

# Family Protection Act 1955

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**An Act to consolidate and amend certain enactments of the General Assembly relating to claims for maintenance and support out of the estates of deceased persons**

**BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:**

**1 Short Title**

This Act may be cited as the Family Protection Act 1955.

**2 Interpretation**

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

**administration** and **administrator** have the same meanings as they have in section 2(1) of the Administration Act 1969

**application** means an application made under this Act

**child of a de facto relationship** *[Repealed]*

child of a de facto relationship: this definition was repealed, as from 26 April 2005, by section 7 Relationships (Statutory References) Act 2005 (2005 No 3).

*[Repealed]*

**child of a marriage, civil union, or de facto relationship** includes a child whose parents marry each other, or who enter into a civil union or de facto relationship with each other, after the child's birth

child of a marriage, civil union, or de facto relationship: this definition was substituted for the definition of the term child of a marriage, as from 26 April 2005, by section 7 Relationships (Statutory References) Act 2005 (2005 No 3).

**Court** means a Court having jurisdiction in the proceedings by virtue of section 3A

**de facto partner** has the meaning given to it by section 2 of the Property (Relationships) Act 1976

**de facto relationship** has the meaning given to it by section 2 of the Property (Relationships) Act 1976

**stepchild**, in relation to any deceased person, means any person—

- (a) who is not a child of the deceased, but is a child of—
  - (i) the deceased's spouse or civil union partner; or
  - (ii) a de facto partner who was living in a de facto relationship with the deceased at the date of his or her death and in whose favour the Court can make an order under this Act; and
- (b) who was living at the date on which the deceased—
  - (i) married that spouse; or

- (ii) entered into the civil union with that civil union partner; or
- (iii) became a party to that de facto relationship.

stepchild: this definition was substituted, as from 26 April 2005, by section 7 Relationships (Statutory References) Act 2005 (2005 No 3).

- (2) This Act shall apply in all cases, whether the deceased person died before or after the commencement of this Act:

Provided that no distribution of any part of the estate of a deceased person that has been made before the commencement of this Act shall be disturbed in favour of any person by reason of any application or order made under this Act if it could not have been disturbed in favour of that person by reason of any application or order made under the enactments repealed by this Act.

(3)

- (4) For the purposes of this Act no real or personal property that is held upon trust for any of the beneficiaries in the estate of any deceased person who died after the 7th day of October 1939 (being the date of the passing of section 23 of the Statutes Amendment Act 1939), shall be deemed to have been distributed or to have ceased to be part of the estate of the deceased by reason of the fact that it is held by the administrator after he has ceased to be administrator in respect of that property and has become trustee thereof, or by reason of the fact that it is held by any other trustee.

- (5) For the purposes of this act the estate of any deceased person shall be deemed to include all property which is the subject of any donatio mortis causa made by the deceased:

Provided that—

- (a) No claim in respect of any property to which this subsection relates shall lie against the administrator by any person who (under any order of the Court under this Act) becomes entitled to the property or to any benefit therefrom; and
- (b) In all other respects the provisions of this Act and of sections 46 to 51 of the Administration Act 1969 shall apply in respect of that property in the same manner as those provisions would apply to the property if it were part of the estate

of the deceased which was properly distributed by the administrator immediately after the expiration of 6 months from the date of the grant in New Zealand of administration in the estate of the deceased without notice of any application or intended application under this Act in respect of the estate, whether the order of the Court is made before or after the expiration of the said 6 months.

Compare: 1908 No 60 s 32; 1939 No 39 s 23

Child of a marriage: in the former subsection (1), this definition was inserted by section 12(2) Status of Children Act 1969 (1969 No 18).

Court: in the former subsection (1), this definition was substituted by section 2 Family Protection Amendment Act 1991 (1991 No 65).

Stepchild: in the former subsection (1), In the definition of this term the word “illegitimate” was omitted by section 12(2) Status of Children Act 1969 (1969 No 18).

Subsection (1) was substituted, as from 1 February 2002, by section 4 Family Protection Amendment Act 2001 (2001 No 8), with application only in respect of the estates of persons who die on or after 1 February 2002.

