

AUSTRALIAN CAPITAL TERRITORY

FAMILY PROVISION ORDINANCE 1969

Incorporating all amendments by legislation made to 28 February 1979

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AUSTRALIAN CAPITAL TERRITORY

FAMILY PROVISION ORDINANCE 1969

An Ordinance to ensure that the Family of a Deceased Person receives adequate Provision out of his Estate

1. This Ordinance may be cited as the *Family Provision Ordinance* Short title 1969.¹

2. This Ordinance shall come into operation on a date to be fixed by the Minister by notice in the *Gazette*.¹

* * * * *

Section 3
repealed by
No. 46, 1978, s. 3

4. (1) In this Ordinance, unless the contrary intention appears—
- “administration” means probate, granted in the Territory, of the will of a deceased person or letters of administration, granted in the Territory, of the estate of a deceased person, whether with or without a will annexed, and whether granted for general, special or limited purposes and includes an order to collect and administer the estate of a deceased person granted to the Curator of Deceased Estates;
- “administrator”, in relation to the estate of a deceased person, means a person to whom administration has been granted in respect of the deceased person;
- “deceased person” includes a person in respect of whose estate there has been made a grant of administration expressed to be made on presumption of the death of the person;
- “intestate” has the same meaning as in sub-section (1) of section 44 of the *Administration and Probate Ordinance* 1929-1969;
- “the Court” means the Supreme Court;
- “will” includes a codicil.

Interpretation

(2) Where probate of a will or letters of administration of an estate granted outside the Territory is sealed with the seal of the Court in pursuance of section 80 of the *Administration and Probate Ordinance* 1929-1969, the probate as so sealed or the administration as so sealed, as the case requires, shall be deemed to be, for the purposes of this Ordinance, probate of the will, or letters of administration of the estate granted in the Territory on the date on which it was so sealed.

Application
of Ordinance

5. (1) Subject to this section, this Ordinance applies in relation to the estates of all deceased persons, including a person who died before the commencement of this Ordinance.

(2) Where the whole or any part of the estate of a deceased person has been lawfully distributed before the commencement of this Ordinance, a person is not entitled to make application under this Ordinance for provision out of that estate or the part of the estate that has been so distributed, as the case may be, unless he would have been entitled to make an application for provision out of the estate or that part of the estate under Part VII of the *Administration and Probate Ordinance 1929-1967* if that Part had continued in force.

Transitional
provisions

6. (1) An order made by the Court under Part VII of the *Administration and Probate Ordinance 1929-1967* that was in force immediately before the commencement of this Ordinance continues in force and has effect as if it were an order made under this Ordinance.

(2) Proceedings instituted under Part VII of the *Administration and Probate Ordinance 1929-1967* that were pending immediately before the commencement of this Ordinance shall be deemed, on and after the date of commencement of this Ordinance, to have been instituted under this Ordinance and this Ordinance applies to and in relation to those proceedings.

(3) Where an appeal has been or is instituted from a judgment of the Court in proceedings instituted under Part VII of the *Administration and Probate Ordinance 1929-1967* and the appeal has not been finally disposed of before the commencement of this Ordinance, Part VII of the *Administration and Probate Ordinance 1929-1967* continues to apply to and in relation to that appeal.

Persons
entitled to
apply under
this
Ordinance

7. (1) Subject to this section, each of the following persons is entitled to make application to the Court for provision out of the estate of a deceased person:

- (a) the widow or widower of the deceased person;
- (b) a former wife or former husband of the deceased person;
- (c) a child of the deceased person;
- (d) a stepchild of the deceased person;
- (e) a grandchild of the deceased person; and
- (f) a parent of the deceased person.

(2) A person, being a former wife or former husband of a deceased person or a stepchild of a deceased person is not entitled to make an application to the Court for provision out of the estate of the deceased person unless the person was maintained by the deceased person immediately before his or her death.

(3) A grandchild of a deceased person is not entitled to make an application to the Court for provision out of the estate of the deceased person unless—

- (a) the parent of the grandchild who was a child of the deceased person died before the deceased person died; or
- (b) one or both of the parents of the grandchild was alive at the date of the death of the deceased person and the grandchild was not maintained by that parent or by either of those parents immediately before the death of the deceased person.

(4) A parent of a deceased person is not entitled to make an application to the Court for provision out of the estate of the deceased person unless—

- (a) the parent was maintained by the deceased person immediately before his death; or
- (b) the deceased person was not survived by his spouse or any of the children of the deceased person.

