

# The Law Commission

(LAW COM. No. 61)

FAMILY LAW

## SECOND REPORT ON FAMILY PROPERTY: FAMILY PROVISION ON DEATH

*Laid before Parliament by the Lord High Chancellor  
pursuant to section 3 (2) of the Law Commissions Act 1965*

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*Ordered by The House of Commons to be printed  
31st July 1974*

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LONDON  
HER MAJESTY'S STATIONERY OFFICE



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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Commissioners are—

The Honourable Mr. Justice Cooke, *Chairman*.

Mr. Claud Bicknell, O.B.E.

Mr. Aubrey L. Diamond.

Mr. Derek Hodgson, Q.C.

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THE LAW COMMISSION

*Item XIX of the Second Programme*

SECOND REPORT ON FAMILY PROPERTY:  
FAMILY PROVISION ON DEATH

*To the Right Honourable the Lord Elwyn-Jones,  
Lord High Chancellor of Great Britain*

INTRODUCTION:  
BACKGROUND AND SCOPE OF THE REPORT

**Working Paper No. 42: Family Property Law**

1. Under Item XIX of our *Second Programme of Law Reform*<sup>1</sup>, which recommends a comprehensive examination of family law with a view to its systematic reform and eventual codification, we published in 1971 a working paper on Family Property Law<sup>2</sup>. The paper put forward for consideration detailed proposals under five heads:

- Part 1: *The Matrimonial Home* dealt with occupation rights and proposals to replace the existing rules determining ownership of the matrimonial home and canvassed the introduction of a principle of co-ownership of the home by husband and wife in equal shares.
- Part 2: *The Household Goods* dealt with the protection of a spouse's use and enjoyment of the household goods.
- Part 3: *Family Provision* dealt with the rights of dependants to apply for and the powers of the court to order family provision from the estate of a deceased.
- Part 4: *Legal Rights of Inheritance* contained tentative proposals for a system under which one spouse would have an automatic right to inherit part of the estate of the other spouse.
- Part 5: *Community of Property* contained tentative proposals for a system under which, when a marriage was ended by death or divorce, certain assets would be automatically shared between the spouses.

**First Report on Family Property: A New Approach**

2. In June 1973 we published our *First Report on Family Property*<sup>3</sup> in which we dealt with the three major proposals considered in Parts 1, 4 and 5 of the working paper for the introduction into English law of some form of fixed property rights between husband and wife. Our conclusions, as explained in our First Report, were as follows:—<sup>4</sup>

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<sup>1</sup> Law Com. No. 14 (1968).

<sup>2</sup> Working Paper No. 42, published on 26 October 1971.

<sup>3</sup> *First Report on Family Property: A New Approach*, Law Com. No. 52; (1973) H.C. 274. For brevity, that report is hereinafter referred to as "our First Report".

<sup>4</sup> *ibid.*, para. 61.

- (a) The present rules determining the interests of a husband and wife in the matrimonial home are in need of reform by the introduction of a principle of co-ownership under which, in the absence of agreement to the contrary, a matrimonial home would be shared equally between husband and wife.
- (b) So far as is practicable in the differing circumstances, the claim of a surviving spouse upon the family assets should be at least equal to that of a divorced spouse, and the court's powers to order family provision for a surviving spouse should be as wide as its powers to order financial provision on a divorce.
- (c) It is neither necessary nor desirable to introduce a principle under which the surviving spouse would have a legal right to inherit part of the estate of the deceased spouse.
- (d) It is not necessary to introduce a system of deferred community under which assets would be shared by husband and wife on fixed principles at the end of a marriage.

Conclusions (c) and (d) were reached on the assumption that our detailed recommendations for giving effect to conclusions (a) and (b) will be implemented<sup>5</sup>. Our detailed recommendations relating to conclusion (b) and arising from the proposals in Part 3 (Family Provision) of our working paper are now contained in this report.

3. In our working paper we expressed the view that family provision law would continue to be needed even if a form of fixed property rights were introduced, such as a system of co-ownership of the matrimonial home<sup>6</sup>. This view was supported by those who commented on the working paper. It was generally thought that, whatever other reforms were introduced, the proposals concerning family provision on death ought to be implemented.

#### **The process of consultation**

4. In reaching the conclusions contained in this report we have been assisted by the exceptionally wide consultation which took place upon our working paper and by the very great response of those who submitted comments upon it. For this help we are deeply grateful. The scope of this consultation was described in our First Report<sup>7</sup>. Those who assisted us with comments on the subject of family provision, with which we are here concerned, are shown in the list at Appendix 2.

#### **Summary of the present legal position**

5. There is a contrast between the position on intestacy and the position where the deceased leaves a will. When a marriage is ended by the death of one of the parties, the rights of the surviving spouse are as summarised in the following paragraphs.

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<sup>5</sup> Law Com. No. 52; (1973) H.C. 274, paras. 45, 59 and 61.

<sup>6</sup> Working Paper No. 42, para. 3.76.

<sup>7</sup> Law Com. No. 52; (1973) H.C. 274, paras. 3-71.

6. When a deceased leaves no will, the rules of intestate succession<sup>8</sup> lay down how the estate is to be distributed:—

- (a) If the deceased leaves children or their issue, the surviving spouse is entitled to the “personal chattels”<sup>9</sup> of the deceased, to a fixed net sum of £15,000 and to a life interest in half the balance of the estate. The children or their issue take the rest, including the remainder after the life interest.
- (b) If there are no children or their issue, but certain other close relatives (i.e. parents, brothers and sisters or their issue), the surviving spouse is entitled to the “personal chattels”, to a fixed net sum of £40,000 and to half the balance.
- (c) If the deceased leaves no such close relatives and no children or their issue, the surviving spouse is entitled to the whole estate.

If the matrimonial home forms part of the intestate estate, the survivor is entitled to require that it be appropriated in satisfaction of his or her interest in the estate<sup>10</sup>.

7. When a deceased leaves a will which either ignores or fails to meet adequately the needs of the surviving spouse or a former spouse, the survivor, under present law, has no fixed proprietary rights in the estate, but may apply to the court for family provision on the ground that the deceased failed to make reasonable provision for his or her maintenance. An application by a surviving spouse is made under the Inheritance (Family Provision) Act 1938<sup>11</sup> (hereinafter referred to as “the 1938 Act”). The children of the deceased may in certain cases apply under the same Act. A former spouse of the deceased may apply for provision from the deceased’s estate under sections 26-28A of the Matrimonial Causes Act 1965<sup>12</sup> (hereinafter referred to as “the 1965 Act”).

#### 8. Applications for family provision under the 1938 Act and the 1965 Act

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The Intestates’ Estates Act 1952 (amending s. 46 of the Administration of Estates Act 1925), as amended by the Family Provision Act 1966 and the Family Law Reform Act 1969. The 1952 Act was based on the *Report of the Committee on the Law of Intestate Succession*; (1951) Cmd. 8310. The Committee’s recommendations were influenced to a large extent by statistics showing how testators had disposed of estates of different sizes (see para. 18). Under the original s. 46 of the Administration of Estates Act 1925, if the deceased left close relatives, the only capital sum given to the surviving spouse was £1,000. The Intestates’ Estates Act 1952 increased this to £5,000 if the deceased left children, and to £20,000 if there were no children but certain other close relatives. These sums were increased to the present amounts by the Family Provision Act 1966, s. 1, and by the Family Provision (Intestate Succession) Order 1972, S.I. 1972/916 (which came into force on 1 July 1972).

<sup>9</sup> “Personal chattels” include virtually all goods (but not money) owned by the deceased other than items used in connection with a business.

<sup>10</sup> Intestates’ Estates Act 1952, Second Schedule. If, at the time of the death, the matrimonial home was held by the spouses on a beneficial joint tenancy, the severable interest of the deceased will pass to the other spouse by right of survivorship.

<sup>11</sup> As amended by the Intestates’ Estates Act 1952, the Family Provision Act 1966, the Family Law Reform Act 1969 and the Law Reform (Miscellaneous Provisions) Act 1970. The 1938 Act was based on legislation introduced in New Zealand: the Family Protection Act 1908, now the Family Protection Act 1955.

<sup>12</sup> As amended by the Family Provision Act 1966, the Family Law Reform Act 1969, the Divorce Reform Act 1969, the Law Reform (Miscellaneous Provisions) Act 1970 and the Matrimonial Proceedings and Property Act 1970. A former spouse of the deceased was first given the right to apply for family provision by the Matrimonial Causes (Property and Maintenance) Act 1958, ss. 3–6. These provisions were replaced by ss. 26–28 of the Matrimonial Causes Act 1965. A former spouse who has remarried is not entitled to apply.

may be made whether the deceased left a will or died intestate. In view of the interest which a surviving spouse automatically has in the estate under the rules of intestacy, claims by widows or widowers are more likely to be made where the deceased left a will.

**The scope of this report: a draft Bill**

9. As we have said, this report is concerned with family provision on death. The report is not confined to applications by a surviving spouse, but covers the whole law of family provision as it affects all classes of applicant. We make recommendations for—

- (a) extending the scope of family provision law and the powers of the court;
- (b) removing certain restrictions on applications by children; and
- (c) extending the class of potential applicants for family provision.

10. We make certain recommendations for the provision of maintenance out of a deceased's estate for persons who are not members of his<sup>13</sup> family. Since it has the merit of brevity, we use the expression "family provision" to include provision for such persons. However, when we came to consider the short title of the draft Bill to give effect to our recommendations, we decided that accuracy should prevail over brevity and accordingly the short title is "The Inheritance (Provision for Family and Dependants) Bill". This draft Bill is annexed at Appendix 1.

11. In due course we will publish further reports dealing respectively with the matrimonial home and with household goods.

**PART I:**

**ROLE AND OBJECTIVES OF FAMILY PROVISION LAW**

**The aim of the present law: maintenance**

12. The aim of the present family provision legislation is to ensure that reasonable provision is made for the maintenance of the widow or widower, the former spouse and dependent children<sup>14</sup>. If the court considers that the disposition of the deceased's estate does not make reasonable provision for the maintenance of an applicant, it may order that such reasonable provision as it thinks fit be made out of the estate by way of periodical payments or by a lump sum, or both, taking into account the means, needs and conduct of those concerned and all relevant circumstances.

**Should the aim of family provision be extended beyond maintenance?**

13. The working paper considered whether the role of family provision law should be extended beyond the sphere of maintenance so that it could be used to secure for the surviving spouse ownership of a fair share of the family property<sup>15</sup>. The survivor could be given the right to apply to the court not

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<sup>13</sup> For convenience, in this report we use the masculine or feminine pronoun to indicate either gender.

<sup>14</sup> For the meaning of dependent children in this context, see para. 64 below.

<sup>15</sup> Working Paper No. 42, paras. 3.6–3.9.

merely for maintenance but for a reasonable share of the deceased's estate. The court could take account of the circumstances in each individual case in deciding what share of the estate should go to the survivor. However, our provisional view in the working paper was that in the case of the surviving spouse, as in the case of other dependants, the aim of family provision should remain that of securing reasonable provision for maintenance. We suggested that, if the scope of family provision law were extended so as to enable the surviving spouse to claim a fair or reasonable share of the deceased's estate, uncertainty, involving litigation and expense, might be introduced into the administration of estates. Further, it might be difficult for the court to determine what would be a fair or reasonable share of the estate. Some of those who commented disagreed with the working paper on this point. While many professional and other bodies whom we consulted were in favour of limiting family provision law to its present role of maintenance for the reasons advanced in the working paper, our interpretation of the results of the Social Survey<sup>16</sup> which we commissioned, is that the general public were prepared to see it assume a wider role in the case of a surviving spouse.

14. As we explained in our First Report<sup>17</sup>, we no longer adhere to our provisional view in the working paper as to the limited role of family provision in the case of a surviving spouse. Recent decisions<sup>18</sup> have emphasised that maintenance is no longer the principal consideration in fixing the amount of financial provision on divorce and that the courts have the widest possible powers under Part II of the Matrimonial Causes Act 1973<sup>19</sup> to effect an equitable sharing of the family assets. We are of the opinion that the court's powers to order financial provision for a surviving spouse should be equally wide. Thus in our First Report we reached the conclusion which is set out in paragraph 2(b) above.

#### **Two principles underlying this report**

15. In the light of the conclusion just mentioned we are in a position to state two principles on which the detailed recommendations of this report are founded.

#### **Proposed standard of provision for a surviving spouse**

16. The first principle is that maintenance should no longer be retained as the objective in determining family provision for a surviving spouse<sup>20</sup> and that the court's powers should, so far as practicable, be as wide as its powers to award financial provision on divorce. Under our recommendation in paragraph 28 below, the court, in exercising its powers to award reasonable financial provision for a surviving spouse, would have regard to a set of guidelines laid down by

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<sup>16</sup> *Matrimonial Property*, by J. E. Todd and L. M. Jones (H.M.S.O. SBN 11 700129 5). The survey was carried out on our behalf by the Social Survey Division of the Office of Population Censuses and Surveys and was published in May 1972: see Law Com. No. 52; (1973), H.C. 274, paras. 4 and 37.

<sup>17</sup> *ibid.*, para. 41.

<sup>18</sup> *Wachtel v. Wachtel* [1973] Fam. 72 (C.A.); *Trippas v. Trippas* [1973] Fam. 134 (C.A.); *Harnett v. Harnett* [1974] 1 W.L.R. 219 (C.A.).

<sup>19</sup> This Act, which came into force on 1 January 1974, consolidates a number of enactments, including the relevant provisions of the Matrimonial Proceedings and Property Act 1970.

<sup>20</sup> Excluding a surviving spouse whose marriage has been the subject of a decree of judicial separation which was in force at the time of the other party's death. See para. 18 below.

statute. In the case of financial provision on divorce, statutory guidelines are laid down by section 25(1) of the Matrimonial Causes Act 1973. It is apparent that the guidelines required in the case of family provision for a surviving spouse cannot be in all respects identical with those laid down by section 25(1) of the 1973 Act. The guidelines we propose are set out in paragraph 34 below.

17. We think that these guidelines would afford sufficient guidance to the court in determining what would be a fair or reasonable share of the estate. And while there may be some increase in litigation in the early days after the legislation implementing our recommendation, we think that such litigation is likely to diminish once the courts have developed the principles on which they will in general exercise their new powers.

18. Our recommendation that the level of family provision should not be limited to maintenance is directed only to a surviving spouse. For the purposes of the recommendation, the expression "surviving spouse" is used to include a "spouse" who had in good faith entered into a void marriage with the deceased which had not been annulled prior to his death<sup>21</sup>. But the recommendation does not extend to a surviving spouse whose marriage has been the subject of a decree of judicial separation which was in force at the time of the death of the other spouse.

#### **Proposed standard of provision for other dependants**

19. The second principle on which the detailed recommendations of this report are founded is that for other dependants, including former spouses and the judicially separated spouse above referred to, the function of family provision legislation should be confined, as it is at present, to securing reasonable provision for their maintenance. The considerations which have led us to formulate this second principle are as follows.

20. In the case of a former or judicially separated spouse the financial position of the parties will normally have been considered at the time of the decree and any adjustments then appearing to be necessary will, as a general rule, have been made. In the case of decrees made after 1 January 1971 the court will, in making those adjustments, have had at its disposal the wide powers originally conferred by sections 2, 3 and 4 of the Matrimonial Proceedings and Property Act 1970 and now contained in sections 23 and 24 of the Matrimonial Causes Act 1973. Those powers are sufficient to enable the court in the matrimonial proceedings to make a fair and final adjustment of the property and financial rights of the parties to the proceedings. Where, therefore, the decree has been made after 1 January 1971 there should be no occasion, on the subsequent death of one of the parties, to seek the aid of family provision legislation to secure that the survivor obtains a fair share of the estate.

21. Where the decree and the consequential financial orders were made before 1 January 1971, the court will, in making those orders, have been subject to restrictions which have now been swept away. That raises the question whether in such cases the court should, after the death of one of the parties, have power to make in favour of the survivor orders for family provision extending beyond such provision as is appropriate for the survivor's maintenance. We have come to

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<sup>21</sup> See paras. 29 and 30 below.



the conclusion that the case for conferring such a power has not been made out and for the following reasons.

22. It has been held that the powers of the court to make orders for financial provision under sections 23 and 24 of the 1973 Act extend to cases where the decree of divorce, nullity or judicial separation was made at any date, however remote, before the commencement of the 1973 Act<sup>22</sup>. Thus a former spouse dissatisfied with the extent of the financial provision made for her by an order made before 1 January 1971 may apply for further provision under the 1973 Act. It is clear, however, that the power to make further provision on such an application will be very sparingly exercised. Lord Simon of Glaisdale P. has said: "The courts are in particular unlikely to look with favour on attempts to reopen cases long concluded."<sup>23</sup>

23. The case which we are here considering is a case arising some time in the future where:—

- (a) an order for financial provision has been made in matrimonial proceedings before 1 January 1971;
- (b) that order has not been modified or superseded by the exercise of the powers conferred by the 1970 Act or the 1973 Act; and
- (c) the person against whom the order has been made has died.

In such a case we do not think it unreasonable to say that the powers of the court to make family provision for the survivor should be limited to making such provision as may be appropriate for his maintenance.

24. Finally, we should point out that nothing has emerged in the course of our consultations to suggest that in the case of persons other than the surviving spouse<sup>24</sup> the function of family provision legislation should be extended beyond making reasonable provision for their maintenance. We therefore feel that there is some reason to hope that the principle expressed in paragraph 19 above will be generally acceptable.

## PART II:

### PERSONS ENTITLED TO APPLY FOR FAMILY PROVISION

#### A. APPLICATIONS BY A SURVIVING SPOUSE

##### The cases to be dealt with

25. In this section of the report, we deal with applications for family provision by the following:—

- (a) the deceased's wife or husband<sup>25</sup> (other than one who had been judicially separated<sup>26</sup> from the deceased and was in fact still so separated at the time of death);

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<sup>22</sup> *Williams v. Williams* [1971] P. 271; *Powys v. Powys* [1971] P. 340. Both these decisions related to the construction of s. 4 of the 1970 Act, but the material words in ss. 23 and 24 of the 1973 Act are the same.

<sup>23</sup> *Williams v. Williams* [1971] P. 271, 281.

<sup>24</sup> For the meaning of this expression, see para. 18 above.

<sup>25</sup> At present provided for by s. 1(1) (a) of the 1938 Act.

<sup>26</sup> See paras. 44–63 below for applications by a judicially separated spouse.

(b) a survivor who had in good faith entered into a void marriage with the deceased which had not been dissolved or annulled<sup>27</sup>.

#### The standard of provision

26. The present family provision legislation sets the standard of “reasonable provision for the maintenance”<sup>28</sup> of the applicant, whereas in divorce proceedings the court is not limited to any standard<sup>29</sup>. The Court of Appeal has held that the Matrimonial Proceedings and Property Act 1970 is a reforming statute under which the court has the widest possible powers to readjust the financial position of the parties and that in the normal case a wife should be regarded as entitled to a share in the capital assets of the family<sup>30</sup>.

27. In view of our conclusion that, as a general principle, the surviving partner should have a claim upon the family assets at least equivalent to that of a divorced spouse<sup>31</sup>, we consider that for the surviving spouse the standard set by family provision legislation should no longer be confined to maintenance, but should be more generally expressed.

28. *We accordingly recommend* that in the case of the surviving spouse<sup>32</sup> the powers of the court to order family provision should not be limited by the concept of maintenance and that the court should be directed to assess reasonable financial provision for the applicant in accordance with the guidelines recommended in paragraph 34 below.

29. The principle underlying our recommendation applies equally to a survivor who had in good faith entered into a void marriage with the deceased which had not been annulled<sup>33</sup> prior to his death. Maintenance is no longer the principal consideration in fixing the amount of financial provision in nullity proceedings<sup>34</sup> and it would be anomalous to retain it as the overriding aim in determining family provision for the survivor of a void marriage. The survivor of a void marriage would have been entitled to claim a share of the family assets had she petitioned for nullity during the lifetime of the deceased; we do not think that her claim for family provision should be restricted to her

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<sup>27</sup> Under the Law Reform (Miscellaneous Provisions) Act 1970, s. 6, such a person may, if he has not remarried, apply for maintenance as a dependant under the 1938 Act. As to the use of the expression “dissolved” in relation to a void marriage, see our *Report on Breach of Promise of Marriage*, Law Com. No. 26; (1969) H.C. 453, para. 51, fn. 58. The case where a person has entered into a void marriage with the deceased and then remarried during the deceased’s lifetime raises different considerations and is dealt with separately in paras. 42–43 below.

<sup>28</sup> The 1938 Act, s. 1(1).

<sup>29</sup> Matrimonial Causes Act 1973, ss. 23–25, which re-enacts ss. 2–5 of the Matrimonial Proceedings and Property Act 1970.

<sup>30</sup> *Wachtel v. Wachtel* [1973] Fam. 72 (C.A.).

<sup>31</sup> Paras. 2(b) and 16–18 above.

<sup>32</sup> The expression “surviving spouse” covers and is intended to cover a party to a voidable marriage which has not been annulled before the death of the other party.

<sup>33</sup> It is perhaps illogical to speak of a void marriage being annulled rather than being declared to have been void *ab initio*, but we follow the usage adopted in the Law Reform (Miscellaneous Provisions) Act 1970, s. 6. We also intend in this context to cover by the word “annulled” the cases where a void marriage has been dissolved: see fn. 27 above.

<sup>34</sup> See para. 14 above; on a decree of nullity the court may exercise the same powers as on a decree of divorce to award financial provision to either spouse: Matrimonial Causes Act 1973, ss. 23–25. The principles enunciated in *Wachtel v. Wachtel* [1973] Fam. 72 would appear to apply equally to nullity proceedings.

maintenance needs if the marriage was not annulled during their joint lives. We realise that this would mean that in some cases (for example, in the case of a bigamous marriage by the deceased) two or more persons may be eligible to claim reasonable financial provision from the estate<sup>35</sup> and that an award made to the “spouse” of a void marriage might reduce the amount available for the actual spouse and children. But this would not, we think, give rise to excessive complication; the court will consider the competing claims of the applicants<sup>36</sup> in the light of the guidelines recommended at paragraph 34 below and will take into account the interests of all the dependants and beneficiaries of the deceased.

30. *Accordingly we recommend* that our proposal in paragraph 28 above should also apply to the case of a person who had in good faith entered into a void marriage with the deceased which had not been annulled prior to his death.

### **Matters to be considered by the court**

#### *(a) The present law*

31. In deciding whether the deceased has made reasonable provision for his spouse and, if not, what provision should be made, the court must now have regard, under section 1(6) of the 1938 Act to:—

- (a) the past, present or future capital of the survivor and to any income of the survivor from any source;
- (b) the survivor’s conduct in relation to the deceased and otherwise; and
- (c) any other matter or thing which, in the circumstances of the case, the court may consider relevant or material in relation to the survivor, to persons interested in the estate of the deceased or otherwise.

There is also a direction that “the court shall have regard to the nature of the property representing the deceased’s net estate and shall not order any such provision to be made as would necessitate a realisation that would be improvident having regard to the interests of the deceased’s dependants and of the person who, apart from the order, would be entitled to that property”<sup>37</sup>. The same criteria are applied whether the applicant is a man or a woman<sup>38</sup>.

#### *(b) Guidelines proposed in our working paper*

32. The working paper proposed that a set of guidelines should be introduced to which the court should have regard in determining applications for family provision by a spouse<sup>39</sup> corresponding, so far as is appropriate in the different circumstances, with those applied in proceedings for financial provision in

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<sup>35</sup> This problem would also arise in the case of a polygamous marriage.

<sup>36</sup> Under the present law the court may have to consider the claims of a number of applicants in deciding what award to make, *e.g.* where the deceased is survived not only by the other spouse but also by one or more former spouses or where he is survived by the actual spouse as well as the spouse of a void marriage.

<sup>37</sup> The 1938 Act, s. 1(5). We deal with s. 1(7) of the 1938 Act in paras. 105–108 below under the heading “Statements by the deceased”.

<sup>38</sup> According to recent authority, there is no greater onus on a surviving husband than on a surviving wife: *Re Clayton* [1966] 1 W.L.R. 969; see also *Re Wilson* (1969) 113 Sol. J. 794. For the earlier view that a widower’s claim should be more critically regarded, see *Re Sylvester* [1941] Ch. 87.

<sup>39</sup> Para. 3.17.

matrimonial proceedings<sup>40</sup>. The criteria proposed in the working paper were widely accepted by those who commented.

(c) *The guidelines now proposed*

33. Taking into account the comments on our working paper together with our recommendation in paragraph 28 above that the standard aimed at should be reasonable financial provision for the surviving spouse, we now propose criteria which would enable the court to adopt an approach similar to that adopted in divorce proceedings and to recognise that a surviving spouse may be entitled to a share of the family assets by virtue of contributions to the welfare of the family<sup>41</sup>.

34. *We recommend* that the court should have regard to the following matters in deciding whether the deceased has made reasonable financial provision for his spouse<sup>42</sup> and, if not, what provision should be made:—

- (a) the income, earning capacity, property and other financial resources<sup>43</sup> which the applicant has or is likely to have in the foreseeable future<sup>44</sup>;
- (b) the financial needs, obligations and responsibilities which the applicant has or is likely to have in the foreseeable future<sup>45</sup>;
- (c) the financial resources and financial needs of any other applicant for family provision from the estate of the deceased;
- (d) the financial resources and financial needs of any beneficiary of the estate of the deceased;
- (e) the obligations and responsibilities of the deceased towards any applicant for family provision and towards any beneficiary of the estate of the deceased<sup>46</sup>;
- (f) the size and nature of the estate of the deceased;
- (g) the age of the applicant and the duration of the marriage<sup>47</sup>;
- (h) any physical or mental disability of the applicant<sup>48</sup>;
- (i) the contribution made by the applicant to the welfare of the family,

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<sup>40</sup> Matrimonial Causes Act 1973, s. 25(1); see our *Report on Financial Provision in Matrimonial Proceedings*, Law Com. No. 25; (1969) H.C. 448, paras. 81–83.

<sup>41</sup> See *Wachtel v. Wachtel* [1973] Fam. 72 (C.A.).

<sup>42</sup> Including a spouse who had in good faith entered into a void marriage with the deceased which had not been dissolved or annulled prior to his death: see para. 30 above.

<sup>43</sup> The financial resources of the applicant will in many cases include the matrimonial home. In many cases matrimonial homes are held by spouses in a form of joint ownership under which the surviving spouse becomes the sole owner. Arrangements of this kind will probably become even commoner under proposals we intend to make in another report: see para. 11 above.

<sup>44</sup> This corresponds with the Matrimonial Causes Act 1973, s. 25(1) (a); cf. the 1938 Act, s.1(6). It should be left for the court to decide how far to take into account any social security benefits received by an applicant: see *Re Watkins* [1949] 1 All E.R. 695; *Re E.* [1966] 1 W.L.R. 709; *Re Clayton* [1966] 1 W.L.R. 969; *Re Canderton* (1970) 114 Sol. J. 208.

<sup>45</sup> cf. Matrimonial Causes Act 1973, s. 25(1) (b).

<sup>46</sup> The emphasis should be on the extent of the deceased's obligation to them rather than on preserving their interests in the estate: see Working Paper No. 42, para. 3.18.

<sup>47</sup> cf. Matrimonial Causes Act 1973, s. 25(1) (d); see also *Porter v. Porter* [1969] 1 W.L.R. 1155 (C.A.).

<sup>48</sup> cf. Matrimonial Causes Act 1973, s. 25(1) (e).

including any contribution made by looking after the home or caring for the family<sup>49</sup>;

- (j) any other matter, including the conduct of the applicant or of any other person, which in the circumstances of the case the court may consider relevant<sup>50</sup>.

The above-mentioned considerations should be looked at in the light of all the information available to the court at the hearing of the application. The court should be directed to have regard to the following consideration:—

- (k) the provision which the applicant might reasonably have expected to receive if, when the deceased died, the marriage, instead of being ended by the death, had been ended by a decree of divorce<sup>51</sup>.

(d) *The relevance of conduct*

35. The relevance of conduct in applications for financial provision in divorce proceedings has been considered by the Court of Appeal in *Wachtel v. Wachtel*<sup>52</sup>. Lord Denning, M.R., held that if the conduct of one spouse was “both obvious and gross”<sup>53</sup> so that it would be “repugnant to anyone’s sense of justice” to make an order against the other party the court was free to decline an order. However, he went on, “short of cases falling into this category, the court should not reduce its order for financial provision merely because of what was formerly regarded as guilt or blame”<sup>54</sup>.

36. The nature of the conduct which will be relevant in matrimonial proceedings has been considered in subsequent cases, for example, *Harnett v. Harnett*<sup>55</sup> and *Cuzner v. Underdown*<sup>56</sup>. The judicial views expressed there show some variation of language if not of substance. It is our view that the test which ought to be applied in determining the relevance of conduct is whether (in the words of Lord Denning, M.R., in *Wachtel v. Wachtel*) it would be “repugnant to anyone’s sense of justice” to make an order for financial provision. We hope that this will be accepted as the test to be applied in determining the significance of conduct on the application of a surviving spouse for family provision. We do not consider it necessary to make a specific recommendation on this point.

### Effect of remarriage

(a) *The present rule*

37. Orders for periodical payments made in favour of a surviving spouse

<sup>49</sup> cf. Matrimonial Causes Act 1973, s. 25(1)(f); see also our *Report on Financial Provision in Matrimonial Proceedings*, Law Com. No. 25; (1969) H.C. 448, paras. 81–83.

<sup>50</sup> cf. The 1938 Act, s. 1(6); *Re Sivyver* [1967] 1 W.L.R. 1482; *Re Styler* [1942] Ch. 387; the second husband’s application was dismissed when the estate, derived from the first husband, was left to a child of the first marriage.

<sup>51</sup> This guideline was not mentioned in our working paper. Our reasons for including it now will appear from paras. 16–18 and 33 above.

<sup>52</sup> [1973] Fam. 72 (C.A.) see also *Trippas v. Trippas* [1973] Fam. 13 (C.A.). Under s. 25(1) of the Matrimonial Causes Act 1973, the court is directed to exercise its powers so as “to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other”.

<sup>53</sup> The words quoted are those of Ormrod J. in the court below. [1973] Fam. 72 (C.A.), 80.

<sup>54</sup> *ibid.*, 90.

<sup>55</sup> [1974] 1 W.L.R. 219 (C.A.).

<sup>56</sup> [1974] 1 W.L.R. 641 (C.A.).

in proceedings under the 1938 Act cease on the death or remarriage of the payee<sup>57</sup>. The same rule applies to orders for periodical payments made in matrimonial proceedings<sup>58</sup>.

*(b) Provisional proposals in our working paper*

38. We suggested in the working paper that there may be grounds for distinguishing a remarriage which follows the death of the other spouse from one which follows a decree of divorce or nullity<sup>59</sup>. When a spouse leaves an interest in property to the other spouse by will, it is now less common to make that interest cease on remarriage. The survivor's right to a life interest on an intestacy does not come to an end on remarriage. It could be argued that the present rule in family provision is unfair in that it automatically deprives the survivor of maintenance, even if the remarriage brought no additional sources of income. Our provisional proposal was that remarriage by a surviving spouse should not automatically bring to an end an order for periodical payments. It was made clear that the court would have power to reduce the payments under the order or even to end them if remarriage had resulted in a change in the circumstances of the survivor.

39. Some of those who commented accepted the proposal; others thought that the onus should be on the survivor to apply for the order to be continued in the same or a reduced amount. Some objected to the proposal on the ground that no distinction should be made between the divorced spouse and the widow.

*(c) Our proposals*

40. On further consideration we adhere to our view in the working paper. We think it justifiable to distinguish between financial provision after a decree of divorce or nullity and family provision after the death of a party to a marriage. On divorce the court has to take into account the needs of both parties, but on a family provision application the needs of a deceased spouse no longer have to be considered. In our opinion it is not possible to state as a matter of principle that remarriage justifies the extinguishment of an order for periodical payments in favour of a surviving spouse. The justice of the matter will vary according to the circumstances of the case, including the financial benefits (if any) accruing to the surviving spouse from the remarriage, the needs of other dependants, and the position of beneficiaries of the deceased's estate whose rights have been diminished in consequence of the periodical payments order. The practical conclusion which we draw from these considerations is that, on the remarriage of a surviving spouse, an order for periodical payments made by way of family provision in her favour should continue in force subject to a power of the court to vary or discharge the order on an application made to the court for that purpose. We deal generally in paragraphs 177-181 and in paragraph 184 below with the persons who should be entitled to apply for the variation and discharge of orders.

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<sup>57</sup> The 1938 Act, s. 1(2) (a). This is also the position with regard to the survivor of a void marriage under the Law Reform (Miscellaneous Provisions) Act 1970, s. 6(2).

<sup>58</sup> Matrimonial Causes Act 1973, s. 28. That Act draws a distinction between a periodical payments order and a secured periodical payments order. In this report, when we refer, in whatever terms, to an order for periodical payments, we intend to include such an order whether secured or not.

<sup>59</sup> Working Paper No. 42, para. 3.32.

41. *We therefore recommend* that an order for periodical payments made in favour of a surviving widow or widower should not automatically come to an end on remarriage. The court should have power to vary or discharge such orders under the powers of variation and discharge dealt with in a later section of this report<sup>60</sup>. We are not proposing that the court should be prohibited from including in an order for periodical payments a provision that payments should end on remarriage (though we do not expect such provisions to be common), but where such a provision is included we propose that the powers of variation and discharge should extend to it<sup>61</sup>.

