

Caribbean Community (CARICOM) Secretariat

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CARICOM MODEL LEGISLATION ON INHERITANCE (FAMILY PROVISIONS)

As the **Long Title** suggests, the main objectives of the legislation are to make reasonable financial provision for the family and dependents of a deceased person out of the estate of that person where the disposition of the deceased's estate under

(a) the terms of the deceased's will or the law relating to intestacy; or

(b) the combination of the will and that law,

is not such as to make reasonable financial provision for the maintenance of the deceased's family and dependents.

Clause 1 - Short Title

The short title suggested is the Inheritance (Family Provisions) Act.

Clause 2 - contains definitions of words and phrases -

"*beneficiary*" is defined in terms wide enough to include parents as well as husband or wife and children.

"*child*" is defined to include a child born in or out of wedlock, an adopted child, a child *en ventre sa mere* at the date of the deceased's death and a child of one part to a marriage where that child has been accepted as one of the deceased's family.

"*former wife*" or "*former husband*" is defined to refer to a former wife or husband who has not remarried.

The definition of "*net estate*" embraces real and personal property less funeral, testamentary and administration expenses and transfer tax.

The definition of "*parent*" includes persons in *loco parentis*.

"*property*" is defined as moveable and immovable and includes property located out of the country or domicile of the deceased.

"*valuable consideration*" is defined to exclude marriage or a promise of marriage.

The definition of "*wife*" or "*husband*" includes the case of a person, who, in good faith, entered a void marriage with the deceased, but excludes the cases where that marriage was annulled during the deceased's lifetime.

Subsection (2) prescribes the circumstances in which a person over the age of 18 will come within the definition of child for the purposes of the Act.

Clause 4 sets out the grounds on which an application may be made for a court order for financial provision out of a deceased's estate. The Clause also specifies the persons who are entitled to make such an application.

Provision is also made whereby the Administrator of the deceased's estate may apply on behalf of a minor or a person who is mentally incapacitated, or may seek the court's advice or directions as to whether the person ought to apply. The time limit for making applications is also specified.

Clause 5 specifies the time limit for making applications which in normal circumstances, is within 6 months from the date on which representation is first taken out with respect to the deceased's estate.

Clause 6 sets out the power of the court to make orders on applications for financial provision. The types of orders which may be made are specified in paragraphs (a) to (f) of subsection (1). Provisions are also included as regards the substances of orders.

Clause 7 sets out matters which the court is to have regard in exercising its powers as regards the grant of orders under **Clause 6**.

Clause 8 provides for the making of interim orders by the court in cases requiring urgent action.

Clause 9 provides for the incidence of payments order by the court to fall rateably on the deceased's entire estate or so much thereof as is subject to the court's authority.

Subsection (2) empowers the court to exclude any part of the estate from the incidence of any other.

Clause 10 empowers the court, on application, to vary or discharge orders for periodical payments and specifies the persons who may apply for variation or discharge of the order. Supplemental provisions are also included regarding the power to vary or discharge an order.

Clause 11 empowers the court, on application, to vary orders for payments of lump sums.

Clause 12 provides for the termination of orders on the remarriage of the former wife or husband of the deceased.

Clause 13 confers certain powers on the court in cases where dispositions of of the deceased's estate were made with the intention of defeating an application for financial provision under the Act.

Clause 14 contains provisions supplementary to **Clause 13**.

Clause 15 deals with the situation in which an order under **Clause 13** is made in respect of dispositions made by the deceased to a person as a trustee. The powers of the court to order the trustee to provide money or other property is limited in the manner specified. Provision is also made for the protection of the trustee in relation to any distribution by the trustee.

Clause 16 contains provisions exempting personal representatives from liability for having distributed any part of the deceased's estate in the time prescribed in subsection (1). The protection of the personal representative is provided without prejudice to a power to recover by way of an order under the Act, any part of the estate distributed by the personal representative. The personal representative is also empowered to postpone action on a contract entered into by the deceased where there is reason to believe that the deceased entered into the contract with the intention of defeating an application for financial provision.

Clause 17 prescribes the method of determining when representation was first taken out with respect to the deceased's estate.

Clause 18 provides for the effective date of an order in relation to the distribution of property under a will or the law relating to intestacy.

