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Law Reform in South Australia: Succession Act 2023 (SA)

The South Australian Parliament has passed legislation which modernises and consolidates all succession law in South Australia within the Succession Act 2023 (SA).

The *Succession Act 2023* (SA) (**Act**), passed on 28 September 2023, overhauls succession law in South Australia by repealing the *Administration and Probate Act 1919* (SA), the *Inheritance (Family Provision) Act 1972* (SA) and the *Wills Act 1936* (SA) and amending various other acts. The changes brought about by the Act make significant (and in some cases, long overdue) reforms in various areas, including:

- who can access the will of a deceased person;
- statutory remedies against executors who fail to comply with their duties;
- orders for the alternate distribution of intestate estates; and
- changes to family provision claims including who can make a claim, the factors the Court must take into account, and security for costs.

This article highlights the amendments referred to above, and how they materially compare to succession legislation in other States and Territories across Australia.

Entitlement to inspect the will of a deceased person

Section 48 of the Act lists persons who are entitled to inspect or be given a copy of a will of a deceased person (by a person who has the will in their possession or control). A "will" is defined to include a revoked will, a purported or informal will or even part of a will.

This is a new provision for South Australia. Previously, access to copies of wills was guided largely by (occasionally inconsistent) practice and convention. The new list of entitled persons is broad, and largely reflects existing legislation in other Australian jurisdictions including Queensland, Victoria and New South Wales. It includes:

- a person named or referred to in the will, even if not a beneficiary;
- a person named or referred to in an earlier will as a beneficiary;
- the surviving spouse, domestic partner, child or step child;
- a former spouse or domestic partner;
- a parent or guardian;
- a person who would be entitled to a share on intestacy; or
- a parent or guardian of a minor referred to in the Will or entitled on intestacy.

Will drafters and those who hold original (or copy wills) will need to be aware of these provisions, as they should expect that requests will made under that section regularly.

Remedy if executor or administrator fails to perform duties

New section 98 of the Act is in some ways a codification of causes of action and remedies available at common law, but creates a clear statutory pathway for aggrieved beneficiaries to issue proceedings against an executor if they believe that the executor has failed to perform any duties or comply with any undertaking or direction of the Court. This is given context by new section 81, which sets out (in very general terms) the duties of an executor.

The Court may make any or all of the following orders:

- *requiring the executor/administrator to pay into the estate an amount equivalent to any financial benefit the executor/administrator as obtained (directly or directly) by their failure;*
- *requiring the executor/administrator to compensate any person who has suffered loss or damage; or*
- *any other order appropriate to compensate persons who have suffered loss or damage as a result of the failure of the executor/administrator.*

An application must be made within 3 years from the time the aggrieved person becomes aware of the failure. This timeframe has the potential to cause issues for executors, as foreseeably the time that the aggrieved person becomes aware of the failure could be *after* the time the executor has finally distributed the estate. The executor would then be unable to rely on recourse to estate assets to defend the claim.

Distribution of intestate estates according to Court approved agreements

Section 111 introduces an entirely new concept, which allows the Court to approve an agreement for the distribution or "re-distribution" of an intestate estate (or part of one), in a manner other than to those family members or relatives specified by Division 3 of the Act.

Previously, this result could only be achieved either by contractual agreement, or by an order made under the *Inheritance (Family Provision) Act 1972* (SA). The problem with the former was enforceability (requiring a separate set of proceedings) and stamp duty implications in transferring dutiable property. The latter required potentially expensive and unnecessary proceedings (if all parties were in agreement). Section 111 has sought to remove some of those obstacles by creating a new process.

Procedurally, the section requires:

- the application to be made by the administrator of the intestate estate;
- all persons who are entitled to share in the distribution of the intestate estate (or part of the intestate estate) must be parties to the agreement, and have notice of the application;
- the Court to be satisfied that the terms of the agreement are, in all the circumstances, "just".

Satisfying the Court of those matters will no doubt require that all interested persons who are not *sui juris* are separately represented, and that the agreement is recommended as being in their interests.

It is also noteworthy that an agreement can provide for the distribution of an intestate to persons who are not blood relatives of the intestate (step children for example).

There are similar legislative provisions in New South Wales and the Northern Territory, but they are much more narrow in application in that they only apply to the estates of indigenous persons.[1] The few cases in the area suggest there are difficulties in applying those provisions in practice.

Family Provision

A. The testator's intention is now the "primary consideration" for the Court

Section 116(2) of the Act provides that when determining whether to make a family provision order, '*the wishes of the deceased person is the primary consideration of the Court*'. This is a significant change from the *Inheritance (Family Provision) Act 1972* (SA), which simply granted the Court a broad discretion to make a family provision order and did not provide any specific criteria.[2] Other jurisdictions such as New South Wales and Victoria have enacted legislation which sets out in some detail the matters to which the Court may have (and in some cases, must have) regard to when considering a family provision claim. However, framing the wishes of the deceased person as a "primary" consideration for the Court is a unique provision.

