



BERMUDA

SUCCESSION ACT 1974

1974 : 5

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### PART I PRELIMINARY

#### Interpretation

- 1 (1) In this Act, unless the context otherwise requires—
  - “Court” means the Supreme Court;
  - “child” means any child whether or not his parents are or were married to each other at any time relevant for the purposes of this Act;
  - “estate representative” means the executor, original or by representation, or administrator for the time being of a deceased person;

“intestate” includes a person who leaves a will but dies intestate as to some beneficial interest in his real or personal estate.

(2) References to a child or issue living at the death of any person include a child or issue en ventre sa mere at the death.

(3) References to the estate of a deceased person include property over which the deceased exercises a general power of appointment by his will.

*[Section 1(1) amended by 1991:21 effective 18 June 1991; “child” amended, “child born in wedlock” and “child not born in wedlock” deleted, by 2002:36 Sch para 28(a) effective 19 January 2004]*

## PART II

### DISTRIBUTION OF RESIDUARY ESTATE

#### Interpretation of Part II

2 In this Part, unless the context otherwise requires—

“pecuniary legacy” includes an annuity, a general legacy, a demonstrative legacy so far as it is not discharged out of the designated property, and any other general direction by a testator for the payment of money;

“personal chattels” means vehicles and accessories, marine craft and accessories, horses, stable furniture and effects, garden effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, furniture, furnishings, jewellery, objets d’art, bric-a-brac, photographic equipment, radios, record players, tape-recorders, television sets, musical and scientific instruments and apparatus, wines, liquors and consumable stores, and all other articles of household or personal use or ornament, but do not include any chattels used at the death of the intestate for business purposes nor money or securities for money nor bullion whether gold or silver;

“residuary estate of the intestate” means every beneficial interest of the intestate in property which (otherwise than by virtue of a special power of appointment) he could, if of full age and capacity, have disposed of by his will, less all such funeral, testamentary and administration expenses (and, in the case of a partial intestacy, pecuniary legacies), debts and other liabilities as are properly payable thereout having regard to the rules of administration contained in the Administration of Estates Act 1974 [title 26 item 12].

#### Abolition of descent to heir, curtesy, dower and escheat

3 (1) With regard to the real estate and personal inheritance of every person dying after 31 August 1974; there shall be abolished—

- (a) all existing modes, rules and canons of descent, and of devolution by special occupancy or otherwise, of real estate, or of personal inheritance, whether operating by the general law or by custom or otherwise howsoever; and

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- (b) tenancy by the curtesy and every other estate and interest of a husband in real estate as to which his wife dies testate or intestate, whether arising under the general law or by custom or otherwise; and
- (c) dower and every other estate and interest of a wife in real estate as to which her husband dies testate or intestate, whether arising under the general law or by custom or otherwise; and
- (d) escheat to the Crown for want of heirs.

(2) Nothing in this section shall affect the descent or devolution of an entailed estate or interest.

Construction of references to "heirs"

4 (1) The word "heir" or "heirs" used as a word of limitation in any enactment, deed or instrument passed or executed either before or after 1 September 1974 shall have the same effect as if this Act had not passed.

(2) The word "heir" or "heirs" used as a word of purchase in any enactment, deed or instrument passed or executed before 1 September 1974 shall bear the same meaning as if this Act had not passed.

(3) The word "heir" or "heirs" used as a word of purchase in any enactment, deed or instrument passed or executed on or after 1 September 1974 shall, unless the contrary intention appears, be construed to mean the person or persons, other than a creditor, who would be beneficially entitled under this Part to the estate of a deceased person if that person had died intestate.

(4) Subject to subsections (1), (2) and (3), references in this Act, and in any enactment, deed or instrument passed or executed either before or after 1 September 1974, to the heirs of any person shall be construed as including references to his estate representatives.

Succession to real and personal estate on intestacy

5 (1) Subject to section 11, the residuary estate of an intestate shall be distributed in the manner or held on the trusts mentioned in this section, namely—

Case 1

If the intestate leaves a husband or wife and leaves

- (a) no issue; and
- (b) no parent, or brother or sister of the whole blood, or issue of a brother or sister of the whole blood;

the residuary estate shall be held in trust for the surviving husband or wife absolutely.

Case 2

If the intestate leaves a husband or wife and issue (whether or not persons mentioned in sub-paragraph (b) of Case 1 also survive) the surviving husband or wife shall take the

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personal chattels absolutely, and, in addition, the residuary estate of the intestate (other than the personal chattels) shall stand charged with the payment of a sum equal to fifty per centum of the value of the residuary estate (other than the personal chattels) or one hundred thousand dollars, whichever is the greater, free of costs to the surviving husband or wife with interest thereon from the end of the time allowed by law for administration at the rate of five per centum per annum until paid or appropriated, and subject to providing for that sum and the interest thereon, the residuary estate (other than the personal chattels) shall be held on the intestacy trusts for the issue of the intestate according to their stock (per stirpes).