42. We have considered whether the above principle should also apply to the survivor of a void marriage. In the case of a void marriage it is open to either party to remarry during the lifetime of the other party without obtaining a decree of nullity. We think that remarriage by a party to a void marriage during the lifetime of the deceased should, as at present, terminate his right to claim family provision from the deceased's estate; in such a case the survivor may be said to have treated the marriage with the deceased as at an end. On the other hand, remarriage after the death of the other party carries no such implication and we think that such remarriage should not automatically terminate an order for family provision in favour of the survivor of a void marriage.

43. *We recommend* that:—

- (a) remarriage by a party to a void marriage during the lifetime of the deceased should terminate his right to claim family provision from the deceased's estate;
- (b) remarriage after the death of the other spouse should not automatically terminate an order for family provision in favour of the survivor, but should be subject to the powers of variation and discharge referred to above;
- (c) the principle expressed in sub-paragraph (b) above should also apply in the case of the survivor of a void marriage who has not remarried in the lifetime of the deceased.

#### B. APPLICATIONS BY A FORMER SPOUSE OR A JUDICIALLY SEPARATED SPOUSE

##### **The cases to be dealt with**

44. In this section of the report we deal with applications for family provision by:—

- (a) a former spouse of the deceased;
- (b) a surviving spouse whose marriage had been the subject of a decree of judicial separation which was in force at the time of the other spouse's death, and who remained in fact separated from the other spouse at the time of the death.

##### **The standard of provision**

45. Under the present law an application by a former spouse of the deceased

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<sup>60</sup> Paras. 156–184 below.

<sup>61</sup> Para. 167 below.

for maintenance from the estate is made under section 26 of the Matrimonial Causes Act 1965. A judicially separated spouse can apply for maintenance from the estate under the 1938 Act as the widow or widower of the deceased<sup>62</sup>. We have already expressed the view that in the case of a former spouse or a judicially separated spouse the aim of family provision legislation should remain that of securing reasonable provision for their maintenance<sup>63</sup>. *We so recommend.*

#### **The definition of a former spouse**

46. By section 26(6) of the 1965 Act the expression "former spouse" is defined as meaning a person whose marriage with the deceased was during the deceased's lifetime dissolved or annulled by a decree made by the courts of England and Wales. The effect of the definition is to exclude a former spouse whose marriage with the deceased was during his lifetime dissolved or annulled under the law of any country outside England and Wales. We have considered whether this definition should continue to have that exclusive character.

47. On the one hand, it may be said that the place where the divorce or annulment was pronounced is immaterial to the merits of the former spouse's claim. On the other hand, it may be said that, where a divorce or annulment takes place under the law of a country other than England and Wales, the question what financial provision should be made will have been considered under the law of that country and that it is not appropriate that the English courts should intervene. We are concerned in dealing with this problem in this report to produce a fair practical solution rather than to consider the merits of conflicting principles.

48. In clause 8 of the draft Law Reform (Personal Injuries, etc.) Bill appended to our *Report on Personal Injury Litigation—Assessment of Damages*<sup>64</sup> provision is made for including a "former spouse" among the persons for whose benefit an action may be brought under the Fatal Accidents Acts. The definition of "former spouse" in clause 8(2) of the draft Bill extends to persons whose marriage was terminated by divorce or annulment under the law of countries other than England and Wales. It is to be observed, however, that a former spouse whose marriage was so terminated will not be entitled to benefit under the Fatal Accidents Acts unless dependency is proved.

49. Later in this report<sup>65</sup> we make recommendations as to family provision for persons, not necessarily related to the deceased, who were being wholly or partly maintained by him immediately before his death. Where a marriage has been dissolved or annulled abroad, there is nothing which would prevent the former spouse from applying for family provision under those recommendations if wholly or partly dependent on the deceased at the date of death. Those recommendations are thus consistent with our recommendations as to the Fatal Accidents Acts, and we think that they should cover the great majority of deserving cases.

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<sup>62</sup> A decree of judicial separation does not change the marital status of the parties.

<sup>63</sup> Para. 19 above.

<sup>64</sup> Law Com. No. 56; (1973) H.C. 373.

<sup>65</sup> Paras. 92-98 below.



50. We have reached the conclusion that, if in this report we were to consider extending the definition of “former spouse” by including cases where the divorce or annulment took place abroad, we should have to embark upon a much wider inquiry involving the whole question as to how far the English courts should award maintenance to a former spouse after the dissolution or annulment of the marriage abroad. Such an inquiry may well be desirable, but it involves problems (including problems of private international law) going beyond the scope of this report and beyond the scope of the consultations in which we have engaged. We therefore think it preferable to be guided by the definition in the 1965 Act.

51. It only remains to add that in this section of our report we use the expression “annulled” to include both the case where a decree is made declaring a marriage to have been void *ab initio*<sup>66</sup> and the case where a decree is made avoiding a voidable marriage.

#### **Matters to be considered by the court**

##### *(a) The present law*

52. In deciding whether to order family provision for a former spouse, the court must have regard to the same factors as on an application under the 1938 Act<sup>67</sup> and, in addition, to any application for maintenance made by the applicant during the lifetime of the deceased<sup>68</sup>.

##### *(b) The guidelines now proposed*

53. We have recommended that in applications for family provision by a surviving spouse, the court should have regard to the guidelines set out in paragraph 34 above. Although the guidelines would not be applied in the same manner as in the case of a surviving spouse<sup>69</sup>, all the matters set out are (with one exception) equally relevant to applications by a former spouse or a judicially separated spouse. The exception relates to guideline (k), which directs the court to have regard to the provision which the applicant might reasonably have expected to receive if, when the deceased died, the marriage, instead of being ended by the death, had been ended by a decree of divorce.

54. *We accordingly recommend* that in applications for family provision by a former spouse or a judicially separated spouse the court should have regard to the guidelines (other than guideline (k)) set out in paragraph 34 above.

#### **Effect of remarriage**

##### *(a) The present rule*

55. The present rule is that a former spouse who has remarried is not entitled to apply for family provision<sup>70</sup>. Moreover, orders for periodical payments in

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<sup>66</sup> cf. para. 29, fn. 33 above.

<sup>67</sup> Para. 31 above; cf. the 1965 Act, s. 26(4) (a), (b), (d) and s. 26(5).

<sup>68</sup> The 1965 Act, s. 26(4) (c).

<sup>69</sup> In the case of a former spouse or a judicially separated spouse, the court would have regard to the guidelines in determining the amount of maintenance to be awarded to the applicant, whereas in applications by a surviving spouse the court would not be limited to considering the maintenance needs of the applicant.

<sup>70</sup> The 1965 Act, s. 26(1).

favour of a former spouse must cease at the latest on the remarriage of the payee<sup>71</sup>.

*(b) Our proposals*

56. We have recommended that remarriage should not automatically terminate an order for periodical payments in favour of a surviving spouse<sup>72</sup>. Although considerations of uniformity suggest that this recommendation should also apply to the case of a former spouse, there are grounds for distinguishing remarriage by a surviving spouse from remarriage by a former spouse. On the death of one spouse, it is reasonable that the provision made from his estate for the surviving spouse should so far as practicable have a permanent character; on the other hand, the remarriage of one of the parties to a divorce may reasonably be regarded as a renunciation of claims against the former spouse. This is the principle which obtains at present.

57. Where the marriage is ended by a decree of divorce or nullity, the principle is that if one of the parties remarries during their joint lives his claims against the other party come to an end<sup>73</sup>. It seems to us that if remarriage destroys any claim against a former spouse, it should also destroy any claim against his estate. We therefore adhere to the view expressed in our working paper<sup>74</sup> that the existing rule relating to remarriage by a former spouse of the deceased should remain.

58. Although a decree of judicial separation does not change the partners' marital status, it almost invariably denotes the end of the marriage. We think that in such a case the present rule should remain; an order for family provision by way of periodical payments in favour of a spouse who was judicially separated at the time of the death should cease to have effect on her remarriage.

**Former spouses and judicially separated spouses whose financial position was not dealt with in matrimonial proceedings**

59. We now consider the special problem which arises in the case of an application for family provision by a former spouse who has not remarried or by a spouse who was judicially separated from the deceased at the date of the death<sup>75</sup> where, before the deceased's death, either:

- (a) no application had been made for financial provision in her favour in the relevant matrimonial proceedings, or
- (b) such an application had not been disposed of by the court in those proceedings.

By "financial provision" in this context we do not mean maintenance pending suit, but financial provision under sections 23 or 24 of the 1973 Act.

60. In this report we distinguish between the standard of family provision

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<sup>71</sup> The 1965 Act, s. 26(3).

<sup>72</sup> Para. 41 above.

<sup>73</sup> Matrimonial Causes Act 1973, s. 28; see our *Report on Financial Provision in Matrimonial Proceedings*, Law Com. No. 25; (1969) H.C. 448, para. 14.

<sup>74</sup> Working Paper No. 42, para. 3.33.

<sup>75</sup> And who has not remarried since that date: para. 58 above.

for a surviving spouse (other than a judicially separated spouse) and that for a former spouse or a judicially separated spouse. One of our reasons for doing so is that under the present law the former spouse or the judicially separated spouse has the opportunity during the deceased's lifetime to obtain a share of the family assets in matrimonial proceedings<sup>76</sup>. There will, however, be cases where, even under the present law, the former spouse or the judicially separated spouse has no such opportunity because the death of the other spouse has supervened before the court has made an order for financial provision in the matrimonial proceedings. We consider that special provision should be made for such a spouse who, without fault on her part, is placed in this situation.

61. It would be an unsatisfactory solution to direct that the court should automatically treat such a spouse as entitled to the same standard of provision as that specified for claims by surviving spouses. There may well be cases where an order made on that basis in favour of a former spouse or a judicially separated spouse would not be justified. For example, the reason why no order for financial provision has been made in the matrimonial proceedings may be that the deceased had voluntarily made adequate financial arrangements for his former spouse, or that the former spouse has been guilty of unjustified delay in applying for such provision in the matrimonial proceedings.

62. *We recommend* that the court should be empowered, on a claim for family provision by a former spouse, or a judicially separated spouse, whose financial position was not dealt with by an order for financial provision in the matrimonial proceedings, to apply the standard of provision applicable to claims by surviving spouses, where it considers it just so to do.

63. *We further recommend* that the above proposal, which is designed to deal with an exceptional type of situation, should in the interests of certainty and finality be limited to applications where the deceased has died within twelve months of the grant of the relevant decree absolute of divorce or nullity, or decree of judicial separation, as the case may be.

### C. APPLICATIONS BY CHILDREN

#### **Children entitled to apply**

64. Under the 1938 Act, section 1(1), the following categories of children may apply for maintenance from the estate of the deceased:—

- “(b) a daughter who has not been married, or who is, by reason of some mental or physical disability, incapable of maintaining herself,
- (c) a son who has not attained the age of twenty-one years<sup>77</sup>,
- (d) a son who is, by reason of some mental or physical disability, incapable of maintaining himself”.

The definition of “son” and “daughter” includes both adopted and illegitimate children as well as posthumous children of the deceased<sup>78</sup>.

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<sup>76</sup> Paras. 20–22 above.

<sup>77</sup> The age limit of 21 was preserved by s. 5 of the Family Law Reform Act 1969 (which lowered the age of majority to 18).

<sup>78</sup> S. 5(1), as amended by the Family Law Reform Act 1969, s. 18.

65. As a practical matter, the circumstances in which an application by a child is likely to be made are:—

- (a) when the will fails to make any provision or reasonable provision for the child; or
- (b) on an intestacy, where the rights of the surviving spouse, who may or may not be a parent of the child, have exhausted the estate or left insufficient to provide for the child.

66. A child who is not the deceased's own child or adopted child has no right to claim any share of the estate, either on intestacy or under family provision law. Thus, a child of the deceased's spouse by a different union, or a child of neither party who has nonetheless been treated as part of the deceased's family, has no rights against the deceased's estate. If a man leaves an illegitimate child, even if he never contributed to its support, the child has succession rights on intestacy and is entitled to apply for maintenance from the estate; but if a man accepts full responsibility for his wife's children by a previous marriage, without a formal adoption, those children have no rights against his estate<sup>79</sup>.

67. Under the Matrimonial Causes Act 1973, the court on granting a decree of divorce, nullity or judicial separation may order either spouse to make financial provision for a "child of the family"<sup>80</sup>. This category includes the children of the marriage and (subject to certain conditions) a child who has been treated by both of the parties to the marriage as a child of their family. It does not necessarily include stepchildren. Before making an order against a party in favour of a child who is not the child of that party the court must have regard to all the circumstances relating to the assumption of responsibility for the child by that party<sup>81</sup>.

68. On a divorce the court is dealing with the obligations of both spouses towards a child of their family. In the case of death one is concerned with the obligation of the deceased towards the child, which should not depend, in our view, on whether the deceased and his spouse had treated the child as a child of their family.

69. We consider that, where the deceased had, in relation to any marriage to which he was at any time a party, treated a child as a child of the family, that child should be entitled to apply for family provision from his estate. This view is a development from the proposal in our working paper that "where the deceased had treated a child as a child of his family that child should be entitled to apply for family provision from the estate"<sup>82</sup>. The proposal was accepted by the great majority, subject to the same qualifications as apply to the corresponding situation in the case of a divorce, namely that in considering an application the court should have regard to the circumstances relating to the assumption of responsibility by the deceased and to any claim the child may have against another person to be maintained<sup>83</sup>.

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<sup>79</sup> In contrast, if that man were killed by the negligence of another, a dependent stepchild would be entitled to claim under the Fatal Accidents Acts 1846–1959.

<sup>80</sup> Ss. 23 and 52(1); see the recommendations in our *Report on Financial Provision in Matrimonial Proceedings*, Law Com. No. 25; (1969) H.C. 448, paras. 23–32.

<sup>81</sup> S. 25(3) of the 1973 Act, which is set out in full in para. 83 below.

<sup>82</sup> Working Paper No. 42, para. 3.38.

<sup>83</sup> In paras. 83–84 below we recommend criteria to which the court should have regard.

70. *We recommend* that a child treated by the deceased as a child of the family in relation to any marriage to which the deceased was a party should be entitled to apply for family provision from the deceased's estate.

**Position of adult or married children: age limits**

*(a) The present rules*

71. The age limit of 21 in respect of applications by a son<sup>84</sup> differs from the age limit in respect of orders for financial provision in divorce and other matrimonial proceedings. Under the Matrimonial Causes Act 1973, section 29(1), no order other than a settlement or variation of a settlement may be made in favour of a child who has attained the age of 18; section 29(2)(b) of that Act provides that the term to be specified in a periodical payments or secured periodical payments order in favour of a child shall not extend beyond the date of the child's eighteenth birthday. By way of exception, however, section 29(3)<sup>85</sup> provides that the court may make an order or extend an order in favour of a child over the age of 18 if it appears to the court that:

“(a) the child is, or will be, or if an order were made without complying with either or both of those provisions would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or

(b) there are special circumstances which justify the making of an order without complying with either or both of those provisions.”

If an age limit for an application by a son for family provision is retained, we can see no reason why it should differ from that applicable in matrimonial proceedings.

72. At present there is no age limit for an application for family provision by an unmarried daughter. Considerations of equality suggest that there should be no difference between the rights of children of different sexes. All should have the same right to apply for family provision.

*(b) Should age limits be removed?*

73. There are precedents in other jurisdictions for eliminating all age limits<sup>86</sup>. The absence of any age limit in England on claims by unmarried daughters is presumably because it was thought that an unmarried daughter was likely to be an actual dependant of a deceased parent. Although it may be more common for a parent to leave an adult daughter dependent on him than an adult son (excluding cases of incapacity), it is not impossible for an adult son to be dependent on a parent.

74. The argument against removing the age limit altogether is that it might encourage able-bodied sons capable of supporting themselves to apply for provision from the estate, thereby possibly incurring costs to be paid from the

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<sup>84</sup> The 1938 Act, s. 1(1); see para. 64 above.

<sup>85</sup> See our *Report on Financial Provision in Matrimonial Proceedings*, Law Com. No. 25; (1969) H.C. 448, paras. 37-39.

<sup>86</sup> There is no age limit in the Republic of Ireland (Succession Act 1965, s. 117), or in most of the Australian States or in New Zealand. (Wright, *Testator's Family Maintenance in Australia and New Zealand*) (2nd ed. (1966) pp. 120, 123 ff.).

estate and reducing the share of the surviving spouse or other beneficiaries. However, an application by a son (or, indeed, by a daughter in the same position) could not succeed unless the court found that the deceased had failed to make reasonable provision for that child's maintenance.

75. One solution would be to limit the right to apply to those children, of any age, who were actually dependent on the deceased at the time of his death; but this would rule out a claim against the estate of a parent who had unreasonably refused to support an adult child during his lifetime where it would have been morally appropriate to provide such support. Moreover, an adult child, who is fully self-supporting at the time of the parent's death, may quite suddenly thereafter cease to be so.

76. In our working paper we considered that the better solution would be to remove all age limits, leaving the court to distinguish between the deserving and the undeserving<sup>87</sup>. Our proposal to this effect was widely supported by those who commented. Some commentators, however, suggested that in the case of children over 18 the court ought not to make an order unless the child is still being educated or there are special circumstances<sup>88</sup>. On reflection, however, we do not favour restricting the court's discretion unduly. There might be circumstances in which it would be reasonable to order family provision which may not be "special circumstances"<sup>89</sup> within the meaning of section 29(3)(b) of the Matrimonial Causes Act 1973.

77. We therefore adhere to the proposal in our working paper. If, contrary to this proposal, an age limit is retained we think that it should be 18 for both sons and daughters, as in the case of matrimonial proceedings; and that a child over 18 should be entitled to apply for family provision only in the circumstances specified in section 29(3)(a) and (b) of the Matrimonial Causes Act 1973, which are set out in paragraph 71 above.

78. There remains the question whether there is any merit in the provision that a daughter may claim only if she has not married<sup>90</sup>. Although in principle the responsibility for maintaining her passes on marriage to her husband, in our view the restriction is capable of causing hardship, for example, where the daughter is a widow with young children who has not been provided for by her husband<sup>91</sup>. To avoid possible hardship, we proposed that the condition that a daughter can apply only if unmarried be removed<sup>92</sup>. We thought the proposal unlikely to lead to any substantial increase in the number of cases, since a married daughter

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<sup>87</sup> Para. 3.41.

<sup>88</sup> cf. Matrimonial Causes Act 1973, s. 29(1) and (3); see para. 71 above. There is no restriction on the power to make a settlement benefiting an adult child.

<sup>89</sup> This phrase has not yet been judicially interpreted.

<sup>90</sup> Or is incapacitated, see para. 64 above.

<sup>91</sup> In *Re Rodwell* [1970] Ch. 726 it was held that a daughter whose voidable marriage had been annulled was entitled to make a claim against her father's estate under the 1938 Act. At the time of that decision the decree of nullity operated retrospectively, but see now the Matrimonial Causes Act 1973, s. 16, which reproduces s. 5 of the Nullity of Marriage Act 1971. We think it material to the question of policy which we have to consider to bear in mind the following comment which was made on the decision in *Re Rodwell*: "... it is hard to see any rational basis for a rule which *excludes* a daughter who has been left a penniless widow with several children to support, but which *includes* a childless daughter whose marriage has been annulled and who can claim financial provision from her former husband..." Hall (1970) C.L.J. 213. See also Tyler, *Family Provision* (1971) p. 20.

<sup>92</sup> Working Paper No. 42, para. 3.42.

whose husband is supporting her would not be likely to make or succeed in an application against the estate of her deceased parent. The proposal was widely supported.

79. *We accordingly recommend*, reaffirming the views expressed in the working paper, that any child or child of the family of the deceased, whether over or under 21 and whether married or unmarried, should be entitled to apply for family provision.

#### **The standard of provision**

80. We have already expressed the view that as regards children the objective of family provision legislation should remain that of securing reasonable provision for their maintenance<sup>93</sup>. *We so recommend*.

#### **Matters to be considered by the court**

##### *(a) The present law: the guidelines proposed in our working paper*

81. In determining whether the deceased has made reasonable provision for the maintenance of a child, the matters which the court at present has to consider are the same as those applicable in the case of a spouse<sup>94</sup>. The working paper proposed certain changes in the guidelines applicable to children to bring them into line with those applicable to children in matrimonial proceedings<sup>95</sup>. We took into account that the circumstances on divorce and on death are not necessarily the same, and that there are some matters which are relevant to only one class of application. The criteria proposed were accepted by the great majority of those who commented on the working paper. In the light of these comments and our own reconsideration of the matter, we now propose the following guidelines.

##### *(b) The guidelines now proposed*

82. *We recommend* that in family provision applications by a child or a child of the family of the deceased the court, in exercising its power to award maintenance, should have regard to the following matters:—

- (a) the income, earning capacity, property and other financial resources which the applicant has or is likely to have in the foreseeable future;
- (b) the financial needs, obligations and responsibilities which the applicant has or is likely to have in the foreseeable future;
- (c) the financial resources and financial needs of any other applicant for family provision from the estate of the deceased;
- (d) the financial resources and financial needs of any beneficiary of the estate of the deceased;
- (e) the obligations and responsibilities of the deceased towards any applicant for family provision and towards any beneficiary of the estate of the deceased;
- (f) the size and nature of the estate of the deceased;

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<sup>93</sup> Para. 19 above.

<sup>94</sup> Para. 31 above.

<sup>95</sup> Para. 3.44; see Matrimonial Causes Act 1973, s. 25(2) and (3).

- (g) any physical or mental disability of the applicant;
- (h) the manner in which he has been, is being or might be expected to be educated or trained;
- (i) any other matter, including the conduct of the applicant or of any other person, which in the circumstances of the case the court may consider relevant<sup>96</sup>.

83. When considering an application by a child who, although not a child of one of the parties to a marriage, has been treated by that party as a child of the family, the court in matrimonial proceedings at present has regard:—

- “(a) to whether that party had assumed any responsibility for the child’s maintenance and, if so, to the extent to which, and the basis upon which, that party assumed such responsibility and to the length of time for which that party discharged such responsibility;
- (b) to whether in assuming and discharging such responsibility that party did so knowing that the child was not his or her own;
- (c) to the liability of any other person to maintain the child.”<sup>97</sup>

84. We proposed<sup>98</sup> that similar considerations should be included in those taken into account in a family provision application by a child treated by the deceased as a child of his family. This proposal was accepted as necessary by those who favoured extension of the class of children entitled to apply. *We recommend* the adoption on such applications of the additional criteria set out in paragraph 83 above.

#### D. APPLICATIONS BY OTHER DEPENDANTS

##### **Should the class of applicants be further extended?**

85. The working paper raised the question whether the class of applicants entitled to apply for family provision (at present limited to the spouse, former spouse and children of the deceased)<sup>99</sup> should be extended<sup>100</sup>.

##### *(a) Position in other jurisdictions*

86. Our working paper referred to the view expressed in a study by the Family Law Project of the Ontario Law Reform Commission<sup>101</sup> that all actual dependants should have the right to apply and quoted from the study as follows:—

“There may also have been other persons whom the deceased was supporting, and he may not have covered these commitments adequately in his will, he may have no will, or his will may be invalid. The court should have a discretion to continue against the estate of the deceased, on such

<sup>96</sup> Other circumstances might include, e.g. any previous order made in respect of the child in any matrimonial proceedings or the financial position of the other parent, if living.

<sup>97</sup> Matrimonial Causes Act 1973, s. 25 (3).

<sup>98</sup> Working Paper No. 42, para. 3.45.

<sup>99</sup> Including adopted and illegitimate children, see para. 64 above.

<sup>100</sup> Para. 3.47.

<sup>101</sup> *Study on Property Subjects* Vol. III, Part IV, *Conclusions* Ch. 3, p. 539 (rev.); see also Vol. III, Part III, Ch. 3, pp. 478 ff.



terms as to amount and mode of payment as it may think reasonable, support obligations in existence at the date of the death, whether legal or *de facto*.”

This question has also been considered by the Law Reform Committee of Western Australia<sup>102</sup>. Recognition of the fact that persons other than the surviving spouse and children may have been dependent on the deceased can be found in the Fatal Accidents Acts 1846–1959 under which a claim can be brought on behalf of a wide class of dependants of the deceased<sup>103</sup>.

*(b) Provisional proposals in our working paper*

87. The working paper considered which categories of persons had a claim to be recognised as applicants for family provision and suggested that the right to apply could be made to depend, so far as applicants other than a spouse or child are concerned, not on the applicant's relationship to the deceased but on whether the deceased had in fact been contributing to the support of the applicant. It was thought that consideration should be given to extending the right to apply for family provision to all persons who were in fact wholly or partially dependent on the deceased at the time of his death<sup>104</sup>. We pointed out that there are many factors to be considered before such a change could be made. For example, it might be appropriate to attach special weight to the deceased's intentions. No provisional proposal was made but views were invited as to whether the class of applicants should be extended and, if so, how a wider class of dependants should be defined.

*(c) Results of consultation*

88. This issue attracted a great deal of interest and comment. A few were opposed to any extension of the class of applicants. The majority were in favour of adding to the categories of dependants entitled to apply. They were, however, divided as to the scope of the extension which should be made. Some favoured the inclusion of a wide circle of relatives (for example, parents, grandchildren); others thought that dependent members of the household should be covered, whether or not related to the deceased (for example, a *de facto* spouse). The majority of those who commented favoured the inclusion of the more general category suggested in the working paper, *viz.* persons who were actually dependent upon the deceased at the time of his death<sup>105</sup>.

*(d) The arguments for and against extension*

89. An important purpose of family provision law, it seems to us, is to ensure that a person makes reasonable provision for the maintenance of those whom he is in law liable to maintain. The existing categories of applicants already include all those in respect of whom an order for maintenance could be made against the deceased during his life. The law also recognises, though it does not

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<sup>102</sup> Report on *The Protection to be given to the Family and Dependants of a deceased person* (11 August 1970): paras. 35 and 51 and clause 6(e) of annexed Bill. They recommended the following formula: “any other person who, at the time of the death of the deceased, was ordinarily a member of the household of the deceased and was being wholly or partly maintained by him and for whose maintenance he had some special moral responsibility”.

<sup>103</sup> The class includes not only the spouse and children but also the parents, grandparents, grandchildren, brothers and sisters, uncles and aunts.

<sup>104</sup> Working Paper No. 42, para. 3.47.

<sup>105</sup> *ibid.*

enforce directly, certain other moral obligations which the deceased may have assumed during his life. For example, in family provision law the right of the deceased to fulfil a moral obligation to his mistress has been recognised to this extent, that it may defeat the widow's application for such provision<sup>106</sup>.

90. It is arguable that persons who have no rights enforceable against the deceased during his lifetime ought not to be entitled to claim family provision from the estate. However, where a deceased person was contributing to someone's maintenance before his death his failure to make provision for that person may have been accidental or unintentional; he may have made no will; his will may be stale; or his will may have operated in a way he did not anticipate (for example, the specific legacies may exhaust the estate and leave no residue). In these cases an order for family provision would be doing for the deceased what he might reasonably be assumed to have wished to do himself. This argument carries particular weight where the "dependant" is a person with whom the deceased has been cohabiting. If the deceased dies intestate the person with whom he has been living has no claim; whereas any illegitimate children have rights under the rules of intestate succession as well as a claim to family provision.

91. Another argument against any extension of the class of applicants is that the deceased may have been prepared to contribute to someone's support during his lifetime while he had a reasonable income, but he might be unwilling that the burden should be imposed on his estate to the possible detriment of his wife and children. However, though we accept that this position may arise in some cases, we think the objection fails to take account of two matters. The first is that, in any event, the court may always take into consideration the interests of other applicants and beneficiaries. The second is that it could (and should) be made clear that, if those who were dependent on the deceased at the time of his death are to be entitled to apply for family provision, the court should give special consideration to the basis upon which the deceased undertook responsibility for that person's maintenance. An analogy can be drawn with the position of a child of the family; where a person accepts a child as a member of his family and voluntarily assumes responsibility for that child, the court is directed to take account of all the circumstances surrounding that assumption of responsibility<sup>107</sup>.

*(e) Our present proposals for extension*

92. Having considered these arguments, we conclude that the class of applicants entitled to apply for family provision should be extended to include any person who was being wholly or partly maintained by the deceased immediately before his death. We appreciate that such a situation may exist where the deceased had never been married and it is our intention that cases of that kind should be covered. This is an example of the loose use of the convenient term "family provision" to which we have already referred<sup>108</sup>.

93. We have considered whether the dependence on the deceased should have existed for a specified minimum period, for example, not less than a year before the death. We appreciate that this is a matter on which different views

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<sup>106</sup> *Re Joslin* [1941] Ch. 200.

<sup>107</sup> Matrimonial Causes Act 1973, s. 25(3); see para. 83 above.

<sup>108</sup> See para. 10 above.

may be entertained. On balance, we have reached the conclusion that no minimum period of dependence should be prescribed. The length of the period of dependence is clearly a factor which the court should take into account in deciding whether to order family provision for the applicant, but to impose a rigid time limit could lead to unfair results. We are, of course, concerned not to open the door too wide to undeserving applicants inevitably destined to fail. We think, however, that the powers of the court relating to costs will provide some protection to the estate against such applications.

94. *We accordingly recommend* that the class of applicants entitled to apply for family provision should be extended to include any person who was being wholly or partly maintained by the deceased immediately before his death. Where such a person would also be entitled to apply under one of the earlier recommendations in this report (for example, as a child of the deceased) it is our intention that he should make his application in accordance with and subject to the provisions of that earlier recommendation and not as a person covered by the recommendation in this paragraph.

#### **The standard of provision**

95. We have already expressed the view that in the case of applicants for family provision other than a surviving spouse, the aim of the legislation should be to secure reasonable provision for their maintenance<sup>109</sup>. *We recommend* that this should be the standard of provision in the case of applicants falling within the class with which we are now concerned.

#### **Matters to be considered by the court**

96. *We further recommend* that in family provision applications by a person who was being wholly or partly maintained by the deceased immediately prior to his death, the court, in exercising its power to award maintenance, should have regard to the following matters:—

- (a) the extent to which and the basis upon which the deceased assumed responsibility for the maintenance of the applicant, and the length of time for which the deceased discharged that responsibility;
- (b) the income, earning capacity, property and other financial resources which the applicant has or is likely to have in the foreseeable future;
- (c) the financial needs, obligations and responsibilities which the applicant has or is likely to have in the foreseeable future;
- (d) the financial resources and financial needs of any other applicant for family provision from the estate of the deceased;
- (e) the financial resources and financial needs of any beneficiary of the estate of the deceased;
- (f) the obligations and responsibilities of the deceased towards any applicant for family provision and towards any beneficiary of the estate of the deceased;
- (g) the size and nature of the estate of the deceased;
- (h) any physical or mental disability of the applicant;

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<sup>109</sup> Para. 19 above.

- (i) any other matter, including the conduct of the applicant or of any other person, which in the circumstances of the case the court may consider relevant.

97. Cases may occur in which the deceased was during his lifetime providing wholly or partly for some person's maintenance but has, during his lifetime, evinced an intention that the provision should not continue after his death. In cases of this kind, we think that the intention of the deceased is a relevant factor for the court's consideration. The weight to be attached to it may depend, among other things, on the manner in which and the person to whom the intention of the deceased was made evident. We think that guideline (a) in paragraph 96 above is sufficiently widely expressed to include the factor which we have in mind as one to which the court should have regard. We have no doubt that courts will recognise the importance of taking it into account and of assigning to it the weight which is appropriate in the particular circumstances of the case.

98. In some cases questions may arise as to whether a person was being wholly or partly maintained by the deceased immediately before his death. An elderly housekeeper may receive food, shelter, warmth and clothing in return for purely nominal services. A nephew may be attending school at the expenses of the deceased. A widowed sister may be receiving board and lodging in the home of the deceased but making some contribution in cash to the expenses of the home. We think that these questions can be resolved by the court on common-sense lines. The principle in our view is that a person should be treated as having been maintained by the deceased, either wholly or partly, as the case may be, if the deceased was, otherwise than for full consideration, making a substantial contribution in cash or kind towards that person's reasonable needs. *We so recommend.*

### **PART III: GENERAL POWERS OF THE COURT**

#### **The matters dealt with in Part III**

99. In this part of the report we consider a number of matters which are relevant to all applications for family provision. We deal with them under the following headings:—

- A. Test for determining reasonable provision.
- B. Orders which the court may make.
- C. Property available for family provision.
- D. Application for the effect of orders.
- E. Variation, suspension and discharge of orders.

#### **A. TEST FOR DETERMINING REASONABLE PROVISION**

##### **An objective test**

100. In applications under the 1938 Act the court has to determine whether reasonable provision has in fact been made for the maintenance of the applicant<sup>110</sup>. In applications by a former spouse under the 1965 Act there is an antecedent question, namely whether it would have been reasonable for the

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<sup>110</sup> The 1938 Act, s. 1(1).

deceased to make provision for the maintenance of the applicant; it is only if that question is decided in the affirmative that it becomes necessary to determine whether reasonable provision has in fact been made<sup>111</sup>. The question has arisen as to whether “reasonable provision” should be considered from a subjective or from an objective point of view. The 1938 Act was construed in some cases as meaning that an order could be made only if the deceased had acted unreasonably in not making any provision or a larger provision for the dependant<sup>112</sup>, *i.e.*, a subjective approach was adopted. But now it appears to be established that the test to be applied both under the 1938 Act<sup>113</sup> and the 1965 Act<sup>114</sup> is whether, in the opinion of the court, the provision made by the deceased for the applicant is in fact reasonable. Megarry J. in *Re Goodwin* expressed the appropriate test as follows:—

“In my judgment the question is not subjective but objective. It is not whether the testator stands convicted of unreasonableness, but whether the provision in fact made is reasonable.”<sup>115</sup>

In the working paper<sup>116</sup> we expressed the view that this was the proper approach and this was unanimously agreed by those who commented on this point.