Subsection (3) was repealed, as from 1 January 1970, by section 12(2) Status of Children Act 1969 (1969 No 18).

Subsection (5)(b) was amended by substituting the words “and of sections 46 to 51 of the Administration Act 1969” for the words “and of sections 30A and 30B of the Administration Act 1952”.

### **3 Persons entitled to claim under Act**

- (1) An application for provision out of the estate of any deceased person may be made under this Act by or on behalf of all or any of the following persons:
- (a) the spouse or civil union partner of the deceased:
  - (aa) a de facto partner who was living in a de facto relationship with the deceased at the date of his or her death:
  - (b) The children of the deceased:
  - (c) The grandchildren of the deceased living at his death:
  - (d) The stepchildren of the deceased who were being maintained wholly or partly or were legally entitled to be maintained wholly or partly by the deceased immediately before his death:
  - (e) the parents of the deceased.
- (1A) A parent of the deceased may not make a claim under this Act unless—

- (a) the parent was being maintained wholly or partly, or was legally entitled to be maintained wholly or partly, by the deceased immediately before his or her death; or
  - (b) at the date of the claim, none of the following is living:
    - (i) the spouse or civil union partner of the deceased;
    - (ii) a de facto partner of the deceased in whose favour the Court can make an order under this Act;
    - (iii) a child of the marriage, civil union, or de facto relationship of the deceased.
- (2) In considering any application by a grandchild of any deceased person for provision out of the estate of that person, the Court, in considering the moral duty of the deceased at the date of his death, shall have regard to all the circumstances of the case, and shall have regard to any provision made by the deceased, or by the Court in pursuance of this Act, in favour of either or both of the grandchild's parents.

Compare: 1908 No 60 s 33(1); 1936 No 58 s 26; 1939 No 39 s 22; 1943 No 20 s 14; 1947 No 60 s 15

Subsection (1)(aa) was inserted, as from 1 February 2002, by section 5(1) Family Protection Amendment Act 2001 (2001 No 8), with application only in respect of the estates of persons who die on or after 1 February 2002.

Subsection (1)(a) was substituted, as from 26 April 2005, by section 7 Relationships (Statutory References) Act 2005 (2005 No 3).

Subsection (1)(b) and (c) were substituted, as from 1 January 1970, by section 12(2) Status of Children Act 1969 (1969 No 18).

Subsection (1)(e) was amended by section 12(2) Status of Children Act 1969 (1969 No 18) by omitting the words "whether their relationship is legitimate or illegitimate" and by substituting in para (e)(ii) the words "child of a marriage" for the words "legitimate child".

Subsection (1)(e) was substituted, as from 1 February 2002, by section 5(2) Family Protection Amendment Act 2001 (2001 No 8), with application only in respect of the estates of persons who die on or after 1 February 2002.

Subsection (1)(e) was substituted, as from 26 April 2005, by section 7 Relationships (Statutory References) Act 2005 (2005 No 3).

Subsection (1A) was inserted, as from 26 April 2005, by section 7 Relationships (Statutory References) Act 2005 (2005 No 3).

Subsection (2) was inserted by section 3(2) Family Protection Amendment Act 1967 (1967 No 47).

**3A Courts to have concurrent jurisdiction**

- (1) Subject to the succeeding provisions of this section, the High Court and a Family Court shall each have jurisdiction in respect of proceedings under this Act.
- (2) A Family Court shall not have jurisdiction in respect of any application under this Act if, at the date of the filing of the application, proceedings relating to the same matter have already been commenced in the High Court.
- (3) Notwithstanding anything in subsection (1) of this section, if a Family Court Judge is of the opinion that any proceedings under this Act, or any question in any such proceedings, would be more appropriately dealt with in the High Court, the Judge may, upon application by any party to the proceedings or without any such application, refer the proceedings or the question to the High Court.
- (4) The High Court, upon application by any party to any proceedings pending under this Act in a Family Court, shall order that the proceedings be removed into the High Court unless it is satisfied that the proceedings would be more appropriately dealt with in a Family Court. Where the proceedings are so removed, they shall be continued in the High Court as if they had been properly and duly commenced in that Court.

Section 3A was inserted by section 3 Family Protection Amendment Act 1991 (1991 No 65).

