretion on application so made, order that such provision as the Court thinks fit shall be made out of the estate of the deceased for all or any of those persons.

(2) Where an application has been filed on behalf of any person, it may be treated by the Court as an application on behalf of all persons who might apply, and as regards the question of limitation it shall be deemed to be an application on behalf of all persons on whom the application is served and all persons whom the Court has directed shall be represented by persons on whom the application is served.

(3) It shall not be necessary to serve any application on any 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—

- (a) The person is the wife or husband or a legitimate child of the deceased, or is a legitimate child of a deceased legitimate child of the deceased; or
- (b) The Court in its discretion considers that there are special circumstances which render it desirable that the person be served or represented.

(4) An administrator of the estate of the deceased may apply on behalf of any person who is not of full age or mental capacity in any case where the person might apply, or may apply to the Court for advice or directions as to whether he ought so to apply; and, in the latter case, the Court may treat the application as an application on behalf of the person for the purpose of avoiding the effect of limitation.

5. (1) The Court may attach such conditions to any order under this Act as it thinks fit or may refuse to make such an order in favour of any person whose character or conduct is or has been such as in the opinion of the Court to disentitle him to the benefit of such an order.

Terms of order.
1908, No. 60,
s. 33 (2), (3)

(2) 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.

6. (1) Without in any way restricting the powers of the Court under this Act, it is hereby declared that the Court may order that any 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 two or more persons specified in the order (being persons for whom provision may be made under this Act).

Provision for
class fund.

(2) Where any amount is ordered to be held on trust as a class fund for any persons under subsection one of this section, 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 or education (including past maintenance or education provided after the death of the deceased) or the advancement or benefit of those persons or of 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 eighty-one of the Statutes Amendment Act 1936 (which relates to dealings with trust property) either on the creation of the class fund or from time to time during the continuance of the trusts thereof.

1936, No. 58

Incidence of
payments
ordered.
1908, No. 60,
s. 33 (4)-(6),
(8)

7. (1) The incidence of the payment or payments ordered shall, unless the Court otherwise determines, fall rateably upon the whole estate of the deceased, or, in cases where the authority of the Court does not extend or cannot directly or indirectly be made to extend to the whole estate, then to so much thereof as is subject to the authority of the Court.

(2) The Court shall have power to exonerate any part of the deceased's estate from the incidence of any such order, after hearing such of the parties who may be affected by the exoneration as it thinks necessary, and may for that purpose direct any administrator to represent, or appoint any person to represent, any such party.

(3) The Court shall have power at any time to fix a periodical payment or lump sum to be paid by any beneficiary in the estate of the deceased to represent, or in commutation of, such proportion of the sum ordered to be paid as falls upon the portion of the estate in which he is interested, and to exonerate that portion from further liability, and to direct in what manner the periodical payment shall be secured, and to whom the 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.

(4) Upon an 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.

8. 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 made before the order of the Court is made shall be of any force, validity, or effect; and no such mortgage, charge, or assignment made after the order of the Court is made shall be of any force, validity, or effect unless it is made with the permission of the Court.

Mortgages and assignments of provisions under orders. 1908, No. 60, s. 33 (12)

9. (1) No application in respect of any estate shall be heard by the Court at the instance of a party claiming the benefit of this Act unless the application is made before the expiration of the prescribed period specified in subsection two of this section:

Limitation of proceedings. 1908, No. 60, s. 33 (9), (11) 1921-22, No. 33, s. 2

Provided that the time for making an application 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 shall extend to cases where the time for applying has already expired, including cases where it expired before the commencement of this Act:

Provided also that no such extension shall be granted unless the application for extension is made before the final distribution of the estate, and no distribution of any part of the estate made before the administrator receives notice that the application for extension has been made to the Court shall be disturbed by reason of that application or of any order made thereon, and no action shall lie against the administrator by reason of his having made any such distribution.

(2) The prescribed period mentioned in this section shall be,—

- (a) In the case of an application by an administrator made on behalf of a person who is not of full age or mental capacity, a period of two years from the date of the grant in New Zealand of administration in the estate; and
- (b) In the case of any other application, a period of twelve months from the date of the grant in New Zealand of administration in the estate.