101. *We recommend* that it should be made clear in new family provision legislation that the test to be applied in respect of all applications<sup>117</sup> is whether the provision in fact made by the deceased for the applicant was reasonable. In some cases the provision which is reasonable will be nil. In those cases, if no provision has in fact been made, the court will not interfere.

#### Relevant circumstances as at the date of hearing

102. The working paper also put forward the view that the court should be able to take into account any change in circumstances which has arisen since the date of the death and consider the relevant facts as at the date of the hearing<sup>118</sup>. This, too, was agreed without dissent by those who commented on the paper. Two recent cases have thrown further light on this matter. The first is *Re Shanahan*<sup>119</sup>, an application under the 1965 Act, in which Lord Simon of Glaisdale held that in applying the objective test the proper date for assessing the value of the estate was the date of the investigation by the court<sup>120</sup>. He endorsed the view of the registrar that if the estate had fallen in value that was a

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<sup>111</sup> The 1965 Act, s. 26(2).

<sup>112</sup> *Re Brownbridge* (1942) 193 L.T. Jo. 185; *Re Styler* [1942] Ch. 387; *Re Inms* [1947] Ch. 576; *Re Howell* [1953] 1 W.L.R. 1034; *Re E.* [1966] 1 W.L.R. 709.

<sup>113</sup> *Re Goodwin* [1969] 1 Ch. 283; *Re Gregory* [1970] 1 W.L.R. 1455 (C.A.); *Millward v. Shenton* [1972] 1 W.L.R. 711 (C.A.).

<sup>114</sup> *Roberts v. Roberts* [1965] 1 W.L.R. 560; *Eyre v. Eyre* [1968] 1 W.L.R. 530; *Re Shanahan* [1973] Fam. 1.

<sup>115</sup> [1969] 1 Ch. 283, 288. See Tyler, *Family Provision*, (1971) p. 39; Hopkins, “Family Provision on Death”, (1971) 35 Conv. 72.

<sup>116</sup> Working Paper No. 42, para 3.15.

<sup>117</sup> Whether by a spouse, former spouse, children or other dependants.

<sup>118</sup> Para. 3.15. See *Re Goodwin* [1969] 1 Ch. 283, 289–290 per Megarry J.: “I am entitled to take supervening events into account in so far as they quantify an uncertainty . . . at the date of the testator’s death”.

<sup>119</sup> [1973] Fam. 1.

<sup>120</sup> He thought that on a subjective construction it was inevitable that the proper date was the date of the death.

misfortune to be shared by both sides<sup>121</sup>. In *Lusternik v. Lusternik*<sup>122</sup>, another decision under the 1965 Act, the Court of Appeal held that, in deciding whether reasonable provision had been made, the value of the estate at the date of the death was the criterion, but in considering the amount to award the value of the estate at the date of the award should also be considered.

103. In the light of our proposal that the test of reasonable provision should be an objective one, it seems to us that it is drawing an unnecessarily rigid distinction to ask the court to look at one date in deciding whether the provision made was in fact reasonable and at another date in determining the amount of provision to be made.

104. *We recommend* that it be made clear in future family provision legislation that the relevant circumstances for the court to consider are those existing at the date of the hearing and not those existing at the date of the death.

#### Statements by the deceased

105. Under section 1(7) of the 1938 Act the court is directed in the following terms to have regard to the reasons of the deceased:—<sup>123</sup>

“The court shall also . . . have regard to the deceased’s reasons, so far as ascertainable, for making the dispositions made by his will (if any), or for refraining from disposing by will of his estate or part of his estate, or for not making any provision, or any further provision, as the case may be, for a dependant, and the court may accept such evidence of those reasons as it considers sufficient including any statement in writing signed by the deceased and dated, so however, that in estimating the weight, if any, to be attached to any such statement the court shall have regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement.”

This section appears to lay down that the reasons of the deceased are a separate matter to which the court should have regard, quite independently of the factors mentioned in paragraph 31 above. This view is supported by authorities which treat the knowledge and state of mind of the testator as one of the material circumstances<sup>124</sup>. Later authorities, however, have held that the reasonableness or otherwise of the testator’s disposition must be tested objectively<sup>125</sup>. These later authorities are, in our view, consistent with the conclusion which we have reached in paragraph 101 above. In the working paper<sup>126</sup> we agreed with the view that “if the testator’s reasons are good reasons founded on truth, then they

<sup>121</sup> [1973] Fam. 1, 8–9.

<sup>122</sup> [1972] Fam. 125; no reference was made to *Re Shanahan*. See also *Millward v. Shenton* [1972] 1 W.L.R. 711, 714–715 per Lord Denning, M.R.

<sup>123</sup> There is no equivalent provision in the 1965 Act.

<sup>124</sup> *Re Watkins* [1949] W.N. 125.

<sup>125</sup> *Re Blanch* [1967] 1 W.L.R. 987; see also *Re Smallwood* [1950] Ch. 369, in which the court said that evidence could be given of facts from which the court could infer the reasons of the deceased, and *Re Gregory* [1970] 1 W.L.R. 1455 (C.A.). A Practice Note [1945] W.N. 210 under which it was said that any suggestion of the testator’s weakness of mind ought to be excluded was explained by Buckley J. in *Re Blanch*, at p. 991, to mean only that “testamentary capacity, or the lack of it, is not a matter which should be investigated on an application under this Act, and that feebleness of mind or understanding cannot constitute a reason for the deceased’s conduct which is relevant for the purpose of section 1(7)”.

<sup>126</sup> Working Paper No. 42, para. 3.23.

come in under section 1(6) [matters to which the court must have regard], and there is no need to add anything thereto"<sup>127</sup>. There was no disagreement with the proposition in the working paper to that effect.

106. Section 1(7) of the 1938 Act also has an evidentiary aspect, in that it allows the court to accept such evidence of the deceased's reasons, including any statement in writing, signed by the deceased and dated, as it considers sufficient. It is in our view desirable that the court should have available any statement made orally or in writing by the deceased on a matter relevant to its decision. However, in the working paper we doubted whether section 1(7) is necessary for this purpose. The reason for our doubt was that under section 2(1) of the Civil Evidence Act 1968 oral or written statements by a person can be admitted as evidence of any fact of which direct oral evidence by him would be admissible. Sections 6 and 7 of the 1968 Act deal with the weight to be given to the statement and with evidence as to the credibility of the maker of the statement, and section 8 deals with rules of court. Our provisional view was that the Civil Evidence Act 1968 made the evidentiary aspect of section 1(7) of the 1938 Act unnecessary<sup>128</sup>.

107. A number of people, however, thought that it would be useful if the family provision legislation contained a provision drawing to the attention of the testator and his advisers the fact that a statement can be made: it was thought that the existence and contents of a statement could often lead to the prompt settlement of a claim. Acceptance of the views which we have earlier expressed regarding the relevance of conduct<sup>129</sup> might mean that statements by the deceased as to conduct would be relied on less in the future. However, statements by the deceased, if admissible in evidence, might be relevant to other matters which under the guidelines we propose have to be taken into consideration, for example, the basis on which the deceased assumed responsibility for the maintenance of an applicant<sup>130</sup>. Moreover, our further examination of the Civil Evidence Act 1968 leaves us in doubt as to whether section 2(1) does cover statements by a deceased person who could never have given direct oral evidence since the proceedings in question are brought against his estate. We think the matter should be put beyond doubt by an express provision applying to all family provision proceedings.

108. *We therefore recommend* that it should be expressly provided that any statement by the deceased as to any matter which is relevant in determining what order the court should make should be admissible in accordance with sections 2(1), 6, 7 and 8 of the Civil Evidence Act 1968. On the assumption that this recommendation is accepted, *we recommend* that in the new legislation section 1(7) of the 1938 Act should not be re-enacted.

## B. ORDERS WHICH THE COURT MAY MAKE

### Existing powers

109. The court at present may order maintenance for the applicant by way of periodical payments<sup>131</sup> or a lump sum or both<sup>132</sup>. The order may provide for

<sup>127</sup> Albery, *The Inheritance (Family Provision) Act 1938*, p. 23.

<sup>128</sup> Working Paper No. 42, para. 3.24.

<sup>129</sup> Paras. 35–36 above.

<sup>130</sup> Paras. 34, 96 and 97 above.

<sup>131</sup> The 1938 Act, s. 1(2); the 1965 Act, s. 26(3).

<sup>132</sup> The 1938 Act, s. 1(4); the 1965 Act, s. 26(3).

periodical payments of a specified amount or for payments equal to the whole or part of the income of the net estate or may provide for the amount of the payments to be fixed in any other way the court thinks fit<sup>133</sup>. A sufficient part of the net estate (but no more than is necessary) may be set aside or appropriated to meet the order<sup>134</sup>. There are no longer any restrictions on the court's power to order a lump sum<sup>135</sup>, which is useful in the case of small estates where a lump sum is usually the only practicable order.

#### **Extension of existing powers**

##### *(a) Powers in family provision proceedings to be similar to powers for financial provision in matrimonial proceedings*

110. As we pointed out in the working paper<sup>136</sup> the present powers of the court on an application for family provision on death compare unfavourably with the powers of the court to make financial provision for spouses and children after a decree of divorce, nullity or judicial separation<sup>137</sup>. There are differences in the circumstances of the two classes of case. In the case of divorce, nullity or judicial separation not only is litigation already in progress but it is more likely that justice will not be done unless the court intervenes to make an order. When a marriage has ended with death the deceased will normally have fulfilled his obligations to his family; only in a minority of cases will a system of family provision need to be invoked. Further, on a family provision application the needs of the deceased no longer have to be considered, though it will be necessary for the court to take into account the interests of beneficiaries, whether or not such beneficiaries are applicants for family provision.

111. Despite the foregoing differences, it was and remains our view that the effective enforcement of family provision law requires that the court should have powers over the property of the deceased similar to those it may exercise when dealing with financial provision on divorce, nullity or judicial separation.

112. As we have pointed out in paragraph 109, the court in family provision proceedings already has power to order payment of a lump sum. We think it is clear that the power to award a lump sum should be retained<sup>138</sup> and in this respect we are proposing no change in the law. In practice, however, we think that this power is likely to be used more extensively than hitherto.

##### *(b) Transfer or settlement of property*

113. Under the Matrimonial Causes Act 1973, section 24, the court has power in proceedings for divorce, nullity or judicial separation to adjust the property of the spouses by ordering the transfer or settlement of any property of either spouse for the benefit of the other spouse or of any child of the family. Ordering the transfer or settlement of specific items of property may be more difficult in family provision proceedings. For instance, the deceased's interest in a specific item of property may have passed under his will to a particular beneficiary. The

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<sup>133</sup> The 1938 Act, s. 3(1A); the 1965 Act, s. 28(3).

<sup>134</sup> The 1938 Act, s. 3(2); the 1965 Act, s. 28(3).

<sup>135</sup> Former restrictions relating to the size of the estate were removed by the Family Provision Act 1966, s. 4.

<sup>136</sup> Working Paper No. 42, para. 3.10.

<sup>137</sup> Matrimonial Causes Act 1973, ss. 23–25.

<sup>138</sup> This was the view of all those who commented on this aspect of our working paper.



court would then have to decide not only whether to transfer it to the applicant, but also whether the beneficiary should bear the whole burden of the order. Nevertheless, especially in the case of a surviving spouse or a child of the family, it may be justifiable to order the transfer of a specific asset as, or as part of, family provision. The transfer of a specific asset may often be a more convenient way of meeting the applicant's claim than the award of a lump sum, which may entail realisation of assets at an inconvenient or unfavourable time. The power to order a settlement of property would give the court greater flexibility in making its order.

114. For these reasons we proposed in the working paper<sup>139</sup> that in the exercise of its family provision jurisdiction the court should have power to order the transfer or settlement of any property forming part of the estate of the deceased for the benefit of the surviving spouse or of any child of the family. Consultation has revealed wide support for this proposal. The working paper asked for views as to whether these powers should also apply in relation to a former spouse of the deceased<sup>140</sup>. We considered that such powers might be useful in the new situation which arises on death and that property might be more readily available at that time. The proposal was accepted by the great majority of those who commented on this point.

115. *We accordingly recommend* that the court should have power to order the transfer or settlement of any property for the time being forming part of the estate of the deceased to or for the benefit of the applicant.

*(c) Purchase of property or other rights*

116. We also proposed in the working paper<sup>141</sup> that the court should have power to authorise the purchase of property to be settled on the applicant. It was envisaged that such a power could be used in cases where a home did not form part of the estate or where the applicant wished to move to a smaller home. This proposal was widely supported. We think that the power to authorise the purchase of property should be expressed in wide terms both as to the nature of the property to be purchased and as to the manner in which it is to be dealt with.

117. *We recommend* that the court should have power to make an order that assets forming part of the estate be applied in acquiring property or other rights for the applicant or for settlement for his benefit.

*(d) Consequential directions: distribution of burdens*

118. Under the existing family provision law the court has wide powers to allocate the burden of awards as between beneficiaries<sup>142</sup>. We think that such a power is essential if justice is to be done and *we recommend* that, on making an order for family provision, the court should have power to give such consequential directions as appear to be just, including directions as to the manner in which the burden is to be distributed between beneficiaries.

*(e) Wide discretion of the court to create trusts*

119. We think that the court should have the widest possible discretion as to

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<sup>139</sup> Working Paper No. 42, paras. 3.28 and 3.46.

<sup>140</sup> *ibid.*, para. 3.31.

<sup>141</sup> *ibid.*, para. 3.29.

<sup>142</sup> *Re Preston* [1969] 1 W.L.R. 317, 321, interpreting s. 3(1) and (2) of the 1938 Act.

the trusts on which property is to be settled under its orders, and should be in a position to confer wide powers on the trustees of any such settlement, including all the discretionary powers commonly found in family trusts. *We so recommend.*

(f) *Range of powers for new class of dependants*

120. We have recommended that the class of applicants entitled to apply for family provision should be extended to include any person who was being wholly or partly maintained by the deceased immediately before his death<sup>143</sup>. It could be argued that the range of powers in respect of these dependants should be less extensive than in the case of the spouse and children, whose interests might otherwise be unfairly prejudiced. However, the court will only exercise the powers of transfer and settlement of property in appropriate cases after taking into account all the relevant factors, including the interests of other applicants and beneficiaries. In the light of this consideration, and bearing in mind that these powers might well be useful in some circumstances, *we recommend* that the powers referred to in paragraphs 110–119 above should be exercisable in the case of applications for family provision by the new class of dependants.

(g) *Variation of marriage settlements*

121. Under section 24(c) of the Matrimonial Causes Act 1973 the court has power to vary for the benefit of the spouses or the children of the family any ante-nuptial or post-nuptial settlements<sup>144</sup> made on the parties to the marriage. In our working paper<sup>145</sup> we suggested that there was no need for a similar power in family provision legislation. We invited views on this point. The reactions of those who commented were mixed; some thought that such a power would be very helpful, others felt that it would be unnecessary. Some thought the power should apply only to post-nuptial settlements or that it should be exercised only in exceptional cases.

122. The situation arising on death is closely analogous to that on divorce and we think that the court's powers to order family provision for a surviving spouse should be as wide as its powers to order financial provision in matrimonial proceedings.

123. Having reconsidered our provisional view in the light of the consultation, we are now of the opinion that the court should have power to vary ante-nuptial and post-nuptial settlements in family provision proceedings. We think, however, that the powers of variation should be exercisable only in favour of the surviving spouse or of children of the marriage. We think that it would be unacceptable to many people that such powers should be exercisable in favour of a dependant other than the surviving spouse or such children. On the other hand, we think that a child who has been treated by the deceased as a child of the family in relation to that marriage should be a person for whose benefit the power is exercisable.

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<sup>143</sup> Para. 94 above.

<sup>144</sup> The courts have placed a wide interpretation on "ante- or post-nuptial settlements". It includes not only marriage settlements in the strict sense, but also, in effect, any property acquired by the parties to the marriage or either of them as husband and wife other than under an out-and-out disposition in favour of one of them alone. See *Rayden on Divorce* (11th ed.) pp. 653–655.

<sup>145</sup> Working Paper No. 42, para. 3.30.

124. The power of variation which we propose would include a power to extinguish a person's rights under an ante-nuptial or post-nuptial settlement. It would only, however, be exercisable for the benefit of the surviving spouse or the children of the marriage as defined above. We do not think that there should be any power to extinguish such rights for the benefit of any other person and we do not propose the inclusion of a provision on the lines of section 24(d) of the Matrimonial Causes Act 1973.

125. *We accordingly recommend* that the court should be empowered to vary ante-nuptial and post-nuptial settlements in family provision proceedings in favour of the surviving spouse or of any child who is a child of the family in relation to the marriage in question.

*(h) Variation of other settlements*

126. The deceased during his lifetime may have made settlements which are neither ante-nuptial nor post-nuptial settlements. He may have made one or more settlements for the benefit of members of the family or for the benefit of a third party (or both). If any of those settlements has the effect of defeating the applicant's claim for family provision and was made with that intention, the powers we recommend below<sup>146</sup> may enable it to be reviewed and re-opened. There may, however, be settlements which, though not intended to defeat a survivor's application for family provision, have had the effect of reducing the assets available in the estate for that survivor. We have considered whether there should be a general power to re-open settlements (other than "marriage" settlements) which have had this effect. We feel that this would be far too wide a power, which would enable a great number of dispositions which were entered into perfectly properly to be challenged. We do not recommend any power, beyond that outlined below<sup>147</sup>, to vary such settlements.

C. PROPERTY AVAILABLE FOR FAMILY PROVISION

**The "net estate" of the deceased**

127. We have hitherto in this report spoken of provision being made for the applicant out of the "estate" of the deceased. Under the Inheritance (Family Provision) Act 1938 the provision is made out of the "net estate" of the deceased, which is defined as all the property of which a testator had power to dispose by his will (otherwise than by virtue of a special power of appointment) less certain expenses and liabilities<sup>148</sup>. The effect of the definition is that where the deceased has a general power of appointment which can be exercised by will, and he either does not exercise the power or exercises it by will, the property which is the subject of the power will in either case form part of his net estate. We propose no change in this respect. In general, we think that the property available for family provision should be defined as meaning all the property which a person had power to dispose of by his will subject to exceptions similar to those mentioned in the 1938 Act.

128. There can be the unusual case where the deceased has a general power of

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<sup>146</sup> Paras. 189–215 below.

<sup>147</sup> *ibid.*

<sup>148</sup> S. 5(1). Cases where the deceased lacks the necessary testamentary capacity are not dealt with in the definition. Our draft Bill deals with this lacuna: see clause 25(2).

appointment not exercisable by will, which he did not in fact exercise. We consider that property which is the subject of such a power should in those circumstances be regarded as part of the net estate and thus available for family provision. *We so recommend.*

#### **Property subject to a special power of appointment**

129. We have considered whether there should be any change in the law whereby the property available for family provision should in future include property over which the deceased had power of disposition by virtue of a special power of appointment, where the applicant for family provision is an object of that power and whether or not the power has been exercised (unless it has been exercised irrevocably in the lifetime of the deceased).

130. The argument for such a change may be illustrated by the most usual form of a special power, where a married man by will leaves all or a substantial part of his property to his wife for her life and then to such of their children or issue as she may be deed or will appoint, with a gift to them equally in default of appointment. The wife may have little property of her own and in making provision for the children the property subject to the special power may be all-important. Nonetheless such property may not, in practice, be available to help a needy child (either to the extent it could be or at all) because:—

- (a) the widow may fail to exercise the power; or
- (b) she may exercise it in a way which, as events turn out, fails to make adequate provision for a child who has come to need it; or
- (c) she may remarry, thereby revoking an appointment made by will.

131. In the above situation it is arguable that the court should be able to review the exercise of the special power in order to make family provision for an applicant who is an object of that power.

132. There are, however, certain important arguments against this change. The property subject to the special power was not that of the deceased and, moreover, the objects of the power—the persons in whose favour it may be exercised—were not selected by the deceased. We do not think it would be right to permit a court to go outside the objects of the special power on such an application for family provision, so that an order could only be made in favour of one of the objects contemplated by the donor of the power. Although, in the example given above, the donee of the power was the donor's wife and the objects were the children of them both, there may in many cases be no blood or marriage relationship between any of these parties, so that the objects may only fortuitously include a person for whom the donee is under a duty to provide. In such cases we think that a change of this kind might have certain dangers: certainly it would seem wrong in principle if a donee, anxious only to exercise the power as he thinks the donor would have wished, should feel himself under any obligation to show special favour to some particular object who happened to be his own dependant.

133. We would emphasise that this possible change in the law was not canvassed in our working paper and it was not suggested by any of those whom we consulted. In these circumstances we are not persuaded that there is any demand for change. In the absence of any consultation we certainly feel it would be wrong

for us to make any positive recommendation. Accordingly, having drawn attention to this problem, we make no proposals upon it.

#### Nominations and donationes mortis causa

134. There are two classes of property which in our view require special consideration:—

- (a) A number of statutory provisions authorise the disposal of property by a nomination made during the lifetime of the deceased<sup>149</sup>. In general the amount which may be so disposed of under a single nomination is subject to a limit (usually £500). In some cases, however, the amount which may be so disposed of under a single nomination is considerable<sup>150</sup>. We think that property so nominated should be treated as part of the estate and available for family provision. *We so recommend.*
- (b) Where there is a *donatio mortis causa* we think that it would be equitable to apply a similar provision. We think that property the subject of a *donatio mortis causa* should be treated as part of the estate and available for family provision. *We so recommend.*

135. There will no doubt be many cases in which under the statutory provisions authorising nominations a small sum will be nominated to the surviving spouse. It is unlikely that such a nomination could be successfully challenged in family provision proceedings. We think that it would be unfortunate if, for instance, a widow in whose favour such a nomination had been made were unable to receive money which she might sorely need, because of the possibility of claims for family provision by other parties. We think that the Post Office or the bank having control of the securities should be put into a position in which it can transfer title to the nominee without fear of challenge to itself. If that is provided for, we see no reason why the nominee should not be able to obtain the funds without delay. On the other hand, the fact that nominated sums form part of the property available for family provision requires that the nominee should be liable to make those sums available, if the court so orders. Similar principles apply to property which is the subject of a *donatio mortis causa*.

136. *We therefore recommend* that where money is paid or property is transferred to a person entitled thereto under a nomination or a *donatio mortis causa*, the payer or transferor (for example, the Post Office or the bank which paid money out to give effect to the nomination or the *donatio*) should not be liable to make restitution. However, in proceedings for family provision the court would have power to make such order as may be just against the payee or transferee.

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<sup>149</sup> For a list of some of such provisions, see Schedule 2 to the Administration of Estates (Small Payments) Act 1965.

<sup>150</sup> *e.g.*, in relation to ordinary deposits in the National Savings Bank there is a limit of £10,000 on the amount which may be held; within this figure there is no limit on the amount which may be the subject of a nomination; in relation to investment deposits in that Bank, there is now no limit on the amount which may be held or nominated. See the Savings Bank (Ordinary Deposits) (Limits) Orders 1969 (S.I. 1969/939, 1699), the Post Office Savings Bank (Investment Deposits) (Limits) Orders 1969 (S.I. 1969/940, 1701), the National Savings Bank Regulations 1972 (S.I. 1972/764) and the Post Office Savings Bank (Investment Deposits) (Limits) (Revocation) Order 1974 (S.I. 1974/931).

### **Property in co-ownership**

137. The meaning of the expression "estate" also requires consideration in relation to property held by the deceased as a co-owner with another or others. There are two kinds of beneficial co-ownership. Under the first, the "joint tenancy", each co-owner holds an equal interest and on his death his interest accrues to the survivors, the last survivor becoming the sole owner. The other type of co-ownership is the "tenancy in common". Tenants in common do not necessarily own equal shares in the property and on the death of a tenant in common, his share forms part of his estate. A joint tenant may, in his lifetime (but not by will), sever his interest, *i.e.*, convert his interest into a tenancy in common.

138. The question arises whether on the death of a joint tenant his interest ought to be available for family provision in spite of the fact that it does not form part of his estate. If, for example, the deceased owned a house as a joint tenant with his brother and the power of the court to make orders for family provision were limited to making provision out of the estate of the deceased, no part of the value of the house would be available for an order in favour of the deceased's widow. So far as applicants other than the surviving spouse are concerned, the problem is of particular importance where the deceased was a joint tenant with his wife, for many matrimonial homes are held by spouses as beneficial joint tenants.

139. Moreover, in our forthcoming report on co-ownership of the matrimonial home we shall recommend that, unless agreed otherwise, the beneficial ownership of dwellings occupied by husbands and wives as matrimonial homes shall be shared by them as joint tenants. In such a case, if one of the spouses dies and the power of the court to make an order for family provision is limited to making provision out of the estate of the deceased, no part of the value of the house will be available for such provision. In some cases the result might be that no property at all was available for an order for the maintenance of the children or other dependants of the deceased.

140. We do not think that the results above described are acceptable either in cases where the applicant is the surviving spouse or in cases where the applicant is a child or other dependant. The fact that property is held on a beneficial joint tenancy rather than a tenancy in common may often be the result of arrangements made without consideration of this particular point. We think that justice requires that in all cases where property whether real or personal was held by the deceased on a beneficial joint tenancy, the interest which passes by right of survivorship should be available for family provision. On the other hand, we think that justice also requires that the person who held the property with the deceased as a joint tenant should know with certainty how his rights are going to be affected with the least possible delay. To achieve this, we think it is desirable that an interest which passes by right of survivorship should only be available for family provision where the application for such provision is made promptly after the death.

141. *We recommend* that, where the deceased owned any beneficial interest in any property, real or personal, as a joint tenant, the court should have power to direct that his severable share of that property shall, to such extent as appears to the court to be just in all the circumstances of the case, be treated as part of the

net estate of the deceased. *We further recommend*, however, that the foregoing rule should only apply to applications for family provision made within a period of six months from the date when representation is first taken out. There should be no power in the court to extend that period.

142. A common example of co-ownership of personal property is a joint bank account. As between the bank and the customers, the terms on which such an account is held are determined by the contract between the bank and the customers. We think that it is desirable that a bank making payment in accordance with those terms should be protected. *We accordingly recommend* that a bank paying money to a surviving customer in accordance with the terms of such a contract should not be liable thereafter to be made accountable for such money in family provision proceedings. Building Societies, Friendly Societies, and indeed all debtors of the deceased jointly with another should be similarly protected. In family provision proceedings the court should have power to make such order as may be just against the surviving customer or creditor to whom any such money has been paid or is owing.

#### **Life assurance policies**

143. We have considered whether the net estate for family provision purposes should include benefits arising under life policies which are nominated in favour of specific beneficiaries. In many cases such nominations are made under the Married Women's Property Act 1882. We have no evidence that they lead to injustice; and we are reluctant to suggest a general rule that such benefits be treated as part of the net estate for family provision purposes. We think that cases where the nomination of such benefits is used for the purpose of evading family provision can be adequately dealt with under the provisions for review of dispositions which we recommend later in this report<sup>151</sup>.

### **D. APPLICATION FOR AND EFFECT OF ORDERS**

#### **Time and manner of application**

144. Under the 1938 Act, section 2(1) as amended by the Family Provision Act 1966, section 5:

“an application . . . shall not, without the permission of the court<sup>152</sup> be made after the end of the period of six months<sup>153</sup> from the date on which representation in regard to the estate of the deceased is first taken out”.

Section 26(1) of the 1965 Act is in similar terms. The personal representatives are protected if, no application having been made, they distribute any part of the estate after the expiration of the six months' period, but this is without prejudice to any right to recover any part of the estate distributed<sup>154</sup>. A time limit for applications must balance the interests of the possible applicants for family provision against the need for certainty in administering the estate, and we think the present balance is fair. We make no proposal for change.

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<sup>151</sup> Paras. 189–217 below.

<sup>152</sup> See *Re Ruttle* [1970] 1 W.L.R. 89 (extension of time allowed in “interests of justice”).

<sup>153</sup> In New Zealand the normal period for application is twelve months, but applications in respect of minors or persons under any incapacity can be made at any time within two years.

<sup>154</sup> The 1938 Act, s. 1 (1B); the 1965 Act, s. 28(1).

145. There is at present no provision for ensuring that all persons who might be possible applicants are notified of their right to apply, or of any pending claim by another dependant. The working paper<sup>155</sup> invited views on whether some such provision should be introduced. A number favoured the principle without specifying how they thought it should be implemented. A number opposed the idea on the ground that it would be impracticable and might lead to delay in the winding up of estates; it was thought that the provision allowing an extension of time for applications gave sufficient protection.

146. We have given further consideration to the question whether the personal representatives should be under a duty to inform all known dependants that an application for family provision has been made by another dependant. In our view it would be unjust to add to the burden of personal representatives by prescribing a sanction for the breach of such a duty. In these circumstances, we are not in favour of imposing the duty at all. We therefore make no proposal for change.

#### **Interim orders**

147. Under both the 1938 Act and the 1965 Act the court may order interim payments to be made to or for the benefit of any applicant, if the applicant appears to be in immediate need of financial assistance and property can be made available<sup>156</sup>. The court in making an interim order must have regard, as far as possible, to all the circumstances to which it would have regard in making a final order, and the subsequent order may direct that the interim payments be treated as payments on account of that order. The power is an important one and is particularly valuable where, for example, a widow needs money to live on, to pay her rent or to make mortgage repayments. We do not propose any change.

#### **The effect of orders: estate duty**

##### *(a) The position where there is a court order for family provision*

148. Where an order is made under the 1938 Act, section 3(1) provides that the will or the intestacy law shall have effect, subject to such variations as may be specified for the purpose of giving effect to the order, as from the deceased's death<sup>157</sup>. This rule can have important estate duty effects.

149. For example, if the court order gives the surviving spouse an income for life payable from the estate, the order has the same effect as if it had been originally part of the will. Accordingly when the property charged with the surviving spouse's life interest passes on her death, it will be exempt from duty<sup>158</sup>. This exemption applies to cases where there is an order by the court under the 1938 Act. It does not apply to cases where the claim of a surviving spouse is settled without such an order and we discuss this situation in paragraph 151 below.

150. Again, for example, section 121(1) (c) of the Finance Act 1972 provides

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<sup>155</sup> Working Paper No. 42, para. 3.49.

<sup>156</sup> Family Provision Act 1966, s. 6.

<sup>157</sup> S. 28 (3) of the 1965 Act applies s. 3 of the 1938 Act to applications under s. 26 of the 1965 Act.

<sup>158</sup> Finance Act 1894, s. 5(2), as amended by Finance Act 1914, s. 14(a), and other enactments.



that property given to or devolving on the deceased's spouse up to the limit of £15,000 shall be exempt from estate duty. The effect of section 3(1) of the 1938 Act is that property transferred to the surviving spouse under a court order enjoys exemption from estate duty for the first £15,000.

(b) *The position where there is no court order for family provision*

151. There can also be the situation where a claim is settled and no order is made by the court under the 1938 Act or the 1965 Act. Those entitled under the will or intestacy may settle property for life upon a claimant by way of a bona fide compromise of a claim for family provision. In such a case it would seem that the property would be exempt from estate duty upon the death of the claimant on the ground that it had passed by reason only of a bona fide purchase from the beneficiaries<sup>159</sup>.

152. The exemption contained in section 121(1) (c) of the Finance Act 1972 will also apply where property is transferred to a surviving spouse under a document compromising her claim for family provision, if that compromise is made not later than two years after the deceased's death<sup>160</sup>.

(c) *Estate duty exemptions not to be curtailed*

153. We think that the provisions for exemption from estate duty to which we have referred in paragraphs 148–152 above are of importance to the fair and effective operation of family provision legislation and should not be curtailed. *We so recommend*<sup>161</sup>.

#### **The effect of orders: consequential directions**

154. Under the existing law the court may give such consequential directions as it thinks fit for the purpose of giving effect to its order, but no larger part of the net estate is to be set aside than is sufficient to provide the income necessary to meet the order<sup>162</sup>. It has been held that the court may apportion the burden of the award between classes of beneficiaries or between beneficiaries in the same class in its discretion<sup>163</sup>. It is, of course, essential that any category of beneficiaries likely to be affected be represented. We do not recommend any

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<sup>159</sup> Finance Act 1894, s. 3(1). The material words are: "Estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a bona fide purchase from the person under whose disposition the property passes . . . where such purchase was made . . . for full consideration in money or money's worth paid to the vendor . . . for his own use or benefit . . .". It is not the practice of the Estate Duty Office to claim duty in cases where there has been such a compromise on terms such that no duty would have been claimed had they been embodied in a court order—Press notice dated 2 March 1967.

<sup>160</sup> Finance Act 1972, Schedule 26, paragraph 25. That paragraph states: "If not more than two years after the death any of the dispositions of the property of which the deceased was competent to dispose, whether effected by will or under the law relating to intestacies, or otherwise, are varied by a deed of family arrangement or similar instrument the principal section [s. 121] and this Schedule shall apply as if the variation made by the deed or other instrument had been effected by the deceased."

<sup>161</sup> The foregoing provisions for exemption from estate duty will not apply in the same way to those categories of property not at present available for family provision, but which are made available in future under our proposals for the review of dispositions designed to defeat family provision: see paras. 218–219 below.

