



Australian Capital Territory

Family Provision Act 1969

A1969-15

Republication No 1 (RI)

Effective: 11 May 1989 – 30 April 1996

Republication date of printed version: 31 July 1991

Reissued electronically: 9 January 2014

Last amendment made by Ord1989-18

(republiation for initial republication since self-government)

Authorised by the ACT Parliamentary Counsel

About this republication

The republished law

This is a republication of the *Family Provision Act 1969* effective from 11 May 1989 to 30 April 1996.

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This consolidation has been prepared by the ACT Parliamentary Counsel's Office

Reprinted as at 31 July 1991

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Australian Capital Territory

FAMILY PROVISION ACT 1969

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

Short title

1. This Act may be cited as the *Family Provision Act 1969*.¹

Commencement

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

Interpretation

4. (1) In this Act, 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 Estates of Deceased Persons or the Public Trustee for the Australian Capital Territory;

“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 subsection 44 (1) of the *Administration and Probate Act 1929*;

“the Court” means the Supreme Court;

“will” includes a codicil.

(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 Act 1929*, 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 Act, 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 Act

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

(2) Where the whole or any part of the estate of a deceased person has been lawfully distributed before the commencement of this Act, a person is not entitled to make application under this Act 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 Act 1929* 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 Act 1929* that was in force immediately before the commencement of this Act continues in force and has effect as if it were an order made under this Act.

(2) Proceedings instituted under Part VII of the *Administration and Probate Act 1929* that were pending immediately before the commencement of this Act shall be deemed, on and after the date of commencement of this Act, to have been instituted under this Act and this Act 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 Act 1929* and the appeal has not been finally disposed of before the commencement of this Act, Part VII of the *Administration and Probate Act 1929* continues to apply to and in relation to that appeal.

Persons entitled to apply

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.

(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.

Order for maintenance etc. out of estate of a deceased person

8. (1) Subject to this Act, upon application made by or on behalf of a person entitled to apply to the Court under section 7, 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 or 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 for the person 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 for making application under subsection 8 (1)

9. (1) Subject to subsection (2), an application for an order under section 8 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 section 8.

(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 section 8 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.

Variation, suspension and discharge of orders

9A. (1) In this section, “previous order” means an order—

- (a) made under this Act; or
- (b) continued in force under subsection 6 (1),

that has not been discharged.

(2) Subject to this Act, upon application made by or on behalf of the administrator of the estate of a deceased person or a person beneficially entitled to, or having an interest in, a part of the estate of a deceased person, the Court may, in its discretion and having regard to all the circumstances of the case, by order—

- (a) vary a previous order relating to that estate by reducing the amount of the provision made by that previous order;
- (b) suspend a previous order relating to that estate for a specified period; or
- (c) discharge a previous order relating to that estate.

(3) Subject to this Act, where by a previous order the Court has directed that provision by way of periodical payments or the benefit of the investment of a lump sum be made for a person out of the estate of a deceased person, upon application made by or on behalf of the person, if the Court is satisfied that the provision is not adequate for the proper maintenance, education or advancement in life of the person, the Court may, in its discretion and having regard to all the circumstances of the case, by order, vary the previous order by increasing the amount of the provision.

(4) The applicant for an order under subsection (2) shall cause notice of his application to be served on the person in whose favour the previous order was made.

(5) Where the Court makes an order under this section, the Court may make such orders as it thinks fit for the purpose of giving effect to the first-mentioned order and such other orders as it considers just.

Service of application for order under section 8 or 9A

10. (1) Where an application has been made to the Court for an order under section 8 or 9A for or in relation to 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.

(2) The Court may—

- (a) of its own motion and either before or during the hearing of an application for an order under section 8 or 9A for or in relation to 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.

Form of order and burden of provision

11. (1) An order under section 8 or 9A shall specify the amount and nature of the provision, if any, to be 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.

(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 subsection (3), 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 Act 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 subsection (2) 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 Act, 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 subsection 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 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 subsection (2) 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 or 9A 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 subsection 26 (2) of the *Wills Act 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 subparagraph (1) (c) (i) 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 subsection 26 (3) of the *Wills Act 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 subparagraph (1) (c) (i) shall be deemed to include the personal property over which the deceased person had that power of appointment.