Power of administrator to distribute before limitation period has expired. 1936, No. 58, s. 26 (1)

10. (1) No action shall lie against the administrator by reason of his having distributed any part of the estate, and no application or order under this Act shall disturb the distribution, if it was properly made by the administrator for the purpose of providing for the maintenance, support, or education of any person who was totally or partially dependent on the deceased immediately before the death of the deceased, whether or not the administrator had notice at the time of the distribution of any application or intended application under this Act in respect of the estate.

(2) No action shall lie against the administrator by reason of his having distributed any part of the estate, if the distribution was properly made by the administrator after the expiration of six months from the date of the grant in New Zealand of administration in the estate of the deceased and without notice of any application or intended application under this Act in respect of the estate.

(3) Without limiting the foregoing provisions of this section, it is hereby declared that no action by any person whose relationship to the deceased is in any way illegitimate shall lie against the administrator by reason of his having distributed any part of the estate, if the distribution was properly made by the administrator without notice of any application or intended application under this Act in respect of the estate.

(4) 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 twelve months from the date of the grant in New Zealand of administration in the estate of the deceased, the administrator does not receive notice that the application has been made to the Court:

Provided that nothing in this subsection shall prevent the subsequent making of the application.

(5) For the purposes of this section a distribution by an administrator of any part of the estate shall be deemed to be properly made if it is made in accordance with any trust, power, or authority which is subsisting when the distribution is made and would justify the distribution

if no subsequent order were made by the Court under this Act in respect of the estate.

(6) It is hereby declared that in any case where the administrator has made a distribution of any assets forming part of the estate and there is nothing in this Act to prevent the distribution from being disturbed,—

(a) The Court may make an order under this Act in respect of the assets, or may order that any person to whom the assets were distributed or his administrator shall pay to any applicant under this Act or to the administrator of the deceased a sum not exceeding the value of the assets; and for the purpose of giving effect to any such order the Court may make such further order as it thinks fit:

Provided that no such order shall deprive any other person of any estate or interest in the assets if the estate or interest was acquired in good faith, for valuable consideration, and without notice that any application was being made or was intended to be made under this Act and might affect the assets:

(b) If an order is made under paragraph (a) of this subsection in favour of any applicant,—

(i) That applicant may exercise all remedies available to him in respect of the assets and against the person who received them or his administrator without first exercising his remedies (if any) against the administrator of the deceased, notwithstanding any rule of law to the contrary;

(ii) No remedies which may be available to the applicant against the administrator of the deceased for distributing the assets shall be enforceable by execution or otherwise except so far as that applicant, having exhausted all remedies available to him against the assets and the persons to whom they were distributed or their administrators, has failed to recover all assets and benefits to which he has become entitled under that order or their value:

Provided that nothing in this subparagraph shall prevent the administrator of the deceased from being joined as a defendant in any action

against any person to whom the assets were distributed or his administrator or prevent judgment from being entered against the administrator of the deceased in any such action, but judgment so entered shall not be enforceable by execution or otherwise except in accordance with this subparagraph:

Provided also that nothing in this subparagraph shall affect any other defence which may be available to the administrator of the deceased.

Evidence as to deceased's reasons for dispositions.

11. Without restricting the evidence which is admissible or the matters which may be taken into account on any application under this Act, it is hereby declared that on any such application the Court may have regard to the deceased's reasons, so far as they are ascertainable, for making the dispositions made by his will, or for not making any provision or any further provision, as the case may be, for any person; and the Court may accept such evidence of those reasons as it considers sufficient, whether or not the same would be otherwise admissible in a Court of law.

Variation of orders.
1908, No. 60,
s. 33 (13)

12. (1) Where (whether before or after the commencement of this Act) the Court has ordered periodical payments, or has ordered any part of the estate or a lump sum to be held as a class fund or invested for the benefit of any person or persons, it shall have power to inquire whether at any subsequent date any party deriving benefit under its order is still living or has become possessed of or entitled to provisions for his proper maintenance or support and into the adequacy of the provisions, or whether the provisions made by its order for any such party remain adequate, and may increase or reduce the provisions so made or discharge, vary, or suspend its order, or make such other order as is just in the circumstances.

