

EXPLANATORY STATEMENT
AUSTRALIAN CAPITAL TERRITORY
ADMINISTRATION AND PROBATE (AMENDMENT)
ORDINANCE 1984
No. 67

The purpose of this Ordinance is to amend the Administration and Probate Ordinance 1929 (the "Principal Ordinance") to increase the entitlements of the spouse of a person who dies intestate.

The Ordinance also makes a number of other amendments intended to remove anomalies and facilitate the administration of estates.

Section 1 provides that the Ordinance may be cited as the Administration and Probate (Amendment) Ordinance 1984.

Section 2 provides that the words "Principal Ordinance", where they appear in the Ordinance, mean the Administration and Probate Ordinance 1929.

Section 3 provides that the Ordinance applies only in relation to the estates of persons who die after the Ordinance came into force.

Section 4 amends section 8C of the Principal Ordinance. That section provided (inter alia) that where a deceased person was, at the time of his death, domiciled in a State of Australia, probate or administration could not be granted or sealed unless an assessment of death duty had been made in

that State or unless the officer responsible for collection of death duty in the State had consented to the grant or sealing. However, death duty is no longer imposed in most States. Section 4 amends section 8C to limit its application to cases where the relevant State imposes death duty.

Section 5 amends sub-section 10(2) of the Principal Ordinance to extend the power of the Registrar of the A.C.T. Supreme Court to issue probate or administration to cases where there is no direct evidence of death but only evidence supporting a presumption of the death of the person. Formerly, this power was reserved to the Court. The Registrar is still required, under sub-section 10(2), not to issue probate or administration without an order of Court in any case where it appears doubtful to him whether the probate or administration should be granted.

Section 6 repeals section 47 of the Principal Ordinance. Its place is taken by section 49P (see section 12).

Section 7 amends sub-section 49(4) of the Principal Ordinance consequentially upon the amendment of the Sixth Schedule to provide for payment of interest on the statutory legacy (see section 15).

Section 8 inserts a new section 49AA in the Principal Ordinance, to prevent a spouse receiving double entitlements on intestacy. When a person dies intestate, distribution of his immovable property is governed by the law of the place in which it is situated. Distribution of his movable property is

determined by the law of the place in which he was domiciled at the time of death. Formerly, if a person domiciled in the A.C.T. died intestate leaving immovable property in, for example, one of the States, the spouse of the deceased was entitled to two statutory legacies - one out of the immovables in the State under the law of that State and one out of the remaining assets (the statutory legacy is the amount paid upon intestacy to the surviving spouse before the balance of the estate is distributed). An entitlement to 2 statutory legacies also arose where a person died intestate domiciled outside the A.C.T. but leaving immovable property in the A.C.T.

Where a deceased intestate is survived by a spouse and children, the balance of the estate, after payment of the statutory legacy to the spouse, is divided between the spouse and children. A spouse's receiving two or more legacies therefore reduces the share of the children.

The effect of the amendments is that the spouse is entitled to receive an amount equal to whichever is the greater of the two statutory legacies, i.e. the statutory legacy provided by A.C.T. law and the statutory legacy provided by the law of the other place. This section provides that the amount of the statutory legacy payable under A.C.T. law is reduced by the amount (if any) of a statutory legacy payable under the law of another place. This provision does not apply where a person dies domiciled outside the A.C.T. having immovable property in the A.C.T. and the law of the

place of domicile provides for the statutory legacy payable under its law to be reduced by the statutory legacy payable out of the A.C.T. property under A.C.T. law.

Section 9 repeals sub-sections 49B(3) and (4). These sub-sections provided that gifts to a child made by a person who dies intestate within 5 years of the gift were taken into account as part of that child's share of the intestate estate where -

- . the gift was by way of advancement or on the marriage of the child;
- . there was no intention shown that the gift should not be taken into account; and
- . the total of all gifts within the 5 year period, in respect of which no such intention was shown, was not less than \$1,000.

These provisions are replaced by new section 49BA (see section 10).

Section 10 inserts a new section 49BA in the Principal Ordinance to deal with gifts before death by a person who dies intestate. The new section substitutes simpler and more comprehensive provisions for those formerly found in sub-sections 49B (3) and (4) (see section 9). The new section applies to all gifts (not only those by way of advancement or upon marriage) made to a person (other than the spouse of the deceased person) who benefits from the intestate estate. Gifts made to a spouse of a beneficiary are also taken into account.

Gifts may not be taken into account where an intention is shown that they not be taken into account or where the total of all gifts (excluding those where such an intention was shown) in the 5 year period before death does not exceed \$3,000.

Section 11 amends section 49D, which deals with distribution of an estate where there is a partial intestacy, in accordance with the amendments made to the Sixth Schedule by section 15, which relates to the distribution of intestate estates.

Section 12 inserts a new section 49P which provides for the devolution of property in circumstances where two or more persons died simultaneously or it is uncertain which of them died first.

Formerly, a number of different rules were applicable in these situations depending upon whether the property passed under a will or on intestacy, the relationship of the persons to each other and the nature of the property. The new section provides that where a person who would be entitled under a will or on intestacy to take an interest in the estate of another person dies at the same time as the second person (or where there is uncertainty as to who died first) the estate of the second person is distributed as if the first person had died first.

The effect of this provision is that for the purpose of distributing his or her own estate, each person is deemed to have survived the other. Similar provision is made in relation to the transmission on death of property held in joint tenancy where the joint tenants die in such circumstances.

Section 13 amends section 58 of the Principal Ordinance to make it clear that an executor or administrator of an estate is only required to file an inventory of an estate or accounts if it is so prescribed or if the Court so orders.

Section 14 amends section 70 of the Principal Ordinance to give the Registrar of the A.C.T. Supreme Court power to allow commission not exceeding 5 per cent to executors, administrators or trustees. Formerly, only the Court had this power. It also removes the upper limit of 5 per cent where the Court allows commission.

Section 15 replaces Part I of the Sixth Schedule to the Principal Ordinance which deals with the manner of distribution of intestate estates where the intestate is survived by a spouse. The principal changes are:

- . Where the intestate is not survived by issue, the spouse receives the whole of the estate. Formerly, the spouse received \$50,000 plus half of the balance. The remainder went to the parents (if any) of the intestate, and (if the intestate was not survived by either parent), to his or her brothers or sisters.

- . The statutory legacy (the amount payable to the surviving spouse before the balance of the estate is distributed) is increased from \$10,000 to \$100,000. Interest is payable on the amount of the statutory legacy at the rate of 8 per cent per annum from the date of death until payment. The increase in the amount of the statutory legacy and the provision for interest brings the A.C.T. into line with New South Wales.

Section 16 omits the definition of "the Judge" from sub-section 5(1) of the Principal Ordinance and omits references to "the Judge" wherever they occur in the Ordinance. Consequent on these amendments, the definition and references are no longer appropriate.

Authorised by the
Attorney-General

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