### Case 3

If the intestate leaves a husband or wife and one or more of the following, that is to say, a parent, a brother or sister of the whole blood, or issue of a brother or sister of the whole blood, but leaves no issue, the surviving husband or wife shall take the personal chattels absolutely and, in addition, the residuary estate of the intestate (other than the personal chattels) shall stand charged with the payment of a sum equal to sixty-six and two thirds per centum of the value of the residuary estate (other than the personal chattels) or one hundred and fifty thousand dollars, whichever is the greater, free of costs to the surviving husband or wife with interest thereon from the end of the time allowed by law for administration at the rate of five per centum per annum until paid or appropriated, and, subject to providing for that sum and the interest thereon, the residuary estate (other than the personal chattels) shall be held—

- (a) where the intestate leaves one parent or both parents (whether or not brothers or sisters of the intestate or their issue also survive) in trust for the parent absolutely or, as the case may be, for the two parents in equal shares absolutely;
- (b) where the intestate leaves no parent, on the intestacy trusts for the brothers and sisters of the whole blood of the intestate and in the event that any of the brothers and sisters of the whole blood of the intestate predeceased the intestate leaving issue any of whom shall be living at the death of the intestate such issue living at the death of the intestate shall take equally among them if more than one the share which their respective parents would have taken if living at the death of the intestate.

### Case 4

If the intestate leaves issue but no husband or wife, the residuary estate of the intestate shall be held on the intestacy trusts for the issue of the intestate according to their stock.

### Case 5

If the intestate leaves no husband or wife and no issue but both parents, then the residuary estate of the intestate shall be held in trust for the parents in equal shares absolutely.

### Case 6

If the intestate leaves no husband or wife and no issue but one parent, then the residuary estate of the intestate shall be held in trust for the surviving parent absolutely.

Case 7

If the intestate leaves no husband or wife and no issue and no parent, then the residuary estate of the intestate shall be held in trust for the following persons living at the death of the intestate and in the following order and manner, namely—

First, on the intestacy trusts for the brothers and sisters of the whole blood of the intestate; however, in the event that any of the brothers and sisters of the whole blood of the intestate predeceased the intestate leaving issue any of whom shall be living at the death of the intestate such issue living at the death of the intestate shall take equally among them if more than one the share which their respective parents would have taken if living at the death of the intestate; but if no person takes an absolutely vested interest under such trusts; then

Secondly, on the intestacy trusts for the brothers and sisters of the half blood of the intestate; however, in the event that any of the brothers and sisters of the half blood of the intestate predeceased the intestate leaving issue any of whom shall be living at the death of the intestate such issue living at the death of the intestate shall take equally among them if more than one the share which their respective parents would have taken if living at the death of the intestate; but if no person takes an absolutely vested interest under such trusts; then

Thirdly, for the grandparents of the intestate and, if more than one survive the intestate, in equal shares; but if there is no member of this class; then

Fourthly, on the intestacy trusts for the uncles and aunts of the intestate (being brothers or sisters of the whole blood of a parent of the intestate); however, in the event that any of such uncles and aunts of the intestate predeceased the intestate leaving issue any of whom shall be living at the death of the intestate such issue living at the death of the intestate shall take equally among them if more than one the share which their respective parents would have taken if living at the death of the intestate; but if no person takes an absolutely vested interest under such trusts; then

Fifthly, on the intestacy trusts for the uncles and aunts of the intestate (being brothers or sisters of the half blood of a parent of the intestate); however, in the event that any of such uncles and aunts of the intestate predeceased the intestate leaving issue any of whom shall be living at the death of the intestate such issue living at the death of the intestate shall take equally among them if more than one the share which their respective parents would have taken if living at the death of the intestate.

Case 8

In default of any person taking an absolute interest under the foregoing provisions, the residuary estate of the intestate shall belong to the Government as bona vacantia, and in lieu of any right to escheat.

The Government may, out of the whole or any part of the property devolving on the Government, provide for dependants, whether kindred or not, of the intestate, and other persons for whom the intestate might reasonably have been expected to make provision or any other person whom the Government is satisfied has a legal, equitable or moral claim.

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(2) A husband and wife shall for all purposes of distribution or division under the foregoing provisions of this section be treated as two persons.

(3) Where the intestate and the intestate's husband or wife have died in circumstances rendering it uncertain which of them survived the other and the intestate's husband or wife is by virtue of section 1 of the Presumption of Survivorship Act 1956 [*title 26 item 7*] deemed to have survived the intestate, this section shall, nevertheless, have effect as respects the intestate as if the husband or wife had not survived the intestate.

(4) The interest payable to a surviving husband or wife under Case 2 or Case 3 of subsection (1) shall be primarily payable out of income.

(5) For the purposes of Case 2 or Case 3 of subsection (1) the estate representative shall employ an independent valuer in any case where such employment may be necessary.

(6) The Premier may by order vary the sum specified in subsection (1), Case 2 and Case 3 which order is subject to the affirmative resolution procedure.