<sup>162</sup> The 1938 Act, s. 3(2); the 1965 Act, s. 28(3). See *Re Knowles* [1969] Ch. 386; *Re Jennery* [1967] Ch. 280 (C.A.); *Re Loftis* [1968] 1 W.L.R. 1949.

<sup>163</sup> *Re Preston* [1969] 1 W.L.R. 317, 321; see also *Re Westby* [1946] W.N. 141; *Re Simson* [1950] Ch. 38.

change in the substance of these powers<sup>164</sup> and the draft Bill appended to our report is intended to make it clear that the court has power if it thinks fit to make some other provision out of the estate for a beneficiary of specific property which is transferred to or settled on an applicant.

#### **The effect of orders: payments by beneficiaries**

155. The usual practice is for the court to order that a certain part of the estate be set aside to meet the payments ordered in favour of a dependant. The working paper proposed that the court should have power to order a beneficiary to make a periodical or lump sum payment directly to the dependant<sup>165</sup>. It was thought that such a provision might be useful, as it would avoid the necessity of tying up part of the estate for an indefinite period. For example, in the case of agricultural property or of shares in a private company it might be convenient to let the beneficiaries have the property or the shares vested in themselves immediately, subject to paying the dependant whatever sum was ordered. The proposal was not widely supported. It was thought impracticable to enforce such a provision without creating a charge on the property in the hands of the beneficiary, and that this would give rise to unjustifiable complication. Of those who did support the proposal, some thought that the power should be exercisable only on the election of or with the consent of the beneficiary. In the light of the comments received we have reached the view that on balance the case for the proposal has not been made out, and we make no recommendation.

### **E. VARIATION, SUSPENSION AND DISCHARGE OF ORDERS**

#### *Existing provisions*

156. After the expiration of the six-month time limit for original applications, an order made under the 1938 Act may be varied by the court under section 4(1)(a) "on the ground that any material fact was not disclosed to the court when the order was made, or that any substantial change has taken place in the circumstances of the dependant<sup>166</sup> or of a person beneficially interested in the property". An application for a variation order under section 4(1) (a) may be made by a dependant of the deceased, by the trustees of the property or by a person beneficially interested in the property. The court may also make an order under section 4(1) (b) "for making provision for the maintenance of another dependant of the deceased" after the time limit for original applications has expired.

157. An order under section 4(1) may be made "only as respects property the income of which is at that date applicable for the maintenance of a dependant of the deceased". Under section 1(1) a "dependant" is a person entitled to apply for family provision. It has been held that no application can be made under section 4 unless there is already a dependant in receipt of provision under an order made pursuant to the Act<sup>167</sup>.

158. It would seem to follow that a variation order can affect only property the income of which is applicable for the maintenance of a dependant under an

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<sup>164</sup> Para. 118 above.

<sup>165</sup> Para. 3.53; cf. the New Zealand Family Protection Act 1955, s. 7(3).

<sup>166</sup> A person in whose favour an order is in force under s. 1 of the 1938 Act.

<sup>167</sup> *Re Dorgan* [1948] Ch. 366.

earlier family provision order <sup>168</sup>. The effect is that the court can rarely vary an order so as to increase the total amount of maintenance payable to dependants, though it may decrease it, and it may, where there is more than one dependant, vary the amounts payable to the various dependants. The court may make provision for a dependant who was not previously receiving anything by reducing the amount payable to another dependant. Where a dependant has made an unsuccessful application but an order has been made in favour of another dependant, there appears to be nothing in the existing law to prevent the first-mentioned dependant, on a change of circumstances, from applying for a variation of the order so as to obtain some provision for himself.

159. Section 27 of the 1965 Act provides for the variation of an order made in favour of a former spouse under section 26. The persons who may apply for a variation include the original applicant, any other former spouse of the deceased, any dependant of the deceased, the trustees, and the beneficiaries under the will or intestacy. A variation order under section 27 can affect only property "the income of which in accordance with the original order . . . is applicable wholly or in part for the maintenance of the former spouse on whose application the original order was made". As in the case of the 1938 Act, there is thus considerable certainty for the beneficiaries after six months.

#### **Scope of the powers of variation**

##### *(a) Should the powers of variation be retained?*

160. If the court finds that the deceased failed to make reasonable provision for the maintenance of an applicant for family provision and makes an order for a lump sum payment (or, under the new powers we have proposed, for the transfer or settlement of property) it is, in effect, making for the deceased a will which it considers reasonable in the light of the circumstances existing at the date of the hearing<sup>169</sup>. An order for periodical payments to be made from the estate to a dependant is more akin to a maintenance order in matrimonial proceedings; such an order reflects a continuing obligation and, under present law, can be varied within limits on a change of circumstances. There is, however, a case for saying that once the court has decided what is reasonable this should conclude the matter, and that all orders for family provision should be final. An advantage of eliminating all power to vary orders for family provision would be the greater certainty in the administration of estates.

161. We accept that certainty in the administration of estates is a consideration of major importance. But we also attach importance to securing, wherever possible, that orders for family provision may be varied to meet changes of circumstance. The problem is to reconcile the need for certainty with the requirement of flexibility. In the case of orders for periodical payments a power of variation is not, in our view, incompatible with the necessary degree of certainty and accordingly we think that there should be power to vary such orders. On the other hand, we think that where property is settled outright pursuant to an order, certainty requires that that should be the end of the matter.

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<sup>168</sup> Under s. 27(3) and (5) of the 1965 Act this matter is beyond doubt since the court can have recourse to property "the income of which, in accordance with the original order . . . is applicable . . . for the maintenance of the former spouse . . .". See Tyler, *Family Provision*, (1971) pp. 34-36.

<sup>169</sup> Para. 104 above.

*(b) Variation of orders for lump sums and transfer of property*

162. So far as concerns orders for lump sums and transfer of property, the arguments against later review of such orders were set out in our *Report on Financial Provision in Matrimonial Proceedings*<sup>170</sup>. It would be impracticable to re-open matters after the estate had been distributed and the property or lump sum disposed of. If such orders could not be varied, the court would take that into account in deciding whether to order a lump sum or a transfer of property in preference to making an order for periodical payments.

163. *We accordingly recommend* that orders for lump sum payments or for transfer of property should be final and not subject to later variation.

164. In saying that orders for lump sum payments or for transfer of property should not be subject to later variation, we mean only that the orders themselves should not be capable of increase or reduction: we do not mean that the recipients should not be eligible for further benefits if circumstances warrant it and funds become available through the variation or discharge of an order for periodical payments: see paragraphs 168 and 169 below.

165. As regards a lump sum, there will be cases where it will be convenient for payment to be made by instalments and *we recommend* that:—

- (a) the court should have power to make an order for the payment of a lump sum by instalments;
- (b) where such an order is made, the court should have a power of variation enabling it to alter the amounts of the instalments and the dates on which they are payable but not the amount of the lump sum itself.

*(c) Variation of orders for periodical payments*

166. In some cases a part of the net estate may be set aside to meet the obligation to provide periodical payments for the dependant. In other cases the whole of the estate may be charged with a continuing obligation to contribute to the maintenance of the dependant<sup>171</sup>. Once the circumstances which give rise to the obligation have changed, for example, by the dependant acquiring or losing another source of income, our view is that the obligation itself should be capable of being varied downwards or upwards or being discharged. The working paper<sup>172</sup> proposed that the present powers to vary orders for periodical payments should not be curtailed. This was accepted without dissent. *We recommend* that the power to vary orders for periodical payments should be retained and the scope of the power should not in any way be diminished. There are indeed two respects in which we think the scope of the power should be widened and our proposals in this regard appear in paragraphs 167–169 below.

167. Our first proposal is that, where under an order for periodical payments the payments are by the terms of the order to cease on a particular event, such as remarriage, the existing powers of variation should be widened so as to include a power to vary the provision for cessation<sup>173</sup>. We think that this power of

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<sup>170</sup> Law Com. No. 25; (1969) H.C. 448. paras. 87-90.

<sup>171</sup> The 1938 Act, s. 3(1A).

<sup>172</sup> Working Paper No. 42, para. 3.59.

<sup>173</sup> We have proposed that an order in favour of a former spouse or a judicially separated spouse should automatically cease on his or her remarriage: see paras. 57–58 above. The power to vary a provision for cessation would not extend to such an order.

variation should be exercisable on an application made either before the date of cessation or within six months after that date. *We accordingly recommend* that if an application is made before the expiration of six months from the date of cessation, the court should have power to extend or revive the obligation to make periodical payments, with or without variation, and either from the date on which the original order expired or from such later date as the court may direct.

168. Our second proposal arises from the fact that where the family provision order is for periodical payments, the property set aside for making such payments has not been distributed. For this reason, when the order of periodical payments is varied or discharged, we consider it will be useful to give the court a wide discretion to consider whether the property hitherto earmarked for making the periodical payments should be made available for additional family provision before it is ultimately distributed in accordance with the deceased's will or the law of intestacy.

169. *We therefore recommend* that where an order for periodical payments is varied (or discharged) under the general powers we propose, the court should have the following specific powers of variation:—

- (a) To order, out of the property set aside for providing the periodical payments, the award of a lump sum to any person who was entitled to apply for family provision. Such a power would be useful in certain circumstances, for example, to enable a deposit to be paid on a new house or to cover a widow's expenses of moving house.
- (b) To order that the whole or a part of the property set aside for the making of periodical payments be transferred to any person who was entitled to apply for family provision. Since, as we have already mentioned, the property concerned will not have been ultimately distributed, we consider it is justifiable to regard it as still available by way of transfer for family provision purposes, if the court thinks proper and so orders.

170. As to the matters to which the court should have regard in exercising its powers of variation, section 27(4) of the 1965 Act provides that the court:

“shall have regard to all the circumstances of the case, including any change in the circumstances to which the court was required to have regard in determining the application for the original order.”

A similar principle is laid down in section 13(7) of the Matrimonial Causes Act 1973 in relation to the variation of orders for financial provision in matrimonial proceedings. In our view this principle is more appropriate than the somewhat restrictive principle which is to be found in section 4(1)(a) of the 1938 Act<sup>174</sup>. Our proposal<sup>175</sup> that the principle of section 27(4) of the 1965 Act should be adopted generally in relation to variation proceedings was accepted without dissent. *We so recommend.*

(d) *Change of circumstances in cases where no order for family provision has been made*

171. The working paper<sup>176</sup> considered the case where a dependant applied unsuccessfully for family provision and, there being no other successful applicant,

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<sup>174</sup> The material words of s. 4(1)(a) are quoted in para. 156 above.

<sup>175</sup> Working Paper No. 42, para. 3.56.

<sup>176</sup> *ibid.*, paras. 3.64–3.65.

no order for family provision was made. The question canvassed was whether, in the absence of an existing order for family provision, a dependant should have the right to apply for such provision if at any time after the deceased's death he considered that his circumstances were such as to warrant such provision. There was little support for such a change; a few thought that an application might be allowable in exceptional circumstances. The great majority of those who expressed a view on this matter thought that it would lead to great uncertainty and extra expense. It was thought that a change was not justified by any evidence or likelihood of real hardship. In this connection it is to be borne in mind that, under the existing law, the court has power to extend the time for applying for family provision. We propose that no change should be made in the present position.

#### **The property which may be affected by a variation order**

172. At present the court, on an application for variation, can deal only with property the income of which is applicable for the maintenance of a dependant under the order. That property may in some cases be the whole of the net estate. In other cases a part of the net estate may have been set aside to provide the income required to satisfy the order. In those cases the rest of the estate will probably have been distributed. The result is that in such cases it will seldom be possible to vary an order for periodical payments upwards.

173. The working paper considered whether the existing law as to the property available to satisfy a variation order was too restrictive<sup>177</sup>. Starting from the proposition that no recourse can be had to property which has already been distributed, such as a bequest of property which has already been transferred to the legatee or a lump sum paid to a successful applicant under the original order, the working paper<sup>178</sup> invited views on which of the following funds should be liable to be affected by a variation order:—

- (a) property which was set aside under the original order to provide income for the maintenance of the dependant who made a successful application for family provision;
- (b) property the income of which is being applied either in accordance with the original order or under the will or intestacy of the deceased for the maintenance of any dependant of the deceased (*i.e.*, a person who would have been entitled to apply for family provision, whether or not an application was made);
- (c) all property the income of which is being applied for the maintenance of any dependant or beneficiary of the deceased.

174. There was virtually no support for extending the categories of property to be affected beyond (a). It was thought widely that a measure of finality is essential and that it would introduce great uncertainty for beneficiaries if the court's power were extended. We interpret the results of the consultation as supporting the view that the property which should be liable to be affected by a variation order is the property the income of which, in accordance with the original order or any consequential directions given by the court in connection with it, is applicable wholly or in part for the maintenance of the person in receipt

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<sup>177</sup> Working Paper No. 42, paras. 3.60–3.63.

<sup>178</sup> *ibid.*, para. 3.61.

of family provision under the order. Thus if the court has directed that a part of the net estate be set aside to provide periodical payments, the property comprised in that part of the net estate will be the only property liable to be affected by a variation order. Where, however, under the terms of the original order or any consequential directions, the provision of the periodical payments was a charge on the whole of the net estate, the whole of the net estate will be liable to be affected by the variation order. It would seem that these propositions represent the present law. In any event, they represent what in our view the law should be.

175. *We accordingly recommend* that on an application to vary an order for family provision, the court should, where property was set aside under the terms of the original order or any consequential directions to provide an income for the applicant, be able to have recourse only to that property. Where, however, under the terms of the original order or any consequential directions given by the court in connection with it, the property charged extends to the whole of the net estate, the power to vary should extend to the whole of the net estate.

176. The effect of an order for variation may be to reduce the amount of any capital required to service the order for periodical payments. We think that the court which makes a variation order ought to have power to give such directions consequential upon the making of an order as appear expedient, including directions reducing the amount of the capital sums or property on which the periodical payments are charged. We think that the court should also have power to deal in its consequential directions with the destination of the property released in this way. *We so recommend.*

#### **The persons entitled to apply for a variation order**

##### *(a) Trustees and beneficiaries*

177. Under present law the persons entitled to apply for a variation include the trustees of the property and any person beneficially interested in the property under the will or intestacy. The working paper proposed that in case there was any doubt it should be made clear that this means the will or intestacy as it stood before any order for family provision was made<sup>179</sup>. This was accepted without dissent and *we so recommend.*

##### *(b) Dependants of the deceased*

178. Others who under the present law may apply for the variation of an order under the 1938 Act are the dependants of the deceased, *i.e.*, persons falling within the definition, in section 1 of the Act, of those who may make an original application for such an order. On an application for the variation of such an order, the court may make provision for the maintenance of any dependant, even though he was not an original applicant for maintenance or was an original applicant whose application was unsuccessful. The existence of such a power is justified, because a change in circumstances may have made it reasonable that some provision should be made for a dependant for whom none was made in the original order. We do not think that permitting such provision to be made on

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<sup>179</sup> Working Paper No. 42, para. 3.64. The effect aimed at is that any beneficiary whose interest was extinguished by the original order would be entitled to apply. See the 1938 Act, s. 3(1).

an application for variation introduces an unacceptable degree of uncertainty as to the rights of beneficiaries, because the only property which can be affected by the variation order is property already charged with providing maintenance for some dependant under the order which is being varied.

179. The persons entitled to apply for the variation of an order under the 1965 Act include the former spouse in whose favour the order was made, any other former spouse of the deceased and any dependant of the deceased as defined by the 1938 Act. However, it does not appear that on such an application for variation the court could make an order for maintenance in favour of a person other than a former spouse of the deceased<sup>180</sup>. The only property which can be affected by a variation order under the 1965 Act is property already charged with the provision of maintenance for a former spouse under the order which is being varied.

180. If the proposals in Part II of this report are accepted, the classes of persons entitled to make an original application for an order for family provision will be somewhat extended. It seems to us, following the principles of the 1938 Act, that the persons entitled to apply for a variation order should include all those who did make, or might have made, an application for an original order. Again following the principles of the 1938 Act, we think that, on an application for variation, the court should have power to make an order for periodical payments or for the payment of a lump sum or the transfer of property<sup>181</sup> in favour of any person falling within the classes of persons who were entitled to apply for an original order for family provision. The interests of beneficiaries will be protected by the fact that there will be no power to make a variation order affecting property which was not affected by the original order.

181. *We recommend that:—*

- (a) the persons entitled to apply for a variation order should include all those who did make or might have made an application for an original order for family provision;
- (b) on an application for variation, the court should have power to make an order for periodical payments or for the payment of a lump sum or the transfer of property in favour of any person falling within the classes of persons who were entitled to apply for an original order for family provision.

#### **A need for uniformity**

182. Our consideration of variation orders in the foregoing paragraphs has, we think, illustrated the fact that the present legislation, being based on two separate Acts passed at different times, does not constitute a completely unified system of family provision. For example, it is possible for an order made in favour of a surviving spouse under the 1938 Act to be in existence at the same time as an order made in favour of a former spouse under the 1965 Act. The income to be provided under those orders may be a charge on the whole estate, or in each case on some part of it. If it is desired to vary both orders simultan-

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<sup>180</sup> The construction of s. 27 of the 1965 Act is not entirely clear. On one view, the court has no power to provide, by means of a variation order, for the maintenance of a former spouse for whom no provision was made by the original order.

<sup>181</sup> See para. 169 above.



ously, separate applications will have to be made, though no doubt arrangements would be made for the applications to be heard together. The principles on which orders for family provision are made and varied should, we think, constitute a uniform code embodied in a single corpus of legislation. This is one of the considerations which have led us to our final recommendation that the present legislation be replaced by a single Act of Parliament covering the whole of family provision<sup>182</sup>.

#### **Suspension of orders**

183. Under section 27 of the Matrimonial Causes Act 1965 the court may suspend any provision of the original order temporarily and thereafter revive the operation of any provision so suspended. The 1938 Act contains no such provision. We do not envisage that there will be many cases in which it will be necessary to invoke a power of suspension. Such cases might, however, arise; for example, where the income from the property set aside to satisfy an order for periodical payments was temporarily reduced or extinguished. We therefore think that the court should have a power of suspension exercisable on the application of the same persons who may apply for a variation of the order. *We so recommend.*

#### **Discharge of orders**

184. Although the 1938 Act does not specifically refer to discharge of orders, it has been suggested that a power to vary includes a power to discharge<sup>183</sup>. By contrast, the 1965 Act includes a specific power to discharge<sup>184</sup>. We think that the power to discharge an order is a valuable one which should be specifically conferred. The power might, for example, be used where a widow receiving periodical payments from a small estate in which other dependants were also interested contracted a marriage leading to a substantial change in her economic position. Further, having regard to our recommendation that there should be no limit as to the age of children who may apply for family provision<sup>185</sup>, we think that the power to discharge orders will be a useful safeguard against the imposition of a continuing burden on the deceased's estate if circumstances change so that the child is no longer in need of maintenance. It is our view that in the interests of finality an order once discharged should not be capable of revival. We think that the power to discharge orders should be exercisable on the application of the same class of persons who may apply for a variation and that on making an order for discharge the court should have power to give such consequential directions as appear expedient. *We so recommend.*

### **PART IV: AGREEMENTS TO EXCLUDE FAMILY PROVISION**

#### **Provisional proposals in our working paper**

185. The working paper proposed that parties to matrimonial proceedings for divorce or nullity should be allowed to make an agreement which, if sanctioned by the court, could bind the parties even after the death of one of them and bar claims for family provision under the 1965 Act<sup>186</sup>. Children would not

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<sup>182</sup> Para. 277 below.

<sup>183</sup> Tyler, *Family Provision*, (1971) p. 80.

<sup>184</sup> S. 27(1).

<sup>185</sup> Para. 79 above.

<sup>186</sup> Working Paper No. 42. para. 3.68.

be affected. The proposal was widely accepted; it was commented that there would be advantages in finality.

#### **Our present proposal**

186. We agree with the above comment, and would add the further comment that the possibility of excluding further applications may facilitate the settlement of the financial issues in matrimonial proceedings. However, there are two points on which, on further consideration, we have departed from our provisional views:—

- (a) In the legislation dealing with matrimonial proceedings, the emphasis tends to be on the order made by the court and not on any agreement between the parties which may in fact have inspired the order. We think that it will be more consistent with the general tenor of the matrimonial proceedings legislation if the court is simply empowered, where it thinks fit and the parties so agree, to direct that its order shall bar a claim for family provision by one of the parties to the marriage.
- (b) Our provisional view was that it was undesirable to extend our proposals as to contracting out to agreements made during the subsistence of a marriage<sup>187</sup>. In general we remain of that view, but on reconsideration we think that the possibility of contracting out should extend to orders for judicial separation, since judicial separation is, in effect, the end of the marriage.

187. We are fortified in the conclusion which we have now reached as to contracting out by the consensus of opinion to which we have referred. We are aware that there are limitations imposed by statute<sup>188</sup> and by public policy<sup>189</sup> on the right of a spouse to contract out of her right to apply for financial provision in matrimonial proceedings; but the contracting out which we propose is entirely dependent on the court's approval, and we feel that the overriding discretion of the court is a sufficient safeguard.

188. *We accordingly recommend* that in proceedings for divorce, judicial separation or nullity the court should, if the parties so agree, have power to make an order barring either of them from applying for family provision.

### **PART V: TRANSACTIONS DESIGNED TO DEFEAT FAMILY PROVISION**

#### **The transactions to be considered**

189. It is self-evident that legislation which allows the dependants of a deceased to apply for family provision will be effective only to the extent that there is an estate. Thus the deceased can defeat or at least prejudice the rights of his dependants by two types of transactions effected by him whilst he is yet alive<sup>190</sup>. He may dispose of his property elsewhere and he may make a contract

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<sup>187</sup> Working Paper No. 42, para. 3.68.

<sup>188</sup> Matrimonial Causes Act 1973, s. 34.

<sup>189</sup> See *Hyman v. Hyman* [1929] A.C. 601 (H.L.).

<sup>190</sup> See Albery, *The Inheritance (Family Provision) Act 1938*, (1950) "Appendix D: Settlement upon Mistress and Illegitimate Child for Purpose of Evading the provisions of the [1938] Act", pp. 67–68; see also MacDonald, *Fraud on the Widow's Share* (Ann Arbor, 1960) in which family provision legislation combined with anti-evasion provisions is advocated for America to overcome the evasion by *inter vivos* dispositions of widows' legal rights.

to leave the property elsewhere in his will. In this part of the report we deal with both these situations, though only the former was discussed in the working paper.

#### A. REVIEW OF DISPOSITIONS MADE DURING THE DECEASED'S LIFETIME

##### The case in principle for interfering with dispositions

190. In general, people do not try to evade their obligations to their family, but there will always be some who will seek to put their property beyond the reach of certain members of their family who may have a just claim for family provision<sup>191</sup>.

191. It may be argued that any provision designed to call in question dispositions made with this intention would involve too great an interference with the freedom of an individual to dispose of his property as he pleases, that uncertainty would be introduced into *inter vivos* transactions and that it would be difficult in the case of a deceased person to produce evidence of an intention to defeat the claims of family members. In our view, however, it is a matter of overriding importance to ensure that family provision laws are effective<sup>192</sup>. The introduction of measures to prevent a person from defeating family provision by dispositions in his lifetime would not only give the court power to protect the dependants but would also discourage a testator from acting to their prejudice.

##### Avoidance of transactions in matrimonial proceedings

192. The case for such a provision is strengthened by the fact that the court has power under the Matrimonial Causes Act 1973, section 37<sup>193</sup>, to avoid transactions made with the intention of defeating a claim for financial provision in matrimonial proceedings. It is difficult to see why a person should be allowed to defeat a claim for family provision on his death but not a claim for financial provision on the breakdown of his marriage. It may be that he is more likely to want to defeat the latter but that is hardly an adequate justification for the distinction.

193. Under section 37 of the Matrimonial Causes Act 1973, the court may set aside a transaction in matrimonial proceedings if it is satisfied:—

- (a) that the transaction was made with the intention of defeating the claim for financial relief, and
- (b) that, if the transaction were set aside, financial relief or different financial relief would be granted to the applicant.

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<sup>191</sup> In *Re Carter* (1968) 112 Sol. J. 136, the deceased had made a large *inter vivos* gift before his death to one of the beneficiaries of the will. Buckley J. took this into account in ordering the whole estate to go to the widow. The court would have been unable to act if the deceased had disposed of the whole of his property *inter vivos*.

<sup>192</sup> For avoidance provisions in other jurisdictions, see the Republic of Ireland Succession Act 1965, s. 121, and the Proceedings of the 49th Conference of Commissioners on Uniformity of Legislation in Canada 1967, pp. 219–221. It has been said of the Australian and New Zealand Family Provision Acts that they can be successfully evaded by the expedient of transferring property *inter vivos*: Wright, *Testator's Family Maintenance in Australia and New Zealand*, 2nd ed. (1966) p. IX.

<sup>193</sup> These powers were first introduced by the Matrimonial Causes (Property and Maintenance) Act 1958, ss. 2, 5. See the *Report of the Royal Commission on Marriage and Divorce*; (1956) Cmd. 9678, paras. 531–534.

An intention to defeat the applicant's claim is presumed, unless the contrary is shown, if the transaction took place less than three years before the application and the disposition has had the effect of "preventing financial relief from being granted to [the applicant] . . . or reducing the amount of any financial relief which might be so granted". The provision does not apply to a disposition made for valuable consideration to a *bona fide* purchaser without notice of the intention of the other party to defeat a claim for financial provision. There is no time limit on the transactions which can be investigated, but the presumption only applies in respect of dispositions made within three years. A disposition made with the intention of defeating the applicant's claim for financial provision is voidable and not void; consequently, if third parties, acting in good faith and without notice of the invalidity, acquire rights over the property, such rights are not invalidated by the disposition being set aside<sup>194</sup>.

#### **Provisional proposals in our working paper**

194. We proposed in the working paper that in family provision proceedings the court should have powers similar to those exercisable by the court in applications for financial provision in matrimonial proceedings<sup>195</sup>. The views of those who commented on this proposal were divided, though a majority favoured or were not opposed to the power in principle.

195. The reasons given by those who opposed the proposal were as follows:—

- (a) Gifts are often made to preserve the family fortune from the effects of estate duty; such gifts ought not to be challenged.
- (b) It is often difficult to determine the true intention of the deceased.
- (c) There is little evidence of any widespread mischief.
- (d) The powers would be ineffective and could be avoided, for example, by the purchase of an annuity; attempts to prevent evasion would lead to great complication.

#### **Our conclusion**

196. In paragraph 191 above we have stated our view that it is a matter of overriding importance to ensure that family provision laws are effective. Balancing this consideration against the arguments in paragraph 195 above, our conclusion is that a case has been made out for some provision designed to prevent a person from defeating family provision claims by dispositions made during his lifetime. On the other hand, we are not satisfied that a provision for "setting aside" dispositions, modelled merely on section 37 of the Matrimonial Causes Act 1973, is the type of provision required in the context with which we are now concerned.

197. A provision for "setting aside" dispositions will raise difficult problems of third or fourth parties into whose hands the property has come before the deceased's death. What we envisage is a different and simpler type of provision, the object of which is to require a person, who in certain circumstances has received property from the deceased during his lifetime, to make a payment to provide the funds from which a claim for family provision could be satisfied.

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<sup>194</sup> *National Provincial Bank Ltd. v. Hastings Car Mart Ltd. (No. 2)* [1964] Ch. 665 (C.A.).

<sup>195</sup> Working Paper No. 42, para. 3.70.

### **The recommended scheme**

198. *We accordingly recommend* the adoption by legislation of a scheme containing the following features:—

- (a) The deceased must during his lifetime have made a disposition of property with the intention of defeating an application for family provision. We use the expression “property” in this context to include money.
- (b) The person in whose favour that disposition was made (“the donee”) must be a person who takes the benefit of the property without full valuable consideration: marriage or a promise to marry should not be regarded as valuable consideration for this purpose.
- (c) The court may order the donee to make a payment of money or to transfer other property for the purpose of providing resources required to satisfy an order for family provision.
- (d) It should not be a condition of the making of such an order that the donee should still be the owner of, or still be entitled to the benefit of, the property disposed of in his favour by the deceased.
- (e) Where the disposition by the deceased consisted of the payment of money to or for the benefit of the donee, the amount of any sum of money or the value of any property which the donee is ordered to pay or transfer is not to exceed the amount of the payment made by the deceased after deducting therefrom any death duties payable in respect of that payment by reason of the deceased’s death.
- (f) When the disposition by the deceased consisted of the transfer of property other than money to or for the benefit of the donee, the amount of any sum of money or the value of any property which the donee is ordered to pay or transfer is not to exceed the value at the date of the death of the deceased of the property disposed of by him to or for the benefit of the donee (or, if that property has been disposed of by the donee, the value at the date of his disposal of it) after deducting therefrom any death duties payable in respect of that property by reason of the deceased’s death.
- (g) In determining whether to make any and, if so, what order, the court is to have regard not only to the circumstances specifically referred to above but to all the circumstances of the case, including the circumstances in which the disposition was made and any valuable consideration which was given for it, the conduct and financial resources of the donee and his relationship, if any, to the deceased.
- (h) For the effective operation of the scheme, the court should have wide ancillary powers; for instance, where the donee is ordered to transfer a specific item of property, the court should have power to order some payment to be made to the donee out of the net estate and to make consequential adjustments of the rights of beneficiaries.

### **The intention to defeat an application for family provision**

199. Under the scheme recommended above, the disposition must have been made with the intention of defeating an application for family provision. The

working paper considered whether there should be any presumption as to the intention of the deceased to defeat an application for family provision in cases where the disposition has had the effect of preventing or reducing the amount of family provision<sup>196</sup>. A presumption as to the intention of the deceased would place the burden of proof on the original donee or transferee of the property and it might be difficult to discharge the burden when the donor was dead. On the other hand, if there were no presumption, the applicant would have to prove the intention of the deceased to defeat the application, which would be equally difficult.

200. Our provisional view was that the same presumption should apply as in matrimonial proceedings. There would be no time limit on the transactions which could be investigated, but the presumption would apply only to transactions within three years before the death.

201. We have reconsidered this issue in the light of comments received, and in the light of the misgivings expressed in those comments concerning the power to investigate and reopen concluded transactions<sup>197</sup>. Some thought that a presumption is justified only where the probabilities are in favour of its being true; while this might be so where the parties are involved in matrimonial proceedings, it is not so in the case of a marriage ending in death. On balance, we think that there is no need to presume the intention.

202. *We recommend* that the legislation should provide that the necessary intention is established where the court is of the opinion, on a balance of probabilities, that, in making the disposition, it was the sole intention of the deceased or a substantial part of his intention, to defeat a claim for family provision either wholly or in part.

#### **Transactions which may be reviewed**

203. In the working paper we proposed that the powers of avoidance granted to the court should be wide enough to enable the court to deal with transactions involving the following categories of property<sup>198</sup>:—

- (a) property disposed of or settled outright by the deceased;
- (b) benefits payable on the deceased's death under insurance policies provided by the deceased;
- (c) property in respect of which the deceased held a general power of appointment, or a special power of appointment, exercisable in favour of an applicant for family provision, and property which would go to the applicant in default of exercise of a power of appointment by the deceased. In effect, the exercise of the power, or the failure to exercise the power, should be equally regarded as a "disposition".

204. On consultation it was generally accepted that the property in category (a) (property disposed of or settled outright) should be subject to review. *We so recommend*.

205. Those consulted also generally accepted that the power to review should cover the property in category (b) (benefits payable on the deceased's

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<sup>196</sup> Working Paper No. 42, para. 3.72.

<sup>197</sup> Para. 195 above.

<sup>198</sup> Working Paper No. 42, para. 3.71.

death on insurance policies). However, we now see considerable difficulties in enabling the court to order a payment out of benefits payable under an insurance policy, especially in those cases where some, but not all, of the premiums may have been paid with intent to avoid family provision. Where a premium is paid with that intent, the measure of the diminution in the payer's assets is the amount of the premium.

206. We accordingly think that justice will be satisfied by giving to the court power to require the beneficiary of the policy to repay to the estate a sum not exceeding the amount of the premium or such part of that amount as may be just in the circumstances, after deducting such sum, if any, in respect of the estate duty paid or payable by the beneficiary in respect of the policy moneys as the court considers reasonable in all the circumstances. *We so recommend.*

207. We now turn to the property in category (c) (property over which the deceased had a power of appointment).

208. In paragraphs 129–133 we considered whether property over which the deceased had a special power of appointment, which he had not exercised irrevocably in his lifetime, should be available for family provision purposes. We concluded, for the reasons given in paragraphs 132 and 133, that it should not. For those same reasons we consider that where the deceased has exercised the power in his lifetime, such exercise should not be open to review by the court.

209. As to general powers of appointment, where the deceased has such a power but has failed to exercise it, the property subject to the power would form part of his net estate for family provision purposes, so that no problem of defeating family provision arises.

210. Where the deceased has a general power of appointment which he has exercised by will, the property which is the subject of the power forms part of his net estate for family provision purposes in that case also<sup>199</sup>. On the other hand, where the deceased has exercised a general power of appointment otherwise than by will, the manner of its exercise may be the subject of complaint on the ground that it was intended to defeat family provision. In the circumstances we think it appropriate to regard only the exercise of general powers of appointment as dispositions for the purposes of the new provisions. *We so recommend.*

#### **Time limit**

211. We have considered whether the power of the court to reopen dispositions made by the deceased should be limited to dispositions made within a specified period before his death. Logically, it may be said that there is no case for such a limitation. We are, however, disturbed by the prospect of litigation in which it is necessary to investigate a man's intentions at remote periods of time. We incline to think that in the great majority of cases dispositions intended to defeat family provision will have been made within a period of a comparatively few years before the death. *We recommend* that the court's power to reopen dispositions made by the deceased should be limited to dispositions made within the period of six years before death.