Section 116(2) appears to be an attempt to address concerns raised in the public consultation process that insufficient weight and respect is currently given to the testator's wishes in family provision claims. It will be instructive to see how the Court construes this provision. Some practitioners have expressed the view that this provision will make a family provision claim essentially impossible to prosecute, given that in most cases a provision claim is inherently at odds with the testator's wishes. However that is a very literal interpretation of the statute. It seems more likely that Section 116(2) will result in the Court placing a greater emphasis on interfering with the testator's wishes *to the least extent necessary*, as well as:

- increased calls for the discovery of will drafter's files in family provision claims (as ancillary evidence of the

testator's intention); and
- will drafters advising clients to give consideration to leaving a written statement of their wishes addressing their reasons for disinheriting a particular beneficiary.

The Act also sets out further criteria to which the Court *must* have regard, being 'any evidence of the deceased person's reasons for making the dispositions in the deceased person's will (if any); the applicant's vulnerability and dependence on the deceased; the applicant's contribution to the estate of the deceased person; and the character and conduct of the applicant'. The Court may also have regard to any other matter that the Court considers relevant'.[3] These criteria essentially comprise an abridged version of those which appear in Part IV of the *Administration and Probate Act 1958* (Vic).

B. Changes to categories of persons entitled to claim

The Act has made various amendments to the classes of claimants eligible to make a family provision claim. Generally, compared to the existing provisions, these changes increase the eligibility of step children to make a claim,[4] while limiting the eligibility of grandchildren, siblings and parents.[5]

Step children were previously only eligible if they were the child of a spouse or domestic partner of the deceased and they were, or were entitled to be, maintained by the deceased. That definition has been expanded so that 'step child' includes a child of a *former* spouse or domestic partner of the deceased, and they satisfy any one of the following:

- disabled and significantly vulnerable;
- dependent on the deceased at the date of death;
- cared for, contributed to maintenance of deceased at date of death;
- substantially contributed to estate of deceased person; or
- step-child's parent contributed assets to estate of deceased person.

Previously, parents and siblings simply had to satisfy the Court that they had cared for or contributed to the maintenance of the deceased at some point during their lifetime. This has now been tightened to provide that they must have cared for or contributed to the maintenance of the deceased at the date of death (or alternatively if the deceased died in an aged care facility, as at the date they entered that facility). Parents are also eligible if they were maintained by the deceased at the date of death.

Grandchildren were previously eligible to claim, without any additional criteria. That is now limited to circumstances where the grandchild's parent (being the child of the deceased) died before the deceased, or alternatively where the grandchild was maintained, or was entitled to be maintained, by the deceased as at the date of death.

These amendments do not appear to adopt any particular existing statutory regime in another State or Territory, but rather appear to borrow elements from various sources.

C. Security for costs in family provision claims

Section 117 of the Act now authorises the Court to order that a party to family provision proceeding provide security for costs. An order may be made where a party's claim for family provision is '*without merit*' or they are '*unwilling to negotiate a settlement of a claim for provision*'.[6] This amendment is intended to '*discourage unmeritorious claims*'.[7]

An order for security for costs can already be sought in civil proceedings in South Australia under the *Uniform Civil Rules 2020* (SA).[8] However, in practice this is rarely, if ever, sought for family provision claims. Section 117 of the Act may be an attractive option for respondents seeking to protect themselves against weak or vexatious family provision claims, though it remains to be seen whether the Court will treat this provision any differently than the existing powers. It may be expected that the Court will be reluctant to exercise this power, except perhaps in cases involving small estates and blatantly unmeritorious claims.

A specific provision to make orders for security for costs in family provision claims does not appear to exist in any of the equivalent Acts throughout Australia.

Conclusion

The reforms to succession law by the Act are wide-ranging, and include unique provisions which have not been applied in other jurisdictions. It will be instructive to see how these provisions are applied in practice and interpreted by the Courts.

Please contact the team to discuss how these reforms may impact on you.

[1] See, eg. *Succession Act 2006* (NSW), Part 4.4

[2] See *Inheritance (Family Provision) Act 1972* (SA) s 7.

[3] Succession Act 2023 (SA) s 116(2)(b)-(c).

[4] Ibid ss 115(3), (4).

[5] Ibid ss 115(5), (7), (8).

[6] South Australia, *Parliamentary Debates*, House of Assembly, 28 September 2023, 5543 (Catherine Hutchesson).

[7] South Australia, *Parliamentary Debates*, House of Assembly, 14 September 2023, 5371 (Michael Brown).

[8] Uniform Civil Rules 2020 (SA) r 115.