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FAMILY INHERITANCE PROVISIONS IN THE BARBADOS SUCCESSION ACT — REDEFINING “THE FAMILY”

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I. INTRODUCTION

Departing from the established principle that the testator is entitled to determine personally the destiny of his property,¹ the Barbados Succession Act² provides that a testator's spouse has a legal right to a portion of the testator's estate. This right is to have priority over “devises, bequests and shares on intestacy.”³ The common law had long ago afforded a widow the right of dower, which attached to any land of her husband. This right could not be defeated by any disposition by the husband *inter vivos* or by will.⁴ It was legislation, in Barbados the Dower Act of 1878,⁵ which strengthened the husband's freedom of testamentary disposition by enabling him to deprive his wife of her right to dower either through express declaration in his will or through any duly executed deed.⁶ The family inheritance provisions of the Succession Act of 1975 may be regarded in part as a legislative revival of the old common law right of the wife to a share in her deceased husband's estate. The Succession Act, by careful definition of “spouse,” has sought to protect succession rights of the husband and wife, as well as the partners to a common law union. In addition, the Succession Act has provided procedures through which disinherited children are brought within the ambit of the court's discretion. Moreover, the Succession Act has expanded the definition of “dependent,” limited by tradition in other statutes to mean only the “legitimate” family, to include the “illegitimate” family as well.⁷

Therefore, the most innovative aspect of the Barbados legislation must be the interpretation given the words *dependant*, *spouse*, and *child*, which for the purposes of this statute widens the definition to embrace the “illegitimate family.”⁸

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II. INTERPRETATION

The Succession Act provides that reference to a "child" or "issue" of a deceased person shall include a child with respect to whom an adoption order has been made under the Adoption Act. In this respect, the Succession Act merely affirms the status of the adopted child secured by previous legislation.⁹ The Succession Act also defines "child" or "issue" to include an illegitimate child of a deceased person if:

- (i) that person has been adjudged by the court or a Magistrate's Court to be the father or putative father, or
- (ii) that person has acknowledged himself to be the father under Section 8(6) of the Registration Act, or
- (iii) that person has by an affidavit sworn before a Justice of the Peace or a Notary Public, or by other document duly attested and sealed, together with a declaration by the mother of the child contained in the same instrument confirming that that person is the father of the child, admitted paternity, but such affidavit or other document shall be of no effect unless it has been recorded in the Registration Office.¹⁰

The illegitimate child must clearly demonstrate that he is the child of his father and will only be so accepted legally if there has been formal recognition and registration. Evidently these rigid rules signify a legislative attempt to deal with the problem of identification. Bromley, in his comment on sections 14 and 15 of the English Family Law Reform Act,¹¹ points to difficulties which may arise concerning an acceptable method of establishing the relationship of the claimant to the deceased when a statute does not provide clear direction.¹² Thus, the need for some unmistakable means whereby paternity can be formally acknowledged is not in dispute.

However, to establish paternity, the Barbados legislation has conformed to the usual pattern followed by other statutes designed to assist illegitimates. It is the mother or father who must institute proceedings to provide the required evidence of paternity. If no affiliation order has been made by the court, a proceeding must be initiated by the mother. If the father's name is not included through registration on the birth certificate, the only remaining choice is a complicated procedure requiring declarations from the father and mother, which must then be followed by registration. The illegitimate child is not permitted to institute such proceedings on his own behalf.¹³

The limitations placed on the proof of paternity in the Barbados legislation, when considered together with the section of the Succession Act¹⁴ which gives the child of a testator the right to apply for some benefit from the testator's estate, could lead to the conclusion that the approach to reform in this area is rather moderate, especially when the result depends on the discretion of the court.

