

Changes To Succession Law In South Australia: The Succession Act.

South Australian Succession Laws will shortly undergo significant reform when the Succession Act 2023 (“the Act”) comes into force on 1 January 2025. The Act, will repeal the Administration and Probate Act 1919 (SA), the Wills Act 1936 (SA) and the Inheritance (Family Provision) Act 1972 (SA) amongst amendments to various other acts. This article takes a look at some of the changes that will shape this area of law.

Who can inspect a Will of a

deceased person:

Section 48 of the Act provides a specific provision for the circumstances in which a person is entitled to a copy of a deceased person's Will. This includes:
(a) a person named or referred to in the Will (whether as a beneficiary or not);
(b) a person named or referred to in an earlier Will as a beneficiary of the deceased person;
(c) the surviving spouse, domestic partner or child or stepchild of the deceased person;
(d) a former spouse or domestic partner of the deceased;
(e) a parent or guardian of the deceased person;
(f) a person who would be entitled to a share of the estate of the deceased person if they died intestate;
(g) a parent or guardian referred to in the Will or who would be entitled to a share of the estate if the testator had died intestate;
(h) a person committed with the management of the deceased person's estate under the Guardianship and Administration Act 1993 (SA) immediately before the death of the deceased person.

Under this section, there is a new obligation on any person or organisation in control of a Will to allow people in the above categories to either inspect a Will, or to be given copies of a Will. There is also the right for a person or organisation to seek order from the Court to require that person or organisation to allow the inspection or copying of the Will. Laura Corbett expands on this in her article **'Do I have a right to inspect a copy of a Will?'**.

Administration Of Estates:

There are a number of notable changes relating to the administration of estates:

- On intestacy, the 'preferential legacy' for a spouse or domestic partner has increased from $100,000 to $120,000.
- A party holding money or personal property of the deceased up to the value of $15,000 is now permitted to pay or transfer the property to the deceased's spouse, domestic partner or child or children without the need to obtain a Grant of Probate or Letters of Administration in the estate. This is set out in Section 100 of the Act.
- There is now a statutory provision for presumption of survivorship and order of death where the order of death is uncertain, under Sections 126 and 127 of the Act. If two people die where the order of death is uncertain and those two people own property as Joint Tenants, then the property will be dealt with as if those two people owned the property as tenants in common and would flow to the Will of each person or by way of intestacy, should that person not have a Will in place.
- Section 57 of the Act now removes the requirement to re-seal an interstate Grant of Probate and allows the Probate Registry to deal with it as a registration of the Grant. An overseas Grant of Probate will be dealt with as a re-seal. Should you be in a position where you have an interstate Grant of Probate that needs registration, or an international Grant of Probate

that needs to be re-sealed in South Australia, speak to a Solicitor for more information about the process to do so.

- The Court can now approve an agreement in an intestate estate, for the distribution or re-distribution that is contrary to the provisions of 'Division 3 – Rules Governing Distribution of Intestate Estates'. Ordinarily, if a person dies intestate, that is, without a Will, then Division 3 applies, and the estate is distributed according to those provisions. What Section 111 introduces, is a concept that allows family members and those who are not blood relatives of the deceased, for example stepchildren, to enter into an agreement as to how the estate will be distributed. The application is to be made by the administrator of the intestate estate and everyone who is entitled to a share in the distribution must be parties to the agreement and have notice of the application to the Court. If the court is satisfied that the agreement is just, then it can approve the distribution to take place pursuant to the agreement between all parties.

Changes to Inheritance Claims:

Part 6 of the Act addresses family provision claims and in particular, sets out the categories of persons eligible to make a further claim for provision. The biggest change to this area is the eligibility of stepchildren. Previously, stepchildren were only eligible to make a claim if they were maintained wholly or partly by the deceased. Now, if the stepchild can claim the following, then they are entitled to claim:
(a) the stepchild is disabled and significantly vulnerable as a result;
(b) the stepchild was dependent on the deceased at time of death;
(c) the stepchild cared for or contributed to the maintenance of the deceased immediately before death;
(d) the stepchild substantially contributed to the estate of the deceased;
(e) assets accumulated by a parent of the stepchild substantially contributed to the estate of the deceased.

Section (e) above is the greatest change to the law in this area and will likely see a rise in claims of those whose stepparent received a greater benefit from the parent of the claimant, and did not provide for the stepchild in their Will. To what extent a parent must have 'substantially contributed' to an estate is yet to be determined and subject to clarification by the Courts in the coming years.

The eligibility of grandchildren to claim has been reduced under the Act, with grandchildren now only being eligible to claim if their parent died before the deceased person or if they were legally entitled to be maintained by the deceased person immediately prior to their death.

Claims from parents and siblings were already rare, however, the eligibility of said claimants has now been reduced even further under the new Act. Namely, they must prove they cared for or contributed to the maintenance of the deceased right before their death.

Wishes of the deceased person are now the ‘primary consideration’.

Section 116(2) of the Act now requires the Court to take into account and place the wishes of the deceased as the primary consideration when determining if they will make an order for provision. This appears to be a significant change to existing laws and will be instructive to see how the Court interprets this provision in the coming years.

From a Will drafting perspective, it would see an increase in will drafters advising clients to leave a statement as to the reasons for disinheriting or providing a minimal inheritance for a particular beneficiary. This would be relevant as evidence of the deceased person’s reasons for making the relevant distribution in the terms of the Will. It would also seem that the changes would also increase the number of requests for Will files from law firms in claims for provision, as evidence of the intention of the testator.

Remedy where an executor breaches their duties:

There is a significant codification of remedies for an aggrieved beneficiary to issue proceedings against an executor under the Act. If the aggrieved beneficiary believes that an executor has failed to perform the duties as an executor, then they can seek an order of the Court for the following:

- Requiring the executor or administrator of an estate to pay into the estate an amount that is equal to the financial benefit they obtained as a result of their failure;
- Requiring that the person is compensated by the executor or administrator for the loss or damage they suffered at the result of the executor or administrators failure;
- Any other appropriate order the Court sees fit.

The important part of this new provision is that the application must be made within 3 years from the time that the aggrieved person became aware of the failure of the executor or administrator. This is important, as the executor may have long finished the administration of the estate before receiving notice that an application under this section is on foot. Further, the executor may no longer hold any estate assets at the time an application is made and consequentially, defend the claim without that recourse. Briefly, section 81 sets out the duties of an executor, which are very general but will provide some context as to what may constitute a breach. Further, there is now section 97 of the Act whereby the Court can order an executor to give an undertaking. This may be helpful in cases where there is worry that an executor will fail to complete or comply with their duties. Should the executor not comply with the undertaking, then proceedings can be issued under section 98 as described above.

Security for Costs:

Under Section 117 of the Act, the Court can order a party in a family provision proceeding to provide security for costs if the Court deems that the claim is without merit, or, if the party has been unwilling to negotiate a settlement.

How Andersons can help?

Andersons has a team of specialist **Wills**, **Probate & Estate Administration** and **Estate Litigation** Lawyers working across our 6 metropolitan and regional offices, who can assist you in understanding your rights under the new Succession Act. For assistance with your enquiry, please contact us on 8238 6666 or email enquiry@andersons.com.au