SOUTH  AUSTRALIA

SIXTY-FOURTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO THE REFORM OF THE LAW ON WILLS AND INTESTACIES

1983

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

THE HONOURABLE MR JUSTICE ZELLING, C.B.E., *Chairman.*

THE HONOURABLE MR JUSTICE WHITE, *Deputy Chairman.*

THE HONOURABLE MR JUSTICE LEGOE, *Deputy Chairman.*

M. F. GRAY, S.-G., Q.C.

P. R. MORGAN.

D. F. WICKS.

A. L. C. LIGERTWOOD.

The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Victoria Square, Adelaide 5000.

SIXTY-FOURTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE REFORM OF THE LAW ON WILLS AND INTESTACIES

To:

The Honourable C. J. Sumner, M.L.C.,
Attorney-General for South Australia.

Sir,

In the Twenty-Eighth Report of this Committee we reported to one of your predecessors, now the present Chief Justice, on the reform of the law relating to wills and intestacy.

In it we found it necessary to discuss a number of Imperial Statutes, but it was not necessary to deal with the fate of those statutes, with minor exception, in order to report to the then Attorney within the ambit of the reference made to us.

Your predecessor has referred the matter back to us so that these Imperial Statutes can be disposed of. They are as follows:

1. Statute of Westminster II (1285) 13 Edw. I st.1 c.19.

This is the first of the series of statutes in intestacy and is the statute under which the administrator of an intestate estate can be sued for the debts due by the estate. We recommend that the statute be repealed and that the power be put into the Administration and Probate Act.

2. Statute 31 Edw. III st.1 c.11 (1357).

This statute enabled the courts to appoint a private person as administrator of an intestate estate in lieu of the ordinary of the diocese, who previously was the universal administrator of intestate estates. It enables an administrator to sue and be sued in relation to debts and other obligations of the estate. The statute is still in force in South Australia. It should be repealed here and the requisite provision put in the Administration and Probate Act, 1919.

3. Statute 21 Hen. VIII c.5 (1529).

This statute mainly deals with fees taken for probates of last will and testaments and to that extent has long since expired, but there are certain sections which deal with the law in general. Section 3 subsections (6) and (7) deal with the priorities of parties to whom administration should be granted and those priorities remain today. We think the order of priorities should be altered to accord with the statutory alterations which have taken place in the order of persons entitled to take on an intestacy and we discuss this later in this report. The established principle has always been that in general the right to a grant of administration of an intestate's estate follows the right to the property (or a proportion of it where there are several claimants of the same degree). Section 4 (3) requires executors and administrators to make proper inventories of testator's goods. Section 8 gives power, then to the ordinary, and now to the courts, to require executors to prove the testator's will and to bring in the inventory. The remainder of the Act is not of any importance today. However those sections still go to the jurisdiction of the Court and whilst the whole Act should be repealed those sections and subsections should form part of the Administration and Probate Act.

4. The Statute 43 Eliz. I c.8 (1601) which places fraudulent administrators of the goods of an intestate in the same position as an executor de son

tort. We dealt with this in the Fifty-Fourth Report of this Committee and recommended the repeal of the statute and the placing of an equivalent section in modern English in our Administration and Probate Act. We are still of that opinion.

5. The Statute 22 and 23 Car. II c.10 (1670).

Section 5 of this Act was repealed by the South Australian Act 99 of 1975. We described the reasons for the statute and the way in which it acts in the Twenty-Eighth Report of this Committee page 4. Section 3 is still of importance under which the Judges can call administrators to account and so is Section 9 dealing with letters of administration with the will annexed. The statute can be repealed apart from Section 5 which has already been repealed, but the matters referred to in Sections 3 and 9 should find a place in our own legislation.

Clearly the law as to the obligation of executors and administrators to render an inventory of the estate of the deceased and an account of their due administration derives in part of least from this and other statutes under consideration in this report. However the law in this regard derives also in part from the practice of the Prerogative Court. We suggest that when the present Imperial statutory provisions are to be repealed, a suitable provision should be included in the Administration and Probate Act, 1919-1981 under which a beneficiary can compel an executor or administrator to render an inventory of the estate as at the date of death, and at later dates if reasonably required, and an account of his due administration and to give such information touching the administration of the estate as the Court thinks fit. A beneficiary, a guardian or other representative of a minor or infirm beneficiary, a creditor or any other person whom the Court thinks proper to receive the information should have *locus standi* to make the necessary application, if a request has been made and it has been refused or ignored. If the information is not supplied, it should be ordered on summons in chambers. The Court should have power to direct an audit in appropriate cases and should have power to make an order of any of the types specified above even though executorship may have ceased and the executor may have become a trustee.

