

Bill No. 25 of 1947.

A BILL TO AUTHORIZE PROVISION FOR THE MAINTENANCE OF CERTAIN DEFENDANTS OF TESTATORS

NOTE.

The purpose of this Bill is to replace and extend the provisions of *The Widows' Relief Act*, Chapter 304, R.S.A., 1942. The benefits conferred by that Act are limited to widows. Many cases of hardship arise where wills are made with no provision for children, often children who may be helpless, mentally or physically; also where a wife disinherits her husband. This Bill extends the right to apply to the Court for relief to any dependant of a testator for whom adequate provision for proper maintenance and support has not been made in the will. Dependant is defined as meaning the wife or husband of the testator, a child of the testator who at the time of the testator's death is under the age of nineteen years, and a child over that age who by reason of mental or physical disability is unable to earn a livelihood.

Section 3 of the Bill protects a person and his or her children, who has gone through a form of marriage in the belief that a former spouse of the other party to the marriage is dead, the Court having made a declaration of presumption of death. Such a person or the children would be entitled to apply to the Court for relief under the proposed Act.

Section 4 is the section giving a Supreme Court Judge jurisdiction to hear an application or applications on behalf of any of the dependants of a testator and to order, in his discretion, such provision as he deems adequate out of the estate of the testator for proper maintenance and support for any of the dependants. Subsections (2) and (3) indicate what evidence the Judge may consider in arriving at a decision.

Section 5 requires the Judge to take into account any benefits to which a widow is entitled under *The Dower Act*.

Section 6 provides terms and conditions which may be inserted in an order for maintenance and as to how the payments are to be made and secured.

Section 7 authorizes a judge to subsequently give directions for the purpose of giving effect to the order and to discharge, vary or suspend any order directing periodic payments to be made.

Section 8 authorizes a judge, where a payment is directed to be made by a legatee or devisee, to fix a periodic payment or lump sum in commutation to be made by the legatee or devisee and to relieve such portion of the estate from further liability.

Section 9 provides that unless the Judge otherwise determines, the incidence of a provision for support shall fall rateably upon the whole estate.

Section 10 makes invalid any mortgage, charge or assignment with respect to provision ordered under the Act, which is made before the order making such provision is duly entered.

Section 12 deals with contracts made by the testator *bona fide* and for valuable consideration to devise any property and which property is devised in accordance with the contract. It is provided that that property shall not be liable to an order under the Act except to the extent that its value exceeds the consideration received by the testator.

Section 13 is procedural and provides how an application may be made by persons who are infants or whose estate is in the hands of a committee appointed by the Court or designated by Statute. Subsection (4) provides that no costs of an application other than those of the executor shall be paid out of the estate where the net value as determined for succession duty purposes is less than five thousand dollars.

Section 14 relieves the guardian, the Official Guardian or other person representing an infant from the obligation of making an application on behalf of the infant if satisfied that the infant is receiving proper support, if at the time of the testator's death the spouses were living together and all children under nineteen or those over that age suffering from a mental or physical disability were living with or being supported by the spouses or either of them.

Section 15 limits the time within which an application may be made to six months from a grant of probate or administration of the will but gives a judge authority to hear an application after that date if he thinks it just, limited, however, to property of the estate remaining undistributed. This authority is given by subsection (2) and extends to cases where the testator died prior to the coming into force of the Act.

Section 16 sets out that notices of an application must be served on all persons interested in accordance with the Rules of Court.

Section 17 prohibits the executor from distributing any portion of the estate until the expiration of six months from the grant of probate unless all the dependants agree or a judge authorizes it and makes the executor violating this provision personally liable in certain cases in the event of an order for support being made.

Subsection (1) of section 18 provides that where an application is made the executor shall not proceed with distribution of an estate but shall hold it subject to the provisions of any order that may be made. Subsections (2) and (3) make an executor personally liable for violation of subsection (1) in certain cases and expose him to prosecution and a heavy fine.

Sections 19 and 20 are procedural and section 21 provides for an appeal from any order made under the Act.

W. S. GRAY,
Legislative Counsel.

(This note does not form any part of the Bill but is offered in explanation of its provisions.)

BILL

No. 25 of 1947.

An Act to Authorize Provision for the Maintenance of
Certain Dependants of Testators.

(Assented to _____, 1947).

HIS MAJESTY, by and with the advice and consent of
the Legislative Assembly of the Province of Alberta,
enacts as follows:

1. This Act may be cited as "*The Testators Family Maintenance Act*".

2. In this Act, unless the context otherwise requires,—

- (a) "Application" means an application for maintenance and support under this Act;
- (b) "Child" includes a child lawfully adopted by the testator and also a child of the testator *en ventre sa mere* at the date of the testator's death;
- (c) "Dependant" means the wife or husband of the testator, a child of the testator who at the time of the testator's death is under the age of nineteen years, and a child over that age who by reason of mental or physical disability is unable to earn a livelihood;
- (d) "Executor" includes an administrator with the will annexed;
- (e) "Judge" means a judge of the Supreme Court of Alberta;
- (f) "Official Guardian" means the Official Guardian appointed pursuant to the provisions of *The Official Guardian Act*;
- (g) "Order" includes suspensory order;
- (h) "Testator" means a person who by will or by any other instrument or act so disposes of real or personal property or any interest therein that the same will pass on his death to some other person;
- (i) "Will" includes any will, codicil or other instrument or act by which a testator so disposes of real or personal property or any interest therein that the same will pass on his death to some other person.