Intestacy trusts in favour of issue and other classes of relatives of intestate

6 (1) Where under this Part the residuary estate of an intestate, or any part thereof, is directed to be held on the intestacy trusts for the issue of the intestate the same shall be held by the estate representatives upon the following trusts, namely:

- (a) In trust, in equal shares if more than one, for all or any the children or child of the intestate, living at the death of the intestate, who attain the age of eighteen years or marry under that age, and for all or any of the issue living at the death of the intestate who attain the age of eighteen years or marry under that age of any child of the intestate who predeceases the intestate, such issue to take through all degrees, according to their stocks, in equal shares if more than one, the share which their parent would have taken if living at the death of the intestate, and so that no issue shall take whose parent is living at the death of the intestate and so capable of taking;
- (b) The statutory provisions which relate to maintenance and accumulation of surplus income, under the Trustee Act 1975 [*title 26 item 51*], shall apply, but when an infant marries such infant shall be entitled to give valid receipts for the income of the infant's share or interest;
- (c) Where the property held on the intestacy trusts for issue is divisible into shares, then any money or property which, by way of advancement or on the marriage of a child of the intestate, has been paid to such child by the intestate or settled by the intestate for the benefit of such child (including any life or less interest and including property covenanted to be paid or settled) shall, subject to any contrary intention expressed or appearing from the circumstances of the case, be taken as being so paid or settled in or towards satisfaction of the share of such child or the share which such child would have taken if living at the death of the intestate, and shall be brought into account, at a valuation (the value to be reckoned as at the death of the intestate), in accordance with the requirements of the estate representatives;

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(d) The estate representatives may permit any infant contingently interested to have the use and enjoyment of any personal chattels in such manner and subject to such conditions (if any) as the estate representatives may consider reasonable, and without being liable to account for any consequential loss.

(2) If the trusts in favour of the issue of the intestate fail by reason of no child or other issue attaining an absolutely vested interest—

(a) the residuary estate of the intestate and the income thereof and all statutory accumulations, if any, of the income thereof, or so much thereof, as may not have been paid or applied under any power affecting the same, shall go, devolve and be held under this Part as if the intestate had died without leaving issue living at the death of the intestate;

(b) references in this Part to the intestate “leaving no issue” shall be construed as “leaving no issue who attain an absolutely vested interest”;

(c) references in this Part to the intestate “leaving issue” or “leaving a child or other issue” shall be construed as “leaving issue who attain an absolutely vested interest”.

(3) Where under this Part the residuary estate of an intestate or any part thereof is directed to be held on the intestacy trusts for any class of relatives of the intestate, other than issue of the intestate, the same shall be held on trusts corresponding to the intestacy trusts for the issue of the intestate (other than the provision for bringing any money or property into account) as if such trusts (other than as aforesaid) were repeated with the substitution of references to the members or member of that class for references to the children or child of the intestate.

(4) References in Case 1 or Case 3 of section 5(1) to the intestate leaving, or not leaving, a member of the class consisting of brothers or sisters of the whole blood of the intestate and issue of brothers or sisters of the whole blood of the intestate shall be construed as references to the intestate leaving, or not leaving, a member of that class who attains an absolutely vested interest.

*[Section 6 subsection (1)(a) amended by 2001:20 s.7(1) & Sch 2 effective 1 November 2001]*

### Powers of estate representative in respect of interest of surviving spouse

7 The estate representatives may raise the whole or any part of the sum payable under Case 2 or Case 3 of section 5(1) to the surviving husband or wife, and interest thereon and the amount, if any, properly required for the payment of the costs of the transaction, on the security of the whole or any part of the residuary estate of the intestate (other than the personal chattels), so far as that estate may be sufficient for the purpose or the said sum and interest may not have been satisfied by an appropriation under the statutory power available in that behalf.

### Rights of surviving spouse as respects the matrimonial home

8 The First Schedule shall have effect for enabling the surviving husband or wife of a person dying intestate after 31 August 1974 to acquire the matrimonial home.

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### Partial intestacy

9 Where the will of a testator effectively disposes of part only of his estate, then, unless it appears by the will that his estate representatives are intended to take beneficially the remainder of his estate, the estate representatives shall, subject to their powers and rights for the purposes of administration, hold the remainder of his estate upon trust for the persons who would have been entitled thereto under this Part if the testator had died intestate and left no other estate.

### Construction of documents

10 (1) References to the Intestates' Estates Act 1787 in an instrument inter vivos made, or in a will coming into operation, after 31 August 1974, shall be construed as references to this Part; and references in such an instrument or will to statutory next of kin shall be construed, unless the context otherwise requires, as referring to the persons who would take beneficially on an intestacy under the foregoing provisions of this Part.

(2) Trusts declared in an instrument inter vivos made, or in a will coming into operation, before 1 September 1974 by reference to the Intestates' Estates Act 1787 shall, unless the contrary thereby appears, be construed as referring to that Act.