When the old statutory provisions are repealed we think that it would be inappropriate merely to rely upon the new Part VA of the Trustee Act, 1936-1982. First, that Part does not enable the Court to order an account to be made out by an executor or administrator and delivered to beneficiaries. It only requires certain records to be kept and produced for inspection. Secondly, while Part VA permits an inspector to be appointed (which is for all practical purposes equivalent to an audit) the procedure is heavy-handed in that it requires the inspector's report to be furnished, not to the persons who might have asked for it, but to the Court and the Attorney-General. This is totally inappropriate to the administration of estates which are generally family affairs. While there may be some dissatisfaction with appointed executors, beneficiaries are not likely to go to the lengths which Part VA seems to require. Many people will resent the State's involvement in what they will see as essentially a private or family matter.

6. The Statute 29 Car. II c.3 (1677)—the Statute of Frauds 1677.

This statute is dealt with mainly in our Thirty-Fourth Report dealing with the Statute of Frauds but is also dealt with in our Twenty-Eighth Report and Fifty-Fourth Report. As far as the sections relating to wills in that statute are concerned, they were repealed by the Ordinance No. 16 of 1842, adopting for use in South Australia the Imperial Wills Act,

1837. Accordingly apart from Sections 4 and 17 which are the sections of the Statute of Frauds relating to such matters as have to be in writing to be enforceable, the whole of the Statute of Frauds can be repealed, and so can Sections 4 and 17 once the Thirty-Fourth Report of our Committee relating to the Statute of Frauds has been acted upon.

7. The Statute 1 James II c.17 (1685).

Section 7 of this Statute was repealed by the Act 99 of 1975, the Administration and Probate Act Amendment Act of that year. There is nothing else in the statute which needs to be kept except possibly Section 6 which protects an administrator of an intestate estate against having to provide accounts and inventories other than at the instance of beneficiaries, guardians of infants, creditors and next of kin, and it may be from an abundance of caution wise to put a section in those terms (but subject to the remarks above on the Statute 22 and 23 Car. II c.10) into our Act when the statute is repealed in toto, as we recommend it should be.

8. The Statute 14 Geo. II c.20 (1740).

This is discussed as a matter of historical importance in our Thirty-Fourth Report. Section 9 was in fact repealed in its application to South Australia by the Ordinance to which we have already referred, the Ordinance No. 16 of 1842, and therefore no further action needs to be taken with it in this State. The other sections of 14 Geo. II c.20, which do not deal with wills, are dealt with in the Fifty-Fifth Report of this Committee.

9. Statute II Geo. IV and 1 Will. IV c.40 (1830).

As we point out at page 5 of our Twenty-Eighth Report, originally where the residue of personal estate was undisposed of, personalty went to the executors beneficially. This statute provided that unless special provision in that behalf was made by will, the residue went to the persons who were entitled under the Statutes of Distribution. Again this statute should be repealed but we make the same recommendation as we did in our Fifty-Fourth Report that an equivalent section be inserted in the Administration and Probate Act.

We make three other references to the amending Act 99 of 1975: first, at the end of that Act there is a mis-statement of a statute which is the fault of this Committee and not of Parliamentary Counsel. The Committee's report recommended the repeal of 9 Henry III chapter 1 section 7 (1225). That should have read 9 Henry III chapter 7 and that mistake should be corrected in the statute. The second thing we draw your attention to is that at page 10 of our Twenty-Eighth Report we drew attention to the fact that a person *en ventre so mère* is considered as living for the purpose of the distribution rules but having regard to the fact that the Act which was ultimately passed in 1975 acts as a code on intestacy, it might well be that an omission to re-state this rule might be deemed by the Court to be intentional and therefore to exclude a child *en ventre sa mère*. We have now read the relevant Sections 72g, 72i and 72j of the 1975 Act. In each of these sections the operative word is 'survived'. Survived, as is well known in law, has two meanings:

(a) that the person referred to as the survivor was alive at the date of death of the praepositus and went on living after the death of the praepositus;

(b) that the person referred to as the survivor was living at any time subsequent to the death of the praepositus.

The second is the less common meaning in English law and we reinforce our comment in the Twenty-Eighth Report of this Committee, that the

matter should be put beyond doubt by defining child to include a child *en ventre sa mère.*

We turn then to the question as to the order in which persons should be entitled to a grant of administration of an intestate estate.

We suggest that the order should be as follows:

(i) Spouses (including putative spouses) but spouses should have priority over putative spouses;

(ii) Children;

(iii) Remoter issue;

(iv) Relatives;

(v) Issue of relatives;

(vi) The Crown;

(vii) Creditors.