Clause 19 provides for the registration of orders.

THE INHERITANCE [(FAMILY PROVISIONS)] ACT

ARRANGEMENT OF SECTIONS

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MODEL LEGISLATION ON INHERITANCE

AN ACT to make reasonable financial provision for the spouse, children and other dependants of a deceased person out of the deceased's estate where the disposition of that estate effected by the deceased's will or the law relating to intestacy or the combination of that will and that law, is not such as to make reasonable financial provision for the maintenance of the deceased's spouse and children and other dependants, and for connected matters.

ENACTING CLAUSE

PART I - PRELIMINARY

Short title

1. This Act may be cited as the Inheritance [(Family Provisions)] Act.

Interpretation

2. (1) In this Act -

"*beneficiary*" in relation to the estate of a deceased person means a person who, under the deceased person's will or under the law relating to intestacy, is beneficially interested in the estate or would be so interested if an order had not been made under this Act;

"*child*" means subject to subsection (2), a child whether born in or out of wedlock under the age of eighteen years and includes -

- (a) a child adopted in a manner recognised by law;
- (b) a child *en ventre sa mere* at the date of death of the deceased;
- (c) a child of the deceased's husband or wife, as the case may be, who had been accepted as one of the family by the deceased;

"*court*" means the court for the time being having jurisdiction over the probate of the will or the administration of the estate or both, of the deceased;

"*former wife*" or "*former husband*", as the case may be, means a person whose marriage with the deceased was during the deceased's lifetime dissolved or annulled by a decree of divorce or of nullity of marriage and who has not remarried;

"*net estate*" in relation to a deceased person, means -

- (a) property which the deceased had power to dispose of by will (in this paragraph referred to as "disposable property" (otherwise than by virtue of a special power of appointment) less the amount of the deceased's funeral, testamentary and administration expenses, debts and liabilities, including any tax payable out of the deceased's estate on the deceased's death; and for the purposes of this paragraph a person who is not of full age and capacity shall be treated as having power to dispose of by will, any disposable property);
- (b) other property including any sum of money which is treated for the purposes of this Act as part of the net estate of the deceased;
- (c) other property including any sum of money which is, by reason of a disposition made by the deceased, ordered under section 13 to be provided for the purpose of the making of financial provision under this Act;

"*parent*" includes a person who was in *loco parentis* to the deceased immediately before the deceased's death;

"*property*" means all property (whether movable or immovable) -

- (a) in [country] or elsewhere, where the deceased was domiciled in [country]; or
- (b) in [country] where the deceased was not domiciled in [country];

"*wife*" or "*husband*", as the case may be, means the wife or husband of the deceased and includes a person who in good faith entered into a void marriage with the deceased, unless either -

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

(2) For the purposes of the definition of "*child*" in subsection (1), a person over the age of eighteen years may be regarded as a child -

(a) if that person is under the age of twenty-three years and pursuing academic studies or receiving trade or professional training; or

(b) if there are special circumstances (including physical and mental disability) which justify the disregard of the age limit.

Application of Act

3. This Act shall only apply to cases here a deceased person dies after the date of commencement of this Act.

PART II - APPLICATION FOR FINANCIAL PROVISION

Application for financial provision from deceased's estate

4. (1) An application for an order under section 6 for financial provision out of the estate of any deceased person may be made by or on behalf of all or any of the persons deceased's estate referred to in subsection (2) on the grounds that the terms of the deceased's will or the law relating to intestacy, or the combination of the will and that law are not such as to make reasonable financial provision for the maintenance of the applicant.

(2) The persons referred to in subsection (1) are -

(a) the wife or husband of the deceased;

(b) a child;

(c) a parent of the deceased who was being maintained wholly or partly or was legally entitled to be maintained wholly or partly by the deceased immediately before the deceased's death;

(d) a former wife or former husband of the deceased, who -

(i) was being maintained wholly or partly; or

(ii) was entitled under an existing order of a court of competent jurisdiction or under an agreement between the parties to be maintained wholly or partly, by the deceased immediately before the deceased's death;

(e) a person who lived with the deceased as the deceased's husband or wife, as the case may be, for a period of not less than five years.