3. Where a judge makes a declaration of presumption of death and the spouse of the person presumed to be dead goes through a form of marriage with another person in accordance with the law in force where the marriage ceremony is performed, then notwithstanding that it is later found that

the person presumed to be dead was alive when such marriage ceremony was performed the parties to and the children of such marriage shall have the same rights under this Act as they would have had if the person presumed to be dead had in fact died before such marriage.

4.—(1) Where a testator dies leaving a will and without making therein adequate provision for the proper maintenance and support of his dependants or any of them, a judge on application by or on behalf of the dependants or any of them may in his discretion order that such provision as he deems adequate shall be made out of the estate of the testator for the proper maintenance and support of the dependants or any of them.

(2) The judge upon the hearing of the application may inquire into and consider all matters which he deems should be fairly taken into account in deciding upon the application, and in addition to the evidence adduced by the parties appearing may direct such other evidence to be given as he deems necessary or proper.

(3) The judge may accept such evidence as he deems proper of the testator's reasons, so far as ascertainable, for making the dispositions made by his will or for not making adequate provision for a dependant, including any statement in writing signed by the testator, and in estimating the weight, if any, to be given to the statement, the judge shall have regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement.

(4) The judge may make an order, herein referred to as a suspensory order, suspending in whole or in part the administration of the testator's estate, to the end that application may be made at any subsequent date for an order making specific provision for maintenance and support.

(5) The judge may refuse to make an order in favour of any dependant whose character or conduct is such as in the opinion of the judge to disentitle him to the benefit of an order under this Act.

(6) Notwithstanding the provisions of *The Intestate Succession Act*, where a testator dies intestate as to part of his estate, a judge may make an order affecting that part of his estate in respect of which he died intestate to the same extent as if the will had provided for disposition of that part in the same manner as on an intestacy.

5. The benefits to which a widow is entitled under the provisions of *The Dower Act* shall be taken into account by the judge when determining the provision which ought to be made for the widow out of the estate.

6.—(1) The judge in any order making provision for maintenance and support of a dependant may impose such conditions and restrictions as he deems fit.

(2) The judge may in his discretion order that the provision for maintenance and support be made out of and charged against the whole or any portion of the estate in such proportion and in such manner as to him seems proper, and such provision may be made out of income or corpus or both and may be made in one or more of the following ways,—

- (a) an amount payable annually or otherwise
- (b) a lump sum to be paid or held in trust
- (c) any specified property to be transferred or assigned, either absolutely or in trust or for life, or for a term of years to or for the benefit of the dependant,—
as the judge deems fit.

(3) Where a transfer or assignment of property is ordered, the judge may give all necessary directions for the execution of the transfer or assignment, either by the executor or such other person as the judge may direct, or may grant a vesting order.

7. When an order making provision for the maintenance and support of a dependant has been made a judge at any subsequent time may,—

- (a) give such further or other directions as he may deem necessary for the purpose of giving effect to the order;
- (b) where periodic payments have been ordered, discharge, vary or suspend the order or make such other order as he deems fit in the circumstances.

8. A judge at any time may,—

- (a) fix a periodic payment or lump sum to be paid by a legatee or devisee to represent or in commutation of such proportion of the sum ordered to be paid as falls upon the portion of the estate in which he is interested; and
- (b) relieve such portion of the estate from further liability; and
- (c) direct,—
 - (i) in what manner such periodic payment shall be secured; or
 - (ii) to whom such lump sum shall be paid and in what manner it shall be dealt with for the benefit of the person to whom the commuted payment is payable.

9. The incidence of any provision for maintenance and support ordered shall, unless the judge otherwise determines, fall rateably upon the whole estate of the testator, or in cases where the jurisdiction of the judge does not extend to the whole estate, then to that part to which the jurisdiction of the judge extends, and the judge may relieve any part of the testator's estate from the incidence of the order.

10. Where provision for the maintenance and support of a dependant is made pursuant to this Act, no mortgage, charge or assignment of any kind whatsoever of or with respect to such provision made before the order of the judge making such provision is entered shall be of any force, validity or effect for any purpose whatsoever.

11. Where an order is made under this Act then for all purposes including the purpose of any enactment relating to succession duties, the will shall have effect as from the testator's death as if it had been executed with such variations as may be necessary to give effect to the provisions of the order, and His Majesty shall be bound by the provisions of this section.

12. Where a testator, in his lifetime, *bona fide* and for valuable consideration has entered into a contract to devise and bequeath any property real or personal and has by his will devised and bequeathed such property in accordance with the provisions of the contract, such property shall not be liable to the provisions of an order made under this Act except to the extent that the value of the property in the opinion of the judge exceeds the consideration received by the testator therefor.

13.—(1) The application may be made by originating notice under the Rules of the Supreme Court of Alberta in the matter of the estate of the testator.