### Rights of succession on intestacy in respect of child, and parent of child, not born in wedlock

11 *[Deleted]*

*[Section 11 amended by 1991:21 effective 18 June 1991; and deleted by 2002:36 Sch para 28(b) effective 19 January 2004]*

### General provisions as to the making and effect of declarations

11A *[Deleted]*

*[Section 11A amended by 1991:21 effective 18 June 1991; and deleted by 2002:36 Sch para 28(b) effective 19 January 2004]*

## PART III

### APPLICATION FOR FINANCIAL PROVISION FROM DECEASED'S ESTATE

#### Interpretation of Part III

12 (1) In this Part, unless the context otherwise requires—

“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 Part, and
- (b) a person who has received any sum of money or other property which by virtue of section 20(1) or 20(2) is treated as part of the net estate of the deceased or would have received that sum or other property if an order had not been made under this Part;

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“child” includes a child not born in wedlock and a child en ventre sa mere at the death of the deceased;

“former spouse”, in relation to a deceased person, means a person whose marriage with the deceased was during the deceased’s lifetime dissolved or annulled by a decree of a court of competent jurisdiction;

“net estate”, in relation to a deceased person, means—

- (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 payable out of his estate on his death;
- (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 Part as part of the net estate of the deceased by virtue of section 20(1) or (2);
- (d) any sum of money or other property which is, by reason of a disposition or contract made by the deceased, ordered under section 21 or 22 to be provided for the purpose of the making of financial provision under this Part;

“property” includes any chose in action;

“reasonable financial provision” has the meaning assigned to it by section 13;

“valuable consideration” does not include marriage or a promise of marriage.

(2) For the purposes of paragraph (a) of the definition of “net estate” in subsection (1), 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 Part to provision out of the net estate of a deceased person includes its reference to provision extending to the whole of that estate.

(4) For the purposes of this Part 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—

- (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 Bermuda, or
- (b) that person has during the lifetime of the deceased entered into a later marriage.

(5) Any reference in this Part 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

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entered into such a marriage, as the case may be, and a marriage shall be treated for the purposes of this Part as a remarriage, in relation to any party thereto, notwithstanding that the previous marriage of that party was void or voidable.

(6) Any reference in this Part to an order or decree made under the Matrimonial Causes Act 1974 [*title 27 item 3*] 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 case may be.

*[Section 12 amended by 1991:21 effective 18 June 1991]*

### Application for financial provision from deceased's estate

13 (1) Where after 7 January 1988 a person dies domiciled in Bermuda and is survived by any of the following persons:

- (a) the wife or husband of the deceased;
- (b) a former spouse of the deceased who has not remarried;
- (c) a child of the deceased;
- (d) a grandchild of the deceased 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 14 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.

(2) In this Part "reasonable financial provision"—

- (a) in the case of an application made by virtue of subsection (1)(a) 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), 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), 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)(d), 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.

### Powers of Court to make orders

14 (1) Subject to this Part, 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

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such as to make reasonable financial provision for the applicant, make any one or more of the following orders—

- (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;
- (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 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 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) providing for the making 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;
- (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 determined in any other way the Court thinks fit,

(3) Where an order under subsection (1)(a) 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 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.

(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 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 the will or the law relating to intestacy, or by both the will and the law relating to intestacy, 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 order under this section such powers as appear to the Court to be necessary or expedient.

Matters to which Court is to have regard

15 (1) Where an application is made for an order under section 14, 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—

- (a) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;
- (b) the financial resources and financial needs which any other applicant for an order under section 14 has or is likely to have in the foreseeable future;
- (c) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;
- (d) any obligations and responsibilities which the deceased had towards any applicant for an order under section 14 or towards any beneficiary of the estate of the deceased;
- (e) the size and nature of the net estate of the deceased;
- (f) any physical or mental disability of any applicant for an order under section 14 or any beneficiary of the estate of the deceased;
- (g) 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.

(2) Without prejudice to the generality of subsection (1)(g), where an application for an order under section 14 is made by virtue of section 13(1)(a) or (1)(b) the Court shall, in addition to the matters specifically mentioned in subsection (1)(a) to (f), have regard to—

- (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.

(3) Without prejudice to the generality of subsection (1)(g), where an application for an order under section 14 is made by virtue of section 13(1)(c) the Court shall, in addition to the matters specifically mentioned in subsection (1)(a) to (f), have regard to the manner in which the applicant was being or in which he might expect to be educated or trained.

(4) Without prejudice to the generality of subsection (1)(g), where an application for an order under section 14 is made by virtue of section 13(1)(d), the Court shall, in addition to the matters specifically mentioned in subsection (1)(a) to (f), 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 regard under this section, the Court shall take into account the facts as known to the Court at the date of the hearing.

(6) In considering the financial resources of any person for the purposes of this section the Court shall take into account his earning capacity and in considering the financial needs of any person for the purposes of this section the Court shall take into account his financial obligations and responsibilities.