The Succession Act stipulates the definition of spouse which is to be used for purposes of inheritance rights. According to the Succession Act, the term spouse includes "a single woman who was living together with a single man as his wife for a period of not less than seven years immediately preceding the date of his death" and a single man in the same situation.¹⁵ In the interest of certainty, subsection (5) stipulates that only one such relationship shall be considered for the purposes of benefit. By extending the definition of spouse to include the common law relationship of a woman and man, the legislation may be a first step towards giving legal recognition to common law unions.¹⁶ The legislation's insistence on an uninterrupted seven year period of consensual cohabitation seems to indicate the statute is intended to secure inheritance rights for persons involved in a reasonably stable relationship.¹⁷

In order to avoid ambiguity or uncertainty in the distribution of property on intestacy, the Succession Act also defines words such as brother, sister, and father. Section 48 deals explicitly with these, defining brother or sister in relation to an intestate to include any child of the father or mother of the intestate.¹⁸ The interpretation of the term father, not unnaturally, reflects the earlier problems relating to identification of illegitimate child.¹⁹ However, as a result of these provisions, the recognised father of an illegitimate child,²⁰ together with the mother,²¹ can share or wholly succeed to that child's estate on that child's intestacy. Moreover, where there is no surviving spouse or mother or father at the death of an intestate, his legitimate and illegitimate brothers and sisters will share his estate equally.²²

The introduction of another claimant, the "dependant," for the purposes of intestate succession might be viewed as a mitigation of the seven year restriction placed on common law unions or as an extension to it. Dependand, for the purposes of application for maintenance out of an intestate's estate, means "any woman (other than his spouse) living together with a man as his wife immediately preceding the date of his death and wholly or mainly maintained by him at this time . . ." ²³ The dependant classification also includes an illegitimate child who does not satisfy the previously discussed requirements for illegitimacy. It en-

compasses an illegitimate child of the deceased person who is under the age of eighteen or who, due to mental or physical disability, is incapable of maintaining himself. However, the illegitimate child who wishes to make application as a dependant of the deceased person must have been wholly or mainly maintained by him at the date of his death.²⁴

In considering an application, the court is authorized to direct inquiries into the authenticity of the dependant's claim. The court's discretion to initiate inquiries includes the right to examine the conduct of the person by or on whose behalf the application for maintenance is made, or of any other person and any other matter which in the circumstances the court considers relevant.²⁵ Thus, before an order is granted for maintenance out of the intestate's estate in favour of a dependant, provision is made for a conclusive check of the dependant's right to make such a claim and his need for maintenance.

A maintenance order may be made for periodic or lump sum payments, but where the award is for periodic payments, these must cease when the woman or man enters another common law union or dies. In the case of a dependant who is an illegitimate child, periodic payments are terminated on the attainment of majority, the end of the disability if such is the basis of the claim, or death.²⁶ The limitation period within which applications must be made is "twelve months from the first taking out of the representation of the intestate's estate."²⁷

The statute is less restrictive in its identification of a dependant than it is of a spouse or a child. But when it is recalled that the dependant's claim is to maintenance out of the estate of an intestate, while the spouse and child may succeed to the whole of the intestate's estate, and further that the spouse may be entitled to a share in a testator's property as a legal right, the distinction may be justified. There is still the probability of a situation where a spouse, after six years consensual cohabitation, is replaced by another who, because of the provision requiring maintenance to be provided wholly or mainly by the testator at the time of his death, may benefit after a short relationship with the intestate whereas the common law partner for six years is precluded from making any application to the court.

III. LEGAL RIGHTS OF TESTATOR'S SPOUSE AND CHILDREN

Part X of the Succession Act details the assistance which the legislation affords a testator's spouse and children who are deemed competent

to be granted a share of the testator's estate. The testator must have been domiciled in Barbados at his death. The precise portion of the property to which a spouse is entitled as a legal right is stipulated. If a testator dies and leaves a spouse and a child who is capable of making a claim according to the statute, the spouse shall have a right to one-quarter of the estate. Where there is no such child the spouse takes one-half of the estate. Where a devise or bequest is expressed in a will to be in addition to the spouse's share as a legal right, the testator's intention is construed to entitle the spouse to both the gift by the will and the share as a legal right. In any other case a gift by will is deemed to be in satisfaction of the share as a legal right. The spouse is allowed a six month period from the time the will is admitted to probate to decide whether to accept the devise or bequest, or the share as a legal right.²⁸ A spouse who fails to exercise this option, according to the Succession Act, "shall be entitled under the will and shall not be entitled to take any share as a legal right."²⁹ A similar election is provided for a spouse where a person dies partly testate and partly intestate.³⁰