(2) An application may be made,—

- (a) on behalf of a dependant, who is a person for whose estate a committee has been appointed by the court or designated by statute, by the committee of his estate;
- (b) on behalf of a dependant who is an infant by a parent, or by a guardian appointed by the court, or by the Official Guardian.

(3) Where a dependant is an infant, or a person of unsound mind, or a person for whose estate the Administrator of Estates of the Mentally Incompetent is committee, notice of any application in respect of an estate in which such dependant is interested shall be served upon the Official Guardian or the Administrator of Estates of the Mentally Incompetent, as the case may be, who shall be entitled to appear and be heard upon the application.

(4) No costs of or incidental to an application, other than the executor's costs, shall be ordered to be paid out of the estate in any case where the value of the net estate, as determined by the Collector of Succession Duties for the Province for succession duty purposes, is less than five thousand dollars.

14. Where it appears that at the time of the testator's death the spouses were living together and all children of

the testator who at the date of the testator's death were under the age of nineteen years and children over that age who by reason of mental or physical disability were unable to earn a livelihood, other than illegitimate children or children legally adopted by others, were living with or being supported by the spouses or either of them, there shall be no obligation on the guardian, Official Guardian, or other person representing an infant who is a dependant under this Act to make an application on behalf of such infant, if the guardian, Official Guardian, or other person is satisfied that such infant is receiving adequate maintenance and support.

15.—(1) Subject to subsection (2), no application may be made except within six months from the grant of probate of the will or of administration with the will annexed.

(2) A judge may, if he deems it just, allow an application to be made at any time as to any portion of the estate remaining undistributed at the date of the application.

(3) Subsection (2) shall apply in cases where the testator died prior to the date of the coming into force of this Act as well as in cases where the testator dies subsequent to that date.

16.—(1) Where an application is made on behalf of a dependant,—

(a) the judge shall not make any order until he is satisfied upon oath that all persons who are or may be interested in or affected by the order have been served in accordance with the Rules of the Supreme Court of Alberta, with notice of the application and a copy of this section, and every such person shall be entitled to be heard in person or by counsel at the hearing; and

(b) the application shall, except as otherwise ordered by the judge, be deemed to be an application on behalf of all dependants who have been so served.

(2) Nothing in this section shall deprive a dependant who has not actually received notice of an application of any rights such dependant would otherwise have under this Act.

17.—(1) Until the expiration of six months from the grant of probate of the will or administration with the will annexed, the executor or trustee shall not, without the consent of all the dependants of the testator, or unless authorized so to do by order of a judge, distribute any portion of the estate to any beneficiary under the will.

(2) An executor or trustee who distributes any portion of the estate in violation of the provisions of subsection (1) shall, if any provision for maintenance and support is ordered by a judge to be made out of the estate, be personally liable to pay the amount of the same to the extent that

such provision or any part thereof ought, pursuant to the order or this Act, to be made out of the portion of the estate distributed.

18.—(1) Upon notice of any application being given to the executor or trustee the estate shall be held subject to the provisions of any order that may be made, and the executor or trustee shall not proceed with the distribution thereof otherwise than in accordance with such order.

(2) An executor or trustee who distributes or disposes in any manner of any portion of the estate in violation of the provisions of subsection (1) shall if any provision for maintenance and support is ordered by a judge to be made out of the estate be personally liable to pay the amount of the same to the extent that such provision or any part thereof ought, pursuant to the order or this Act, to be made out of the portion of the estate distributed or disposed of.

(3) An executor or trustee who wilfully violates the provisions of subsection (1) shall, in addition to being personally liable as provided in subsection (2), be guilty of an offence and liable on summary conviction in the case of a natural person to a fine not exceeding one thousand dollars and in default of payment to a term of imprisonment not exceeding sixty days, and in the case of a corporation to a fine not exceeding five thousand dollars.

19. An order made or direction given under this Act may be enforced in the same way and by the same means as any judgment, order or direction of the Supreme Court of Alberta can be enforced, and a judge may make such interim order or direction as may appear necessary to protect or preserve the assets of the estate or provide for the carrying on of the administration of the estate until the application has been finally disposed of.

20. A certified copy of every order made under this Act shall be filed with the Clerk of the Court out of which the letters probate or letters of administration with the will annexed issued, and a memorandum of the order shall be endorsed on or annexed to the copy of the original letters probate or letters of administration with the will annexed in the custody of the clerk.

21. An appeal shall lie to the Appellate Division of the Supreme Court of Alberta from any order made under this Act, and the Appellate Division upon such appeal may affirm, annul or vary the order in such manner as it may deem proper.

22. *The Widows' Relief Act*, being chapter 304 of the Revised Statutes of Alberta, 1942, is hereby repealed.

23. This Act shall come into force on the day upon which it is assented to.

No. 25

FOURTH SESSION
TENTH LEGISLATURE

11 GEORGE VI

1947

BILL

An Act to Authorize Provision for
the Maintenance of Certain De-
pendants of Testators.

Received and read the

First time.....

Second time.....

Third time.....

HON. MR. MAYNARD.

EDMONTON:
A. Shnitka, King's Printer
1947