#### Time limit for application

16 An application for an order under section 14 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.

#### Interim orders

17 (1) Where on an application for an order under section 14 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
- (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 sums and (if more than one) at such intervals

as the Court thinks reasonable; and the Court may order that, subject to this Act, 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 section 14 or decides not to exercise its powers under that section.

(2) Section 14(2), (3) and (4) shall apply in relation to an order under this section as they apply in relation to an order under section 14.

(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 the same matters as those to which the Court is required to have regard under section 15.

(4) An order made under section 14 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 been paid on account of any payment provided for by that order.

#### Variation or discharge of orders for periodical payments

18 (1) Subject to this Part, where the Court has made an order under section 14(1) (a) (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, has 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.

(2) Without prejudice to the generality of subsection (1), 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 periodical payments and for such term as may be specified, in the order to any person who has applied, or would but for section 16 be entitled to apply, for an order under section 14 (whether or not, in the case of any application, an order was made in favour of the applicant);
- (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);
- (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 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 spouse) or on the expiration of a period so specified, 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 has 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 recipient or any such person as is mentioned in subsection (2)(a) 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 includes a reference to an order made under this section and any reference in this section to the original recipient includes a reference to any person to whom periodical payments are required to be made by virtue of an order under this section.

(5) An application under this section may be made by any of the following persons—

- (a) any person who by virtue of section 13(1) has applied, or would but for section 16 be entitled to apply, for an order under section 14;
- (b) the estate representatives of the deceased;
- (c) the trustees of any relevant property; and
- (d) any beneficiary of the estate of the deceased.

(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 Part, or
- (b) in the case of an application under subsection (3), 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,

and any such property as is mentioned in paragraph (a) or (b) is in subsections (2) and (5) 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 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 14(1)(d), (e) or (f), 21 or 22 shall be made on an application under this section.

(10) 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 re-marriage of a former spouse) or on the expiration 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.

Payment of lump sums by instalments

19 (1) An order under section 14(1)(b) or 18(2)(b) 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), the Court has power, on an application made by the person to whom the lump sum is payable, by the estate 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.

Property treated as part of “net estate”

20 (1) Where a deceased person has in accordance with 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 or that other property, to the extent of the value thereof at the date of the death of the deceased, shall be treated for the purposes of this Part as part of the net estate of the deceased; but this subsection does 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.

(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 or that other property, to the extent of the value thereof at the date of the death of the deceased, shall be treated for the purposes of this Part as part of the net estate of the deceased; but this subsection does 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.

Dispositions intended to defeat applications for financial provision

21 (1) Where an application is made to the Court for an order under section 14, the applicant may, in the proceedings on that application, apply to the Court for an order under subsection (2).

(2) Where on an application under subsection (1) the Court is satisfied—

- (a) that, less than three years before the date of the death of the deceased, the deceased with the intention of defeating an application for financial provision under this Part 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 Part,

then, subject to this section and sections 23 and 23A 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) 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.

(4) Where an order is made under subsection (2) 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).

(5) Where an application (in this subsection referred to as "the original application") is made for an order under subsection (2) 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 14 the Court is satisfied—

- (a) that, less than three years before the date of the death of the deceased, the deceased with the intention of defeating an application for financial provision under this Part 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) if the original application had been made in 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 the donee includes 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—

- (a) any provision in a will, any such nomination as is mentioned in section 20(1) or any donatio mortis causa, 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 property of any description, whether made by an instrument or otherwise.

- (8) This section does not apply to any disposition made before 8 January 1988.

Contracts to leave property by will

22 (1) Where an application is made to a Court for an order under section 14, 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) the Court is satisfied—
- (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 Part, and
  - (c) that when the 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
  - (d) that the exercise of the powers conferred by this section would facilitate the making of financial provision for the applicant under this Part,

then, subject to this section and sections 23 and 23A, the Court may make any one or more of the following orders, that is to say—

- (e) 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 or other property as may be specified in the order;
- (f) 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 estate representatives not to make any payment or transfer any property, or not to make any further payment or transfer any further property, as the case may be, in accordance therewith or directing the estate representatives only to make such payment or transfer such property as may be specified in the order.

(3) Notwithstanding anything in subsection (2) the Court 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 contract, and for this purpose the Court shall have regard to the value of property at the date of the hearing.

(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) 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 adjustment made by the Court under section 23(3) and shall survive to such extent only as is consistent with giving effect to the terms of that order.

(6) This section does not apply to a contract made before 8 January 1988.

Provisions supplementary to sections 21 and 22

23 (1) Where the exercise of any of the powers conferred by section 21 or 22 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 intention of the deceased (though not necessarily his sole intention) in making the disposition or contract was to prevent an order for financial provision being made under this Part or to reduce the amount of the provision which might otherwise be granted by an order thereunder.

(2) Where an application is made under section 22 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), 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 Part.

(3) Where the Court makes an order under section 21 or 22 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.