(3) An administrator of the deceased's estate may apply on behalf of any person who is not of full age or mental capacity in any case where such person might apply, or may apply to the court for advice or directions as to whether such person ought so to apply, and in the latter case, the court may hear the application as an application on behalf of the person for the purpose of avoiding the effect of limitation.

Time limit for application

5. An application for an order under section 6 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 is first taken out with respect to the deceased's estate.

PART III - ORDERS

Power of court to make orders

6. (1) Subject to the provisions of this Act, where an application is made under this section and the court is satisfied that the terms of the deceased's will or the law relating to intestacy, or the combination of the will and that law, are not such, at the time the application is heard, as to make reasonable financial provision for the maintenance of the applicant, the court may, in relation to the deceased's net estate, make any one or more of the following orders -

(a) an order for the payment to the applicant of periodical sums specified in the order and for the term so specified;

(b) an order for the payment to the applicant of a lump sum of an amount specified in the order;

(c) an order for the transfer to the applicant of property so specified;

(d) an order for the setting up of a trust fund for the benefit of two or more applicants;

(e) an order for the settlement for the benefit of the applicant, of property specified in the order;

(f) an order for the acquisition out of the net estate, of property specified in the order and for the transfer of the property so acquired to the applicant or for the settlement thereof for the benefit of the applicant.

(2) An order made under subsection (1)(a) for the payment of periodical sums may -

- (a) specify the amount to be so paid;
- (b) provide for payments equal to the whole of the income of the net estate or of such portion thereof as may be specified in the order;
- (c) provide for 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 of payments under this section, or may provide for the amount of the payment or any of them to be determined in any other way the court thinks fit.

(3) Where an order under subsection (1)(a) specifies the amount of the payments to be made, 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 of those payments out of the income thereof; but the part of the net estate to be so set aside or appropriated shall be no larger than that which is sufficient, at the date of the order to produce by income thereof, the amount required for the making of those payments.

(4) An order under subsection (1)(b) may provide for the payment of the sum specified therein by instalments of such amounts as the order may specify.

(5) An order under this section may contain such consequential or 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 deceased's estate and another.

(6) The court may attach such conditions as it thinks fit to an order made under this section.

(7) Where an application for an order under this section has been made by or on behalf of any person, it may be treated by the court as an application on behalf of all persons who are entitled to apply.

Matters to which court is to have a regard in exercising powers under section 6

7. (1) For the purpose of determining, in relation to an application for an order under section 6 -

- (a) whether the terms of the deceased's will or the law, is such as to make reasonable financial provision for the maintenance of the applicant; and
- (b) whether and in what manner it shall exercise its powers under that section,

the court shall have regard to the matters specified in subsection (2).

(2) The matters to which the court shall have regard are -

- (a) the size and nature of the deceased's net estate;
- (b) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;
- (c) the financial resources and financial needs which any other applicant has or is likely to have in the foreseeable future;
- (d) any obligations and responsibilities which the deceased had towards any applicant or towards any beneficiary;
- (e) any physical or mental disability of an applicant or a beneficiary;
- (f) the financial resources and financial needs which any beneficiary has or is likely to have in the foreseeable future;
- (g) the deceased's reasons, so far as they are ascertainable, for making or for not making provision, or for not making adequate provision, as the case may be, by will, for any person;
- (h) the conduct of the applicant towards the deceased;
- (i) the relationship of the applicant to the deceased and the nature of any provision which was made by the deceased's lifetime;
- (j) any other matter which, in the circumstances of the case, the court considers relevant.

(3) Without prejudice to the generality of paragraph (j) of subsection (2), where an application for an order under section 6 is made by or on behalf of a child of the deceased, the court shall, in addition to the matters specified in paragraphs (a) to (i) of that subsection, have regard to the manner in which the child was, or is expected to be, educated or trained and where the application is made on behalf of a child referred to in paragraph (c) of the definition of "child" contained in section 2(1), the court shall also have regard to -

- (a) the extent (if any) to which the deceased had, on or after acceptance of the child as one of the family, assumed responsibility for the child's maintenance; and

(b) the liability of any other person to maintain the child.

Interim orders

8. (1) Where in relation to an application for an order under section 6 it appears to the court that

(a) 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) property forming part of the deceased's net estate is or can be made available to meet the needs of the applicant, the court may make an order in accordance with subsection (2).