(5) A person who was, at the time of his birth, illegitimate (in this sub-section referred to as "the child") shall, for the purposes of this section, be regarded as the legitimate child of a person (in this section referred to as "the parent") if, on the assumption that the parent died an intestate on or after the commencement of section 49E of the *Administration and Probate Ordinance 1929-1969* and was survived by the child, the child would be entitled, under that section, to take the interest in the estate of the parent that the child would be entitled to take if the child were the legitimate child of the parent, and, in such a case, the relationship of the first mentioned person to other persons and the relationship of other persons to him shall, for the purposes of this section, be determined as if he had been born as the legitimate child of the second mentioned person.

(6) The assumption referred to in the last preceding sub-section shall be made—

- (a) whether or not the person whose death is to be assumed has or has not died;
- (b) if the person has died, whether he died an intestate or not; and
- (c) whether the child has or has not survived that person.

(7) For the purposes of this section, a person shall not be regarded as having been maintained by the deceased person immediately before his death unless—

- (a) there was in force at that time an order of a court requiring the deceased person to pay maintenance to or for the benefit of the other person;
- (b) the deceased person was, at that time, whether under an agreement in writing or otherwise, maintaining that other person or making a contribution to the maintenance of that other person,

being a contribution that, in all of the circumstances, can be regarded as other than a nominal contribution; or

- (c) a court would, if the deceased person were still living, have power to make an order requiring the deceased person to pay maintenance to or for the benefit of the other person.

(8) For the purposes of this section, a child of the deceased person born alive after the death of that person shall be regarded as having been born before the death of the deceased person.

Persons entitled may obtain order for proper maintenance, &c., out of the estate of the deceased person

8. (1) Subject to this Ordinance, upon application made by or on behalf of a person entitled to apply to the Court under the last preceding section, if the Court is satisfied that adequate provision is not available, under the terms of the will of a deceased person or under the law applicable on the death of the person as an intestate or under the will and that law, from the estate of the deceased person for the proper maintenance, education and advancement in life of the person by whom, or on whose behalf the application is made, the Court may, in its discretion and having regard to all the circumstances of the case, order that such provision as the Court thinks fit be made out of the estate of the deceased person.

(2) In considering the adequacy of the provision available from the estate of the deceased person for a person who has made application for provision out of the estate of the deceased person, the Court shall regard any benefits conferred upon that person or another person by the exercise, whether expressly or otherwise, by the deceased person by his will of a general or special power of appointment as forming part of the provision available from the estate of the deceased person for the person upon whom those benefits are conferred.

(3) The Court may refuse to make an order in favour of a person whose character is such, or whose conduct is or has been such, as, in the opinion of the Court, disentitles him to the benefit of an order.

(4) The Court may regard an application for provision out of the estate of a deceased person by one person as an application made on behalf of all the persons entitled to make applications for provision out of the estate of the deceased person.

Time within which application is to be made

9. (1) Subject to the next succeeding sub-section, an application for an order under the last preceding section shall be made within a period of twelve months after the date on which administration in respect of the estate of the deceased person has been granted.

(2) The Court may, after hearing such of the persons affected as the Court thinks necessary, extend the time within which an application may be made under the last preceding section.

(3) An extension of time in pursuance of this section may be granted—

- (a) upon such conditions as the Court thinks fit; and

(b) whether or not the time for making an application has expired.

(4) An application for the extension, under this section, of the time within which an application for provision out of the estate of the deceased person may be made under the last preceding section may not be made after the estate of a deceased person has been lawfully and fully distributed.

(5) An application for provision out of the estate of a deceased person shall, for the purposes of this section, be deemed to have been made on the day upon which the notice of motion or other document instituting the application is filed.

10. (1) Where an application has been made to the Court for provision out of the estate of a deceased person, the applicant shall cause notice of the application to be served on each person who is an administrator of the estate of the deceased person. Service of application

(2) The Court may—

(a) of its own motion and either before or during the hearing of an application for an order for provision out of the estate of a deceased person; or

(b) on an application made by the applicant for such an order or by the administrator of the estate of the deceased person,

order that notice of the application be served on such persons as the Court thinks fit.

11. (1) An order under section 8 of this Ordinance shall specify the amount and nature of the provision to be made for the person in whose favour the order is made and may specify such conditions, restrictions and limitations subject to which the provision is to be made as the Court thinks fit to impose. Form of order

(2) Unless the Court otherwise orders, the burden of the provision ordered by the Court to be made for the benefit of a person shall, subject to the next succeeding sub-section, be borne between the persons beneficially entitled to the estate of the deceased person (other than the person or persons in whose favour an order or orders under this Ordinance is or are made), in proportion to the values of their respective interests in the estate.

(3) Where persons are successively entitled to estates or interests in any property that is settled by the will of the deceased person, those estates and interests shall not, unless the Court otherwise orders, be valued separately but the proportion of the provision required by the last preceding sub-section to be borne by those persons out of those estates and interests shall be raised or charged against the corpus of that property.