(4) Any power conferred on the Court by section 21 or 22 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 estate representative of the donee, and—

- (a) any reference in section 21(4) to the disposal of property by the donee shall include a reference to disposal by the estate representative of the donee, and
- (b) any reference in section 21(5) to an application by the donee under that subsection shall include a reference to an application by the estate representative of the donee;

but the Court does not have power under section 21 or 22 to make an order in respect of any property forming part of the estate of the donee which has been distributed by the estate representative; and the estate representative is not liable for having distributed any such property before he has notice of the making of an application under section 21 or 22 on the ground that he ought to have taken into account the possibility that such an application would be made.

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Trustees in relation to sections 21 and 22

23A (1) Where an application is made for—

- (a) an order under section 21 in respect of a disposition made by the deceased to any person as a trustee, or
- (b) an order under section 22 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 section 21 or 22 to order that trustee to provide a sum of money or other property are subject to the following limitation namely, that the amount of any sum of money or the value of any property ordered to be provided—

- (c) 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;
- (d) 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 is not 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 section 21 or 22 to the 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) to a trustee shall be construed in the same way.

Where no financial relief was granted in divorce proceedings

23B (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 27 of the Matrimonial Causes Act 1974 [*title 27 item 3*] or a property adjustment

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order under section 28 of that Act has not been made by the other party to that marriage, or

- (b) an application mentioned in paragraph (a) 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 14 is made by that other party, the Court shall, notwithstanding anything in section 13 or section 15, 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 does 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.

Restriction on application under this Part may be imposed in divorce proceedings

23C (1) On the grant of a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter, the Court, if it considers it just to do so, may, on the application of either party to the marriage, order that the other party to the marriage shall not on the death of the applicant be entitled to apply for an order under section 14.

(2) In the case of a decree of divorce or nullity of marriage an order may be made under subsection (1) before or after the decree is made absolute, but if it is made before the decree is made absolute it shall not take effect unless the decree is made absolute.

(3) Where an order made under subsection (1) on the grant of a decree of divorce or nullity of marriage has come into force with respect to a party to a marriage, then, on the death of the other party to that marriage, the Court shall not entertain any application for an order under section 14 made by the first-mentioned party.

(4) Where an order made under subsection (1) on the grant of a decree of judicial separation has come into force with respect to any party to a marriage, then, if the other party to that marriage dies while the decree is in force and the separation is continuing, the Court shall not entertain any application for an order under section 14 made by the first-mentioned party.

Variation and discharge of secured periodical payments orders

23D (1) Where an application for an order under section 14 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 1974 [*title 27 item 3*], then, in the proceedings on that application, the Court has power, if an application is made under this section by that person or by the estate 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 35 of that Act.

(2) In exercising the powers conferred by this section the Court shall have regard to all the circumstances of the case, including any order which the Court proposes to make

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under section 14 or section 17 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.

(3) The power 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.

### Variation and revocation of maintenance agreements

23E (1) Where an application for an order under section 14 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 maintenance agreement which provided for the continuation of payments under the agreement after the death of the deceased, 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 estate representative of the deceased, to vary or revoke that agreement.

(2) In exercising the powers conferred by this section the Court shall have regard to all the circumstances of the case, including any order which the Court proposes to make under section 14 or section 17 and any change (whether resulting from the death of the deceased or otherwise) in any of the circumstances in the light of which the agreement was made.

(3) If a maintenance agreement is varied by the Court under this section the like consequences shall ensue as if the variation had been made immediately before the death of the deceased by agreement between the parties and for valuable consideration.

(4) In this section “maintenance agreement”, in relation to a deceased person, means any agreement made, whether in writing or not and whether before or after 8 January 1988, by the deceased with any person with whom he entered into a marriage, being an agreement which contained provisions governing the rights and liabilities towards one another when living separately of the parties to that marriage (whether or not the marriage has been dissolved or annulled) in respect of the making or securing of payments or the disposition or use of any property, including such rights and liabilities with respect to the maintenance or education of any child, whether or not a child of the deceased or a person who was treated by the deceased as a child of the family in relation to that marriage.

### Availability of Court’s powers under this Part

23F (1) Where—

- (a) a person against whom a secured periodical payments order was made under the Matrimonial Causes Act 1974 [*title 27 item 3*] has died and an application is made under section 35(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
- (b) a party to a maintenance agreement within the meaning of section 38 of the Matrimonial Causes Act 1974 [*title 27 item 3*] 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

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section 40(1) of that Act for the alteration of the agreement under section 39 thereof,

the Court shall have power to direct that the application made under section 35(6) or 40(1) of that Act, shall be deemed to have been accompanied by an application for an order under section 14 of this Act.

(2) Where the Court gives a direction under subsection (1) it shall have power, in the proceedings on the application under section 35(6) or 40(1) of the Matrimonial Causes Act 1974 [*title 27 item 3*], to make any order which the Court would have had power to make under this Act if the application under section 35(6) or 40(1) of the Matrimonial Causes Act 1974 [*title 27 item 3*], as the case may be, had been made jointly with an application for an order under section 14 of this Act; 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 Part in the case of an application for an order under section 14 of this Act.