**4 Claims against estate of deceased person for maintenance**

- (1) If any person (referred to in this Act as the **deceased**) dies, whether testate or intestate, and in terms of his or her will or as a result of his or her intestacy adequate provision is not available from his or her estate for the proper maintenance and support of the persons by whom or on whose behalf application may be made under this Act, the Court may, at its discretion on application so made, order that any provision the Court thinks fit be made out of the deceased's estate for all or any of those persons.
- (1A) Subsection (1) overrides the Administration Act 1969, but is subject to section 4A.

- (2) Where an application has been filed on behalf of any person, it may be treated by the Court as an application on behalf of all persons who might apply, and as regards the question of limitation it shall be deemed to be an application on behalf of all persons on whom the application is served and all persons whom the Court has directed shall be represented by persons on whom the application is served.
- (3) It shall not be necessary to serve any application on any person, or to make provision for the representation of any person on any application, by reason only of the person being entitled to apply, unless—
- (a) the person is—
    - (i) the spouse or civil union partner of the deceased; or
    - (ii) a de facto partner who was living in a de facto relationship with the deceased at the date of his or her death; or
    - (iii) a child of a marriage, civil union, or de facto relationship of the deceased, or a child of a marriage, civil union, or de facto relationship of any such child; or
  - (b) The Court in its discretion considers that there are special circumstances which render it desirable that the person be served or represented.
- (4) An administrator of the estate of the deceased may apply on behalf of any person who is not of full age or mental capacity in any case where the person might apply, or may apply to the Court for advice or directions as to whether he ought so to apply; and, in the latter case, the Court may treat the application as an application on behalf of the person for the purpose of avoiding the effect of limitation.

Compare: 1908 No 60 s 33(1), (7), (10)

In subsection (1) the “Administration Act 1969”, being the corresponding enactment in force, has been substituted for the repealed “Administration Act 1952”.

Subsection (1) was substituted, and subsection (1A) was inserted, as from 1 February 2002, by section 6(1) Family Protection Amendment Act 2001 (2001 No 8), with application only in respect of the estates of persons who die on or after 1 February 2002.

Subsection (3)(a) was substituted by section 12(2) Status of Children Act 1969 (1969 No 18).

Subsection (3)(a) was substituted, as from 1 February 2002, by section 6(2) Family Protection Amendment Act 2001 (2001 No 8), with application only in respect of the estates of persons who die on or after 1 February 2002.

Subsection (3)(a) was substituted, as from 26 April 2005, by section 7 Relationships (Statutory References) Act 2005 (2005 No 3).

#### **4A Restrictions on orders in favour of certain de facto partners**

- (1) This section applies to a de facto partner who was living in a de facto relationship with the deceased at the date of his or her death if the de facto relationship is a relationship of short duration as defined in section 2 of the Property (Relationships) Act 1976.
- (2) The Court cannot make an order under this Act in favour of a de facto partner to whom this section applies unless—
  - (a) the Court is satisfied—
    - (i) that there is a child of the de facto relationship; or
    - (ii) that the de facto partner has made a substantial contribution to the de facto relationship; and
  - (b) the Court is satisfied that failure to make the order would result in serious injustice to the de facto partner.
- (3) In subsection (2), **child of the de facto relationship** and **contribution** have the same meanings as they have in section 2 of the Property (Relationships) Act 1976.

Section 4A was inserted, as from 1 February 2002, by section 7 Family Protection Amendment Act 2001 (2001 No 8), with application only in respect of the estates of persons who die on or after 1 February 2002.

#### **5 Terms of order**

- (1) The Court may attach such conditions to any order under this Act as it thinks fit or may refuse to make such an order in favour of any person whose character or conduct is or has been such as in the opinion of the Court to disentitle him to the benefit of such an order.
- (2) In making any such order the Court may, if it thinks fit, order that the provision may consist of a lump sum or a periodical or other payment.

