SOUTH AUSTRALIA

THIRD REPORT

of the

LAW REFORM COMMITTEE
of
SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

—

TESTATOR'S FAMILY MAINTENANCE ACT, 1918-1943

1969

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The Members are:

THE HONOURABLE MR. ACTING JUSTICE ZELLING, C.B.E., *Chairman.*
W. A. N. WELLS, Q.C., Solicitor-General.
S. J. JACOBS, Q.C.
K. P. LYNCH.
D. ST.L. KELLY.

The Secretary of the Committee is Mr. H. G. Edwards, c/o Adelaide Magistrates' Court Department, Adelaide, South Australia.

THIRD REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA

To:

The Honourable R. R. Millhouse, M.P.,
Attorney-General for South Australia.

Sir,

Your Committee has considered the provisions of the Testator's Family Maintenance Act, 1918-1943 relating to the time within which claims must be made under the Act, and has the honour to report as follows:—

1. Your Committee thinks that there is some advantage in retaining a special period of limitation in this legislation, provided there are adequate safeguards against hardship flowing from any such limitation. We believe the policy of the law should be to encourage such claims to be made promptly. Moreover, legislation on this subject almost invariably provides that where an application is made later than a specified time (six months after the grant of probate in South Australia) no distribution of any part of the estate made prior to the application shall be disturbed by reason of the application or any order made thereunder. In many cases an estate will be fully administered within the ordinary three year limitation period and it may therefore be misleading to potential applicants to allow them to think that they have that time in which to apply.

Nevertheless your Committee considers that the limitation in this State, and in particular the power to extend time, is too strict. *The application for extension must be made before the expiration of twelve months after the grant of probate, so that a claim is absolutely barred after that date has passed*. The comparable provisions in other States are as follows:—

New South Wales—twelve months from the date of the grant, with power to extend the time on an application made before the final distribution of the estate.

Victoria—six months after the date of grant of probate with a power of extension of time similar to New South Wales.

Queensland—six months from the date of the grant of probate "unless the Court otherwise directs".

Western Australia—six months from the date of the grant with a general power to extend.

Tasmania—three months with a general power to extend.

New Zealand—twelve months from the date of a grant with power to extend upon application made before the final distribution of the estate.

Your Committee recommends that the time limit of six months in section 4 of the South Australian Act should be retained, but that proviso (*b*) in section 4 should be amended by deleting the words "before the expiration of twelve months after the grant in this State of probate of the will or letters of administration with the will annexed of the estate of the testator, and" so that the proviso will then read:—

(*b*) The application for extension shall be made before the final distribution of the estate.

2. If the restriction on the power to extend the time is removed the problem which arose in Re: *Tiller* 1963 *S.A.S.R.* 117 will be largely overcome. In that case, claimants who were not parties to the original application were not permitted to join in that application after the time for making their own application had expired. Nevertheless, there is provision in New Zealand (section 4 (2)), Queensland (section 3 (6)) and Tasmania (section 3 (4)) to the effect (quoting the Queensland section) that "where an application has been filed on behalf of any person it may be treated by the Court as, and so far as regards the question of limitation, shall be deemed to be, an application on behalf of all persons who might apply." The advantage of such a provision is that once an application is made within time, other potential applicants would not have to rely upon the discretion of the Court to extend the time in their case. The possible disadvantage is that there may be potential but unknown claims still outstanding when the application was before the Court, but this disadvantage can be overcome by procedures designed to ensure that notice of the application is given to all prospective applicants. If this is done, our Rules of Court (which require the recipient of such notice to make his claim, if any, by entering an appearance) are adequate. However, Rule 12 (which is to the same effect as the legislative provision referred to above), is of no use unless there is a complimentary provision in the Act itself, because, as the Full Court pointed out in Tiller's Case, such a rule cannot override the limitation provisions of the Act. *Your Committee accordingly recommends* that the Act be amended as suggested, to allow potential applicants who are not themselves parties to an original application to join in the original application, without themselves having to apply, in an appropriate case, for an extension of time.

We have the honour to be

HOWARD ZELLING.
W. A. N. WELLS.
S. J. JACOBS.
K. P. LYNCH.
D. ST.L. KELLY.

Law Reform Committee of South Australia.

A. B. JAMES, GOVERNMENT PRINTER, ADELAIDE