(2) Where an order has been made under this Act in respect of the estate of any deceased person and application is subsequently made in respect of that estate on behalf of any person who is not bound by the order, the Court may vary the previous order in such manner as it thinks fit:

Provided that the previous order shall not be varied so as to disturb any distribution made pursuant thereto if

anything in this Act prevents the distribution from being disturbed:

Provided also that, without limiting the provisions of section ten of this Act, no action shall lie against the administrator by reason of his having distributed any part of the estate pursuant to a previous order without notice of any subsequent application under this Act in respect of the estate, whether the distribution is made before or after the expiration of six months from the date of the grant in New Zealand of administration in the estate of the deceased.

13. In making any order under this Act for provision out of the estate of a deceased person, the Court shall disregard any benefit under Part II of the Social Security Act 1938 (other than a superannuation benefit, a miner's benefit, or a family benefit) which is or may become payable to any person.

Certain benefits under the Social Security Act 1938 to be disregarded. 1950, No. 49, s. 18 (3) 1938, No. 7 (Reprinted 1948, Vol. II, p. 1257)

14. (1) Where an order is made by the Court under this Act, all duties payable on the transmission of the estate under the will or on the intestacy of the deceased shall be computed as if the provisions of the order had been part of the will of the deceased.

Duty on estate. 1908, No. 60, s. 34 1952, No. 33, s. 20 (2) 1953, No. 55, s. 17

(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 refunded by the Commissioner of Inland Revenue or a District Commissioner of Stamp Duties to the person entitled to receive it.

15. From any order made under this Act, a party prejudicially affected may appeal to the Court of Appeal, and may apply to the Supreme Court for directions as to who is to be served with notice of any such appeal.

Right of appeal. 1908, No. 60 s. 35

16. (1) The enactments specified in the Schedule to this Act are hereby repealed.

Repeals and savings.

(2) Without limiting the provisions of the Acts Interpretation Act 1924, it is hereby declared that the repeal of any provision by this Act shall not affect any document made or any thing whatsoever done under the provision so repealed or under any corresponding former provision, and every such document or thing, so far as it is subsisting or in force at the time of the repeal and could have been made or done under this Act, shall

See Reprint of Statutes, Vol. VIII, p. 568

continue and have effect as if it had been made or done under the corresponding provision of this Act and as if that provision had been in force when the document was made or the thing was done.

See Reprint
of Statutes,
Vol. III, p. 292

(3) All the provisions of sections one to thirty-one of the Family Protection Act 1908 shall remain in full force so far as they relate to family homes which are registered under Part I of that Act at the date of the commencement of this Act; and, notwithstanding anything in paragraph (c) of section seventeen of that Act, any alienation (including a mortgage) by a settlor or his family of any such family home shall be valid if it is made with the prior approval of the Court; and the Court may by order confer upon the settlor or his family, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions (if any) as the Court may think fit, and may direct in what manner any money derived from any such alienation shall be applied.

Schedule.

Section 16 (1)

SCHEDULE

ENACTMENTS REPEALED

1908, No. 60—

The Family Protection Act 1908. (Reprint of Statutes, Vol. III, p. 292.)

1921–22, No. 33—

The Family Protection Amendment Act 1921–22. (Reprint of Statutes, Vol. III, p. 302.)

1936, No. 58—

The Statutes Amendment Act 1936: Section 26.

1939, No. 39—

The Statutes Amendment Act 1939: Sections 22 and 23.

1943, No. 20—

The Statutes Amendment Act 1943: Section 14.

1947, No. 60—

The Statutes Amendment Act 1947: Section 15.

1950, No. 49—

The Social Security Amendment Act 1950: Section 18 (3).

1953, No. 55—

The Death Duties Amendment Act 1953: Section 17.