The testator who has made during his lifetime what the Succession Act terms "permanent provision for his spouse whether under contract or otherwise"³¹ is less likely to have his testamentary disposition altered if he has by such disposition disinherited his spouse. The Succession Act permits property which has been the subject matter of such provision, periodic payments excepted, to be regarded as property given in whole or partial satisfaction of the spouse's share as a legal right.³² The same section allows for the necessary readjustment between the value of the property transferred to the spouse during the testator's lifetime, and the statutory legal right.³³

With respect to the children of a testator, no statutory legal right has been established. The court may order that some provision be made for a child who is a minor or who is physically or mentally incapable of maintaining himself. Application for maintenance may be made by the child or on his behalf. The court is authorised to order periodic payments or may, within its discretionary power, award a lump sum payment.³⁴

Thus, emphasis appears to be on the rights of the spouse rather than on making provision for the children of the testator. The assumption could be that a testator is more likely to disinherit his spouse than his children, and therefore, the legislation must seek to afford greater protection for the interests of the spouse. The Irish Succession Act allows the court, after taking into account all the Circumstances, to make an order for the main-

tenance of the child of a testator if in the court's opinion "the testator has failed in his moral duty to make proper provision for the child in accordance with his means whether by will or otherwise."³⁵ Since the measure of responsibility is the testator's moral duty towards the child, the Irish Court has discretion which may be exercised in favour of the child. The postulate may be that the corresponding provisions of the Barbados legislation, which contains minority and disability requirements, may embody the kind of inflexibility which precludes any decision based on moral duty. The principle of freedom of testamentary disposition has little appeal to the radical reformer who is more eager to weigh the testator's rights against the burden of state responsibility.

IV. DISTRIBUTION ON INTESTACY

Before November 1975, the effective date of the Succession Act, distribution of an intestate's estate was governed by the old common law canons of descent³⁶ as amended by the Inheritance Act and the Intestate's Estates Act.³⁷ Part VI of the Succession Act now clearly delineates the order of precedence for spouse, child, issue, mother and father, brothers and sisters, and the children of brothers and sisters. If an intestate's surviving spouse takes the whole estate, there is no issue or next-of-kin. Where there is one child or next-of-kin the spouse's share of the estate is reduced to two-thirds. The child takes the remaining one-third, or in the case of next-of-kin they share the remaining one-third equally. Where the intestate's survivors comprise a spouse and more than one child, the method of apportionment is reversed, the spouse takes one-third leaving two-thirds to be divided equally among the children. A provision for inheritance where the intestate dies leaving issue and no spouse is also distinctly specified. If all the issue are in equal degree of relationship to the deceased person, distribution is to be in equal shares among them, and if they are not, distribution must be "per stirpes."³⁸

The Succession Act also details succession rights of other surviving relatives of an intestate,³⁹ and specifies the conditions under which an estate will vest in the Crown as "bona vacantia."⁴⁰ The Minister responsible for legal affairs in his discretion may waive "in whole or in part the Crown's right in favour of such persons and on such terms as he thinks proper having regard to all the circumstances of the case."⁴¹

By determining the disposition of the decedent's estate on intestacy this part of the Succession Act may be regarded as being beneficially

reformatory. The statutory definitions of spouse, child, and dependant result in a more realistic division of an intestate's estate, although again the spouse's right appears to have been the major consideration.⁴²

