

**THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN
CAPITAL TERRITORY**

**ADMINISTRATION AND PROBATE (AMENDMENT) BILL
1996**

EXPLANATORY MEMORANDUM

Circulated by the authority of

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Outline

This Bill amends the *Administration and Probate Act 1929* (the Act). The Act provides (among other things) for the distribution of deceased estates on intestacy and for payment of a "statutory legacy" of \$100,000 to be made to a spouse whose partner dies intestate before the remainder of the estate is divided between the surviving spouse and the issue of the deceased.

The purpose of the Bill is to enable not only a legally married spouse to inherit upon intestacy but also an "eligible partner" as defined below. The Act also increases the amount of the statutory legacy from \$100,000 to \$150,000.

Formal clauses

Clauses 1, 2 and 3 are formal clauses. They refer to the short title of the Bill, the commencement date and the name of the Principal Act.

Application

Clause 4 provides that the amendments to the Act made by the Bill will apply only to the distribution of the estates of persons who die after the Act commences. This provides certainty by excluding the estates of persons who have died before the commencement of the Act.

Eligible administrators

Clause 5 repeals and replaces section 12 of the Act which sets out the classes of persons to whom the Court may grant administration of the estate of an intestate person. The proposed section 12 widens those classes by substituting the spouse of the deceased for the husband or wife of the deceased. "Spouse" is defined in clause 8 of the Bill (see below).

Administration under power of attorney

Clause 6 repeals and replaces section 22 of the Act which enables the Court to grant probate or administration to an attorney. The proposed new section 22 replaces an existing reference to the husband or wife of the deceased which is inappropriate given that the main purpose of the Bill is to confer on unmarried partners the right to take on intestacy.

Substitution

Clause 7 is essentially a drafting amendment. It provides for the present Division 3A of the Act to become Part 3A, which is more appropriate.

Interpretation

Clause 8 defines three terms used in the proposed provisions of the Act dealing with intestacy.

"Eligible partner" is defined as a person other than the intestate's legal spouse who, whether or not of the same gender as the intestate, was living with the intestate immediately before the death of the intestate as a member of a couple on a genuine domestic basis. To be classified as an eligible partner, a person must also have lived with the intestate for two years or more continuously or be the parent of a child of the intestate under the age of 18 at the date of death of the intestate.

"Legal spouse" is defined as the husband or wife of the intestate immediately before the death of the intestate.

"Spouse" includes both a legal spouse and an eligible partner.

Insertion

Clause 9 is a drafting amendment.

Distribution between legal spouse and eligible partner

Clause 10 deals with the situation where a person dies intestate and is survived both by a legal spouse and by an eligible partner.

Proposed section 45A provides that in that situation if the eligible partner has lived as the eligible partner of the intestate for less than 5 years immediately before the intestate's death, the share of the estate to which the spouse of the intestate is entitled is divided equally between the eligible partner and the legal spouse.

If, however, the eligible partner has been the eligible partner of the intestate continuously for 5 years or more immediately before the intestate's death, the eligible partner is entitled to the "whole" of the spousal share of the estate.

The definition of "eligible partner" in clause 8 requires a person who is not a parent of a child of the intestate under the age of 18 to have lived with the intestate for at least 2 years as a member of a couple on a genuine domestic basis.

Gifts made before death of intestate

Clause 11 amends section 49BA of the Act which provides that where an intestate has within the period of 5 years immediately before the death of the intestate made a gift to a person entitled to a share in the estate of the intestate or to the spouse of such a person, the amount or value of the gift is to be treated as part of the share that the person would be entitled to on the death of the intestate.

This concept (hotchpot) does not apply where a contrary intention appears from the circumstances of the particular case or where the value of the gift does not exceed \$3,000.

The figure of \$3,000 has not been amended since 1984. The purpose of clause 11 is to provide that only gifts amounting to \$10,000 shall be taken into account and to reflect the wider definition of "spouse" in clause 8. Clause 11 makes a number of other amendments of a drafting or formal nature to section 49BA.

Drafting amendments

Clauses 12, 13, 14 and 15 are amendments of a drafting nature.

Distribution on Intestacy

Clause 16 amends the Sixth Schedule to the Act which contains rules for the distribution of an estate upon intestacy.

Where an intestate is survived by a spouse but is not survived by issue, a surviving spouse is entitled to the whole of the intestate estate.

Where the intestate is survived by a spouse and issue and the value of the intestate estate does not exceed \$100,000, the spouse is also entitled to the whole of the intestate estate.

Where the intestate is survived by a spouse and issue and the value of the intestate estate exceeds \$100,000, the spouse is entitled to \$100,000 (plus interest) and one-half or one-third of the value of the estate, depending on the number of issue surviving the intestate. The balance of the estate goes to the issue of the deceased.

The figure of \$100,000 has not been increased since 1984. In New South Wales the corresponding figure was increased from \$100,000 to \$150,000 in 1993. The Bill increases the figure in the ACT from \$100,000 to \$150,000.

Consequential and formal amendments

Clause 17 makes a number of consequential, formal and technical amendments to the Act, including amendments to remove gender-specific references and to reflect changes in drafting practice.