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<sup>199</sup> See paras. 127–128 above.

### **Legislation should not be retrospective**

212. Consistently with our attitude to retrospective legislation in general, *we recommend* that the powers of the court should not extend to any disposition made before the commencement of the Act giving effect to our proposals for family provision.

### **Pension funds**

213. The working paper asked for views as to whether the court should be given power to substitute its own discretion for that of the trustees of a pension fund provided as a result of the deceased's employment<sup>200</sup>. On the death, benefits may become payable to a dependant. Although the trustees generally have an absolute discretion, they frequently pay the benefits to the person nominated by the deceased. The pension may be the only "asset" of any value, and we were concerned lest an unreasonable choice of nominee by the deceased might cause hardship to a dependant. The proposal was not favourably received; it was thought to be too great a burden to expose the trustees of a pension fund, who can confidently be expected to act conscientiously, to the scrutiny of the court. On balance, we accept that the case for interfering with the discretion of the trustees of a pension fund has not been made out and we make no recommendation.

### **Time when court should entertain an application for review**

214. The proceedings for an application to review a disposition made by the deceased during his lifetime would be initiated by the applicant or applicants for family provision. Other parties to the application for review would be the personal representatives and the donee of the property in question<sup>201</sup>. In our working paper we proposed that applications to reopen transactions should be subject to the same time limit as that which applies to original applications for family provision<sup>202</sup>. This was generally accepted. On further consideration, however, we think that, provided that an application for family provision is made by any person within the prescribed time limit, the court seised of that application should at any time before it is disposed of have power to entertain an application for the review of a disposition made by the deceased. *We so recommend*.

215. We have considered whether the court should, on an application to vary or discharge an order for family provision, have power to review dispositions made by the deceased during his lifetime. Our view is that if such dispositions are to be challenged, they should be challenged as soon as possible after the death of the deceased. We therefore do not recommend that the court should have power, on an application for the variation or discharge of an order for family provision, to review a disposition made by the deceased during his lifetime.

### **Review of other dispositions: joinder of parties**

216. Once an application has been made for the review of a disposition made by the deceased, a situation may arise in the proceedings in which the applicant

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<sup>200</sup> Working Paper No. 42, para. 3.71.

<sup>201</sup> Beneficiaries, living and unborn, under a settlement might have to be represented.

<sup>202</sup> Working Paper No. 42, para. 3.73. An application for family provision cannot be made later than six months from the date on which representation is first taken out without the permission of the court: see para. 144 above.



or applicants for family provision or the donee under the transaction which is being challenged may wish to challenge some other disposition which the deceased has made.

217. *We recommend* that the court should, at the instance of any such party, have power to review such other dispositions on the basis of the principles which we have already set out. *We further recommend* that the court should, for the purpose of any such review, have power to order the joinder of any necessary additional parties.

#### **Review of dispositions: estate duty**

218. In paragraphs 148–153 above we have referred to the consequences which an order for family provision will have in the field of estate duty. In footnote 161 to paragraph 153 we have mentioned that the consequences will not necessarily be the same where the property, in respect of which duty is chargeable, has become available by virtue of an order made under the court's power of review referred to above. Moreover, examples can be given of anomalies which can arise; *viz*:—

- (a) A testator leaves a net estate of £50,000 and bequeaths it wholly to his mistress. The widow obtains a family provision order for £30,000. This order will operate to vary the will and less duty will be paid, because the widow's £15,000 exemption will operate.
- (b) In another situation, the deceased, immediately before death, transfers to his mistress his entire property worth £50,000. The widow obtains a family provision order for £30,000. This order operates outside the will (or intestacy rules). Here the Revenue will look to the mistress for duty on a gift basis (which duty will be taken into account in making the widow's order) but there is no room for widow's relief.
- (c) In yet another situation the deceased, a widower with young children, immediately before his death, transfers to a charity his entire estate worth £50,000. Alternatively, he invests it in such a way that he can nominate those who are to benefit on his death, and makes a nomination in favour of the charity. The children obtain a family provision order for the whole £50,000. Again, the order operates outside the will (or intestacy rules). So although the charity in fact receives nothing, the £50,000 enjoys complete exemption from estate duty under section 121 of the Finance Act 1972 and the children avoid the substantial duty which they would have suffered if the gift had been made direct to them.

219. The roots of these anomalies lie essentially in the law of estate duty, however, and if changes are to be made in this area we consider that estate duty legislation provides the best medium for doing so.

#### **Court approval of transactions**

220. It was suggested to us that a person ought during his lifetime to be able to secure the approval of the court to a transaction in order that it might not be impugned in family provision proceedings after his death; an application under the Trustee Act was suggested as a possible means of doing this. We are not convinced that this is necessary or practicable.

221. The proposed powers are aimed at cases where there was clearly an intention to defeat a possible application. It would be difficult, if not impossible, for the court to decide whether to approve a particular transaction without going into all the circumstances of the case and, possibly, hearing all interested parties. This would be a cumbersome procedure to invoke as a safeguard against a possible application for family provision. There might be a case for a provision preventing an applicant from questioning a transaction to which he or she had consented in writing. We think this is unnecessary as the court would be hardly likely to reopen a transaction for the benefit of any applicant who had consented to it. We do not recommend any special provision for approving transactions.

#### B. REVIEW OF CONTRACTS TO LEAVE PROPERTY BY WILL AND ANALOGOUS CONTRACTS

##### *Schaefer v. Schuhmann*

222. A matter which was not dealt with in the working paper, but which has aroused interest in the period since its publication, is the effect on family provision of a contract made by a testator to leave property by will.

223. In *Schaefer v. Schuhmann*<sup>203</sup> the Privy Council found that where a testator had bound himself by an enforceable contract to leave property by will to a certain person, and did so, the court had no power to throw any part of the burden of a family provision order on the property in question.

224. Part of the reasoning underlying the decision was that, if the deceased had failed to perform the contract the person in question could have recovered damages from the estate equalling in value the property, and that the claims of dependants can be met only from the net estate after payment of all debts<sup>204</sup>. Lord Cross of Chelsea, for the majority, went on to say that:—

“The question whether contracts made by a testator not with a view to excluding the jurisdiction of the court under the Act but in the normal course of arranging his affairs in his lifetime should be liable to be wholly or partially set aside by the court under legislation of this character is a question of social policy. . . . If and so far as it is thought desirable that the courts of any country should have power to interfere with testamentary dispositions made in pursuance of bona fide contracts to make them, it is, their Lordships think, better that such a power should be given by legislation deliberately framed with that end in view rather than by the placing of a construction on legislation couched in the form of that under consideration in this case which results in such astonishing anomalies as flow from the decision in *Dillon v. Public Trustee of New Zealand*.”<sup>205</sup>

225. In a dissenting opinion Lord Simon of Glaisdale said that the legislative intention of family provision law was “to prevent family dependants being thrown on the world with inadequate provision, when the person on whom they

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<sup>203</sup> [1972] A.C. 572 (P.C.) (on appeal from the Supreme Court of N.S.W.); not following *Dillon v. Public Trustee of New Zealand* [1941] A.C. 294 (P.C.); C. H. Sherrin, “Contracts to make Wills”, (1972) N.L.J. 576.

<sup>204</sup> See the definition of “net estate” in the 1938 Act, s. 5(1).

<sup>205</sup> [1972] A.C. 572, 592.

were dependent dies possessed of sufficient estate to provide for or contribute to their maintenance”<sup>206</sup>. He thought that the majority decision would countenance the following situation:—

“A widower is left with two infant children; he proposes marriage to another woman, promising to bequeath her the whole of his estate if she will accept him; she does accept him on these terms; he dies shortly afterwards; the court is powerless to order any provision out of his estate for his infant children.”<sup>207</sup>

He invited the legislatures of the various jurisdictions to consider the situation<sup>208</sup>.

### **Our conclusion**

226. We think that a distinction should be drawn between a contract to leave property by will where the intention of the promisor is to defeat a claim for family provision and a contract to leave property by will where there is no such intention. In the former case, we think that the court should have power to order family provision out of the net benefit accruing to the promisee after taking account of any valuable consideration which has been given for the contract (marriage or a promise to marry not being regarded as valuable consideration for this purpose). In the latter case, where the necessary intention is not established, we can see no ground for giving the court power to interfere.

### **The recommend scheme**

227. *We therefore recommend* a scheme on the following lines whereby the family provision legislation should include a power to review contracts by the deceased to leave property by will:—

- (a) The court must be satisfied that the deceased has made a contract to leave property by will, and made it with the intention of defeating an application for family provision. We use the expression “property” in this context to include money.
- (b) The court must be satisfied that when the contract was made full valuable consideration was not given or promised by the person with whom or for whose benefit the contract was made (“the donee”) or by another person. Marriage or a promise to marry should not be regarded as valuable consideration for this purpose.
- (c) To facilitate the making of family provision for an applicant, the court may then make one or more of the following orders:—
  - (i) if any money has been paid or any other property has been transferred to or for the benefit of the donee in accordance with the contract, an order directing the donee to provide, for the purpose of the making of family provision, such sum of money or other property as may be specified in the order;

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<sup>206</sup> [1972] A.C. 596.

<sup>207</sup> *ibid.* at p. 594.

<sup>208</sup> It is, of course, not decided whether the English courts would follow *Schaefer v. Schuhmann*.

- (ii) if the money or all the money has not been paid or the property or all the property has not been transferred in accordance with the contract, an order directing the personal representatives not to make any payment or transfer any property, or not to make any further payment or transfer any further property, in accordance with the contract, or directing the personal representatives only to make such payment or transfer such property as may be specified in the order.
- (d) The foregoing powers should be exercisable only to the extent that the court considers that the amount of any sum paid or to be paid or the value of the property transferred or to be transferred in accordance with the contract exceeds the value of any valuable consideration given or to be given for the contract. For this purpose the court should have regard to values as at the date of the hearing.
- (e) In determining whether and in what manner to exercise its powers, the court should have regard to the circumstances in which the contract was made, the relationship, if any, of the donee to the deceased, the conduct and financial resources of the donee, and all the other circumstances of the case.

**The intention to defeat an application for family provision**

228. Under the scheme recommended above, the court's power to reopen contracts to leave property by will, will depend upon the court being satisfied that the deceased entered into such a contract with the intention of defeating an application for family provision. Following in this respect our recommendation in regard to dispositions *inter vivos*<sup>209</sup>, we recommend that the legislation should provide that the necessary intention is established where the court is of the opinion, on a balance of probabilities, that in making the contract it was the sole intention of the deceased, or a substantial part of his intention, to defeat a claim for family provision either wholly or in part.

229. We have considered whether the burden of satisfying the court on this point should in all cases rest on the applicant. In this respect we think a distinction can be drawn between cases where there is valuable consideration for the contractual promise of the deceased and cases where there is no such consideration.

230. Where there is such consideration, we think it is not unreasonable to place upon the applicant for family provision the burden of proving that the contract was entered into with the intention of defeating his application. Where there is no such consideration, we think it is reasonable that there should be a rebuttable presumption that the contract was entered into with the intention of defeating family provision and that the burden should rest upon the donee of displacing that presumption.

231. If our recommendation that marriage or a promise of marriage should not be regarded as valuable consideration is accepted, it would follow that, in the case instanced by Lord Simon of Glaisdale, quoted in paragraph 225 above, there would be a rebuttable presumption that the purpose of the contract was to defeat family provision.

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<sup>209</sup> Para. 202 above.

232. *We recommend*:—

- (a) That where there is valuable consideration for the contractual promise of the deceased, it should be for the applicant to prove that the contract was entered into with the intention of defeating an application for family provision.
- (b) That where there is no valuable consideration for the contractual promise of the deceased, there should be a rebuttable presumption that the contract was entered into with the intention of defeating such an application.

#### **The Canadian Draft Uniform Relief Act**

233. In formulating our recommendations in paragraphs 227–232 above we have studied the Canadian Draft Uniform Relief Act<sup>210</sup>. The relevant clause provides as follows:—

“16. Where a deceased:

- (a) has, in his lifetime, *bona fide* and for valuable consideration, entered into a contract to devise and bequeath any property real or personal; and
- (b) has by his will devised and bequeathed that property in accordance with the provisions of the contract;

the property is not liable to the provisions of an order made under this Act except to the extent that the value of the property in the opinion of the judge exceeds the consideration received by the deceased therefor.”

234. The Canadian draft provision applies where the deceased has entered into the contract “*bona fide*”. The implication appears to be that if he entered into the contract *mala fide* the whole of the property devised or bequeathed should be available to satisfy an order under the draft Act. The precise distinction which is intended to be drawn by the use of the expression “*bona fide*” might well be the subject of argument. Our own view is that the important distinction is between cases where the deceased has entered into a binding contract and cases where he has not. Where the deceased has not entered into a binding contract, no problem should arise. Where, however, the deceased has entered into a binding contract to leave property by his will, then in our view justice requires that the consideration for the contract should be taken into account in determining the extent to which the court may make that property available for family provision purposes. Our recommendations are framed on that basis.

235. The Canadian draft provision also differs from our own recommendations in that, although the provision requires the contract to be made “*bona fide*”, there is no express reference to an intention on the part of the deceased to defeat family provision. The result of the Canadian draft provision appears to be that the court could examine all contracts made by the deceased to leave property by his will with a view to determining whether the consideration for the contract was adequate. In many cases there could be a slight inequality in the

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<sup>210</sup> 1970 Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada, p. 119.

consideration for the contract which was quite unintentional. For our part, we do not think it is unreasonable or unjust to require that an intention to defeat family provision should be established before the contract can be reviewed, especially having regard to our recommendations as to the burden of proof in paragraph 232 above.

**Deceased's undertaking for payment to be made out of his estate**

236. Analogous to a contract to leave property by will is a contract whereby a person undertakes that his personal representatives will pay money or transfer other property out of his estate. Such a contract might indeed extend to the total net assets of the estate after providing for duty. We think that, if any such contract is made with the intention of defeating a claim for family provision, the court should have the like powers, exercisable under the like conditions, as in the case of a contract to leave property by will. *We therefore further recommend* that the provisions recommended in paragraphs 227, 228 and 232 above should apply also to cases where a deceased has entered into a contract that his personal representatives will pay money or transfer other property out of his estate.

**Time limit**

237. We have considered whether the power of the court to review contracts to leave property by will, or to pay money or to transfer other property out of the deceased's estate, should be limited to contracts made within a specified period before death. We have given reasons for recommending that dispositions *inter vivos* made more than six years before death should not be liable to be called in question<sup>211</sup>. We do not think, however, that contracts of the kind with which we are now concerned are comparable with dispositions *inter vivos*. In the case of a disposition *inter vivos*, the donor is immediately divesting himself of property and this must in most cases have a restraining effect upon him. In the case of contracts of the kind with which we are concerned there is no similar disincentive, because the deceased remains in full enjoyment of his property during his lifetime. We think that any rule rendering such contracts immune from challenge if made more than a specified period before death might be a positive encouragement to make them. Accordingly we do not recommend any such rule.

**Deceased's failure to perform contract: the remedies of the other party**

238. It remains to consider:—

- (a) the case where a person has made a contract to leave property by will but has failed to do so; and
- (b) the case where a person has made a contract that his personal representatives will pay money or transfer property but his personal representatives fail to carry out the contract.

239. As to both of these cases, we think that, if the court finds that the contract was made with the intention of defeating a claim for family provision, the right to recover damages for breach of the contract should be subject to the following limitation. The court should have the right to make an order for family

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<sup>211</sup> Para. 211 above.

provision out of the net value of the property after taking account of any valuable consideration<sup>212</sup> which has been given in respect of the contract. The damages recoverable for the breach of contract would be reduced by the amount necessary to give effect to the order for family provision. If the court decides that the property in question should be an asset out of which family provision is to be made and the case is one in which under the general law the promisee would have been entitled to specific performance of the contract, the promisee should as regards that property lose his rights to specific performance and should be confined to such rights as he may have to recover damages for breach of the contract. *We so recommend.*

#### **Ancillary powers**

240. In connection with the exercise of the powers which we have recommended in paragraphs 227, 228, 232, 236 and 239 above, the court may require ancillary powers. Where, for instance, the promisee under a contract is ordered to restore or renounce property which was to be transferred to him under the contract, fairness may require that the court should have power to order a cash payment to be made to him out of the net estate. Again, where the rights of the parties to a contract are affected by an order of the court, it may be convenient for the court to be able to give specific directions as to what contractual rights, if any, still survive and as to how they shall be satisfied. *We recommend* that the legislation should include such ancillary powers.

#### **Time when court should entertain an application to review a contract**

241. *We further recommend* that, provided that an application for family provision is made within the prescribed time limit, the court seised of that application should, at any time before it is disposed of, have the powers recommended in paragraphs 227, 228, 232, 236 and 239 above.

#### **Legislation should not be retrospective**

242. *We further recommend* that the powers referred to above be limited to contracts entered into after the commencement of the Act giving effect to our proposals for family provision.

### **C. EXTENT OF THE POWER OF REVIEW**

#### **Review proceedings against the estate of donees and promisees**

243. We think it probable that in the majority of cases the beneficiary of a transaction designed to defeat family provision will be a person whom the deceased expects to survive him. It is possible, however, that the donee or promisee in such a transaction will die before the deceased. Again, the donee or promisee may die after the deceased but before proceedings to impugn the transaction have been initiated or while such proceedings are pending. We think it desirable that proceedings for the review of such transactions should, if commenced (as we have recommended) while an application for family provision is pending, be capable of being instituted or continued against the estate of a deceased donee or promisee. On the other hand, we think that, when

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<sup>212</sup> Marriage should not be regarded as valuable consideration for this purpose: see para. 227 above.

the personal representatives of the donee or promisee have distributed any part of the estate of the deceased before they have notice that proceedings for review have been initiated, they should not be under any liability in respect of the property so distributed on the ground that they ought to have taken into account the possibility of such proceedings being initiated.

*We accordingly recommend:—*

- (a) that the family provision legislation should permit review proceedings to be taken or continued against the estate of a donee or promisee in the circumstances specified in this paragraph; and
- (b) that the personal representatives of the donee or promisee should enjoy the immunity set out above.

#### **Review proceedings against trustees**

244. When a person makes a disposition during his lifetime with the intention of defeating an application for family provision, or where a person, with that intention, makes a contract to leave property by his will or a contract that his personal representatives will pay money or transfer other property out of his estate, the donee or promisee may be a trustee for some other person. We think it desirable for the protection of such a trustee that the power of the court to make orders for the payment of money or the transfer of other property against him should be limited to such money or other property in his hands as consists of or represents the fruits of the transaction under review, after making any deduction in respect of death duties pursuant to our recommendations in paragraph 198(e) and (f) and paragraph 206 above. *We so recommend.*

245. We further think that when an application for review is made against such a trustee who has distributed any money or other property subject to the trust before he has notice of the application, he should not be under any liability in respect of the property so distributed on the ground that he ought to have taken into account the possibility that such an application would be made. *We so recommend.*

#### **Review proceedings against other persons**

246. We have considered whether the power of review should include a power to proceed against property representing the fruits of a transaction designed to defeat family provision, when that property is in the hands of a person who has derived it mediately or immediately from the donee or promisee or from the estate of the donee or promisee. Such a power, if conferred, would in our view involve complexities and uncertainties out of proportion to the evil which the power of review is designed to combat. To take only one example, there would be difficulties of tracing, especially where cash transactions and mixed funds were involved. These difficulties would tend to make the review provisions operate unevenly as between different cases. Though the value of the review provisions we have proposed rests partly on the fact that they will swell the assets available for family provision, it also rests to a substantial extent on the deterrent effect which such provisions are likely to have on the mind of the potential evader. The provisions which we have recommended are far-reaching but have, we hope, the merits of simplicity, certainty and finality. We are reluctant to propose that they should be extended further before a practical need for



such extension has become apparent. We therefore make no recommendation for giving the court power, on an application for review, to proceed against property in the hands of a person who has derived it mediately or immediately from the donee, the promisee, or the estate of a donee or promisee.

## PART VI: JURISDICTION

### Courts exercising jurisdiction in family provision applications

247. At present jurisdiction in family provision applications under the 1938 Act and the 1965 Act is exercised by the High Court and the county court. We deal first with the jurisdiction of the county court.

#### The county court

248. A county court has all the jurisdiction of the High Court to hear and determine proceedings for an order under the 1938 Act and the 1965 Act, where it is shown to the satisfaction of the court that the value of the deceased's net estate does not exceed £5,000, or such larger sum as may from time to time be fixed for this purpose by order of the Lord Chancellor<sup>213</sup>. We take the view that the £5,000 limit is satisfactory for the time being and the power of review vested in the Lord Chancellor relieves us from the necessity of speculating as to the future. We have considered, however, whether the net estate for this purpose should be defined as including the classes of property mentioned in paragraph 134 of this report<sup>214</sup>. Our view is that such property should not be taken into account in determining the size of the net estate for the purpose of the allocation of jurisdiction between the High Court and the county court. We feel that, for the purpose of ascertaining jurisdiction, the rule for defining the net estate should be as simple as possible and accordingly we think it is best, for this purpose, to retain the existing definition.

249. It may occasionally happen that an application which under the general rule of allocation would fall within the jurisdiction of the county court, raises points of difficulty which make it more suitable for determination by the High Court. *We accordingly recommend* that where it appears to a county court that any of the matters in question raise difficult points of law or would otherwise be more suitable for determination by the High Court, the county court may order that the proceedings be transferred to the High Court.

250. Subject to what is said in paragraphs 248 and 249 above, we adhere to the view expressed in our working paper that the county court jurisdiction should remain unaffected<sup>215</sup>.

#### Assignment of business in the High Court

251. At present jurisdiction in the High Court under the 1938 Act is exercised by the Chancery Division whereas that under the 1965 Act is exercised by the Family Division. This can lead to the result that a divorced wife must apply in

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<sup>213</sup> Family Provision Act 1966, s. 7(1) and (5). No larger sum has yet been fixed. Where proceedings are commenced in the High Court and it appears that the value of the deceased's estate is such as would give jurisdiction to the county court if proceedings were commenced there, the High Court may order that the proceedings be transferred to the county court: s. 7(3).

<sup>214</sup> *i.e.*, nominated property and property the subject of *donatio mortis causa*.

<sup>215</sup> Working Paper No. 42, para. 3.5.

one Division whereas her children must apply in another, and that the former wife must apply in one Division and the widow in another. Although it is possible for an application to be transferred from one Division of the High Court to another, so that all the applications can be heard together, it would be simpler if all applications had to be made in the same Division. The creation of the new Family Division by the Administration of Justice Act 1970 provided an opportunity to assign all the family provision jurisdiction to one Division. Nevertheless, the former assignment of jurisdiction has been maintained<sup>216</sup>. Only cases under the 1965 Act are assigned to the Family Division. The surviving spouse and children of the deceased must still apply to the Chancery Division.

252. We drew attention to this in the working paper<sup>217</sup> and stated our provisional view that the jurisdictions are essentially the same and should be administered by the same Division. We proposed provisionally that jurisdiction under the 1938 Act should be transferred to the Family Division. The proposal was accepted by the great majority of those who commented on this point.

253. A small number, however, expressed strongly their opposition to the proposal; some of these thought that jurisdiction under section 26 of the 1965 Act should be transferred to the Chancery Division. The main reasons advanced were the following:—

- (a) the Chancery Judges and Bar are far more experienced in this field than are the Family Division Judges and Bar;
- (b) it is sometimes necessary to deal with the construction of a will before considering family provision and both these matters can be dealt with by a judge of the Chancery Division at the same hearing;
- (c) family provision orders affect the administration of the estate, are often complicated, and may have important fiscal implications;
- (d) in 1970 Parliament rejected an amendment to transfer the jurisdiction to the Family Division;
- (e) the Chancery Division, under its general jurisdiction in the administration of estates, is the appropriate Division to make any preliminary orders which may be required for ascertaining and safeguarding the assets belonging to the estate;
- (f) an application for approval of a compromise affecting unborn children or unascertained persons should be made to the Chancery Division, which is experienced in these matters;
- (g) an application under the 1938 Act may have added to it an application under the Trustee Act 1925 to empower executors to purchase a house for the widow and this is a Chancery Division matter.

254. We appreciate the force of the argument that the present distribution between Divisions of the business with which we are concerned has been considered by Parliament as recently as 1970. Moreover, we have no evidence that the distribution does not work reasonably satisfactorily in practice. Nevertheless, in the light of the considerations set out in paragraph 251 above, we have not the slightest doubt that the balance of convenience is in favour of assigning

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<sup>216</sup> An amendment which would have had the result of transferring proceedings under the 1938 Act to the Family Division was rejected on the Report stage of the Administration of Justice Bill; *Hansard*, (House of Commons), 4 May 1970, Vol. 801, Cols. 109–117.

<sup>217</sup> Working Paper No. 42, paras. 3.4–3.5.

all family provision proceedings in the High Court to a single Division. Moreover, our proposals for the reform of the law relating to family provision involve the repeal both of the 1938 Act as amended and of sections 26–28A of the Matrimonial Causes Act 1965, and the replacement of those enactments by a single Act embodying a single and homogeneous code for family provision. If those proposals are accepted and a unified code is enacted, the arguments of convenience for assigning the administration of the code to a single Division of the High Court are still further reinforced.

255. In our opinion, there is no doubt that those arguments of convenience ought to prevail, and that family provision proceedings in the High Court ought to be assigned to a single Division. If that is accepted, the question then is, to which Division should the business be assigned? It is our view that the business should be assigned to the Family Division. We appreciate the force of some of the considerations referred to in paragraph 253 above, although we think that, having regard to the kind of work which is now regularly handled in the Family Division, the first of those considerations has little, if any, weight. Our main reason for our view that the business should be assigned to the Family Division is a reason of principle, viz. that it seems to us that the question of family provision is essentially a family matter. The principal issue is whether the deceased has fulfilled his family obligations to make reasonable provision for his dependants; this issue is one appropriate to the Family Division. The questions for determination, though different, are closely analogous to those arising under Part II of the Matrimonial Causes Act 1973 and under our proposals are indeed expressly linked with those questions (see paragraph 34(k) above). It appears to us that the Division which has the responsibility for administering the 1973 Act is the Division to which questions of family provision should most properly be assigned. We are fortified in our view by the great majority of those who commented on this aspect of our working paper. There may be circumstances where it would be appropriate to transfer an application for hearing to the Chancery Division, for example, where the application is likely to be affected by the result of a construction summons pending in that Division. Machinery already exists for such transfers and should be retained<sup>218</sup>.

256. *We recommend* that the jurisdiction of the High Court under the legislation we propose be assigned to the Family Division.

257. Section 50 of the Matrimonial Causes Act 1973 provides that the power to make rules of court for the purposes of that Act shall be exercisable by an authority so constituted as to have special knowledge of the problems arising under the Act. It appears to us that the rule-making authority constituted under section 50 will also have special knowledge of the problems which are likely to arise under the legislation we propose. *We recommend* that the power to make rules of court for the purposes of our draft Bill should be exercisable by that authority and that section 50 of the Matrimonial Causes Act 1973 be amended accordingly.

#### **Basis of jurisdiction: domicile**

258. The jurisdiction of the court to entertain applications for family provision under the 1938 Act and the 1965 Act is limited to cases where the deceased

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<sup>218</sup> Matrimonial Causes Rules 1973, rr. 103(4) and 102(8); R.S.C., 0.4, r. 3.

was domiciled in England at death<sup>219</sup>. This question of jurisdiction was not considered in the working paper, but in consultation the comment was made to us that the basis of the present jurisdiction is unnecessarily restricted<sup>220</sup>.

259. The general rule of conflict of laws is that succession to movables is governed by the last domicile of the deceased, and that succession to immovables is governed by the *lex situs*. Courts in several parts of the British Commonwealth have applied this rule in administering family provision law. For example, the courts of New Zealand have applied the rule in administering the New Zealand Family Protection Act 1908. They have held that when a testator dies domiciled in New Zealand, the Act applies to his movables in New Zealand<sup>221</sup>. They have also held that where a testator dies domiciled elsewhere than in New Zealand, the Act applies to his immovables in New Zealand<sup>222</sup>.

260. The choice in our view lies between (a) adhering to the present basis of jurisdiction under the English Acts and (b) following the New Zealand example, and adopting a basis of jurisdiction which conforms with the general rule of private international law. Either alternative will in practice involve anomalies and difficulties.

261. To illustrate the difficulties which will arise from adhering to the existing English rule, we may take the example<sup>223</sup> of a testator who dies domiciled in New Zealand leaving land in England and without making adequate provision for his dependants. The New Zealand courts would have no jurisdiction to make an order for family provision affecting the English land because it is not situated in New Zealand, and the English courts would have no jurisdiction because the testator was not domiciled in England. On the other hand, the basis of jurisdiction adopted by the New Zealand courts will also give rise to anomalies and difficulties. In the example given, the English courts could order family provision from the immovables in England, while the New Zealand courts could order family provision from the movable property of the testator, wherever situate. But in such a situation it would be difficult for the courts of either country to assess the amount of family provision which should be ordered, or to pay proper regard to the interests of all the beneficiaries of the estate of the deceased.

262. We do not think that the solution to these problems lies in moving from a basis of jurisdiction which gives rise to one set of difficulties to a basis of jurisdiction which gives rise to another. Moreover, as a matter of principle, we think there is something to be said for the view to which the English rule gives effect, namely, that the question whether the surviving members of a deceased person's family should have a claim to an interest in his estate should be governed by his personal law, that is, the law of his domicile. However that may be, we think that a fully rational system would involve changes in the rules of private international law which could only be effected by an international convention. We note that the law relating to family property will be one of the

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<sup>219</sup> The Domicile and Matrimonial Proceedings Act 1973, which came into force on 1 January 1974, abolishes the rule of unity and provides for a married woman's domicile to be ascertained independently of her husband's.

<sup>220</sup> For a criticism of the present rule, see J. H. C. Morris, "The Choice of Law Clause in Statutes", (1946) 62 L.Q.R. 170, 178-179; see also D. St. L. Kelly, "Testators' Family Maintenance and the Conflict of Laws", (1967) 41 A.L.J. 382-392.

<sup>221</sup> *Re Roper* [1927] N.Z.L.R. 731.

<sup>222</sup> *Re Butehart* [1932] N.Z.L.R. 125.

<sup>223</sup> We are indebted for this example to J.H.C. Morris, *loc. cit.* p. 179.

subjects for discussion at the Hague Conference on Private International Law in 1976. Pending a satisfactory solution to the problems by international convention, we think there is much to be said for adhering to the present rule that family provision should be regulated by the personal law of the deceased and therefore, in this respect, we propose no change.

**PART VII: MAINTENANCE AGREEMENTS AND ORDERS MADE IN MATRIMONIAL PROCEEDINGS: RELATIONSHIP TO THE FAMILY PROVISION CODE**

**Maintenance agreements**

*(a) Power to alter under section 36 of the Matrimonial Causes Act 1973*

263. Spouses, whether judicially separated or not, may during their joint lives have made a maintenance agreement which is expressed to continue in force after the death of one of them. Under section 36 of the Matrimonial Causes Act 1973 the court has power, on the death of one of the parties to the marriage, to entertain an application for the alteration of such a maintenance agreement. The jurisdiction under section 36 is exercisable by the courts having power to make orders for family provision under the existing family provision legislation. We do not propose any change in this jurisdiction. There can also be maintenance agreements which are intended to continue after death but which are not within the provisions of section 36 of the Matrimonial Causes Act 1973 because they are not in writing or for some other reason<sup>224</sup>.

264. The existence of a maintenance agreement expressed to continue after the death of one of the parties will, whether that agreement is or is not alterable under section 36, be a relevant factor in determining what order for family provision should be made in favour of the surviving spouse under the legislation we recommend. Since the relevance of this factor is obvious, we do not think that it need be specifically referred to as a relevant factor in the new legislation.

265. There may, however, be cases where the court seised of an application for family provision will find it convenient, in connection with the order which it proposes to make, to vary or revoke a maintenance agreement to which the deceased was a party. In this context we use the expression "maintenance agreement" as meaning any agreement, whether or not in writing and whenever made, between the deceased and a person to whom he was at any time married, being an agreement containing financial arrangements as defined by section 34(1) of the 1973 Act and providing for the continuance of payments under the agreement after the death of the deceased. *We accordingly recommend* that any court seised of an application for family provision should have such a power of variation or revocation.

*(b) Should the power to alter under section 36 be curtailed?*

266. An application for the alteration of a maintenance agreement under section 36 of the 1973 Act may be made either by the surviving party to the agreement or by the personal representatives of the deceased. Where such an application is made by the surviving party, it may raise issues not dissimilar to those which arise on an application by that party for family provision.

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<sup>224</sup> See the definition of "maintenance agreement" in the Matrimonial Causes Act 1973, s. 34.

Further, (subject to any order which the court may have made barring an application for family provision) there is nothing to prevent the surviving party from making an application for family provision in addition to an application for alteration under section 36. This has led us to consider whether the provisions of section 36, in so far as they relate to applications for alteration by a surviving party, should be repealed, leaving the surviving party to obtain such relief as may be appropriate on an application for family provision.

267. We have come to the conclusion that such a repeal is not desirable. The powers of section 36 will still be required on an application by personal representatives. They may still be useful on an application by the surviving party to the agreement where the issues raised are comparatively simple, or where the court has made an order barring an application for family provision by that party. Accordingly, we do not propose any curtailment of the powers conferred by section 36.