V. EXCLUSION FROM SUCCESSION AND DISINHERITANCE

The matter of the spouse's "unworthiness to succeed"⁴³ is the main concern in Part XI of the Succession Act. Other succession statutes, such as English and Trinidad inheritance family legislation,⁴⁴ have adopted the test of reasonableness. This test, applicable only where reasonable provision was neither made in the decedent's will nor implied by the law of intestacy, requires that the courts be satisfied that it would have been reasonable for the decedent to make provision for the dependant. The court must consider the conduct of the spouse in relation to the decedent and the testator's reasons, so far as ascertainable, for failing to make any provision for the dependant. Moreover, the courts cannot assume that the law relating to intestacy necessarily makes reasonable provisions in all cases.⁴⁵ The courts may require evidential support of the disposition, such as a signed statement left by a testator.⁴⁶

The Barbados Act, unlike the English and Trinidad succession statutes, specifies the conditions which will exclude a spouse from succession and disinheritance.

(1) A spouse against whom the deceased obtained a judicial separation, a spouse who failed to comply with a decree of restitution of conjugal rights obtained by the deceased, and a spouse guilty of desertion which has continued up to the death for three years or more shall be precluded from taking any share in the estate of the deceased as a legal right on intestacy.

(2) A spouse who was guilty of conduct which justified the deceased in separating and living apart from him shall be deemed to be guilty of desertion within the meaning of sub-section (1).⁴⁷

Thus, the Barbados court, in examining the exclusion of the spouse in the testamentary disposition of property, lacks the broad discretion of the Trinidad and English courts to consider moral claims, responsibilities, and subjective or objective tests of reasonableness.

These provisions of the Barbados Act seem to be too heavily based on the old concept of matrimonial fault during a period when the trend is to place more emphasis on economic need. Subsection (3) precludes a

person found guilty of any offense against the decedent punishable by imprisonment for a period of at least two years from taking any share in the decedent's estate as a legal right or even from making an application to the court on behalf of a child of a testator. In this manner, the Barbados Succession Act introduces the concept of criminal fault in determining inheritance rights.

In subsection (4), however, the element of fault does not predominate and the term "husband and wife" replaces the term "spouse."

Where a husband and wife have ceased to cohabit with each other and have been living apart continuously for a period of seven years or more immediately preceding the date of death of either of them, the survivor shall be precluded from taking any share in the estate of the deceased as a legal right or on intestacy.⁴⁸

The reason for distinguishing between a spouse, and a husband and wife in subsection (4) seems unnecessary since only a spouse could be guilty of the matrimonial offences listed in subsections (1) and (2). Perhaps the intention is to deal with a situation where there is separation without commission of a recognised matrimonial offence. Whatever is intended, the result must be the disentitlement of the "innocent" as well as the "guilty" spouse provided that the "magic period of seven years"⁴⁹ has worked its alchemy to transform a wife or husband into a person with no right to a claim of succession or inheritance.

Section 103 provides the necessary safeguards against disposition of property before death which would defeat the rights or claims of the surviving spouse and children. If the court is convinced that a disposition of property within three years before death was made with the object of defeating the statutory rights of the spouse and children, the court may order that such a disposition be deemed a gift made by will and to form part of the decedent's estate and to have no other effect. A disposition in this section includes a "donatio mortis causa."⁵⁰

V. CONCLUSION

Altogether, the Succession Act has significantly altered the law relating to succession and inheritance in Barbados. The serious attempt to align legislative development with social reality is commendable. However, in some areas, especially those concerned with the rights of the child, the

Succession Act has failed to be sufficiently inventive.⁵¹ The difficulty of legislating for every eventuality in view of the existing variations in family relationships is recognised. Undoubtedly, morality and "opening the flood gates" arguments influenced the legislators when they drafted the Succession Act. However, this is only the principal act, and amendment to it is not prohibited.

NOTES

¹*Bird v. Luckie*, 8 Hare 301 (1850); A. MELLOWES, *THE LAW OF SUCCESSION* 114-16 (1970).