Persons with a derivative interest such as the personal representatives of a deceased child should be entitled to apply and to have the same right to apply as the person they represent. Persons living and of the same degree should have a paramount right over persons with a derivative interest.

Where the Crown is entitled to apply for administration, administration should be granted to the Attorney-General and his nominee should be authorised to make the oath and to sign any other requisite documents on his behalf. This matter has apparently been dealt with by statute in the United Kingdom.

Under the existing rules, a person who has merely a spes successionis is entitled to administration in certain circumstances. We suggest that this should not be specifically provided for other than under the general power of the court to grant administration to anyone on good cause shown.

We suggest that the court should have general power on summons in Chambers before a Judge or Master and on such notice as the court thinks fit or without notice:

(a) to pass over any person entitled to take administration;

(b) to authorise anyone to take administration (although not legally entitled to do so), or

(c) to deal with any case not covered by the rules,

if just or expedient in the circumstances. There is a precedent in Section 73 of the Court of Probate Act, 1857 which is in force in South Australia. That section should however be made inapplicable to this State and a suitable provision, drafted in wider terms, should be included in the Administration and Probate Act, 1919-1981.

In our view there is need to set flexible rules relating to the choice of administrator. A flexible and efficient chamber procedure now exists which can be made applicable to deal with unusual or difficult cases. It should be sufficient to provide rules to deal with most situations but to leave the court with a discretion to supplement or to override the rules by order in chambers where a proper case can be made out for doing so.

The statutes we are proposing to make inapplicable deal with general administration only. They have no application to special or limited administrations, examples of which are administration with the will annexed, administration de bonis non, administration durante minore

aetate, administration pendente lite, administration durante absentia, and administration ad colligenda bona.

We think that some mention of these may need to be made in the new legislation insofar as they may apply to the property of a person dying intestate. The same observation applies to an application by a syndic, and to grants where a corporation or association or a public, charitable or private body of persons is or are the residuary legatees (see *Tristram & Coote's Probate Practice 19th Edn. (1946) page 126).*

First, it should be made clear that subject to the exceptions mentioned below, the new rules should have no application to special, limited or temporary administrations.

Secondly, the rules should be made applicable to the following cases:

(a) The rules should apply to administration de bonis non of the estate of a person dying intestate.

(b) A guardian of a minor should have the same right of priority as the minor would have had if of full age except that where there are persons of full age entitled to take equally with the minor, they should have priority. Lunatics, convicts and persons subject to a protection order should be similarly provided for.

(c) An attorney applying for administration under Section 34 of the Administration and Probate Act, 1919-1981 should have the same right to administration as the person he represents.

Any amendment to the Administration and Probate Act should recognise that there may be joint grants where several persons of the same degree apply although the number of joint administrators is usually limited to three.

The Court will permit administration to be applied for by one or some only of those entitled but may require evidence that notice of the application has been given to the others (Probate Rule 13).

The Court should have power on summons to make an order permitting a joint grant to applicants who would otherwise not be entitled to take a joint grant, where special circumstances exist for the making of such an order. Such a power already exists under Section 73 of the Court of Probate Act, 1857.

The Court will not compel one party to concur in a joint application for letters of administration where he objects to one or more of the other applicants. In that case the Court must make a selection. As this is part and parcel of the topic of selection of the administrator, We suggest that the point ought to be covered in the legislation. Where an objection is raised, the Registrar should be required to refuse to proceed until it is resolved by order of a Judge or Master in Chambers.

Section 8 of 21 Henry VIII chapter 5 appears to deal with the question of the citation of named executors to accept or refuse probate with a view to clearing them off, so that a grant may be made to other applicants. The subject of citation in this regard is clearly much wider, in that it must deal, not only with clearing off executors, but also with all persons entitled to take administration either with or without a will. If the law relating to citations to accept or refuse probate is to be re-enacted, it should deal with administration and administration with the will annexed as well as probate.

We refer also to a minor point which needs clearing up in the amending Act of 1975. Generally speaking the distribution set out in Sections 72i and 72j of that Act is a stirpital one. Section 72i *(d)* however envisages a per capita distribution among grandchildren. We think this subclause should be altered to stirpital distribution to accord with all the other subclauses of those two sections, and a corresponding cross reference should be inserted in Section 72j *(d)* (iv).

We have the honour to be

HOWARD ZELLING
J. M. WHITE
CHRISTOPHER J. LEGOE
M. F. GRAY
P. R. MORGAN
D. R. WICKS
A. L. C. LIGERTWOOD
G. HISKEY
Law Reform Committee of South Australia.

8 March 1983.

D. J. WOOLMAN, Government Printer, South Australia