#### **Court orders for family provision in matrimonial proceedings**

##### *(a) Power to alter under section 31 of the 1973 Act*

268. When the court grants a decree of divorce, nullity or judicial separation, it may make in favour of one of the spouses or in favour of a child of the family an order for secured periodical payments which will remain in force after the death of the person against whom it is made<sup>225</sup>. Similar orders may also be made in the case of wilful neglect by a party to a marriage to maintain the other party or to maintain a child of the family. Where the person liable to make payments under the order dies, the court which made the order has power to vary or discharge the order under section 31 of the Matrimonial Causes Act 1973.

269. The existence of any such order in favour of a surviving spouse or former spouse or child and the question whether it should remain in force with or without variation will, even without specific provision for that purpose, be relevant matters on applications for family provision by the surviving spouse or former spouse or child under the legislation we propose. We do not propose that the legislation should contain any specific provision referring to these matters as relevant factors. But it is obviously desirable that where a court is considering the question of family provision, it should have power to review any orders for maintenance which have been made in matrimonial proceedings and which continue in force after the death of the person liable to make the payments.

270. *We accordingly recommend* that any court seised of an application for family provision should have the same powers to vary and discharge orders under section 31 of the Matrimonial Causes Act 1973 as are possessed by the court which made the order.

##### *(b) Should the power to alter under section 31 be curtailed?*

271. Where the person liable to make payments under a secured periodical payments order has died, the persons entitled to apply for a variation or revocation of the order are (a) the personal representatives of the deceased and (b) the person for whose benefit the order has been made, who may be:—

- (i) a surviving spouse of the deceased;
- (ii) a former spouse of the deceased;
- (iii) a child of the family of the deceased as defined by section 52(1) of the 1973 Act.

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<sup>225</sup> Matrimonial Causes Act 1973, s. 28(1) (b).

All the persons specified in (b) above are persons who would, under our proposals, be entitled to apply for an order for family provision, unless (in the case of a surviving spouse or a former spouse) barred by an order of the court. When an application is made by such a person under section 31 of the 1973 Act, it may raise issues not dissimilar from those which arise on an application for family provision. Moreover, there is nothing to prevent that person (unless specifically barred by an order of the court) from making an application for family provision in addition to an application under section 31. We have therefore considered whether the provisions of section 31, in so far as they relate to applications by persons of the classes we have mentioned for the variation or revocation of an order against a person who has died since the making of the order, should be repealed, leaving the persons concerned to obtain such relief as may be appropriate on an application for family provision.

272. Our conclusion is that such a repeal is not desirable. The powers of section 31 will still be required on an application by the personal representatives of the deceased. They may still be useful in other cases where a simple variation of an order against a deceased person is required, or where the applicant under section 31 is a person barred from applying for an order for family provision. Accordingly, we do not recommend any curtailment of the powers conferred by section 31.

#### **Review of maintenance agreements and orders for secured provision**

273. It is not at present possible to reopen a transaction on the ground that it was designed to defeat a claim, made after the death of the party chargeable, to vary a maintenance agreement or an order for secured provision<sup>226</sup>. We drew attention to this in our *Report on Financial Provision in Matrimonial Proceedings* and said that "it would be anomalous to introduce such a power until it can be extended equally to claims under the Inheritance (Family Provision) Act 1938 and section 26 of the Matrimonial Causes Act 1965. Any such extension must await a full review of Family Property Law"<sup>227</sup>.

274. Where the person liable to make payments under a secured periodical payments order has died, and an application for variation of the order is made under section 31 of the 1973 Act, he may find that the court's power to make the variation desired has been defeated by a disposition made by the deceased. That disposition may be a disposition which might have been successfully challenged if the application, instead of being an application under section 31, had been an application for family provision under the new code we propose. A similar situation may arise on an application for the variation of a maintenance agreement by the surviving party to that agreement under section 36 of the 1973 Act. In a case where the application under section 31 or section 36 is accompanied by an application for family provision by the same applicant, no difficulty will arise, for the court will have power on the application for family provision to review the impugned transaction. The difficulty will arise in cases where the application under sections 31 or 36 is not accompanied by an application for family provision by the same applicant.

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<sup>226</sup> Matrimonial Causes Act 1973, ss. 31(6) and 36. S. 37 operates only where proceedings are brought against the person who made the disposition that is in question.

<sup>227</sup> Law Com. No. 25; (1969) H.C. 448, para. 97; Working Paper No. 42, para. 3.75.

275. We think that the difficulty will be removed by conferring on the court power, on an application under sections 31 or 36, to direct that it shall be deemed to have been accompanied by an application for family provision, to give such consequential directions as may be necessary, and to make any order which might have been made on a joint application for an order for family provision and for an order under section 31 or section 36, as the case may be. If the court has such powers, it will be able to review dispositions and contracts made by the deceased under the provisions for review which we have recommended in Part V of this report. *We recommend* that such powers be conferred on the court.

#### **No review where there is a court order barring family provision**

276. We have considered whether the powers recommended in the preceding paragraph should extend to cases where there is in existence an order of the court barring an application for family provision by the applicant in question. Our conclusion is that the powers should not extend to such cases. Where such an order is in existence, it will have been made on the basis that arrangements intended to be final have already been made. Where such arrangements have been made, we do not think there can be a case for calling in question dispositions and contracts subsequently made by the deceased. *We accordingly recommend* that the powers recommended in the preceding paragraph should not extend to cases where there is in existence an order of the court barring an application for family provision by the applicant in question.

### **PART VIII: THE LEGISLATION REQUIRED**

#### **The need for a new comprehensive code**

277. In its present form, our family provision law may be said to consist of the Inheritance (Family Provision) Act 1938 together with a variety of extensions and accretions. If the recommendations contained in this report are adopted, the principles of family provision law will undergo substantial change and its scope will be extended in a number of important respects. That would require the repeal of the existing legislation and its replacement by a new and comprehensive legislative code. *We accordingly recommend* that the existing legislation on family provision be repealed and replaced by an Act in the terms of the draft Bill annexed to this report. The Bill is intended to give effect to all the recommendations contained in our report, in so far as they require legislation.

### **PART IX: SUMMARY OF RECOMMENDATIONS**

278. The following gives a summary of the recommendations in this report with cross-references to the clauses which implement them in the draft Bill annexed at Appendix 1.

#### **APPLICATIONS BY A SURVIVING SPOUSE**

##### *Standard of provision*

- (1) In the case of a surviving spouse (other than one who was judicially separated from the deceased at the time of the death) the powers of the court to order family provision should not be limited by the concept of maintenance and the court should be directed to assess reasonable financial provision for the applicant (para. 28 and see Clause 1(2) (a)).



This recommendation applies also to the case of a person who had in good faith entered into a void marriage with the deceased which had not been annulled prior to his death (para. 30 and see Clause 25(4) (a)).

*Matters to be considered by the court*

- (2) In deciding whether the deceased has made reasonable financial provision for his spouse (including the survivor of a void marriage) and if not, what provision, if any, should be made, the court should have regard to the guidelines set out in this report at paragraph 34 (and see Clauses 3(1) and 3(2)).

*Remarriage*

- (3) An order for periodical payments made in favour of a surviving spouse (other than a judicially separated spouse) should not automatically come to an end on remarriage but should be subject to the powers of variation and discharge dealt with in paragraphs 156–184 (para. 41: implemented by the repeal of the 1938 Act).
- (4) (a) Remarriage by a party to a void marriage during the lifetime of the deceased should as at present, terminate his right to claim family provision from the deceased's estate (para. 43(a) and see Clause 25(4)(b)).
- (b) Remarriage after the death of the other spouse should not automatically terminate an order for family provision in favour of the survivor (para. 43(b): implemented by the repeal of the 1938 Act).
- (c) The principle in (b) above should also apply in the case of a survivor of a void marriage who has not remarried in the lifetime of the deceased (para. 43(c) and see Clause 25(4)).

**APPLICATIONS BY A FORMER SPOUSE OR JUDICIALLY SEPARATED SPOUSE**

*Standard of provision*

- (5) In the case of former spouses or judicially separated spouses, the aim of family provision legislation should remain that of securing reasonable provision for their maintenance (para. 45 and see Clause 1(2) (b)).

*Matters to be considered by the court*

- (6) In applications for family provision by a former or a judicially separated spouse of the deceased the court should have regard to the guidelines (other than guideline (k)) set out in this report at paragraph 34 (para. 54 and see Clauses 3(1) and 3(2)).

*Former or judicially separated spouses whose financial position was not dealt with in the matrimonial proceedings*

- (7) The court should be empowered on a claim for family provision by a former spouse or a judicially separated spouse, whose financial position was not dealt with in the matrimonial proceedings, to apply the standard of provision applicable to claims by surviving spouses, where the court considers it just to do so (para. 62). This recommendation should be limited to applications where the deceased has died within twelve months of the grant of the relevant decree absolute of divorce or nullity, or decree of judicial separation, as the case may be (para. 63 and see Clause 14).

#### APPLICATIONS BY CHILDREN

##### *Child of the family*

- (8) A child treated by the deceased as a child of the family in relation to any marriage to which the deceased was a party should be entitled to apply for family provision from the estate of the deceased (para. 70 and see Clause 1(1) (d)).

##### *No age limits*

- (9) Any child or child of the family of the deceased, whether over or under 21 and whether married or unmarried, should be entitled to apply for family provision from the estate of the deceased (para. 79: implemented by the repeal of the 1938 Act and see Clause 1(1)(c) and Clause 1(1) (d)).

##### *Standard of provision*

- (10) As regards any child or child of the family of the deceased, the objective of family provision legislation should remain that of securing reasonable provision for their maintenance (para. 80 and see Clause 1(2) (b)).

##### *Matters to be considered by the court*

- (11) In exercising its powers to award maintenance in favour of a child or a child of the family of the deceased, the court should have regard to the criteria set out in paragraph 82 of this report (and see Clauses 3(1) and 3(2)); in the case of a child treated by the deceased as a child of his family the matters referred to in paragraph 83 should also be considered (para. 84 and see Clause 3(3)).

#### APPLICATIONS BY OTHER DEPENDANTS (A NEW CLASS OF APPLICANT)

##### *Those entitled to apply*

- (12) The class of applicants entitled to apply for family provision should be extended to include any person who was being wholly or partly maintained by the deceased immediately prior to his death (para. 94). A person should be treated as having been maintained by the deceased, either wholly or partly, as the case may be, if the deceased was, otherwise than for full consideration, making a substantial contribution in cash or kind towards that person's reasonable needs (para. 98 and see Clause 1(1) (e), Clause 1(3) and the definition of "valuable consideration" in Clause 25(1)).

##### *Standard of provision*

- (13) As regards persons falling within the new class of dependants, the aim of family provision legislation should be that of securing reasonable provision for their maintenance (para. 95 and see Clause 1(2) (b)).

##### *Matters to be considered by the court*

- (14) In exercising its power to award maintenance for an applicant falling within the new class of dependants, the court should have regard to the matters set out in this report at paragraph 96 (and see Clauses 3(1) and 3(4)).

#### GENERAL POWERS OF THE COURT

##### *Objective test for determining reasonable provision*

- (15) The test to be applied in respect of all applications for family provision should be whether the provision in fact made by the deceased for the applicant was reasonable (para. 101 and see Clause 2(1)).

*Relevant circumstances at the date of hearing*

- (16) It should be made clear in future family provision legislation that the relevant circumstances for the court to consider are those existing at the date of the hearing and not those existing at the date of the death (para. 104 and see Clause 3(5)).

*Statements by the deceased*

- (17) It should be expressly provided that any statement made by the deceased as to any matter which is relevant in determining what order the court should make, be admissible in accordance with sections 2(1), 6, 7, and 8 of the Civil Evidence Act 1968. Subject to this, section 1(7) of the 1938 Act should not be re-enacted (para. 108 and see Clause 21).

ORDERS WHICH THE COURT MAY MAKE

*Transfer or settlement of property*

- (18) In family provision proceedings the court should have power to order the transfer or settlement of any property for the time being forming part of the estate of the deceased to or for the benefit of the applicant (para. 115 and see Clauses 2(1) (c) and 2(1) (d)).

*Purchase of property or other rights*

- (19) The court should have power to make an order that assets forming part of the estate be applied in acquiring property or other rights for the applicant or for settlement for his benefit (para. 117 and see Clause 2(1) (e)).

*Consequential directions: distribution of burdens*

- (20) The court should have power to give such consequential directions as appear to be just including directions as to the manner in which the burden is to be distributed between beneficiaries (para. 118 and see Clause 2(4)).

*Wide discretion of the court to create trusts*

- (21) The court should have the widest possible discretion as to the trusts on which property is to be settled under its orders and should be able to confer wide powers on the trustees of any such settlement (para. 119 and see Clause 2(4) (c)).

*Range of powers for new class of dependants*

- (22) The powers of the court referred to in paragraphs 115–119 should be exercisable in the case of applications for family provision by the new class of dependants recommended in paragraph 94 (para. 120 and see generally Clause 2).

*Variation of marriage settlements*

- (23) The court should be empowered to vary ante-nuptial and post-nuptial settlements in family provision proceedings in favour of the surviving spouse or of any child of the family (para. 125 and see Clause 2(1) (f)).

PROPERTY AVAILABLE FOR FAMILY PROVISION

*Property comprised in a general power of appointment not exercisable by will*

- (24) In the unusual case where the deceased has a general power of appointment

not exercisable by will, which he did not in fact exercise, the property comprised in such power should be regarded as part of the net estate and thus available for family provision (para. 128 and see definition of net estate in Clause 25(1)).

*Nominations and donationes mortis causa*

- (25) Property nominated by the deceased under statutory provisions authorising nominations and property the subject of a *donatio mortis causa* should be treated as part of the estate and available for family provision (para. 134 and see Clause 8(1)).
- (26) Where money is paid or property is transferred to a person entitled thereto under a nomination or a *donatio mortis causa*, the payer or transferor should not be liable to make restitution in proceedings for family provision, but in any such proceedings the court may make such order as may be just against the payee or transferee (para. 136 and see Clause 8(2)).

*Property in co-ownership*

- (27) Where the deceased owned any beneficial interest in any property, real or personal, as a joint tenant, the court should have power to direct that his severable share of that property shall, to such extent as appears to the court to be just in all the circumstances of the case, be treated as part of the net estate of the deceased. This rule should only apply in relation to applications for family provision made within a period of six months from the date when representation is first taken out (para. 141 and see Clause 9(1)).
- (28) Where money is held in a joint account the bank or building society paying money to the surviving customer in accordance with the terms on which such an account is held, should not be liable thereafter to be made accountable for that money in family provision proceedings; Friendly Societies and indeed all debtors of the deceased should be similarly protected. The court should have power to make such order as may be just against the surviving customer or creditor to whom any such money has been paid or is owing (para. 142 and see Clauses 9(1), 9(3) and 9(4)).

*The effect of orders: estate duty*

- (29) The exemptions from estate duty in favour of the surviving spouse discussed in paragraphs 148–152 should not be curtailed (para. 153 and see Clause 19(1)).

**VARIATION, SUSPENSION AND DISCHARGE OF ORDERS**

*Lump sums and transfer of property*

- (30) Orders for lump sum payments or for transfer of property should be final and not subject to later variation (para. 163 and see Clause 6 by which power of variation extends only to orders for periodical payments).
- (31) The court should have power to make an order for the payment of a lump sum by instalments. Where such an order is made, the court should have a power of variation enabling it to alter the amounts of the instalments and the dates on which they are payable. But such a power should not extend to altering the amount of the lump sum itself (para. 165 and see Clause 7).

*Periodical payments*

- (32) Orders for periodical payments should remain subject to the court's powers of variation. The scope of the power should not be diminished and in two respects it should be widened (para. 166 and see generally Clause 6).
- (33) If an application for the variation of an order is made before the expiration of six months from the date of cessation, the court should have power to extend or revive the obligation to make periodical payments, with or without variation, and either from the date on which the original order expired or from such later date as the court may direct (para. 167 and see Clauses 6(3) and 6(10)).
- (34) Where an order for periodical payments is varied or discharged the court should have the following specific powers:—
- (a) to order (out of the property set aside for providing the periodical payments) the award of a lump sum to any person entitled to apply for family provision;
  - (b) to order the whole or part of the property previously set aside for providing the periodical payments to be transferred to any person entitled to apply for family provision (para. 169 and see Clause 6(2)).
- (35) In exercising its power to vary an order, the court should have regard to all the circumstances of the case, including any change in the circumstances to which the court was required to have regard in determining the application for the original order (para. 170 and see Clause 6(7)).

*Property which may be affected by a variation order*

- (36) On an application to vary an order for family provision, the court should, where property was set aside under the original order to provide an income for the applicant, be able to have recourse only to that property. Where, however, the property charged with providing for the existing order extends to the whole of the estate, the power to vary should extend to the whole of the estate (para. 175 and see Clause 6(6)).
- (37) The court which makes a variation order should have power to give such directions consequential upon the making of an order as appear expedient, including directions reducing the amount of the capital sums or property on which the periodical payments are charged. The court should also have power to deal in its consequential directions with the destination of the property released in this way (para. 176 and see Clause 6(8)).

*Persons entitled to apply for a variation order*

- (38) It should be made clear that the persons entitled to apply for a variation include any persons beneficially interested in the estate under the will or intestacy rules before any order for family provision was made (para. 177 and see Clause 6(5)).
- (39) The persons entitled to apply for a variation order should include all those who did make, or might have made, an application for an original order. On an application for a variation, the court should have power to make an order for periodical payments in favour of any person falling within the classes of persons who were entitled to apply for an original order for family provision (para. 181 and see Clause 6(3)).

*Suspension of orders*

- (40) The court should have power to suspend any provision of the original order temporarily and thereafter revive the operation of any provision so suspended. The power of suspension should be exercisable on the application of the same persons who may apply for a variation of the order (para. 183 and see Clause 6(1)).

*Discharge of orders*

- (41) The court should have power to discharge an order for family provision; an order once discharged should not be capable of revival (para. 184 and see Clause 6(1)).

AGREEMENTS TO EXCLUDE FAMILY PROVISION

- (42) In proceedings for divorce, judicial separation or nullity the court should, if the parties so agree, have power to make an order barring either of them from applying for family provision (para. 188 and see Clause 15).

TRANSACTIONS DESIGNED TO DEFEAT FAMILY PROVISION

A. *Review of dispositions made during the deceased's lifetime*

- (43) The court should be empowered to review dispositions made by the deceased during his lifetime with the intention of defeating a claim for family provision. The recommended scheme is set out in this report at paragraph 198 (and see generally Clauses 10 and 12).

*Proof of intention to defeat an application for family provision*

- (44) In order to establish the necessary intention on the part of the deceased, the applicant should be required to satisfy the court, on a balance of probabilities, that in making the disposition it was the sole intention of the deceased, or a substantial part of his intention, to defeat a claim for family provision (para. 202 and see Clause 12(1)).

*Transactions which may be reviewed*

- (45) The court's power of review should extend to the following categories of property:—
- (a) property disposed of or settled by the deceased (para. 204);
  - (b) premiums under insurance policies provided by the deceased (para. 206);
  - and
  - (c) property in respect of which the deceased has exercised a general power of appointment (para. 210 and see generally Clause 10(7)).

*Time limit*

- (46) The court's power to reopen dispositions made by the deceased should be limited to dispositions made within the period of six years before the deceased's death (para. 211 and see Clause 10(2) (a)).

*Legislation should not be retrospective*

- (47) The powers of the court to review dispositions should not extend to any disposition made before the commencement of the Act giving effect to the present proposals for family provision (para. 212 and see Clause 10(8)).

*Time when court should entertain an application for review*

- (48) The court seized of an application for family provision made within the prescribed time should, at any time before that application is disposed of, have power to entertain an application for the review of a disposition made by the deceased (para. 214 and see Clause 10(1)).
- (49) Once an application has been made for the review of a disposition made by the deceased, the court should at the instance of any party have power to review other dispositions by the deceased. The court should have power to order the joinder of any necessary additional parties (para. 217 and see Clause 10(5)).

*B. Review of contracts to leave property by will and analogous contracts*

- (50) The court should be empowered to review contracts to leave property by will where the deceased entered into such a contract with the intention of defeating a claim for family provision. The recommended scheme is set out in this report at paragraph 227 (and see generally Clause 11).

*Proof of intention to defeat an application for family provision*

- (51) Legislation should provide that the necessary intention is established where the court is of the opinion, on a balance of probabilities, that in making the contract it was the sole intention of the deceased, or a substantial part of his intention, to defeat a claim for family provision either wholly or in part (para. 228 and see Clause 12(1)).
- (52) As regards the burden of proof of satisfying the court that the deceased had the intention to defeat family provision:—
- (a) where there is valuable consideration for the contractual promise of the deceased, it should be for the applicant to prove that the contract was intended to defeat family provision (para. 232(a) and see Clause 12(1));
  - (b) where there is no such valuable consideration, there should be a rebuttable presumption that the contract was entered into with the intention of defeating family provision (para. 232(b) and see Clause 12(2)).

*Deceased's undertaking for payments to be made from his estate*

- (53) Where the deceased has, with the intention of defeating a claim for family provision, made a contract undertaking that his personal representatives will pay money or transfer property out of his estate, the court should have the like powers, exercisable under the like conditions, as in the case of a contract to leave property by will (para. 236 and see Clause 11(2)).

*Deceased's failure to perform contract*

- (54) Where the deceased has with the intention of defeating a claim for family provision made a contract to leave property by will but has failed to do so, the promisee's right to recover damages for breach of the contract should be subject to the limitations set out in paragraph 239 of this report. The same rules should also apply to the case where the deceased has with the intention of defeating a claim for family provision made a contract that his personal representatives will pay money or transfer property but his personal representatives fail to carry out the contract (para. 239 and see Clause 11(5) and Clause 12(3)).

*Ancillary powers*

- (55) The court should have wide ancillary powers in connection with its powers to review contracts to leave property by will (para. 240 and see Clause 11(5) and Clause 12(3)).

*Time when court should entertain an application to review a contract*

- (56) The court seised of an application for family provision made within the prescribed time should, at any time before that application is disposed of, have power to entertain an application to review contracts of the kind specified in recommendations (50) and (53) above (para. 241: implemented by the terms of Clause 11(1)).

*Legislation should not be retrospective*

- (57) The powers to review such contracts should be limited to those entered into after the commencement of the Act giving effect to the present proposals (para. 242 and see Clause 11(6)).

*C. Extent of the power of review*

*Review proceedings against the estate of donees and promisees*

- (58) Proceedings for reviewing a transaction should be permitted against the estate of a donee or promisee who has died before the deceased, or who has died after the deceased but before proceedings to impugn the transaction have been initiated or while such proceedings are pending. The court's power to review such transactions should cease once the estate of the donee or promisee has been wound up (para. 243 and see Clause 12(4)).
- (59) The personal representatives of the donee or promisee who have distributed any part of the estate before they have notice that proceedings for review have been initiated, should not be under any liability on the ground that they ought to have taken into account the possibility of such proceedings being initiated (para. 243 and see Clause 12(4)).

*Review proceedings against trustees*

- (60) The power of the court to make orders against a trustee for the payment of money or the transfer of property should be limited to such money or property in the hands of the trustee as consists of or represents the fruits of the transaction under review (para. 244 and see Clause 13(1)).
- (61) A trustee who has distributed any money or other property before he has notice that proceedings for review have been initiated should not be under any liability on the ground that he ought to have taken into account the possibility of such proceedings being initiated (para. 245 and see Clause 13(2)).

**HIGH COURT AND COUNTY COURT JURISDICTION**

- (62) The county court should have power to transfer family provision proceedings before it to the High Court, where it appears to the court that any of the matters in question raise difficult points of law or would otherwise be more suitable for determination by the High Court (para. 249 and see Clause 22(4)).
- (63) The jurisdiction of the High Court under the legislation proposed should be assigned to the Family Division (para. 256).



- (64) The power to make rules of court for the purposes of the legislation implementing the annexed draft Bill should be exercisable by the rule-making authority constituted under section 50 of the Matrimonial Causes Act 1973, which should be amended accordingly (para. 257 and see Clause 24).

MAINTENANCE AGREEMENTS AND ORDERS MADE IN MATRIMONIAL PROCEEDINGS:  
RELATIONSHIP TO THE FAMILY PROVISION CODE

*Variation of maintenance agreements*

- (65) Any court seised of an order for family provision should have power to vary or revoke a maintenance agreement to which the deceased was a party (para. 265 and see Clause 17(1)).

*Variation of orders for secured periodical payments*

- (66) Any court seised of an application for family provision should have the same powers to vary and discharge orders under section 31 of the Matrimonial Causes Act 1973 as are possessed by the court which made the order (para. 270 and see Clause 16(1)).

*Review of maintenance agreements and orders for secured provision*

- (67) In cases where an application under sections 31 or 36 of the Matrimonial Causes Act 1973 is not accompanied by an application for family provision by the same applicant, the court should have power to direct that such an application under those sections shall be deemed to have been accompanied by an application for family provision. The court should also have power to give such consequential directions as may be necessary, and to make any order which might have been made on a joint application for an order for family provision and for an order under sections 31 or 36 of the Matrimonial Causes Act 1973, as the case may be (para. 275). The above powers should not extend to cases where there is in existence an order of the court barring an application for family provision by the applicant in question (para. 276 and see generally Clause 18).

A NEW COMPREHENSIVE CODE

- (68) The existing legislation on family provision should be repealed and replaced by an Act in the terms of the draft Bill annexed to this report (para. 277 and see Clause 26 and the Schedule to the draft Bill).

(Signed) SAMUEL COOKE, *Chairman.*  
CLAUD BICKNELL.  
AUBREY L. DIAMOND.  
DEREK HODGSON.  
NORMAN S. MARSH.

J. M. CARTWRIGHT SHARP, *Secretary.*

29 July 1974.

## Draft Inheritance (Provision for Family and Dependants) Bill

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### ARRANGEMENT OF CLAUSES

#### *Powers of court to order financial provision from deceased's estate*

##### *Clause*

1. Application for financial provision from deceased's estate.
2. Powers of court to make orders.
3. Matters to which court is to have regard in exercising powers under s. 2.
4. Time-limit for applications.
5. Interim orders.
6. Variation, discharge etc. of orders for periodical payments.
7. Payment of lump sums by instalments.

#### *Property available for financial provision*

8. Property treated as part of "net estate".
9. Property held on a joint tenancy.

#### *Powers of court in relation to transactions intended to defeat applications for financial provision*

10. Dispositions intended to defeat applications for financial provision.
11. Contracts to leave property by will.
12. Provisions supplementary to ss. 10 and 11.
13. Provisions as to trustees in relation to ss. 10 and 11.

#### *Special provisions relating to cases of divorce, separation etc.*

14. Provision as to cases where no financial relief was granted in divorce proceedings etc.
15. Restriction imposed in divorce proceedings etc. on application under this Act.
16. Variation and discharge of secured periodical payments orders made under Matrimonial Causes Act 1973.
17. Variation and revocation of maintenance agreements.
18. Availability of court's powers under this Act in applications under ss. 31 and 36 of Matrimonial Causes Act 1973.

*Miscellaneous and supplementary provisions*

*Clause*

19. Effect, duration and form of orders.
20. Provisions as to personal representatives.
21. Admissibility as evidence of statements made by deceased.
22. Jurisdiction of county courts.
23. Determination of date on which representation was first taken out.
24. Rules of court for purposes of this Act to be made by authority constituted under s. 50 of Matrimonial Causes Act 1973.
25. Interpretation.
26. Repeals and transitional provisions.
27. Short title, commencement and extent.

SCHEDULE—Enactments repealed.

DRAFT

OF A

# BILL

TO

A.D. 1974

**M**AKE fresh provision for empowering the court to make orders for the making out of the estate of a deceased person of provision for the spouse, former spouse, child, child of the family or dependant of that person; and for matters connected therewith.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Application  
for financial  
provision from  
deceased's  
estate.

**1.**—(1) Where after the commencement of this Act a person dies domiciled in England and Wales and is survived by any of the following persons:—

- (a) the wife or husband of the deceased ;
- (b) a former wife or former husband of the deceased who has not remarried; 10
- (c) a child of the deceased;
- (d) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage; 15
- (e) any person (not being a person included in the foregoing paragraphs of this subsection) who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased;

that person may apply to the court for an order under section 2 of this Act on the ground that the disposition of the deceased's estate effected by his will, or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable financial provision for the applicant. 20

(2) In this Act "reasonable financial provision"— 25

- (a) in the case of an application made by virtue of subsection (1)(a) above by the husband or wife of the deceased (except where the marriage with the deceased was the subject of a decree of judicial separation and at the date of death the decree was in force and the separation was continuing), 30

## EXPLANATORY NOTES

In accordance with the recommendation contained in paragraph 277 of the report, the Bill constitutes a new comprehensive code relating to family provision from the estates of deceased persons. It thus repeals (clause 26(1)) all the existing relevant legislation and re-enacts those portions of that legislation in respect of which no change is made.

### *Clause 1*

1. This clause specifies the persons who may apply to the court for financial provision from the estate of a deceased person; limits the right to apply to cases where the deceased died domiciled in England and Wales; and implements the recommendation in paragraph 28 that the standard of provision should not, in the case of the surviving spouse (other than one judicially separated at the date of the death), be limited to maintenance.

### *Clause 1(1)*

2. The limitation of the court's jurisdiction to cases where the deceased died domiciled in England and Wales re-enacts the existing legislation. The reasons for the retention of the present rule are discussed in paragraphs 258 to 262.

3. Clause 1(1)(a) re-enacts the existing law.

4.(a) Clause 1(1)(b) re-enacts the existing law. The definition of "former wife" and "former husband" in clause 25(1), as under the existing legislation, includes an applicant whose marriage with the deceased, whether void or voidable, was annulled during the deceased's lifetime. The definition precludes an application by a former spouse whose marriage was dissolved or annulled otherwise than by the courts of England and Wales (see paragraphs 46 to 51). Such a spouse may, however, claim provision under clause 1(1)(e) if wholly or partly dependent on the deceased at the date of the death.

(b) The first part of clause 25(5), re-enacting the existing legislation, makes it clear that "remarriage" includes a void or voidable marriage; and, by the second part of that subsection, the term includes a marriage contracted by a person whose previous marriage was void or voidable.

5.(a) Clause 1(1)(c) extends the present law and implements the recommendation in paragraph 79. At present a son of the deceased may apply only if he is under 21 or is, by reason of some mental or physical disability, incapable of maintaining himself; a daughter of the deceased may apply only if she is unmarried or is, by reason of some mental or physical disability, incapable of maintaining herself. All these limitations as to age and otherwise are removed for the reasons set out in paragraphs 73 to 78.

(b) The term "child" includes an illegitimate or adopted child and also a child born after the deceased's death: see the definition in clause 25(1).

6. Clause 1(1)(d) also extends the present law and implements the recommendation in paragraph 70. It permits an application to be made by a person who, though not a child of the deceased, was treated by the deceased as a child of his family. The policy underlying this extension is set out in paragraphs 66 to 69.

7. Clause 1(1)(e) adds a new category of applicant; namely a person who is not comprised in the other categories but was being wholly or partly maintained by the deceased. It gives effect, for the reasons discussed in paragraphs 85 to 93, to the recommendation in paragraph 94. The meaning of "maintained" is elaborated by clause 1(3).

*Inheritance (Provision for Family and Dependants) Bill*

means such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance;

(b) in the case of any other application made by virtue of subsection (1) above, means such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance.

(3) For the purposes of subsection (1)(e) above, a person shall be treated as being maintained by the deceased, either wholly or partly, as the case may be, if the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards the reasonable needs of that person.

## EXPLANATORY NOTES

### *Clause 1(1) (continued)*

8. The concluding words of clause 1(1) repeat the present law (except that they remove, as explained in the opening sentences of paragraph 100, the small difference in the court's approach to claims by a former spouse and claims by other applicants). They also make clear that the question whether reasonable financial provision has been made by the deceased is to be decided objectively, as recommended in paragraph 101.

### *Clause 1(2)*

9. This subsection assigns a wider meaning to "reasonable financial provision" in the case of an application by a former spouse than in the case of a claim by any other applicant and so gives effect to the recommendation in paragraph 28. Pursuant to the recommendation in paragraph 45, a spouse who is judicially separated from the deceased at the date of death is not treated as a surviving spouse for this purpose. Such a spouse is expressly excluded from paragraph (a) of the definition and is accordingly restricted to claiming maintenance as defined in paragraph (b).

10. By virtue of clause 25(4), the term "husband or wife of the deceased" includes a person who in good faith entered into a void marriage with the deceased (which was not dissolved or annulled during the deceased's lifetime) and who did not enter into a later marriage during the deceased's lifetime. Such a person is entitled to apply for maintenance from the deceased's estate under the present law, and will now be entitled to provision under the higher standard applicable to surviving spouses as recommended in paragraph 30.

11. Clause 1(2)(b) retains the present objective of family provision law of providing reasonable maintenance in every case other than that of an application by a surviving spouse: see paragraph 45 (former spouses and judicially separated spouses), paragraph 80 (children and "children of the family") and paragraph 95 (other dependants).

12. The standard of provision specified in clause 1(2)(a) may be applied in certain unusual cases which may arise and are dealt with separately by clause 14.

### *Clause 1(3)*

13. This subsection, by further explaining the meaning of "maintained" in relation to the new category of dependant in clause 1(1)(e), gives effect to the recommendation in paragraph 98.

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Powers of  
court to make  
orders.