(3) Where an order made under section 23C(1) is in force with respect to a party to a marriage, the Court shall not give a direction under subsection (1) with respect to any application made under section 35(6) or 40(1) of the Matrimonial Causes Act 1974 [*title 27 item 3*] by that party on the death of the other party.

### Effect, duration and form of orders

23G (1) Where an order is made under section 14 then for all purposes the will or the law relating to intestacy, or both the will and the law relating to intestacy, as the case may be, shall have effect and be deemed to have had effect as from the deceased's death subject to the provisions of the order.

(2) Any order made under section 14 or 17 in favour of—

- (a) an applicant who was the former spouse of the deceased; or
- (b) an applicant who was the husband or wife of the deceased in a case 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,

shall, in so far as it provides for the making of periodical payments, cease to have effect on the remarriage of the applicant, except in relation to any arrears due under the order on the date of the remarriage.

(3) Two copies of every order made under this Part other than an order made under section 23C(1), shall be sent to the Registrar for entry and filing, (one copy in probate and administration and the other copy in the book of wills), and a memorandum of the order shall be endorsed on, or permanently annexed to the probate or letters of administration under which the estate is being administered.

### Estate representative

23H (1) Section 53 of the Administration of Estates Act 1974 [*title 26 item 12*] applies to this Part; however, this Part shall not render the estate representative of a deceased

person liable for having distributed any part of the estate of the deceased, 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, on the ground that he ought to have taken into account the possibility—

- (a) that the Court might permit the making of an application for an order under section 14 after the end of that period, or
- (b) that, where an order has been made under section 14, the Court might exercise in relation thereto the powers conferred on it by section 18,

but this subsection shall not prejudice any power to recover, by reason of the making of an order under this Part, any part of the estate so distributed.

(2) When the estate representative of a deceased person pays any sum directed by an order under section 17 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.

(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 estate 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 Part, 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 14, until the determination of the proceedings on that application.

#### Admissibility as evidence of statements made by deceased

23J In any proceedings under this Part a statement made by the deceased, whether orally or in a document or otherwise, is admissible under section 27B of the Evidence Act 1905 [*title 8 item 10*] as evidence of any fact stated therein in like manner as if the statement were a statement falling within section 27B(1) of that Act; and any reference in that Act to a statement admissible, or given or proposed to be given, in evidence under section 27B thereof or to the admissibility or the giving in evidence of a statement by virtue of that section or to any statement falling within section 27B(1) of that Act shall be construed accordingly.

#### Determination of date when representation was first taken out

23K In considering for the purposes of this Part when representation with respect to the estate of a deceased person was first taken out, a grant limited 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 been made or is made at the same time.

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Effect of this Part on section 5(1), case 8

23L Section 5(1), Case 8, in so far as it provides for the devolution of property on the Government as bona vacantia shall have effect subject to this Part.

### PART IV

#### MISCELLANEOUS AND GENERAL

##### Rules

24 (1) The power of the Chief Justice to make rules under section 62 of the Supreme Court Act 1905 [*title 8 item 1*] shall extend to the making of rules regulating the procedure and practice to be followed in applications to the Court under this Act.

(2) Section 6 of the Statutory Instruments Act 1977 [*title 1 item 3*] shall not apply to rules made by the Chief Justice under this Act.

##### Savings

25 Save as otherwise expressly provided, this Act shall not derogate from the Matrimonial Proceedings (Magistrates' Courts) Act 1974, the Matrimonial Causes Act 1974 or the Adoption of Children Act 2006.

*[Section 25 amended by 2002:36 Sch para 28(c) effective 19 January 2004; amended by 2011 : 17 s. 11(f) effective 4 November 2013]*

##### Application of Act

26 Save as otherwise expressly provided, this Act does not apply in any case where the death occurred before 1 September 1974.

##### Repeals

27 *[omitted]*

##### Commencement

28 *[omitted]*

FIRST SCHEDULE

RIGHTS OF SURVIVING SPOUSE AS RESPECTS THE MATRIMONIAL HOME

1 (1) Subject to this Schedule, where the residuary estate of the intestate comprises an interest in a dwellinghouse in which the surviving husband or wife was resident at the time of the intestate's death, the surviving husband or wife may require the estate representative, in exercise of the power conferred by section 48 of the Administration of Estates Act 1974 [*title 26 item 12*] (and with due regard to the requirements of that section as to valuation) to appropriate the said interest in the dwelling-house in or towards satisfaction of any absolute interest of the surviving husband or wife in the real and personal estate of the intestate.

(2) The right conferred by this paragraph shall not be exercisable where the interest is—

- (a) a tenancy which at the date of the death of the intestate was a tenancy which would determine within the period of two years from that date; or
- (b) a tenancy which the landlord by notice given after that date could determine within the remainder of that period.

(3) Nothing in section 48(5) of the Administration of Estates Act 1974 [*title 26 item 12*] (which requires the estate representative, in making an appropriation to any person under that section, to have regard to the rights of others) shall prevent the estate representative from giving effect to the rights conferred by this paragraph.