(2) For the purpose of subsection (1), the court may order that

(a) subject to such conditions or restrictions, if any, as the court may impose and to any further order of the court, there should be paid to the applicant out of the deceased's net estate, such sum or sums and, if more than one, at such intervals as the court thinks reasonable; and

(b) subject to the provisions of this Act, such payments are to be made until a date specified by the court, not being later than the date on which the court either makes an order under section 6 or decides not to exercise its powers under that section.

(3) Subsections (2), (3), (4), (5), (6) and (7) of section 6 shall apply in relation to an order under this section as they apply to an order under section 6.

(4) 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 7.

(5) An order made under section 6 may provide that any sum paid to the applicant by virtue of this section shall be treated, to such extent and in such manner as may be provided in that order, as having been paid on account of any payment provided for by that order.

Incidence of payments ordered

9. (1) The incidence of payment or payments ordered under this Act shall, unless the court otherwise determines, fall rateably upon the whole estate of the deceased, or, in cases where the authority of the court does not extend or cannot directly or indirectly be made to extend to the whole estate, then to so much thereof as is subject to the authority of the court.

(2) The court shall have power to exclude any part of the deceased's estate from the incidence of any such order, after hearing such of the parties who may be affected by the exclusion as it thinks necessary, and may for that purpose direct any administrator to represent or appoint any person to represent, any such party.

Variation of orders for periodical payments

10. (1) Subject to the provisions of this Act, where the court has made an order under section 6(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 made under this section shall have the power by order to vary or discharge the provisional order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended.

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

(a) any person who, by virtue of section 4 has applied, or would but for section 5 be entitled to apply, for an order under section 6;

(b) the personal representatives of the deceased;

(c) the trustees of any relevant property;

(d) any beneficiary of the deceased's estate.

(3) Where the original order provides that any periodical payments payable thereunder to the original recipient are to cease on the occurrence of an event specified in the order (other than the remarriage of a former wife or former husband) or on the expiration of a period so specified, then, if an application is made for an order under this section before the end of a period of six months from the date of the occurrence of that event or of the expiration of that period, the court shall have power to make any order which it would have had power to make if the application had been made before that date (whether in favour of the original recipient or any person referred to 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 made under this section.

(5) An order made under this section may only affect -

(a) property the income of which is at the date of the order applicable wholly or partly for the making of periodical payments to any person who has applied for an order under this Act; 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 that event occurred or that period expired, as the case may be, and any such property as aforesaid is referred to in subsection (2) as relevant property.

(6) 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.

(7) The court may, in making an order under this section, give such consequential directions as it thinks necessary or expedient having regard to the provisions of that order.

(8) The power to vary an order includes a power to provide for the making of periodical payments after the expiration of the period specified in subsection (3) or the occurrence of the event so specified.

Variation of orders for payment of lump sums

11. Where an order is made under this Act for the payment of a lump sum, the court shall have power, on an application made by the person to whom the lump sum is payable, the personal representatives of the deceased or 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.

Termination of orders on remarriage of former wife or husband

12. An order under this Act for the making of periodical payments to a former wife or former husband of the deceased may if the court so directs, terminate on the remarriage of such former wife or former husband.

PART IV - POWERS OF COURT IN RELATION TO TRANSACTIONS INTENDED TO DEFEAT APPLICATION FOR FINANCIAL PROVISION

Dispositions intended to defeat application for financial provisions

13. (1) Where the court is satisfied, on application by a person who has applied for an order under section 6, that

(a) less than one year before the date of the deceased's death, the deceased made an application for financial provision under this Act;

(b) that disposition was not made for valuable consideration to a person or, as the case may be, to a person who was not a *bona fide* purchaser for value without notice (hereinafter referred to as the donee) who at the time of the disposition did not act in relation to it in good faith and had notice of the deceased's intention of defeating a claim for financial provision under this Act, the court may act in accordance with subsection (2).

(2) The court may order the donee (whether or not at the date of the order the donee holds any interest in the property disposed of by the deceased to or for the benefit of the donee) to provide, for the purpose of the making of the financial provision applied for under this Act, 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, 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 or the value at the date of the deceased's death, of the property disposed of by the deceased to or for the benefit of the donee, after deducting therefrom any tax borne by the donee in respect of that payment or the transfer of that property.