2.—(1) Where an application is made for an order under this section, the court may, if it is satisfied that the disposition of the deceased's estate effected by his will, or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable financial provision for the applicant, make any one or more of the following orders:— 5

- (a) an order for the making to the applicant out of the net estate of the deceased of such periodical payments and for such term as may be specified in the order;
- (b) an order for the payment to the applicant out of that estate of a lump sum of such amount as may be so specified; 10
- (c) an order for the transfer to the applicant of such property comprised in that estate as may be so specified;
- (d) an order for the settlement for the benefit of the applicant of such property comprised in that estate as may be so specified;
- (e) an order for the acquisition out of property comprised in that 15 estate of such property as may be so specified and for the transfer of the property so acquired to the applicant or for the settlement thereof for his benefit;
- (f) an order varying any ante-nuptial or post-nuptial settlement (including such a settlement made by will) made on the parties 20 to a marriage to which the deceased was one of the parties, the variation being for the benefit of the surviving party to that marriage, or any child of that marriage, or any person who was treated by the deceased as a child of the family in relation to that marriage.

(2) An order under subsection (1)(a) above providing for the making 25 out of the net estate of the deceased of periodical payments may provide for—

- (a) payments of such amount as may be specified in the order,
- (b) payments equal to the whole of the income of the net estate or of such portion thereof as may be so specified; 30
- (c) payments equal to the whole of the income of such part of the net estate as the court may direct to be set aside or appropriated for the making out of the income thereof of payments under this section.

or may provide for the amount of the payments or any of them to be 35 determined in any other way the court thinks fit.

(3) Where an order under subsection (1)(a) above provides for the making of payments of an amount specified in the order, the order may direct that such part of the net estate as may be so specified shall be set aside or appropriated for the making out of the income thereof of those 40 payments; but no larger part of the net estate shall be so set aside or appropriated than is sufficient, at the date of the order, to produce by the income thereof the amount required for the making of those payments.



## EXPLANATORY NOTES

### *Clause 2*

1. Before the court may make an order for family provision, it must first determine that reasonable financial provision has not already been made for the applicant under the deceased's will, or the law of intestacy, or both. This issue is to be decided objectively, as recommended in paragraph 101, and in the light of the considerations specified in clause 3.

### *Clause 2(1)*

2. (a) This subsection specifies the orders which the court may make if it decides that reasonable financial provision has not been made.
- (b) Clauses 2(1)(a) and 2(1)(b) re-enact the present powers of the court to make an order for periodical payments, or for a lump sum, or both, from the net estate. (Subsection (3) of clause 25 (the interpretation clause) makes it clear that the court may if it thinks fit order the whole net estate to be applied by way of family provision.)
- (c) Clause 2(1)(e) to 2(1)(f) extends the court's powers and implements the recommendations in paragraphs 115, 117 and 125.
- (d) All the powers—except the power to vary ante- or post-nuptial settlements conferred by clause 2(1)(f)—may be exercised in favour of any applicant (including the new category of dependant specified in clause 1(1)(e), as recommended in paragraph 120).
- (e) As recommended in paragraph 125, the power to vary ante- or post-nuptial settlements is exercisable only in favour of the relevant surviving spouse or a child of the relevant marriage, including a “child of the family” defined in clause 1(1)(d).

### *Clauses 2(2) and 2(3)*

3. These two subsections, which relate to the method of providing for periodical payments to be made out of the net estate, re-enact the present law.

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(4) An order under this section may contain such consequential and supplemental provisions as the court thinks necessary or expedient for the purpose of giving effect to the order or for the purpose of securing that the order operates fairly as between one beneficiary of the estate of the deceased and another and may, in particular, but without prejudice to 5 the generality of this subsection—

- (a) order any person who holds any property which forms part of the net estate of the deceased to make such payment or transfer such property as may be specified in the order;
- (b) vary the disposition of the deceased's estate effected by his will 10 or the law relating to intestacy, or the combination of his will and that law, in such manner as the court thinks fair and reasonable having regard to the provisions of the order and all the circumstances of the case;
- (c) confer on the trustees of any property which is the subject of an 15 order under this section such powers as appear to the court to be necessary or expedient.

## EXPLANATORY NOTES

### *Clause 2 (continued)*

#### *Clause 2(4)*

4. The power conferred on the court by the general words of this subsection to make consequential and supplemental provisions reflects the present statutory provisions and confirms the interpretation of the existing law in *Re Preston* [1969] 1 W.L.R. 317, 321. The subsection thus implements the recommendation in paragraph 118. It then goes on to confer three specific powers.
5. The need for the power conferred by clause 2(4)(a) arises from the extended definition of the "net estate" in clause 25(1). That definition includes property other than property comprised in the estate under the existing legislation. Paragraphs (b) and (c) of the definition extend the net estate by including respectively the item recommended in paragraph 128 and assets covered by clause 8 (see Note 3 on that clause). Paragraphs (d) and (e) include items which may be treated as part of the net estate by a court order under clause 9, 10 or 11 (see the Notes on those clauses). Accordingly, items of property which are not part of the net estate under the present law can be in the hands of persons other than the personal representatives. Clause 2(4)(a) enables the court, if it is necessary for family provision, to order such persons to transfer assets to the personal representatives or to such other person (perhaps an applicant for family provision or a beneficiary of the estate) as the court shall direct.
6. Clause 2(4)(b) effects the clarification referred to in the last sentence of paragraph 154.
7. Clause 2(4)(c) implements the recommendation in paragraph 119.

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Matters to which court is to have regard in exercising powers under s. 2.

3.—(1) Where an application is made for an order under section 2 of this Act, the court shall, in determining whether the disposition of the deceased's estate effected by his will, or the law relating to intestacy, or the combination of his will and that law, is such as to make reasonable financial provision for the applicant and, if the court considers that reasonable financial provision has not been made, in determining whether and in what manner it shall exercise its powers under that section, have regard to the following matters, that is to say—

- (a) the income, earning capacity, property and other financial resources which the applicant has or is likely to have in the foreseeable future; 5
- (b) the financial needs, obligations and responsibilities which the applicant has or is likely to have in the foreseeable future;
- (c) the financial resources and financial needs of any other applicant for an order under section 2 of this Act; 15
- (d) the financial resources and financial needs of any beneficiary of the estate of the deceased;
- (e) the obligations and responsibilities which the deceased had towards any applicant for an order under the said section 2 and towards any beneficiary of the estate of the deceased; 20
- (f) the size and nature of the net estate of the deceased;
- (g) any physical or mental disability of the applicant;
- (h) any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant. 25

(2) Without prejudice to the generality of paragraph (h) of subsection (1) above, where an application for an order under section 2 of this Act is made by virtue of section 1(1)(a) or 1(1)(b) of this Act, the court shall, in addition to the matters specifically mentioned in paragraphs (a) to (g) of that subsection, have regard to— 30

- (a) the age of the applicant and the duration of the marriage;
- (b) the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family;

and, in the case of an application by the wife or husband of the deceased, the court shall also, unless at the date of death a decree of judicial separation was in force and the separation was continuing, have regard to the provision which the applicant might reasonably have expected to receive if on the day on which the deceased died the marriage, instead of being terminated by death, had been terminated by a decree of divorce. 40

## EXPLANATORY NOTES

### Clause 3

1. This clause sets out detailed guidelines specifying matters to which the court must have regard in answering the two distinct but related questions: (a) whether reasonable provision has been made for an applicant by the deceased's will or by the law relating to intestacy and (b) if the answer to this is in the negative, what order should be made.
2. The considerations to which the court must have regard under the existing legislation are described in paragraphs 31 and 52. The guidelines contained in this clause supersede the present rules.
3. The guidelines incorporated in clause 3 which are relevant to claims by the various categories of applicant implement the recommendations in the following paragraphs of the report, viz:—
  - (a) paragraph 34 in the case of a surviving spouse;
  - (b) paragraph 54 in the case of a former spouse or a judicially separated spouse;
  - (c) paragraph 82 in the case of a child;
  - (d) paragraphs 82 and 84 in the case of a "child of the family",
  - (e) paragraph 96 in the case of other dependants.
4. Clause 3(1) specifies the guidelines common to claims by every category of applicant; and then clauses 3(2), 3(3) and 3(4) specify those that relate only to claims by surviving and former spouses, by children and "children of the family" and by other dependants respectively.

### Clause 3(1)

5. (a) This subsection sets out the guidelines common to every category of applicant for family provision.
  - (b) The term "beneficiary of the estate of the deceased" in guidelines (d) and (e) extends to a person in whose favour the deceased has nominated money or property, and to a donee of money or property under a *donatio mortis causa* effected by the deceased: see the definition in clause 25(1).
  - (c) The relevance of the reference to "conduct" in guideline (h) is discussed, in relation to claims by surviving spouses, in paragraphs 35 and 36.

### Clause 3(2)

6. The first part of this subsection relates only to claims by spouses and former spouses. It implements the recommendations in paragraphs 34 and 53.
7. The concluding part of the subsection which relates only to claims by surviving spouses not judicially separated at the date of the deceased's death, implements the recommendation specified as guideline (k) in paragraph 34. It reinforces clause 1(2)(a) which defines the new higher standard of provision appropriate to claims by surviving spouses.

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(3) Without prejudice to the generality of paragraph (h) of subsection (1) above, where an application for an order under section 2 of this Act is made by virtue of section 1(1)(c) or 1(1)(d) of this Act, the court shall, in addition to the matters specifically mentioned in paragraphs (a) to (g) of that subsection, have regard to the manner in which the applicant was 45 being or in which he might expect to be educated or trained, and where the application is made by virtue of section 1(1)(d) the court shall also have regard—

- (i) to whether the deceased has assumed any responsibility for the applicant's maintenance and, if so, to the extent to which and 50 the basis upon which the deceased assumed that responsibility and to the length of time for which the deceased discharged that responsibility;
- (ii) to whether in assuming and discharging that responsibility the deceased did so knowing that the applicant was not his own child; 55
- (iii) to the liability of any other person to maintain the applicant.

(4) Without prejudice to the generality of paragraph (h) of subsection (1) above, where an application for an order under section 2 of this Act is made by virtue of section 1(1)(e) of this Act, the court shall, in addition to the matters specifically mentioned in paragraphs (a) to (g) of that 60 subsection, have regard to the extent to which and the basis upon which the deceased assumed responsibility for the maintenance of the applicant and to the length of time for which the deceased discharged that responsibility.

(5) In considering the matters to which the court is required to have 65 regard under this section, the court shall take into account the facts as known to the court at the date of the hearing.

## EXPLANATORY NOTES

### *Clause 3 (continued)*

#### *Clause 3 (3)*

8. The first part of this subsection specifies a guideline (in respect of the actual or expected education or training of an applicant) additional to those specified in clause 3(1) and relates only to a claim by a child who is either a child of the deceased, or a “child of the family” of the deceased as defined by clause 1(1)(d). It implements the recommendation listed as guideline (h) in paragraph 82.

9. The second part of the subsection relates to claims by a “child of the family” of the deceased as defined by clause 1(1)(d) and gives effect to the recommendation in paragraph 84.

#### *Clause 3(4)*

10. The guideline specified by this subsection applies only to an application by a person entitled to apply for financial provision on the ground that he was being wholly or partly maintained by the deceased (see clause 1(1)(e), as supplemented by clause 1(3)). It implements the recommendation in paragraph 96. It is in sufficiently wide terms to take into account the deceased’s intention in cases where such intention was that the maintenance should not continue after his or her death: see paragraph 97.

#### *Clause 3(5)*

11. This subsection makes clear that the relevant date as on which the court should apply the guidelines is the date of the hearing of the application, and not the date of death. It settles the questions canvassed briefly in paragraphs 102 and 103 by implementing the recommendation in paragraph 104.

*Inheritance (Provision for Family and Dependants) Bill*

Time-limit for applications.

4. An application for an order under section 2 of this Act shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out.



## EXPLANATORY NOTES

### *Clause 4*

1. This clause re-enacts the existing legislation. A brief explanation of the reason why no recommendation for change is made appears in paragraph 144.
2. In general, where the court grants permission to a dependant to apply for financial provision after the expiry of six months from the date on which representation to the deceased's estate was first taken out, its powers are the same as if the claim had been made within the six-months' period. Exceptionally, however, the court's power under clause 9 (which relates to property in which the deceased held a beneficial interest jointly with another or others) cannot, by the terms of that subsection, be exercised in favour of an applicant who applies for provision, with the permission of the court, after the expiry of that period.
3. Clause 23, which is supplemental to this clause, elaborates the meaning of the reference here to representation being "first taken out".

*Inheritance (Provision for Family and Dependants) Bill*

Interim orders. 5.—(1) Where on an application for an order under section 2 of this Act it appears to the court—

(a) that the applicant is in immediate need of financial assistance, but it is not yet possible to determine what order (if any) should be made under that section; and 5

(b) that property forming part of the net estate of the deceased is or can be made available to meet the need of the applicant;

the court may order that, subject to such conditions or restrictions, if any, as the court may impose and to any further order of the court, there shall be paid to the applicant out of the net estate of the deceased such sum or 10 sums and (if more than one) at such intervals as the court thinks reasonable; and the court may order that such payments are to be made until such date as the court may specify, not being later than the date on which the court either makes an order under the said section 2 or decides not to exercise its powers under that section. 15

(2) Subsection (2), (3) and (4) of section 2 of this Act shall apply in relation to an order under this section as they apply in relation to an order under that section.

(3) In determining what order, if any, should be made under this section the court shall, so far as the urgency of the case admits, have regard to 20 the same matters as those to which the court is required to have regard under section 3 of this Act.

(4) An order made under section 2 of this Act may provide that any sum paid to the applicant by virtue of this section shall be treated to such an extent and in such manner as may be provided by that order as having 25 been paid on account of any payment provided for by that order.

## EXPLANATORY NOTES

### *Clause 5*

1. In substance this clause re-enacts, in accordance with paragraph 147, the existing provision conferring power on the court to make interim orders.
2. The protection enjoyed under the present legislation by personal representatives who pay money out of the net estate pursuant to an interim order is conferred by clause 20(2).

*Inheritance (Provision for Family and Dependants) Bill*

Variation,  
discharge, etc.  
of orders for  
periodical  
payments.

6.—(1) Subject to the provisions of this section, where the court has made an order under section 2(1)(a) of this Act (in this section referred to as “the original order”) for the making of periodical payments to any person (in this section referred to as “the original recipient”), the court, on an application under this section, shall have power by order to vary or discharge the original order or to suspend any provision of it temporarily and to revive the operation of any provision so suspended. 5

(2) Without prejudice to the generality of subsection (1) above, an order made on an application for the variation of the original order may—

(a) provide for the making out of any relevant property of such 10 periodical payments and for such term as may be specified in the order to any person who has applied, or would but for section 4 of this Act be entitled to apply, for an order under section 2 of this Act (whether or not, in the case of any application, an order was made in favour of the applicant); 15

(b) provide for the payment out of any relevant property of a lump sum of such amount as may be so specified to the original recipient or to any such person as is mentioned in paragraph (a) above;

(c) provide for the transfer of the relevant property, or such part thereof as may be so specified, to the original recipient or to any 20 such person as is so mentioned.

(3) Where the original order provides that any periodical payments payable thereunder to the original recipient are to cease on the occurrence of an event specified in the order (other than the remarriage of a former wife or former husband) or on the expiration of a period so specified, 25 then, if, before the end of the period of six months from the date of the occurrence of that event or of the expiration of that period, an application is made for an order under this section, the court shall have power to make any order which it would have had power to make if the application had been made before that date (whether in favour of the original 30 recipient or any such person as is mentioned in subsection (2)(a) above and whether having effect from that date or from such later date as the court may specify).

(4) Any reference in this section to the original order shall include a reference to an order made under this section and any references in this 35 section to the original recipient shall include a reference to any person to whom periodical payments are required to be made by virtue of an order made under this section.

(5) An application under this section may be made by any of the following persons, that is to say— 40

(a) any person who by virtue of section 1(1) of this Act has applied, or would but for section 4 of this Act be entitled to apply, for an order under section 2 of this Act,

(b) the personal representatives of the deceased,

(c) the trustees of any relevant property, and 45

(d) any beneficiary of the estate of the deceased.

## EXPLANATORY NOTES

### *Clause 6*

1. In the case where financial provision is awarded, pursuant to clause 2(1)(a), by an order for periodical payments, this clause implements all the recommendations as to the variation, discharge, and suspension and revival of the order.
2. The powers to vary are the same in respect of all categories of applicant, and the existing differences between the power to vary orders made in favour of a former spouse and those made in favour of other dependants are removed: see paragraph 182.

### *Clause 6(1)*

3. The court has power under the existing legislation to vary orders and, as recommended in paragraph 166, this power is retained.
4. This subsection also extends the powers of the court in two respects. At present there is no express power to discharge orders other than those made in favour of former spouses and the subsection now confers power, as recommended in paragraph 184, to discharge any order; and at present there is no power, except in relation to former spouses, temporarily to suspend and subsequently to revive an order, and the subsection now confers this power in every case, as recommended in paragraph 183.

### *Clause 6(2)*

5. This subsection re-enacts the existing law as to the persons in whose favour a variation order may be made. It thus implements the recommendation in paragraph 181(b).
6. In respect of the kinds of order that may be made under this clause, paragraph (a) re-enacts the existing law (see paragraph 166 of the report); and paragraphs (b) and (c) of the subsection extend the court's powers and respectively implement the recommendations in paragraph 169(a) and 169(b).
7. As in the case of lump sum payments ordered to be made under clause 2(1)(a) on an original application for financial provision, an order for a lump sum payment made under this subsection cannot subsequently be varied (see the recommendation in paragraph 163), but the court has power under clause 7(1) to order payment by instalments and subsequently to vary those instalments under, and to the extent specified in, clause 7(2). Similarly, as in the case of an order for the transfer of property made under clause 2(1)(c) on an original application, an order made under this subsection for such transfer is final (as recommended also in paragraph 163).

### *Clause 6(3)*

8. This subsection and subsection 10, with which it should be read, confer the new power recommended in paragraph 167. The exclusion from the ambit of the power of the termination of periodical payments on the remarriage of a former spouse or a judicially separated spouse follows from clause 19(2), which provides that such remarriage shall terminate the order: see footnote 173 (in paragraph 167).

### *Clause 6(4)*

9. This subsection enables the court to exercise its powers under this clause in the case where the relevant order was itself made under the clause.
10. This subsection re-enacts the existing legislation as to the persons who may apply for a variation order, and extends the present law in four respects.
11. The first extension is the inclusion in Clause 6(5)(a) of the new classes of applicant entitled to apply for family provision. The recommendation in paragraph 181(a) is thereby implemented.

*Inheritance (Provision for Family and Dependents) Bill*

(6) An order under this section may only affect:—

- (a) property the income of which is at the date of the order applicable wholly or in part for the making of periodical payments to any person who has applied for an order under this Act, or 50
  - (b) in the case of an application under subsection (3) above in respect of payments which have ceased to be payable on the occurrence of an event or the expiration of a period, property the income of which was so applicable immediately before the occurrence of that event or the expiration of that period, as the case may be, 55
- and any such property as is mentioned in paragraph (a) or (b) above is in subsections (2) and (5) above referred to as “relevant property”.

(7) In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when 60 making the order to which the application relates.

(8) Where the court makes an order under this section, it may give such consequential directions as it thinks necessary or expedient having regard to the provisions of the order.

(9) No such order as is mentioned in section 2(1)(d) (e) or (f), 9, 10 or 65 11 of this Act shall be made on an application under this section.

(10) For the avoidance of doubt it is hereby declared that, in relation to an order which provides for the making of periodical payments which are to cease on the occurrence of an event specified in the order (other than the remarriage of a former wife or former husband) or on the expiration 70 of a period so specified, the power to vary an order includes power to provide for the making of periodical payments after the expiration of that period or the occurrence of that event.

## EXPLANATORY NOTES

### *Clause 6 (continued)*

12. The second extension arises from the fact that, under the existing legislation, a former spouse cannot apply for variation of an order made in favour of any dependant other than a former spouse (see paragraphs 178 and 179). This will no longer be the case, since a former spouse now falls within clause 6(5)(a).

13. The third extension is the inclusion by clause 6(5)(b) of the deceased's personal representatives in the list of persons entitled to apply under this clause. This is a drafting point: it might be, for example, that personal representatives who are also trustees of property in the estate have not, technically, become trustees at the date of the application because their duties as personal representatives have not been completed.

14. The fourth extension arises in clause 6(5) from clause 8 and the definition of "beneficiary" in clause 25(1). That definition includes a person who has received nominated money or property, or money or property comprised in a *donatio mortis causa* made by the deceased. Under the existing law such money and property are not part of the deceased's estate, but they are made so for the purposes of family provision law by the provisions of clause 8. Accordingly the nominee or donee is in a position similar to that of a beneficiary under the will or the law of intestacy.

### *Clause 6(6)*

15. This subsection gives effect to the recommendation in paragraph 175. Except for the necessary reference, for drafting purposes, to the new power under clause 6(3), it probably re-enacts the present law: see paragraph 174.

### *Clause 6(7)*

16. This subsection implements the recommendation in paragraph 170. The wide grounds for review of orders for family provision which under the existing legislation relate only to claims for variation, discharge, or suspension and revival of an order made in favour of a former spouse are now applied to such claims relating to orders made in favour of any applicant.

### *Clause 6(8)*

17. This wide power implements the recommendation in paragraph 176.

### *Clause 6(9)*

18. (a) This subsection makes clear that the court will have no power, on applications under this clause, to make orders for the settlement or acquisition of property, or varying ante- or post-nuptial settlements. The report does not recommend alteration of the existing law as to the orders that the court may make on applications to vary orders, other than the changes referred to in the foregoing Notes to this clause.

(b) The subsection also makes clear that the court's discretionary powers to make orders relating to property held jointly by the deceased with another or others (see clause 9), and to certain dispositions and contracts made by the deceased (see respectively clause 10 and clause 11) cannot be exercised on an application under this clause. (As to dispositions, see paragraph 215.)

### *Clause 6(10)*

19. See Note 8 (above).

*Inheritance (Provision for Family and Dependants) Bill*

Payment of  
lump sums by  
instalments.

7.—(1) An order under section 2(1)(b) or 6(2)(b) of this Act for the payment of a lump sum may provide for the payment of that sum by instalments of such amount as may be specified in the order.

(2) Where an order is made by virtue of subsection (1) above, the court shall have power, on an application made by the person to whom the lump sum is payable, by the personal representatives of the deceased or by the trustees of the property out of which the lump sum is payable, to vary that order by varying the number of instalments payable, the amount of any instalment and the date on which any instalment becomes payable.



## EXPLANATORY NOTES

### *Clause 7(1)*

1. This subsection gives effect to the recommendation in paragraph 165(a). In the case where family provision is awarded in the form of a lump sum, this subsection confers on the court power which it does not possess in terms under the present legislation to order payment by instalments. The power also extends to lump sum payments ordered under clause 6(2)(b) on a variation or discharge of an order for periodical payments.

### *Clause 7(2)*

2. Where an order has been made for the payment of a lump sum by instalments, this subsection gives the court power subsequently to vary that order but only as to the number of instalments payable, the amount of any instalment and the date on which any instalment is to be paid. It thus implements the recommendation in paragraph 165(b). In accordance with the recommendation in paragraph 163, the amount of the lump sum itself is not, however, capable of subsequent variation.

*Inheritance (Provision for Family and Dependants) Bill*

*Property available for financial provision*

Property  
treated as  
part of "net  
estate".

8.—(1) Where a deceased person has in accordance with the provisions of any enactment nominated any person to receive any sum of money or other property on his death, and that nomination is in force at the time of his death, that sum of money, after deducting therefrom any death duties payable in respect thereof, or that other property, to the extent of the value thereof at the date of the death of the deceased after deducting therefrom any death duties so payable, shall be treated for the purposes of this Act as part of the net estate of the deceased; but this subsection shall not render any person liable for having paid that sum or transferred that other property to the person named in the nomination in accordance with the directions given in the nomination. 5 10

(2) Where any sum of money or other property is received by any person as a *donatio mortis causa* made by a deceased person, that sum of money, after deducting therefrom any death duties payable thereon, or that other property, to the extent of the value thereof at the date of the death of the deceased after deducting therefrom any death duties so payable, shall be treated for the purposes of this Act as part of the net estate of the deceased; but this subsection shall not render any person liable for having paid that sum or transferred that other property in order to give effect to that *donatio mortis causa*. 15 20

## EXPLANATORY NOTES

### *Clause 8*

1. The first part of subsection (1) and the first part of subsection (2) extend the property available for family provision under the existing legislation by making available respectively money or property nominated by the deceased, and money or property comprised in a *donatio mortis causa*. They give effect to the recommendations in paragraph 134(a) and (b).
2. The second part of each subsection implements, for the reasons appearing in paragraph 135, the recommendation in paragraph 136.
3. The definition of “net estate” includes money and property falling within the provisions of this clause: see paragraph (c) of the definition in clause 25(1). In contrast to money and property held jointly by the deceased and another or others (covered by clause 9) and to money and property comprising the subject-matter of dispositions made, or contracts entered into, by the deceased with the intention of defeating an application for family provision (covered by clauses 10 to 13), money and property of the kind dealt with by clause 8 automatically form part of the net estate without the need of an application to the court.
4. The clause should be read in conjunction with paragraph (b) of the definition of “beneficiary” in clause 25(1), which includes a nominee or donee of money and property covered by clauses 8(1) and 8(2).

*Inheritance (Provision for Family and Dependants) Bill*

Property held  
on a joint  
tenancy.

9.—(1) Where a deceased person was immediately before his death beneficially entitled to a joint tenancy of any property, then, if, before the end of the period of six months from the date on which representation with respect to the estate of the deceased was first taken out, an application is made for an order under section 2 of this Act, the court for the purpose of facilitating the making of financial provision for the applicant under this Act may order that the deceased's severable share of that property, at the value thereof immediately before his death, shall, to such extent as appears to the court to be just in all the circumstances of the case, be treated for the purposes of this Act as part of the net estate of the deceased. 5 10

(2) In determining the extent to which any severable share is to be treated as part of the net estate of the deceased by virtue of an order under subsection (1) above, the court shall have regard to any death duties payable by reason of the death of the deceased in respect of that severable share.

(3) Where an order is made under subsection (1) above, the provisions of this section shall not render any person liable for anything done by him before the order was made. 15

(4) For the avoidance of doubt it is hereby declared that for the purposes of this section there may be a joint tenancy of a chose in action.

## EXPLANATORY NOTES

### *Clause 9(1)*

1. This subsection gives the court a discretionary power to make an order concerning the deceased's severable share of property of which, immediately before his death, the deceased was a beneficial joint tenant. It gives effect to the recommendations in paragraph 141.

2. In the absence of this power the court would be unable to make orders for financial provision out of such property, since the entire beneficial ownership of the property is held on the death of the deceased by the surviving joint tenant or tenants.

3. An order may be made only on an application for family provision made within six months from the date on which representation is first taken out. If the court grants leave under section 4 for an application to be made after the expiry of the six months' period, it will nevertheless be unable in the proceedings on that application to make an order under this clause.

### *Clause 9(2)*

4. The court's power under clause 9(1) being discretionary, clause 9(2) ensures that in considering both whether an order should be made, and, if so, the extent of that order, the court shall have regard to the reduction in the value of the deceased's severable share of the relevant property by reason of any death duties arising on his death.

### *Clause 9(3)*

5. This subsection has been included to make it clear that a surviving joint tenant or tenants and any other person acting in relation to the relevant property may ignore the possibility that an order might later be made under clause 9(1). It gives effect to the recommendation in paragraph 142 and thus affords protection to all the types of persons and institutions there mentioned.

### *Clause 9(4)*

6. The purpose of this subsection is to make it clear that a debt or other chose in action is comprised in "property" for the purpose of clause 9(1) and to preclude the possible argument that, as a matter of law, a joint tenancy cannot subsist in a chose in action, such as moneys in a bank account.

*Inheritance (Provision for Family and Dependants) Bill*

*Powers of court in relation to transactions intended to defeat applications for financial provision*

Dispositions intended to defeat applications for financial provision.

10.—(1) Where an application is made to the court for an order under section 2 of this Act, the applicant may, in the proceedings on that application, apply to the court for an order under subsection (2) below.

(2) Where on an application under subsection (1) above the court is satisfied—

(a) that, less than six years before the date of the death of the deceased, the deceased with the intention of defeating an application for financial provision under this Act made a disposition, and

(b) that full valuable consideration for that disposition was not given by the person to whom or for the benefit of whom the disposition was made (in this section referred to as “the donee”) or by any other person, and

(c) that the exercise of the powers conferred by this section would facilitate the making of financial provision for the applicant under this Act,

then, subject to the provisions of this section and of sections 12 and 13 of this Act, the court may order the donee (whether or not at the date of the order he holds any interest in the property disposed of to him or for his benefit by the deceased) to provide, for the purpose of the making of that financial provision, such sum of money or other property as may be specified in the order.

(3) Where an order is made under subsection (2) above as respects any disposition made by the deceased which consisted of the payment of money to or for the benefit of the donee, the amount of any sum of money or the value of any property ordered to be provided under that subsection shall not exceed the amount of the payment made by the deceased after deducting therefrom any death duties payable in respect of that payment by reason of the death of the deceased, or, if the disposition is treated for the purposes of estate duty as a gift to the donee of rights under a policy of assurance on the life of the deceased, after deducting therefrom such sum, if any, in respect of death duties payable in respect of the policy as the court considers reasonable in all the circumstances.

(4) Where an order is made under subsection (2) above as respects any disposition made by the deceased which consisted of the transfer of property (other than a sum of money) to or for the benefit of the donee, the amount of any sum of money or the value of any property ordered to be provided under that subsection shall not exceed the value at the date of the death of the deceased of the property disposed of by him to or for the benefit of the donee (or if that property has been disposed of by the person to whom it was transferred by the deceased, the value at the date of that disposal thereof) after deducting therefrom any death duties payable in respect of that property by reason of the death of the deceased.

## EXPLANATORY NOTES

### *Clause 10*

1. This clause changes the present law so as to enable financial provision to be made from money or property comprised in certain dispositions made by the deceased during his lifetime, as proposed in Part V(A) of the report.
2. The meaning of the word “disposition” is defined by clause 10(7).

### *Clause 10(1)*

3. The court can only make an order under subsection (2) on an application made by a dependant who has applied for financial provision under clause 2.
4. As recommended in paragraph 214, once an application for financial provision has been made, an order under this clause may be made at any time before the proceedings on that application have been determined.
5. No order under this clause may be made on an application for a variation order (or a related order) under clause 6: see paragraph 215 and clause 6(9).

### *Clause 10(2)*

6. Paragraph (a) implements, as to the deceased’s intention, the recommendation in paragraph 198(a) and, as to the period of six years prior to the death of the deceased, the recommendation in paragraph 211.
7. Paragraph (b) implements the recommendation in paragraph 198(b) of the report. The recommendation in paragraph 198(b) that marriage or a promise of marriage is not to be regarded as valuable consideration is implemented by the express exclusion of marriage and a promise of marriage from the definition of “valuable consideration” in clause 25(1).
8. The nature of the court’s power conferred by the concluding part of the subsection implements the recommendation in paragraph 198(c). The words in parenthesis in the concluding part of the subsection make it clear that, as recommended in paragraph 198(d), the existence of the court’s power is unaffected by a subsequent disposal of the relevant property or of any interest in it.
9. A limitation is placed on the money or property which the court may order a donee who is a trustee to pay or transfer (see clause 13(1)); and an order may be made against a person who became a trustee of the money or property paid or transferred (or of assets representing such money or property) after the date of the payment or transfer (see clause 13(3)).
10. The court’s power is discretionary in respect of whether the power should be exercised and, if so, to what extent.

### *Clause 10(3)*

11. The first part of this subsection gives effect to the recommendation in paragraph 198(e); the second part (relating to policies of assurance on the life of the deceased) implements, for the reason explained in paragraph 205, the recommendation in paragraph 206.
12. Donees who are trustees are protected by a further limitation: see clause 13(1).

### *Clause 10(4)*

13. This subsection implements the recommendation in paragraph 198(f).
14. As in the case of dispositions of money, donees of property other than money who are trustees are protected by a further limitation: see clause 13(1).

*Inheritance (Provision for Family and Dependents) Bill*

(5) Where an application (in this subsection referred to as “the original application”) is made for an order under subsection (2) above in relation to any disposition, then, if on an application under this subsection by the donee or by any applicant for an order under section 2 of this Act the court is satisfied—

- (a) that, less than six years before the date of the death of the deceased, the deceased with the intention of defeating an application for financial provision under this Act made a disposition other than the disposition which is the subject of the original application, and
- (b) that full valuable consideration for that other disposition was not given by the person to whom or for the benefit of whom that other disposition was made or by any other person,

the court may exercise in relation to the person to whom or for the benefit of whom that other disposition was made the powers which the court would have had under subsection (2) above if the original application had been made with respect of that other disposition and the court had been satisfied as to the matters set out in paragraphs (a), (b) and (c) of that subsection; and where any application is made under this subsection, any reference in this section (except in subsection (2)(b)) to a donee shall include a reference to the person to whom or for the benefit of whom that other disposition was made.

(6) In determining whether and in what manner to exercise its powers under this section, the court shall have regard to the circumstances in which any disposition was made and any valuable consideration which was given therefor, the relationship, if any, of the donee to the deceased, the conduct and financial resources of the donee and all the other circumstances of the case.

(7) In this section “disposition” does not include:— 70

- (a) any provision in a will, or
- (b) any appointment of property made, otherwise than by will, in the exercise of a special power of appointment,

but, subject to these exceptions, includes any payment of money (including the payment of a premium under a policy of assurance), and any conveyance, assurance, appointment or gift of other property of any description, whether made by an instrument or otherwise.