Compare: 1908 No 60 s 33(2), (3)

## **6 Provision for class fund**

- (1) Without in any way restricting the powers of the Court under this Act, it is hereby declared that the Court may order that any amount specified in the order shall be set aside out of the estate and held on trust as a class fund for the benefit of 2 or more persons specified in the order (being persons for whom provision may be made under this Act).
- (2) Where any amount is ordered to be held on trust as a class fund for any persons under subsection (1) of this section, that amount shall be invested and the trustee may at his discretion, but subject to such directions and conditions as the Court may give or impose, apply the income and capital of that amount or so much thereof as the trustee from time to time thinks fit for or towards the maintenance or education (including past maintenance or education provided after the death of the deceased) or the advancement or benefit of those persons or of any one or more of them to the exclusion of the other or others of them in such shares and proportions and generally in such manner as the trustee from time to time thinks fit; and may so apply the income and capital of that amount notwithstanding that only one of those persons remains alive.
- (3) For the purposes of this section the term **trustee** means the administrator, unless the Court appoints any other trustee (whether by the order creating the class fund or subsequently), in which case it means the trustee so appointed.
- (4) If the trustee is not the administrator, then the Court may give such directions as it thinks fit relating to the payment to the trustee of the amount which is to be held on trust as a class fund and may exercise any power under section 64 of the Trustee Act 1956 (which relates to dealings with trust property) either on the creation of the class fund or from time to time during the continuance of the trusts thereof.

## **7 Incidence of payments ordered**

- (1) The incidence of the payment or payments ordered 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 exonerate 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 exoneration as it thinks necessary, and may for that purpose direct any administrator to represent, or appoint any person to represent, any such party.
- (3) The Court shall have power at any time to fix a periodical payment or lump sum to be paid by any beneficiary in the estate of the deceased 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 to exonerate that portion from further liability, and to direct in what manner the periodical payment shall be secured, and to whom the lump sum shall be paid, and in what manner it shall be invested for the benefit of the person to whom the commuted payment was payable.
- (4) Upon an order being made under this Act the portion of the estate comprised therein or affected thereby shall be held subject to the provisions of the order.

Compare: 1908 No 60 s 33(4)-(6), (8)

## **8 Mortgages and assignments of provisions under orders**

No mortgage, charge, or assignment of any kind whatsoever which is given of or over any provision out of the estate of any deceased person granted by any order of the Court under this Act and which is made before the order of the Court is made shall be of any force, validity, or effect; and no such mortgage, charge, or assignment made after the order of the Court is made shall be of any force, validity, or effect unless it is made with the permission of the Court.

Compare: 1908 No 60 s 33(12)

## **9 Limitation of proceedings**

- (1) No application in respect of any estate shall be heard by the Court at the instance of a party claiming the benefit of this

Act unless the application is made before the expiration of the prescribed period specified in subsection (2) of this section:

Provided that the time for making an application may be extended for a further period by the Court, after hearing such of the parties affected as the Court thinks necessary; and this power shall extend to cases where the time for applying has already expired, including cases where it expired before the commencement of this Act:

Provided also that no such extension shall be granted unless the application for extension is made before the final distribution of the estate, and no distribution of any part of the estate made before the administrator receives notice that the application for extension has been made to the Court and after every notice (if any) of an intention to make an application has lapsed in accordance with subsection (1) of section 48 of the Administration Act 1969 shall be disturbed by reason of that application or of any order made thereon, and no action shall lie against the administrator by reason of his having made any such distribution.

- (2) The prescribed period mentioned in this section shall be,—
- (a) In the case of an application by an administrator made on behalf of a person who is not of full age or mental capacity, a period of 2 years from the date of the grant in New Zealand of administration in the estate; and
  - (b) In the case of any other application, a period of 12 months from the date of the grant in New Zealand of administration in the estate.

Compare: 1908 No 60 s 33(9), (11); 1921-22 No 33 s 2

Subsection (1), second proviso, was amended by section 3(a) Administration Amendment Act 1960 by inserting the words “and after every notice (if any) of an intention to make an application has lapsed in accordance with subsection (6) of section 30A of the Administration Act 1952”. The words “subsection (1) of section 48 of the Administration Act 1969” have been substituted for the repealed Administration Act 1952.

## **10 Power of Administrator to distribute before limitation period has expired**

*[Repealed]*

Section 10 was repealed by section 3(b) Administration Amendment Act 1960 (1960 No 100).