(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 any disposition was made and any valuable consideration which was given therefor, the relationship with the deceased, if any, of the donee the conduct and financial resources of the donee and all other circumstances of the case.

(5) In this section "disposition" does not include

(a) any provision in a will 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 those 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 instrument or otherwise.

(6) The provisions of this section shall not apply to any disposition made before the commencement of this Act.

Provisions supplementary to Section 13

14. (1) Where the exercise of any of the powers conferred upon the court by section 13 is conditional on the court being satisfied that a disposition was made by a deceased person with the intention of defeating an application for financial provision under that Act, that condition shall be fulfilled if the court is of the opinion that, on a balance of probabilities, the deceased's intention (though not necessarily the sole intention) in making the disposition was to prevent an order for financial provision being made under this Act or to reduce the amount of the provision which might otherwise be granted by an order made thereunder.

(2) Where the court makes an order under section 13, 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.

(3) Subject to subsection (4), any power conferred by the court by section 13, to order a donee to provide any sum of money or other property, shall be exercisable, in like manner in relation to the personal representative of donee.

(4) The court shall not have power under section 13 to make an order in respect of any property forming part of the donee's estate which has been distributed by the donee's personal representative; and such personal representative shall not be liable for having distributed any such property before the personal representative had notice of the making of an application under section 13 on the ground that the personal representative ought to have taken into account the possibility that such an application would be made.

Provisions as to trustee in relation to section 13

15. (1) Where an application is made for an order to trustees in under section 13 in respect of a disposition made by the deceased to any person as trustee, the powers the court under that section to order the trustee to provide a sum of money or other property shall be limited

(a) in the case of an order to provide a sum of money, to the aggregate of

(i) so much of that money as is at the date of the order in the hands of the trustee; and

(ii) 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;

(b) in the case of an order to provide other property, to 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.

(2) Where any such application is made in respect of a disposition made to any person as a trustee

(a) the trustee shall not be liable for having distributed any money or other property on the ground that the trustee ought to have taken into account the possibility that such an application would be made;

(b) any reference in section 13 to the donee or the person to whom or for the benefit of whom the disposition is made 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) and paragraph (a) of this subsection to a trustee shall be construed accordingly.

PART V - MISCELLANEOUS AND SUPPLEMENTARY PROVISIONS

Provisions as to personal representative

16. (1) The provisions of this Act shall not render the representatives of a deceased person liable for having distributed any part of the deceased's estate after the end of representative the period of six months from the date on which representation with respect to the deceased's estate is first taken out; on the ground that the personal representative ought to have taken into account the possibility that

(a) the court might permit the making of an application for an order under section 6 after the end of that period; or

(b) where an order has been made under section 6, the court might exercise in relation thereto, the powers conferred on it by section 10, but this subsection shall not prejudice any power to recover, by virtue of the making of an order under this Act, any part of the estate so distributed.

(2) Where a deceased person entered into a contract by which the deceased agreed

(a) to leave by will any sum of money or other property to any person; or

(b) that a sum of money or other property would be paid or transferred to any person out of the deceased's estate, then, if the personal representative of the deceased has reason to believe that the deceased entered into the contract with the intention of defeating an application for financial

provision under this Act, the personal representative may, notwithstanding anything in the contract, postpone 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 deceased's estate is first taken out or, if during that period an application is made for any order under section 6, until the proceedings on that application are determined.

Determination of date on which representation was first taken out

17. In considering for the purposes of this Act when representation with respect to the deceased person's estate is first taken out, there shall be left out of account a grant limited to settled land or trust property and to real estate or personal estate, unless a grant limited to the remainder of the estate has previously been made or is made at the same time.

Effective date of will or law relating to intestacy

18. An order made under section 6 shall, in relation to any distribution of property pursuant to a will or the law relating to intestacy or both, have effect, subject to the provisions of the order, as from the date of the deceased's death.

Registration of orders

19. A copy of every order made under this Act shall be registered and filed by the Clerk or the Registrar, as the case may be, of the court, and a memorandum of the order shall be endorsed and permanently annexed to, the probate or letters of administration under which the estate is being administered.

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