(8) The provisions of this section do not apply to any disposition made before the commencement of this Act.



## EXPLANATORY NOTES

### *Clause 10 (continued)*

#### *Clause 10(5)*

15. This subsection implements the first recommendation in paragraph 217.

#### *Clause 10(6)*

16. This subsection implements the recommendation in paragraph 198(g).

#### *Clause 10(7)*

17. The definition in this subsection of the transactions designed to defeat family provision which may be reviewed ensures the implementation of the recommendations in paragraphs 204 (as to property disposed of or settled outright by the deceased), 206 (as to the payment of premiums under a policy of assurance), and 210 (as to the exercise, otherwise than by will, of a general power of appointment).

18. Special powers of appointment exercisable by the deceased are excluded from the meaning of "disposition" by paragraphs (a) and (b) of this subsection and hence from the ambit of clause 10: see paragraph 208. Further, property subject to a special power of appointment is not part of the "net estate": see paragraph (a) of the definition in clause 25(1) and paragraphs 129 to 133.

19. The only property which is the subject-matter of a general power of appointment exercisable by the deceased that falls within clause 10 is property that the deceased appointed (otherwise than by will) in his lifetime. In every other case property which is subject to a general power of appointment (whether or not such power was exercised) is within either paragraph (a) or paragraph (b) of the definition of "net estate" in clause 25(1), and no question of defeating family provision arises: see paragraphs 127 and 128.

#### *Clause 10(8)*

20. This subsection implements the recommendation in paragraph 212; no disposition made before the commencement of the Act will be subject to the court's powers under this clause.

*Inheritance (Provision for Family and Dependants) Bill*

Contracts  
to leave  
property  
by will.

11.—(1) Where an application is made to a court for an order under section 2 of this Act, the applicant may, in the proceedings on that application, apply to the court for an order under this section.

(2) Where on an application under subsection (1) above the court is satisfied— 5

- (a) that the deceased made a contract by which he agreed to leave by his will a sum of money or other property to any person or by which he agreed that a sum of money or other property would be paid or transferred to any person out of his estate, and
- (b) that the deceased made that contract with the intention of defeating an application for financial provision under this Act, and 10
- (c) that when that contract was made full valuable consideration for that contract was not given or promised by the person with whom or for the benefit of whom the contract was made (in this section referred to as “the donee”) or by any other person, and 15
- (d) that the exercise of the powers conferred by this section would facilitate the making of financial provision for the applicant under this Act,

then, subject to the provisions of this section and of sections 12 and 13 of this Act, the court may make any one or more of the following orders, 20 that is to say:—

- (i) if any money has been paid or any other property has been transferred to or for the benefit of the donee in accordance with the contract, an order directing the donee to provide, for the purpose of the making of that financial provision, such sum of money 25 or other property as may be specified in the order;
- (ii) if the money or all the money has not been paid or the property or all the property has not been transferred in accordance with the contract, an order directing the personal representatives not to make any payment or transfer any property, or not to make 30 any further payment or transfer any further property, as the case may be, in accordance therewith or directing the personal representatives only to make such payment or transfer such property as may be specified in the order.

(3) Notwithstanding anything under subsection (2) above, the court 35 may exercise its powers thereunder in relation to any contract made by the deceased only to the extent that the court considers that the amount of any sum of money paid or to be paid or the value of any property transferred or to be transferred in accordance with the contract exceeds the value of any valuable consideration given or to be given for that 40 contract, and for this purpose the court shall have regard to the value of property at the date of the hearing.

## EXPLANATORY NOTES

### *Clause 11*

1. This clause implements, as proposed in Part V(B) of the report, the extension of the law to enable the court to review contracts made by the deceased with the intention of defeating applications for family provision.

### *Clause 11(1)*

2. In contrast to the position under clause 10 (which relates to dispositions made by the deceased), the powers of the court to make an order under this clause do not depend on the date when the contract was made. The reason for this difference is explained in paragraph 237.

3. As in the case of dispositions, before the court can make an order under this clause an application must have been made by a dependant who has applied for financial provision under clause 2; such an order may be made at any time before the proceedings for financial provision have been determined (see the recommendation in paragraph 241); and no application for an order under this clause may be made on an application for a variation order (or a related order) under clause 6; see clause 6(9).

### *Clause 11(2)*

4. Paragraph (a) specifies two kinds of contract as the subject-matter of the court's power: first, as recommended in paragraph 227(a) of the report, contracts by the deceased to leave money or property by his will and, secondly, as recommended in paragraph 236, contracts by the deceased whereby he agreed that money would be paid or property transferred out of his estate. The remainder of the subsection implements the recommendation in paragraph 227(a), (b) and (c).

5. In accordance with the recommendation in paragraph 227(b) of the report, the term "valuable consideration" in paragraph (c) of the subsection excludes marriage or a promise of marriage (see the definition in clause 25(1)), but it includes executory consideration (other than a promise of marriage).

6. Paragraph (ii) gives effect also to the recommendation in paragraph 239 of the report (which relates to cases where the contract has not been performed).

7. A limitation is placed on the money or property which the court may order a donee who is a trustee to pay or transfer (see clause 13(1)); and an order may be made against a person who became a trustee of the money or property paid or transferred (or of assets representing such money or property) after the date of the payment or transfer (see clause 13(3)).

8. If no valuable consideration (other than marriage) was given or promised in return for the deceased's promise, it is presumed, unless the contrary is shown, that the deceased entered into the relevant contract with the intention of defeating an application for family provision: see clause 12(2).

9. The court's power is discretionary in respect of whether the power should be exercised and, if so, to what extent.

### *Clause 11(3)*

10. This subsection implements the recommendation in paragraph 227(d).

*Inheritance (Provision for Family and Dependants) Bill*

(4) In determining whether and in what manner to exercise its powers under this section, the court shall have regard to the circumstances in which the contract was made, the relationship, if any, of the donee to the deceased, the conduct and financial resources of the donee and all the other circumstances of the case.

(5) Where an order has been made under subsection (2) above in relation to any contract the rights of any person to enforce that contract or to recover damages or to obtain other relief for the breach thereof shall be subject to any directions given by the court under section 12(3) of this Act and shall survive to such extent only as is consistent with giving effect to the terms of that order.

(6) The provisions of this section do not apply to any contract made before the commencement of this Act.

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EXPLANATORY NOTES

*Clause 11 (continued)*

*Clause 11(4)*

11. This subsection gives effect to the recommendation in paragraph 227(e). It is similar to clause 10(6) (which relates to dispositions) except that no reference to the effect of the giving of partial valuable consideration is made here since, in the case of contracts, that point is separately and more precisely covered by clause 11(3).

*Clause 11(5)*

12. This subsection ensures that, if the court makes an order under clause 11(2), the contractual rights of the parties are modified accordingly: see paragraph 240.

*Clause 11(6)*

13. As recommended in paragraph 242, only contracts made after the commencement of the Act are to be subject to the court's powers under this clause.

*Inheritance (Provision for Family and Dependants) Bill*

Provisions  
supplementary  
to ss. 10  
and 11.

12.—(1) Where the exercise of any of the powers conferred by section 10 or 11 of this Act is conditional on the court being satisfied that a disposition or contract was made by a deceased person with the intention of defeating an application for financial provision under this Act, that condition shall be fulfilled if the court is of the opinion that, on a balance of probabilities, the sole intention of the deceased, or a substantial part of his intention, in making the disposition or contract, was to prevent an order for financial provision being made under this Act or to reduce the amount of the provision which might otherwise be granted by an order thereunder. 5 10

(2) Where an application is made under section 11 of this Act with respect to any contract made by the deceased and no valuable consideration was given or promised by any person for that contract then, notwithstanding anything in subsection (1) above, it shall be presumed, unless the contrary is shown, that the deceased made that contract with the intention of defeating an application for financial provision under this Act. 15

(3) Where the court makes an order under section 10 or 11 of this Act, it may give such consequential directions as it thinks fit (including directions requiring the making of any payment or the transfer of any property) for giving effect to the order or for securing a fair adjustment of the rights of the persons affected thereby. 20

(4) Any power conferred on the court by the said section 10 or 11 to order the donee, in relation to any disposition or contract, to provide any sum of money or other property shall be exercisable in like manner in relation to the personal representative of the donee, and— 25

(a) any reference in section 10(4) to the disposal of property by the donee shall include a reference to disposal by the personal representative of the donee, and

(b) any reference in section 10(5) to an application by the donee under that subsection shall include a reference to an application by the personal representative of the donee; 30

but the court shall not have power under the said section 10 or 11 to make an order in respect of any property forming part of the estate of the donee which has been distributed by the personal representative; and the personal representative shall not be liable for having distributed any such property before he has notice of the making of an application under the said section 10 or 11 on the ground that he ought to have taken into account the possibility that such an application would be made. 35

## EXPLANATORY NOTES

### *Clause 12(1)*

1. This subsection gives effect to the recommendation in paragraph 202 in relation to dispositions, and to the similar recommendation as to contracts in paragraph 228.

### *Clause 12(2)*

2. This subsection implements the recommendation in paragraph 232 (b).

### *Clause 12(3)*

3. This subsection implements, as to dispositions, the recommendation in paragraph 198(h) and, as to contracts, the recommendation in paragraph 240.

### *Clause 12(4)*

4. This subsection implements the recommendations in paragraph 243.

*Inheritance (Provision for Family and Dependants) Bill*

Provisions as  
to trustees in  
relation to  
ss. 10 and 11.

13.—(1) Where an application is made for—

- (a) an order under section 10 of this Act in respect of a disposition made by the deceased to any person as a trustee, or
- (b) an order under section 11 of this Act in respect of any payment made or property transferred, in accordance with a contract made by the deceased, to any person as a trustee,

the powers of the court under the said section 10 or 11 to order that trustee to provide a sum of money or other property shall be subject to the following limitation (in addition, in a case of an application under section 10, to any provision regarding the deduction of death duties or of a sum in respect of death duties) namely, that the amount of any sum of money or the value of any property ordered to be provided—

- (i) in the case of an application in respect of a disposition which consisted of the payment of money or an application in respect of the payment of money in accordance with a contract, shall not exceed the aggregate of so much of that money as is at the date of the order in the hands of the trustee and the value at that date of any property which represents that money or is derived therefrom and is at that date in the hands of the trustee;
- (ii) in the case of an application in respect of a disposition which consisted of the transfer of property (other than a sum of money) or an application in respect of the transfer of property (other than a sum of money) in accordance with a contract, shall not exceed the aggregate of the value at the date of the order of so much of that property as is at that date in the hands of the trustee and the value at that date of any property which represents the first mentioned property or is derived therefrom and is at that date in the hands of the trustee.

(2) Where any such application is made in respect of a disposition made to any person as a trustee or in respect of any payment made or property transferred in pursuance of a contract to any person as a trustee, the trustee shall not be liable for having distributed any money or other property on the ground that he ought to have taken into account the possibility that such an application would be made.

(3) Where any such application is made in respect of a disposition made to any person as a trustee or in respect of any payment made or property transferred in accordance with a contract to any person as a trustee, any reference in the said section 10 or 11 to a donee shall be construed as including a reference to the trustee or trustees for the time being of the trust in question and any reference in subsection (1) or (2) above to a trustee shall be construed in the same way.



## EXPLANATORY NOTES

### *Clause 13(1)*

1. By this subsection the liability of a trustee-donee to pay money or transfer property for the purpose of family provision under an order of the court made under clause 10 or 11 is limited to such part of the money or property in his hands as, at the date of the order, represents the money or property originally transferred pursuant to the deceased's disposition or contract. This implements the recommendation in paragraph 243.

### *Clause 13(2)*

2. This subsection enables a trustee, in performing his functions (as for example in distributing, under the terms of the trust, income or capital to the beneficiaries, or, under such terms, in selling trust property), to ignore the possibility that an application might be made under clause 10 or 11. It implements the recommendation in paragraph 244.

### *Clause 13(3)*

3. This subsection enables the court to make an order under clause 10 or 11 against a person who became a trustee after the date of the relevant payment, transfer or contract. But for the subsection, no order could be made against him since the payment, transfer or contract was not made to or with him, or for his benefit: see clause 10(2)(b) and clause 11(2)(c).

*Inheritance (Provision for Family and Dependants) Bill*

*Special provisions relating to cases of divorce, separation, etc.*

Provision as  
to cases where  
no financial  
relief was  
granted in  
divorce  
proceedings,  
etc.

**14.**—(1) Where, within twelve months from the date on which a decree of divorce or nullity of marriage has been made absolute or a decree of judicial separation has been granted, a party to the marriage dies and—  
(a) an application for a financial provision order under section 23 of the Matrimonial Causes Act 1973 or a property adjustment order under section 24 of that Act has not been made by the other party to that marriage, or  
(b) such an application has been made but the proceedings thereon have not been determined at the time of the death of the deceased, then, if an application for an order under section 2 of this Act is made by that other party, the court shall, notwithstanding anything in section 1 or section 3 of this Act, have power, if it thinks it just to do so, to treat that party for the purposes of that application as if the decree of divorce or nullity of marriage had not been made absolute or the decree of judicial separation had not been granted, as the case may be.

(2) This section shall not apply in relation to a decree of judicial separation unless at the date of the death of the deceased the decree was in force and the separation was continuing.

## EXPLANATORY NOTES

### *Clause 14(1)*

1. This subsection implements the recommendations in paragraphs 62 and 63 of the report. It empowers the court to treat a former spouse or a judicially separated spouse, in the unusual case where no financial provision was granted in the matrimonial proceedings, as entitled to apply for financial provision measured by the higher standard specified in clause 1(2)(a) and applicable in general only to a surviving spouse who is not judicially separated.

### *Clause 14(2)*

2. This subsection defines the meaning of “decree of judicial separation” so as to make clear that subsection (1) is to apply, in the case of an application by a judicially separated spouse, only if the decree was in force at the date of the deceased’s death: if the decree was at that time no longer in force, the spouse may claim the higher standard of provision specified in clause 1(2)(a) as a surviving spouse.





*Inheritance (Provision for Family and Dependants) Bill*

Variation and discharge of secured periodical payments orders made under Matrimonial Causes Act 1973.

**16.**—(1) Where an application for an order under section 2 of this Act is made to the court by any person who was at the time of the death of the deceased entitled to payments from the deceased under a secured periodical payments order made under the Matrimonial Causes Act 1973, then, in the proceedings on that application, the court shall have power, if an application is made under this section by that person or by the personal representative of the deceased, to vary or discharge that periodical payments order or to revive the operation of any provision thereof which has been suspended under section 31 of that Act. 5

(2) In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, including any orders which the court proposes to make under section 2 or section 5 of this Act and any change (whether resulting from the death of the deceased or otherwise) in any of the matters to which the court was required to have regard when making the secured periodical payments order. 10 15

(3) The powers exercisable by the court under this section in relation to an order shall be exercisable also in relation to any instrument executed in pursuance of the order.

## EXPLANATORY NOTES

### *Clause 16*

1. This clause, and clauses 17 and 18, implement the recommendations in Part VII of the report—Maintenance Agreements and Orders made in Matrimonial Proceedings: Relationship to the Family Provision Code.
2. Clause 16 gives effect to the recommendation in paragraph 270 by conferring on the court seised of an application for family provision the same powers to vary and discharge an order for secured periodical payments under section 31 of the Matrimonial Causes Act 1973 as are possessed by the court which made the order.
3. Subsection (1) confers the substantive power and corresponds to section 31(1) of the 1973 Act; subsection (2), which corresponds to section 31(7), specifies the matters to which the court is required to have regard on an application under this clause, and the ancillary power conferred by subsection (3) is identical with that contained in section 31(3).
4. For the reasons appearing in paragraphs 271 and 272, the existing powers of the court under section 31 of the 1973 Act are unaffected.







*Inheritance (Provision for Family and Dependants) Bill*

Availability  
of court's  
powers under  
this Act in  
applications  
under ss. 31  
and 36 of the  
Matrimonial  
Causes Act  
1973.

**18.—(1) Where—**

- (a) a person against whom a secured periodical payments order was made under the Matrimonial Causes Act 1973 has died and an application is made under section 31(6) of that Act for the variation or discharge of that order or for the revival of the operation of any provision thereof which has been suspended or, 5
- (b) a party to a maintenance agreement within the meaning of section 34 of that Act has died, the agreement being one which provides for the continuation of payments thereunder after the death of one of the parties, and an application is made under section 36(1) of that Act for the alteration of the agreement under section 35 thereof, 10

the court shall have power to direct that the application made under the said section 31(6) or 36(1) shall be deemed to have been accompanied by an application for an order under section 2 of this Act. 15

(2) Where the court gives a direction under subsection (1) above it shall have power, in the proceedings on the application under the said section 31(6) or 36(1), to make any order which the court would have had power to make under the provisions of this Act if the application under the said section 31(6) or 36(1), as the case may be, had been made jointly with an application for an order under the said section 2; and the court shall have power to give such consequential directions as may be necessary for enabling the court to exercise any of the powers available to the court under this Act in the case of an application for an order under section 2. 20

(3) Where an order made under section 15(1) of this Act is in force with respect to a party to a marriage, the court shall not give a direction under subsection (1) above with respect to any application made under the said section 31(6) or 36(1) by that party on the death of the other party. 25

## EXPLANATORY NOTES

### *Clauses 18(1) and 18(2)*

1. These subsections remove the difficulty referred to in paragraph 274 by implementing the recommendation in paragraph 275.

### *Clause 18(3)*

2. The exclusion, from the court's power to give a direction under clause 18(1), of an application when an order under clause 15(1) is in force gives effect to the recommendation in paragraph 276.





*Inheritance (Provision for Family and Dependants) Bill*

Provisions as  
to personal  
representatives.

20.—(1) The provisions of this Act shall not render the personal representative of a deceased person liable for having distributed, after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out, any part of the estate of the deceased on the ground that he ought to have taken into account the possibility— 5

(a) that the court might permit the making of an application for an order under section 2 of this Act after the end of that period, or

(b) that, where an order has been made under the said section 2, the court might exercise in relation thereto the powers conferred on it by section 6 of this Act, 10

but this subsection shall not prejudice any power to recover, by reason of the making of an order under this Act, any part of the estate so distributed.

(2) Where the personal representative of a deceased person pays any sum directed by an order under section 5 of this Act to be paid out of the deceased's net estate, he shall not be under any liability by reason of that estate not being sufficient to make the payment, unless at the time of making the payment he has reasonable cause to believe that the estate is not sufficient. 20

(3) Where a deceased person entered into a contract by which he agreed to leave by his will any sum of money or other property to any person or by which he agreed that a sum of money or other property would be paid or transferred to any person out of his estate, then, if the personal representative of the deceased has reason to believe that the deceased entered into the contract with the intention of defeating an application for financial provision under this Act, he may, notwithstanding anything in that contract, postpone the payment of that sum of money or the transfer of that property until the expiration of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out or, if during that period an application is made for an order under section 2 of this Act, until the determination of the proceedings on that application. 25 30

## EXPLANATORY NOTES

### *Clause 20(1)*

1. This subsection re-enacts in substance the existing legislation (which does not, however, in terms exempt the personal representatives from liability on the ground that the court might exercise its powers of variation, except in respect of claims for family provision by a former spouse of the deceased). The reason why no change is proposed is briefly explained in paragraph 144.

### *Clause 20(2)*

2. This subsection re-enacts in substance the existing legislation relating to interim orders. The reason why no change is proposed in the present provision concerning interim orders (of which the terms of clause 20(2) form part) appears in paragraph 147.

### *Clause 20(3)*

3. This subsection is supplemental to the powers conferred on the court by clause 11 in relation to contracts of certain kinds made by the deceased with the intention of avoiding a claim for family provision. The need for the protection it gives to personal representatives arises because they might, apart from the subsection, be bound to perform the obligations of such a contract within the six months' period (from the date of the first grant of representation) during which an application for family provision may be made without leave, even in the case where they had reason to believe that the contract might subsequently be the subject-matter of an order under clause 11.







*Inheritance (Provision for Family and Dependants) Bill*

Jurisdiction  
of county  
courts.

**22.**—(1) A county court shall have jurisdiction to hear and determine any application for an order under section 2 of this Act (including any application for permission to apply for such an order and any application made, in the proceedings on an application for an order under the said section 2, for an order under any other provision of this Act) where it is shown to the satisfaction of the court that the value at the date of the death of the deceased of all property included in his net estate for the purposes of this Act by virtue of paragraph (a) of the definition thereof in section 25(1) of this Act does not exceed the sum of £5,000 or such larger sum as may from time to time be fixed for this purpose by order of the Lord Chancellor.

(2) Where a county court makes an order under section 2 of this Act, the court shall have all the jurisdiction of the High Court for the purpose of any further proceedings in relation thereto under section 6 of this Act.

(3) Where any proceedings for an order under section 2 of this Act are commenced in the High Court, and it appears to the court that the value of the deceased's net estate is such as would give jurisdiction in the matter to a county court if proceedings were commenced there, the court may, if it thinks fit, whether upon the application of an applicant for an order or otherwise, order that the proceedings be transferred to any county court which the court may consider the most convenient.

(4) Where any proceedings for an order under section 2 of this Act are commenced in a county court and it appears to the court that any of the matters in question between the parties raise a difficult point of law or would otherwise be more suitable for determination by the High Court, the court may order that the proceedings be transferred to the High Court.

(5) Any order of the Lord Chancellor under subsection (1) above shall be made by statutory instrument, and a draft of the statutory instrument shall be laid before Parliament; and—

(a) in relation to proceedings commenced in a county court after the making but before the coming into force of any such order the court may, if it thinks fit, refuse to make an order under section 66 of the County Courts Act 1959 (transfer to High Court of proceedings outside jurisdiction of county court) if the proceedings are within the jurisdiction of the county court as extended by the order of the Lord Chancellor; but

(b) the coming into force of any such order of the Lord Chancellor shall not be taken to affect any order previously made under the said section 66.

## EXPLANATORY NOTES

### *Clause 22*

1. Except as to the point mentioned in Note 3 below, this clause in substance re-enacts the existing law, in accordance with paragraphs 248 and 250.

### *Clause 22(1)*

2. This subsection re-enacts the existing law: see paragraph 248. (Paragraph (a) of the definition of "net estate" in clause 25(1) is identical with the definition of that term under the existing legislation.)

### *Clause 22(4)*

3. This is a new provision which gives effect to the recommendation, as to transfer of proceedings from a county court to the High Court, in paragraph 249.

*Inheritance (Provision for Family and Dependants) Bill*

Determination  
of date  
on which  
representation  
was first  
taken out.

**23.** In considering for the purposes of this Act when representation with respect to the estate of a deceased person was first taken out, a grant limited to settled land or to trust property shall be left out of account, and a grant limited to real estate or to personal estate shall be left out of account unless a grant limited to the remainder of the estate has previously 5 been made or is made at the same time.

## EXPLANATORY NOTES

### *Clause 23*

Both this clause and clause 4, which it supplements, re-enact the existing legislation. Clause 4 specifies six months 'from the date on which representation with respect to the estate of the deceased is first taken out' as the period within which a dependant may apply for family provision without leave of the court. This clause elaborates the meaning of "representation".

*Inheritance (Provision for Family and Dependants) Bill*

Rules of court for purposes of this Act to be made by authority constituted under s. 50 of Matrimonial Causes Act 1973.

**24.** Section 50 of the Matrimonial Causes Act 1973 (which provides for the constitution of the authority which has power to make rules of court for the purposes of that Act and certain other enactments) shall be amended as follows:—

- (a) in subsection (1)(a) for the words “and sections 26 and 28A of the Matrimonial Causes Act 1965 (maintenance of survivor from estate of deceased former spouse)” there shall be substituted the words “the Inheritance (Provision for Family and Dependants) Act 1974”;
- (b) in subsection (1)(d) for the words “sections 26 to 28A of the 10 Matrimonial Causes Act 1965” there shall be substituted the words “the Inheritance (Provision for Family and Dependants) Act 1974”; and
- (c) in subsection (2)(a) for the words “section 26 or 27 of the Matrimonial Causes Act 1965” there shall be substituted the words 15 “the Inheritance (Provision for Family and Dependants) Act 1974”.

## EXPLANATORY NOTES

### *Clause 24*

This clause implements the recommendation in paragraph 257: by amending section 50 of the Matrimonial Causes Act 1973 it confers power on the rule-making authority constituted under that section to make rules of court for the purposes of this Act.

*Inheritance (Provision for Family and Dependants) Bill*

Interpretation. 25.—(1) In this Act—

“adopted” means adopted in pursuance of—

- (a) an adoption order made under the Adoption Act 1958, any previous enactment relating to the adoption of children, the Adoption Act 1968 or any corresponding enactment of the Parliament of Northern Ireland; 5
- (b) an adoption order made in the Isle of Man or any of the Channel Islands; or
- (c) subject to sections 5 and 6 of the Adoption Act 1968, an overseas adoption within the meaning of section 4 of that act; 10

“beneficiary,” in relation to the estate of a deceased person, means—

- (a) a person who under the will of the deceased or under the law relating to intestacy is beneficially interested in the estate or would be so interested if an order had not been made under this Act, and
- (b) a person who has received any sum of money or other property which is treated for the purposes of this Act as part of the net estate of the deceased by virtue of section 8(1) or 8(2) of this Act or would have received that sum or other property if an order had not been made under this Act; 15

“child” includes an illegitimate or adopted child and a child *en ventre sa mere* at the death of the deceased; 20

“the court” means the High Court, or where a county court has jurisdiction by virtue of section 22 of this Act, a county court;

“death duties” means estate duty and every other duty chargeable on death; 25

“former wife” or “former husband” means a person whose marriage with the deceased was during the deceased’s lifetime the subject of a decree of divorce or of nullity of marriage made under the Matrimonial Causes Act 1973;

“net estate”, in relation to a deceased person, means— 30

- (a) all property of which the deceased had power to dispose by his will (otherwise than by virtue of a special power of appointment) less the amount of his funeral, testamentary and administration expenses, debts and liabilities, including any death duties payable out of his estate on his death; 35
- (b) any property in respect of which the deceased held a general power of appointment (not being a power exercisable by will) which has not been exercised;
- (c) any sum of money or other property which is treated for the purposes of this Act as part of the net estate of the deceased by virtue of section 8(1) or (2) of this Act; 40
- (d) any property which is treated for the purposes of this Act as part of the net estate of the deceased by virtue of an order made under section 9 of the Act;



## EXPLANATORY NOTES

### *Clause 25*

1. This is the interpretation clause. Notes on most of the terms defined here appear as Notes on the clauses earlier in the Act where such terms appear.

*Inheritance (Provision for Family and Dependents) Bill*

(e) any sum of money or other property which is, by reason of a 45  
disposition or contract made by the deceased, ordered under  
section 10 or 11 of this Act to be provided for the purpose of the  
making of financial provision under this Act;

“property” includes any chose in action;

“reasonable financial provision” has the meaning assigned to it by 50  
section 1 of this Act;

“valuable consideration” does not include marriage or a promise of  
marriage;

“will” includes codicil.

(2) For the purposes of paragraph (a) of the definition of “net estate” 55  
in subsection (1) above a person who is not of full age and capacity shall  
be treated as having power to dispose by will of all property of which he  
would have had power to dispose by will if he had been of full age and  
capacity.

(3) Any reference in this Act to provision out of the net estate of a 60  
deceased person includes a reference to provision extending to the whole  
of that estate.

(4) For the purposes of this Act any reference to a wife or husband shall  
be treated as including a reference to a person who in good faith entered  
into a void marriage with the deceased unless either— 65

(a) the marriage of the deceased and that person was dissolved or  
annulled during the lifetime of the deceased and the dissolution  
or annulment is recognised by the law of England and Wales, or

(b) that person has during the lifetime of the deceased entered into  
a later marriage. 70

(5) Any reference in this Act to remarriage or to a person who has  
remarried includes a reference to a marriage which is by law void or  
voidable or to a person who has entered into such a marriage, as the case  
may be, and a marriage shall be treated for the purposes of this Act as a  
remarriage, in relation to any party thereto, notwithstanding that the 75  
previous marriage of that party was void or voidable.

(6) Any reference in this Act to an order or decree made under the  
Matrimonial Causes Act 1973 or under any section of that Act shall be  
construed as including a reference to an order or decree which is deemed  
to have been made under that Act or under that section thereof, as the 80  
case may be.

## EXPLANATORY NOTES

### *Clause 25 (continued)*

#### *Clause 25(2)*

2. This subsection is new: it deals with the lacuna referred to in footnote 148 (to paragraph 127).

#### *Clause 25(6)*

3. This subsection is a drafting provision, arising from the consolidation, by the Matrimonial Causes Act 1973, of several enactments.

*Inheritance (Provision for Family and Dependants) Bill*

Repeals and  
transitional  
provisions.

26.—(1) Subject to the provisions of this section the enactments specified in the Schedule to this Act are hereby repealed to the extent specified in the third column of the Schedule; and in paragraph 5(2) of Schedule 2 to the Matrimonial Causes Act 1973 for the words “that Act” there shall be substituted the words “the Matrimonial Causes Act 1965.” 5

(2) The repeal of the said enactments shall not affect their operation in relation to any application made thereunder (whether before or after the commencement of this Act) with reference to the death of any person who died before the commencement of this Act.

(3) Without prejudice to the provisions of section 38 of the Interpretation 10 Act 1889 (which relates to the effect of repeals) nothing in any repeal made by this Act shall affect any order made or direction given under any enactment repealed by this Act, and, subject to the provisions of this Act, every such order or direction (other than an order made under section 4A of the Inheritance Family Provision Act 1938 or section 28A of the 15 Matrimonial Causes Act 1965) shall, if it is in force at the commencement of this Act or is made by virtue of subsection (2) above, continue in force as if it had been made under section 2(1)(a) of this Act, and for the purposes of section 6(7) of this Act the court in exercising its powers under that section in relation to an order continued in force by this subsection shall 20 be required to have regard to any change in any of the circumstances to which the court would have been required to have regard when making that order if the order had been made with reference to the death of any person who died after the commencement of this Act.

## EXPLANATORY NOTES

### *Clause 26(1)*

1. As recommended in paragraph 277, this Act repeals all the existing legislation on family provision.

### *Clauses 26(2) and 26(3)*

2. Except as mentioned in Note 3 below, the Act applies only to applications for provision out of the estates of persons dying on and after the date of its commencement. Subsection (2) accordingly preserves the existing legislation in respect of the estates of persons dying before that date; and subsection (3) preserves the validity of orders made under that legislation which are in force at the commencement date of this Act.

3. Subsection (3) also provides that an order for family provision (other than an interim order) which is in force at the commencement of this Act shall continue as if it had been made under its provisions. Accordingly such an order will, for example, be subject to the powers of variation and related powers contained in clause 6, and the grounds on which the court may exercise those powers will be those specified in clause 6(7).

SCHEDULE

ENACTMENTS REPEALED

Chapter	Short title	Extent of repeal
1938 c. 72.	The Inheritance (Family Provision) Act 1938.	The whole Act.
1952 c. 64.	The Intestates' Estates Act 1952.	Section 7 and Schedule 3.
1965 c. 72.	The Matrimonial Causes Act 1965.	Sections 26 to 28A and section 25(4) and (5) as applied by section 28(2).
1966 c. 35.	The Family Provision Act 1966.	The whole Act, except section 1 and subsections (1) and (3) of section 10.
1970 c. 33.	The Law Reform (Miscellaneous Provisions) Act 1970.	Section 6.
1970 c. 45.	The Matrimonial Proceedings and Property Act 1970.	Section 36.
1973 c. 18.	The Matrimonial Causes Act 1973.	In Schedule 2, paragraph 5(1).

## APPENDIX 2

### List of those who commented on Working Paper No. 42, Part 3 (Family Provision)

General Council of the Bar  
The Chancery Bar Association  
The Law Society  
Institute of Conveyancers  
Institute of Legal Executives  
Society of Conservative Lawyers  
University College Law Reform Group

The Rt. Hon. Lord Gardiner  
Master R. E. Ball, M.B.E., Chief Chancery Master  
Mr. Registrar W. D. S. Caird, Principal Registry of the Family Division  
His Honour Judge Potter  
Miss P. J. Messer, Barrister-at-Law  
Messrs. Armstrong & Co., Solicitors  
Mr. D. C. Morris (Messrs. Jaques & Co., Solicitors)  
Mr. A. Laurence Polak, Solicitor

Mr. A. Bissett-Johnson (Leicester University)  
Mr. J. Borkowski (Bristol University)  
Mr. J. Eckelaar (Pembroke College, Oxford)  
Mr. M. D. A. Freeman (University College, London)  
Mr. J. Hall (St. John's College, Cambridge)  
Professor Otto Kahn-Freund, Q.C.  
Professor A. K. R. Kiralfy (King's College, London)  
Mr. A. Samuels (University of Southampton)  
Mr. C. Sherrin (Bristol University)  
Mr. P. J. Schofield (Leeds University)  
Mr. A. Wharam (Leeds Polytechnic)

Mr. K. Castlemount  
Mr. P. Snow

**Married Women's Association**  
**National Council for the Single Woman and her Dependants**  
**National Council of Women of Great Britain**  
**National Federation of Business and Professional Women's Clubs of  
Great Britain and Northern Ireland**  
**National Housewives' Register**  
**National Union of Townswomen's Guilds**  
**National Women Citizens' Association**  
**Women's Liberation Workshop**  
**Women's National Advisory Committee of the Conservative Party**  
**Women's National Commission**

**Building Societies' Association**  
**Federation of Soroptimists' Clubs**





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