**11 Evidence as to deceased's reasons for dispositions**

Without restricting the evidence which is admissible or the matters which may be taken into account on any application under this Act, it is hereby declared that on any such application the Court may have regard to the deceased's reasons, so far as they are ascertainable, for making the dispositions made by his will, or for not making any provision or any further provision, as the case may be, for any person; and the Court may accept such evidence of those reasons as it considers sufficient, whether or not the same would be otherwise admissible in a Court of law.

**11A Duty of administrator to assist Court**

On any application under this Act it shall be the duty of the administrator to place before the Court all relevant information in his possession concerning the financial affairs of the estate and the deceased's reasons for making the dispositions made by his will or for not making any provision or any further provision, as the case may be, for any person:

Provided that the duty imposed by this section shall not extend so as to require the administrator to place any such information before the Court if it is known to him by reason only of its having come to his knowledge in circumstances which impose an obligation, whether legal or moral, on the administrator not to disclose it, and its disclosure in connection with any application under this Act would be a breach of that obligation.

Section 11A was inserted by section 2 Family Protection Amendment Act 1959 (1959 No 24).

**12 Variation of orders**

- (1) Where (whether before or after the commencement of this Act) the Court has ordered periodical payments, or has ordered any part of the estate or a lump sum to be held as a class fund or invested for the benefit of any person or persons, it shall have power to inquire whether at any subsequent date any party deriving benefit under its order is still living or has become possessed of or entitled to provisions for his proper maintenance or support and into the adequacy of the provisions, or whether the provisions made by its order for

any such party remain adequate, and may increase or reduce the provisions so made or discharge, vary, or suspend its order, or make such other order as is just in the circumstances.

- (2) Where an order has been made under this Act in respect of the estate of any deceased person and application is subsequently made in respect of that estate on behalf of any person who is not bound by the order, the Court may vary the previous order in such manner as it thinks fit:

Provided that the previous order shall not be varied so as to disturb any distribution made pursuant thereto if anything in this Act prevents the distribution from being disturbed:

Provided also that, without limiting the provisions of sections 46-51 of the Administration Act 1969, no action shall lie against the administrator by reason of his having distributed any part of the estate pursuant to a previous order without notice of any subsequent application under this Act in respect of the estate, whether the distribution is made before or after the expiration of 6 months from the date of the grant in New Zealand of administration in the estate of the deceased.

Compare: 1908 No 60 s 33(13)

In subsection (2), second proviso, the words “sections 46-51 of the Administration Act 1969” have been substituted for the repealed “ss 30A and 30B of the Administration Act 1952”.

### **13 Certain benefits under the Social Security Act to be disregarded**

In making any order under this Act for provision out of the estate of a deceased person, the Court shall disregard any benefit under the Social Security Act 1964 (other than a superannuation benefit, a miner’s benefit, or a family benefit) which is or may become payable to any person.

Compare: 1950 No 49 s 18(3)

“Part 1 of the Social Security Act 1964” has been substituted, as from 1 April 1965, for Part 2 of the repealed Social Security Act 1938.

Section 13 was amended, as from 1 October 1998, by section 57 Social Security Amendment Act 1998 (1998 No 19) by omitting the words “Part 1 of”.

**14 Duty on estate**

*[Repealed]*

Section 14 was amended, as from 4 October 1966, by section 3 Inland Revenue Department Amendment Act 1966 (1966 No 29) by omitting the words “or a District Commissioner of Stamp Duties”.

Section 14 was repealed, as from 1 January 1969, by section 100(1) Estate and Gift Duties Act 1968 (1968 No 35).

**15 Right of appeal**

(1AA) This subsection applies to a decision of a Family Court or District Court, in proceedings under this Act, to—

- (a) make or refuse to make an order; or
- (b) dismiss the proceedings; or
- (c) otherwise finally determine the proceedings.

(1) A party to proceedings in which there is made a decision to which subsection (1A) applies, or any other person prejudicially affected by the decision, may appeal to the High Court against the decision.

(1A) The High Court Rules and sections 74 to 78 of the District Courts Act 1947, with all necessary modifications, apply to an appeal under subsection (1) as if it were an appeal under section 72 of that Act.