²Succession Act, 1975, Laws of Barbados, §46 (hereinafter cited as Succession Act).

³*Id.* §§93-94.

⁴On the other hand, the husband's right of curtesy was subject to limitation by the wife's disposition of her real property. The Succession Act has abolished both dower and curtesy. *Id.* §4; 3 (W. S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 185-97, 550-51 (6th ed. 1966); (R. MEGARRY & H. WADE, *THE LAW OF REAL PROPERTY* 514-19 (4th ed. 1975)).

⁵Dower Act of 1878, c. 243, 5 Laws of Barbados (1971) (repealed by Succession Act, 1975).

⁶*Id.* §§5, 7-9.

⁷See, e.g., Inheritance (Family Provision) Act, 1938, 1 & 2 Geo. 6, c. 45, as amended by Family Provision Act, 1966, c. 35, Family Law Reform Act, 1969, c. 46, Law Reform (Miscellaneous Provisions) Act, 1970, c. 33 (Eng.) (repealed by the Inheritance (Provision for Family and Dependants) Act, 1975, effective April 1976); Wills and Probate Ordinance, 1950, 1 Laws of Trinidad and Tobago, c. 8, no. 2, as amended by Matrimonial Proceedings and Property Act, 1971, Act 2 of 1972, §41 (Trinidad and Tobago). These statutes turn on the definition of "dependant." For a detailed definition and comment, see P. BROMLEY, *FAMILY LAW* 509-10 (4th ed. 1971).

⁸For definition of terms, see Succession Act, §§2(2), 48(2), 57.

⁹Adoption Act, 1955, 5 Laws of Barbados, c. 212 (1971).

¹⁰Succession Act.

¹¹Family Law Reform Act, 1969, *supra* note 7, §§14-15 involve improved succession rights for illegitimate children. Section 15 states that in any disposition any reference to child or children shall be construed as a reference to an illegitimate child if no contrary intention appears.

¹²P. BROMLEY, *supra* note 7, at 465-66, 507-08.

¹³Compare this with the Status of Children Act, 1969, §10 (N.Z.), which enables a child to make application to the Supreme Court to establish the existence of a filial relationship. *Id.* §10(1)(b). Moreover, any person who has a "proper interest" in the result is authorized to seek such a determination from the Court. *Id.* §10(1)(c). See 2 B. INGLIS, *FAMILY LAW* 420-21 (2d ed. 1970).

The CIVIL CODE OF ST. LUCIA arts. 203, 209 (1957) gives an illegitimate child the right to establish judicially his paternity or maternity claim. Evidence may be derived from title deeds of the family, from registers and papers of the father or

mother, and from public and even private writings from a party engaged in the proceedings. *Id.* art. 201.

The WIS. PROBATE CODE, 40H, WIS. STAT. ANN. §852.05 (West 1971) provision for establishing paternity is less complicated than that of the Succession Act, §§93-94, because it allows acknowledgment of paternity in writing if signed in the presence of a competent witness. *Accord*, Wall v. Altoballo, 49 So.2d 532 (Fla. 1950), where the court held that a hotel registration card acknowledging a child, signed in the presence of a hotel clerk, was sufficient to satisfy the statutory requirement. The writing did not have to be a formal document.

¹⁴Succession Act, §100.

¹⁵Succession Act, §2(3)a-b.

¹⁶Although the Succession Act bears great similarity to the Irish Succession Act, 1965, c. 27, the Irish Act does not include this extended definition of "spouse."