(4) Where part of a building was, at the date of the death of the intestate, occupied as a separate dwelling, that dwelling shall for the purposes of this Schedule be treated as a dwellinghouse.

2 Where—

- (a) the dwelling-house forms part of a building and an interest in the whole of the building is comprised in the residuary estate; or
- (b) the dwelling-house is held with agricultural land and an interest in the agricultural land is comprised in the residuary estate; or
- (c) the whole or a part of the dwelling-house was at the time of the intestate's death used as a hotel or lodging house; or
- (d) a part of the dwelling-house was at the time of the intestate's death used for purposes other than domestic purposes,

the right conferred by paragraph 1 shall not be exercisable unless the Court, on being satisfied that the exercise of that right is not likely to diminish the value of assets in the residuary estate (other than the said interest in the dwelling-house) or make them more difficult to dispose of, so orders.

- 3 (1) The right conferred by paragraph 1—
- (a) shall not be exercisable after the expiration of twelve months from the first taking out of representation with respect to the intestate's estate;
  - (b) shall not be exercisable after the death of the surviving husband or wife;
  - (c) shall be exercisable, except where the surviving husband or wife is the sole estate representative, by notifying the estate representative (or, where there are two or more estate representatives of whom one is the surviving husband or wife, all of them except the surviving husband or wife) in writing.

(2) A notification in writing under sub-paragraph (1)(c) shall not be revocable except with the consent of the estate representative; but the surviving husband or wife may require the estate representative to have the said interest in the dwelling-house valued in accordance with section 48 of the Administration of Estates Act 1974 [*title 26 item 12*], and to inform him or her of the result of that valuation before he or she decides whether to exercise the right.

4 (1) During the period of twelve months mentioned in paragraph 3 the estate representative shall not without the written consent of the surviving husband or wife sell or otherwise dispose of the said interest in the dwelling-house except in the course of administration owing to want of other assets.

(2) An application to the Court under paragraph 2 may be made by the estate representative as well as by the surviving husband or wife, and if, on an application under that paragraph, the Court does not order that the right conferred by paragraph 1 shall be exercisable by the surviving husband or wife, the Court may authorise the estate representative to dispose of the said interest in the dwelling-house within the said period of twelve months.

(3) This paragraph shall not apply where the surviving husband or wife is the sole estate representative or one of two or more estate representatives.

(4) Nothing in this paragraph shall confer any right on the surviving husband or wife as against a purchaser from the estate representative.

5 (1) Where the surviving husband or wife is one of two or more estate representatives, the rule that a trustee may not be a purchaser of trust property shall not prevent the surviving husband or wife from purchasing out of the estate of the intestate an interest in a dwelling-house in which the surviving husband or wife was resident at the time of the intestate's death.

(2) The power of appropriation under section 48 of the Administration of Estates Act 1974 [*title 26 item 12*] shall include power to appropriate an interest in a dwelling-house in which the surviving husband or wife was resident at the time of the intestate's death partly in satisfaction of an interest of the surviving husband or wife in the real and personal estate of the intestate and partly in return for a payment of money by the surviving husband or wife to the estate representative.

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6 (1) Where the surviving husband or wife is incapable, by reason of mental disorder within the meaning of the Mental Health Act 1968 [*title 11 item 36*], of managing or administering his or her property or affairs, a requirement or consent under this Schedule may be made or given on his or her behalf by his or her parents or parent, testamentary or other guardian or receiver, if any, or where there are no parents or parent, testamentary or other guardian or receiver, by the Court.

(2) A requirement or consent made or given under this Schedule by a surviving husband or wife who is an infant shall be as valid and binding as it would be if he or she were of age; and, as respects an appropriation in pursuance of paragraph 1, section 48 of the Administration of Estates Act 1974 [*title 26 item 12*], as to obtaining the consent of the infant's parent or guardian or of the Court on behalf of the infant, shall not apply.

7 (1) Except where the context otherwise requires, references in this Schedule to a dwelling-house include references to any garden or portion of ground attached to and usually occupied with the dwelling-house or otherwise required for the amenity or convenience of the dwelling-house.

(2) The right conferred by paragraph 1 shall not be exercisable if the exercise of the right necessitates the sub-division of any land and—

- (a) the sub-division of such land is prohibited under any statutory provision;  
or
- (b) the sub-division of such land requires the consent of any person or authority by virtue of any statutory provision and such consent is withheld.

8 This Schedule shall be construed as one with Part II of this Act.

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### SECOND SCHEDULE

*[omitted]*

[Assent Date: 11 March 1974]

[This Act was brought into operation on 1 September 1974]

[Note - for the certain transitional provisions relating to the operation of Part III of this Act in relation to persons who died after 31 August 1974 and before 8 January 1988 see 1987:51 section 5]

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*[Amended by:*

1977 : 4

1977 : 35

1987 : 51

1991 : 21

2001 : 20

2002 : 36

2011 : 17]