Class fund

12. (1) Without limiting the powers of the Court under this Ordinance, the Court may order that an amount specified in the order be set aside out of the estate of the deceased person and held on trust as a class fund for the benefit of two or more persons specified in the order in whose favour orders for provision out of the estate of the deceased person have been made.

(2) Where an amount is ordered to be held in trust as a class fund, the trustee of the fund shall invest so much of the amount as he does not apply in accordance with this sub-section and may, subject to such directions or conditions as the Court gives or imposes, but otherwise as he thinks fit, apply the whole or any part of the income and capital of the fund for or towards the maintenance, education or advancement in life for the benefit of the persons for whose benefit the class fund is held, or any one or more of them to the exclusion of the other or others of them in such shares and in such manner as the trustee, from time to time, determines.

(3) Where one or more of the persons for whose benefit moneys are held in trust as a class fund dies, a reference in the last preceding sub-section to the persons for whose benefit moneys are held in trust as a class fund shall, after the death of that person, be read as a reference to the survivor or survivors of those persons.

(4) Where an amount is set aside as a class fund, the administrator of the estate of the deceased person shall, unless the Court otherwise orders, be the trustee of the class fund.

Property
subject to
power of
appointment

13. (1) Where—

- (a) application is made under section 8 of this Ordinance for an order that provision be made out of the estate of a deceased person;
- (b) the deceased person has, by his will, exercised a general or a special power of appointment in respect of property, being a power under which the deceased person was, immediately before his death, entitled to appoint the property to himself; and
- (c) the Court is satisfied that—
 - (i) adequate provision for the person who has made the application cannot justly be made out of other property forming part of the estate of the deceased person; or
 - (ii) by reason of the existence of special circumstances, an order should be made that provision be made out of, or charged on, the property in respect of which the deceased person has exercised the general or special power of appointment,

the Court may order that provision be made out of, or charged on, the property in respect of which the deceased person has exercised the general or special power of appointment.

(2) Where—

- (a) a testator has power to appoint, by will, any real property in such manner as he thinks fit;
- (b) by his will he has made a general devise of his real property or of his real property at a particular place, in the occupation of a particular person or otherwise described in a general manner without expressly exercising the power of appointment; and
- (c) by virtue of sub-section (2) of section 26 of the *Wills Ordinance* 1968, that general devise is to be construed as including the real property over which the deceased person had that power of appointment,

the other property forming part of the estate of the deceased person referred to in sub-paragraph (i) of paragraph (c) of the last preceding sub-section shall be deemed to include the real property over which the deceased person had that power of appointment.

(3) Where—

- (a) a testator has power to appoint, by will, any personal property in such manner as he thinks fit;
- (b) by his will, he has made a general bequest of his personal property or of any class of personal property described in a general manner without expressly exercising the power of appointment; and
- (c) by virtue of sub-section (3) of section 26 of the *Wills Ordinance* 1968, that general bequest is to be construed as including the personal property over which the deceased person had that power of appointment,

the other property forming part of the estate of the deceased person referred to in sub-paragraph (i) of paragraph (c) of sub-section (1) of this section shall be deemed to include the personal property over which the deceased person had that power of appointment.

14. Where the Court makes an order under section 8 of this Ordinance for provision to be made out of the estate of a person of which the Court has granted administration upon being satisfied by evidence supporting the presumption that the person may be presumed to be dead, the Court may direct that the provision shall not be made unless the person in whose favour the order is made gives an undertaking or security that he will, if the grant of administration is revoked on the ground that the person was living at the time of the grant—

Presumption
of death

- (a) where he has received property other than money under the order, restore the property or, at his option, pay an amount equal to the value of the property at the time he receives the property to the person whose death was presumed or, if that person has subsequently died, to the administrator of the estate of that person; or

- (b) where he has received money under the order, pay an amount equal to the amount of the money received by him under the order to the person whose death was presumed or, if that person has subsequently died, to the administrator of the estate of that person.

Exoneration
of part of
estate from
provision
under this
Ordinance

15. (1) The Court may, when making an order under section 8 of this Ordinance or at any time after having made an order under that section, order a person who is entitled to a share in the estate of the deceased person as a legatee, devisee or beneficiary to pay a lump sum or periodical payments, or a lump sum and periodical payments, to represent, or in commutation of, such proportion of the provision ordered to be made for the person in whose favour the order is made as falls upon the legatee, devisee or beneficiary, and may exonerate the property or a specified part of the property to which the legatee, devisee or beneficiary is entitled from further liability in respect of that provision.

(2) Where the Court makes an order under the last preceding sub-section, the Court may direct—

- (a) the manner in which a lump sum or periodical payment is to be secured;
- (b) the person to whom such a lump sum or periodical payment is to be made; and
- (c) in what manner, if any, the lump sum or periodical payment is to be invested for the benefit of the person in whose favour the order under section 8 of this Ordinance has been made.