Presumption of death

14. Where the Court makes an order under section 8 or 9A that provision 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—

- (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

15. (1) The Court may, when making, or at any time after having made, an order under section 8 or 9A 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 subsection (1), 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 or 9A has been made.

Operation of order for provision out of estate of deceased person

16. (1) Subject to subsection (2), an order under section 8 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 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 Act 1929* in their application to that property.

Certified copy of order

18. The Court shall, where it makes an order under section 8, 9A or 15 in relation to the estate of a deceased person, 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.

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

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 Act, is of no force or

effect unless that mortgage, charge or assignment is made with the permission of the Court.

Property available for provision

20. (1) Subject to subsection (2), notwithstanding any distribution of property forming part of the estate of a deceased person made by the administrator of the estate, the Court may, in an order under section 8 or 9A in relation to that estate, direct that provision be made for a person out of that property.

(2) In an order under section 8 or 9A, the Court shall not direct that provision be made for a person out of any property that has been the subject of a distribution referred to in subsection (1) if—

- (a) the distribution was properly made for the purpose of providing for the proper maintenance, education or advancement in life of a person who was totally or partially dependent on the deceased person immediately before the death of the deceased person; or
- (b) the distribution was made—
 - (i) more than 12 months after the date on which administration of the estate was granted; and
 - (ii) before the administrator had notice of the application for the order or, where an application was made under section 9 for an extension of time within which an application for an order under section 8 may be made, the application under section 9,

and the property that was so distributed has vested in possession of any person.

Protection of administrator

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 subsection 20 (2) or if—

- (a) the distribution was made before the administrator had notice of an application for an order under this Act or notice of an application to extend the time within which such an application may be made under this Act; and
- (b) before making the distribution, the administrator had given notices in accordance with section 64 of the *Administration and Probate Act*

1929 and the time specified in the notice or in the last of the notices for sending in claims had expired.

Relevance of testator's reasons

22. (1) The Court shall, in determining an application for an order under section 8 or 9A, 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 Act.

(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 subsection (2) 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 Act 1969* as shown in this reprint comprises Act No. 15, 1969 amended as indicated in the Tables below.

Citation of Laws—The *Self-Government (Citation of Laws) Act 1989* (No. 21, 1989) altered the citation of most Ordinances so that after Self-Government day they are to be cited as Acts. That Act also affects references in ACT laws to Commonwealth Acts.

Table of Ordinances

Ordinance	Number and year	Date of notification in <i>Gazette</i>	Date of commencement	Application, saving or transitional provisions
<i>Family Provision Ordinance 1969</i>	15, 1969	14 Aug 1969	1 Sept 1969 (see <i>Gazette</i> 1969, p. 5072)	
<i>Ordinances Revision Ordinance 1978</i>	46, 1978	28 Dec 1978	28 Dec 1978	—
<i>Family Provision (Amendment) Ordinance 1981</i>	38, 1981	30 Oct 1981	30 Oct 1981	—
<i>Public Trustee (Miscellaneous Amendments) Ordinance 1985</i>	9, 1985	8 Mar 1985	28 Oct 1985 (see <i>Gazette</i> 1985, No. G42, p. 3902)	—
<i>Family Provision (Amendment) Ordinance 1989</i>	18, 1989	22 Mar 1989	24 Mar 1989 (see <i>Gazette</i> 1989, No. S101)	S. 5

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision	How affected
S. 3	rep. No. 46, 1978
S. 4	am. No. 38, 1981; No. 9, 1985
Ss. 5, 6	am. No. 38, 1981
S. 7	am. No. 38, 1981; No. 18, 1989
Ss. 8, 9	am. No. 38, 1981
S. 9A	ad. No. 38, 1981
Ss. 10-16	am. No. 38, 1981
S. 17	rep. No. 38, 1981
S. 18	am. No. 38, 1981
S. 20	rs. No. 38, 1981
Ss. 21, 22	am. No. 38, 1981