¹⁷Practically considered, three to five years of continuous cohabitation as man and wife has been considered equally indicative of stability in a common law union. Therefore, the seven year requirement may be considered purely arbitrary. See Lewis v. Baker, 10 W.I.R. 122 (1966), wherein a testator left the wife from whom he had been separated for six years the sum of \$25 out of an estate valued at \$14,114. Apart from a devise to an aunt, the remainder of his property was to be divided equally among his mother, his aunt, the three children of his marriage, and a woman friend. When the wife applied for an order that reasonable provision be made for her maintenance out of the estate, the Trinidad and Tobago High Court, in the exercise of its statutory authority, objectively examined the reasonableness of the testator's disposition, the conduct of the spouse in relation to the deceased, and the moral obligation of the testator to his wife. The court dismissed the application. See also *Re Howell*, (1953) 2 All E.R. 604; *Re Goodwin*, (1968) 3 All E.R. 12; *Milwards v. Shewton*, (1972) All E.R. 1025; *Thompson v. Roach*, 13 W.I.R. 297 (1968); *Chamroo v. Rookmin*, 13 W.I.R. 470 (1968).

¹⁸Succession Act, §48(2).

¹⁹*Id.* §§48(2) (a)-(c). See pp. 3-5, *supra*.

²⁰*Id.* (Recognised according to the stipulated conditions).

²¹Illegitimacy Act, 1931, c. 216, §9, 4 Laws of Barbados (1971), as amended by Succession Act, 3rd schedule.

²²Succession Act, §§50-52.

²³*Id.* §57(a). Also any man living together with a woman as her husband. *Id.* §57(b).

²⁴*Id.* §57(c).

²⁵*Id.* §58(3).

²⁶*Id.* §58(4)-(5).

²⁷*Id.* §58(2).

²⁸*Id.* §§92-97.

²⁹*Id.* §97(2).

³⁰*Id.* §97(3)-(5).

³¹*Id.* §98(1).

³²*Id.*

³³*Id.* §98(2)-(4)

³⁴*Id.* §100(1)-(5). The definition of father discussed *supra* p. 7 is the same as that used for purposes of this section. See *Id.* §100(6).

³⁵Irish Succession Act, 1965, c. 27, §117(1).

³⁶See 3 W. S. HOLDSWORTH, *supra* note 4, at 556 *et. seq.*; E. H. BURN, CHESHIRE'S MODERN LAW OF REAL PROPERTY 855-58 (11th ed. 1972).

³⁷Inheritance Act of 1891, c. 245, 5 Laws of Barbados (1971); Intestate's Estates Act of 1910, *Id.* c. 246. The Succession Act has also repealed the Real Property (Devolution) Act of 1935, c. 249 and the relevant sections of Pt. III and IV of the Administration of Estates Act of 1891, c. 242.

³⁸Succession Act, §49(1)-(6).

³⁹*Id.* §§50-54.

⁴⁰*Id.* 55(1). Escheat to the Crown is abolished by §55(4).

⁴¹*Id.* §55.

⁴²The statute's emphasis on the rights of the spouse may reflect policy considerations during 1975, International Woman's Year.

⁴³This term is used in the Irish Succession Act, 1965.

⁴⁴See p. 2 & notes 7-8, *supra*.

⁴⁵See P. BROMLEY, *supra* note 7, at 510-13, 516-17. See generally S. M. CRETNY, PRINCIPLES OF FAMILY LAW 177-81 (1974).

⁴⁶Trinidad and Tobago Wills Ordinance, 1 1950 Laws, c. 8, no. 2, *as amended*, Wills and Probate Ordinance §90 (1972).

⁴⁷Succession Act, §102.

⁴⁸*Id.*

⁴⁹Consensual cohabitation for a period of seven years makes a partner a "spouse" for purposes of succession and inheritance. Succession Act, §2(3); see p. 6 *supra*.

⁵⁰Succession Act, §103(10). See also §§103(3)(4), (8), dealing with the court's authority to make orders which appear just and equitable under the circumstances, with the indebtedness of the donee, his representative, or persons deriving under him, and with the situation where the donee disposes of the property to a purchaser; §§103(5)-(7), dealing with the interests that may be served by a court order and with the situations in which the court is precluded from making such an order.

⁵¹See pp. 3-10, 12-13, *supra*.