Operation of
order for
provision out
of estate of
deceased
person

16. (1) Subject to the next succeeding sub-section, an order under section 8 of this Ordinance operates as if it were a codicil to the will of the deceased person executed by the deceased person immediately before his death.

(2) An order under section 8 of this Ordinance in relation to property of a deceased person who died intestate operates as a modification of the provisions of Division 3A of Part III of the *Administration and Probate Ordinance 1929-1969* in their application to that property.

Discharge,
variation,
&c., of order

17. (1) Subject to this section, the Court may, at any time and from time to time, upon application made by the administrator of the estate of the deceased person or by any person beneficially entitled to, or interested in, a part of the estate of the deceased person, discharge, vary or suspend an order made by it under section 8 of this Ordinance or any other order made by it under this Ordinance.

(2) Where the Court has ordered periodical payments, or has ordered that a lump sum be invested for the benefit of a person, the Court may, if it is satisfied, on an application made by the administrator of the estate of the deceased person or by any person beneficially entitled to, or interested in, a part of the estate of the deceased person, that the

person for whose benefit the order was made has otherwise become possessed of or entitled to means for his proper maintenance, education or advancement in life, discharge, vary or suspend its order or make such other order as is just in the circumstances.

(3) An order shall not be made under sub-section (1) of this section increasing a provision made by an order under this Ordinance.

(4) Notice of an application to the Court under this section shall be served on each person who takes a benefit under the order sought to be discharged, varied or suspended.

18. The Court shall, where it makes an order for provision out of the estate of a deceased person, an order under section 15 or an order under section 17 of this Ordinance, direct that a certified copy of the order be endorsed on, or annexed to, the probate of the will or letters of administration with the will annexed or letters of administration of the estate of the deceased person, as the case may be, and, for that purpose, may require the production of the probate or letters of administration.

Certified copy of order

19. A mortgage, charge or assignment of any kind whatsoever, of or over the provision made, or to be made, by an order under this Ordinance, is of no force or effect unless that mortgage, charge or assignment is made with the permission of the Court.

Permission of Court necessary to validity of mortgage, charge or assignment of an interest

20. (1) Notwithstanding any distribution of the property of the deceased person made by the administrator of the estate of the deceased person before the administrator had notice of an application for an order under section 8 of this Ordinance made within twelve months after the date on which administration was granted, the Court may, subject to the next succeeding sub-section, order that provision be made under this Ordinance out of any property of the deceased person that has been so distributed.

Court may order provision to be made out of property distributed

(2) The Court shall not make an order under the last preceding sub-section if the making of that order would affect or disturb a distribution that was a proper distribution made for the purpose of providing for the maintenance, education or advancement in life of a person who was totally or partially dependent on the deceased person immediately before his death.

21. An action does not lie against the administrator of the estate of a deceased person by reason of his having distributed the whole or any part of the estate of the deceased person if the distribution was a distribution referred to in sub-section (2) of the last preceding section or if—

Protection of administrator

(a) the distribution was made before the administrator had notice of an application for an order under this Ordinance or notice of

an application to extend the time within which such an application may be made under this Ordinance; and

- (b) before making the distribution, the administrator had given notices in accordance with section 64 of the *Administration and Probate Ordinance 1929-1969* and the time specified in the notice or in the last of the notices for sending in claims had expired.

The Court may have regard to the testator's reasons

22. (1) The Court shall, in determining an application for an order under section 8 of this Ordinance, have regard to the testator's reasons, so far as they are ascertainable, for making the dispositions made by his will or for not making provision or further provision, as the case may be, for a person who is entitled to make an application under this Ordinance.

(2) The Court may receive in evidence a statement signed by the testator and purporting to bear the date on which it was signed and to set out reasons for making or not making provision or further provision by the will of the testator for a person as evidence of those reasons.

(3) Where a statement of a kind referred to in the last preceding sub-section is received in evidence, the Court shall, in determining what weight, if any, ought to be attached to the statement, have regard to all the circumstances from which any inference may reasonably be drawn concerning the accuracy of the matters referred to in the statement.

NOTE

1. The *Family Provision Ordinance 1969* as shown in this reprint comprises Ordinance No. 15, 1969 as amended by the other Ordinance specified in the following table:

Ordinance	Number and year	Date of notification in <i>Gazette</i>	Date of commencement
<i>Family Provision Ordinance 1969</i>	No. 15, 1969	14 Aug 1969	1 Sept 1969
<i>Ordinances Revision Ordinance 1978</i>	No. 46, 1978	28 Dec 1978	28 Dec 1978