(2) On the ex parte application of the appellant, the Family Court or District Court (as the case requires) may order that the appellant must not be required under section 74(1) of the District Courts Act 1947 to give the Registrar of the High Court security for costs.

(2A) Subsection (2) overrides subsection (1A).

(3) The provisions of the Judicature Act 1908 relating to appeals to the Court of Appeal against decisions of the High Court shall apply with respect to any order or decision of the High Court under this section.

(4)

(5) The High Court or (as the case may be) the Court of Appeal may, in its discretion, rehear the whole or any part of the evidence, or may receive further evidence, if it thinks that the interests of justice so require.

Section 15 was substituted by section 4 Family Protection Amendment Act 1991 (1991 No 65).

Subsection (1AA) was inserted, as from 24 November 2003, by section 4 District Courts Amendment Act 2002 (2002 No 63). *See* section 5 of that Act for the transitional provision relating to appeals. *See* clause 2 District Courts Amendment Act Commencement Order 2003 (SR 2003/281).

Subsection (1) was substituted, as from 24 November 2003, by section 4 District Courts Amendment Act 2002 (2002 No 63). *See* section 5 of that Act for the transitional provision relating to appeals. *See* clause 2 District Courts Amendment Act Commencement Order 2003 (SR 2003/281).

Subsection (1A) was inserted, as from 24 November 2003, by section 4 District Courts Amendment Act 2002 (2002 No 63). *See* section 5 of that Act for the transitional provision relating to appeals. *See* clause 2 District Courts Amendment Act Commencement Order 2003 (SR 2003/281).

Subsection (2) was substituted, as from 24 November 2003, by section 4 District Courts Amendment Act 2002 (2002 No 63). *See* section 5 of that Act for the transitional provision relating to appeals. *See* clause 2 District Courts Amendment Act Commencement Order 2003 (SR 2003/281).

Subsection (2A) was inserted, as from 24 November 2003, by section 4 District Courts Amendment Act 2002 (2002 No 63). *See* section 5 of that Act for the transitional provision relating to appeals. *See* clause 2 District Courts Amendment Act Commencement Order 2003 (SR 2003/281).

Subsection (4) was repealed, as from 1 January 2004, by section 48(2) Supreme Court Act 2003 (2003 No 53). *See* sections 50 to 55 of that Act for the transitional and savings provisions.

## **16 Repeals and savings**

- (1) The enactments specified in the Schedule to this Act are hereby repealed.
- (2) Without limiting the provisions of the Acts Interpretation Act 1924, it is hereby declared that the repeal of any provision by this Act shall not affect any document made or anything whatsoever done under the provision so repealed or under any corresponding former provision, and every such document or thing, so far as it is subsisting or in force at the time of the repeal and could have been made or done under this Act, shall continue and have effect as if it had been made or done under the corresponding provision of this Act and as if that provision had been in force when the document was made or the thing was done.
- (3) All the provisions of sections 1 to 31 of the Family Protection Act 1908 shall remain in force so far as they relate to family homes which are registered under Part 1 of that Act at the date of the commencement of this Act; and, notwithstanding anything in paragraph (c) of section 17 of that Act, any

alienation (including a mortgage) by a settlor or his family of any such family home shall be valid if it is made with the prior approval of the Court; and the Court may by order confer upon the settlor or his family, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions (if any) as the Court may think fit, and may direct in what manner any money derived from any such alienation shall be applied.

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### Schedule

Section 16(1)

#### Enactments repealed

- 1908, No 60—The Family Protection Act 1908. (1931 Reprint, Vol III, p 292.)
- 1921-22, No 33—The Family Protection Amendment Act 1921-22. (1931 Reprint, Vol III, p 302.)
- 1936, No 58—The Statutes Amendment Act 1936: Section 26.
- 1939, No 39—The Statutes Amendment Act 1939: Sections 22 and 23.
- 1943, No 20—The Statutes Amendment Act 1943: Section 14.
- 1947, No 60—The Statutes Amendment Act 1947: Section 15.
- 1950, No 49—The Social Security Amendment Act 1950: Section 18(3).
- 1953, No 55—The Death Duties Amendment Act 1953: Section 17.