



Australian Capital Territory

# **Family Provision Act 1969**

**A1969-15**

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Authorised by the ACT Parliamentary Counsel

## **About this republication**

### **The republished law**

This is a republication of the *Family Provision Act 1969* effective from 31 January 1998 to 11 September 2001.

### **Kinds of republications**

The Parliamentary Counsel's Office prepares 2 kinds of republications of ACT laws (see the ACT legislation register at [www.legislation.act.gov.au](http://www.legislation.act.gov.au)):

- authorised republications to which the *Legislation Act 2001* applies
- unauthorised republications.

The status of this republication appears on the bottom of each page.

### **Editorial changes**

The *Legislation (Republication) Act 1996*, part 3, division 2 authorised the Parliamentary Counsel to make editorial amendments and other changes of a formal nature when preparing a law for republication. Editorial changes do not change the effect of the law, but have effect as if they had been made by an Act commencing on the republication date (see *Legislation (Republication) Act 1996*, s 14 and s 16). The changes are made if the Parliamentary Counsel considers they are desirable to bring the law into line, or more closely into line, with current legislative drafting practice.

This republication includes amendments made under section 13.



Australian Capital Territory

**FAMILY PROVISION ACT 1969**

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

Reprinted as at 31 January 1998

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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 or her Estate

### **Short title**

1. This Act may be cited as the *Family Provision Act 1969*.<sup>1</sup>

### **Commencement**

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

### **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 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;

“Court” means the Supreme Court;

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“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;

“domestic partner”, in relation to a deceased person, means a person who lived with the deceased in a domestic relationship for 2 years continuously at any time during the life of the deceased;

“domestic relationship” means a personal relationship between 2 adults (other than a relationship between spouses) in which 1 provides personal or financial commitment and support of a domestic nature for the material benefit of the other;

“eligible partner”, in relation to a deceased person, means a person other than the person’s legal spouse who—

- (a) whether or not of the same gender as the deceased—lived with the deceased at any time as a member of a couple on a genuine domestic basis; and
- (b) either—
  - (i) had lived with the deceased in that manner for 2 or more years continuously; or
  - (ii) is the parent of a child of the deceased;

“intestate” has the same meaning as in subsection 44 (1) of the *Administration and Probate Act 1929*;

“legal spouse”, in relation to a deceased person, means a person who was the wife or husband of the deceased at any time during the life of the deceased;

“spouse”, in relation to a deceased person, means—

- (a) a legal spouse of the deceased; or
- (b) an eligible partner of the deceased;

“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

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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 1 September 1969.

**(2)** Where the whole or any part of the estate of a deceased person has been lawfully distributed before 1 September 1969, 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 the person 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 1 September 1969 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 1 September 1969 shall be deemed, on and after that date, 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 1 September 1969, Part VII of the *Administration and Probate Act 1929* continues to apply to and in relation to that appeal.

**Eligibility**

**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) a spouse of the deceased;
- (b) a domestic partner of the deceased;
- (c) a child of the deceased person;
- (d) a stepchild of the deceased person;
- (e) a grandchild of the deceased person;

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(f) a parent of the deceased person.

(2) 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 stepchild 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 or her death; or
- (b) the deceased person was not survived by any 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 or her 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.

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**(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.

**Family provision orders**

**8. (1)** On application by a person entitled, under section 7, to apply for provision out of the estate of a deceased person, the Court may order that such provision as the Court thinks fit be made for the applicant out of the estate.

**(2)** The Court shall only make an order under subsection (1) if satisfied, in consideration of the criteria set out in subsection (3), that as at the date of the order, adequate provision for the proper maintenance, education or advancement in life of the applicant is not available—

- (a) under the will of the deceased;
- (b) if the deceased died intestate—under the law applicable to that intestacy; or
- (c) under that will and that law combined.

**(3)** The criteria for the Court's decision under subsection (2) in relation to the deceased and the applicant are as follows:

- (a) the character and conduct of the applicant;
- (b) the nature and duration of the relationship between the applicant and the deceased;
- (c) any financial and non-financial contributions made directly or indirectly by or on behalf of either or both the applicant and the deceased to the acquisition, conservation or improvement of any of the property or financial resources of either or both persons;
- (d) any contributions (including any in the capacity of home-maker or parent) by either the applicant or the deceased to the welfare of the other, or of any child of either person;
- (e) the income, property and financial resources of the applicant and the deceased;
- (f) the physical and mental capacity of the applicant, and the deceased (during his or her life), for appropriate gainful employment;
- (g) the financial needs and obligations of the applicant and the deceased (during the life of the deceased);

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- (h) the responsibilities of either the applicant or the deceased (during his or her life) to support any other person;
- (i) the terms of any order made under section 15 of the *Domestic Relationships Act 1994* with respect to the property of the applicant or the deceased;
- (j) any payments made to either the applicant or the deceased by the other, pursuant to an order of the Court or otherwise, in respect of the maintenance of the other person or any child of the other person;
- (k) any other matter the Court considers relevant.

(4) The Court may regard an application for provision out of the estate of a deceased person by a single 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 12 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 shall 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 the application to be served on the person in whose favour the previous order was made.

**(5)** Where the Court makes an order under subsection (2), the Court may make such further orders as it thinks fit for the purpose of giving effect to the order under subsection (2) 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

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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 2 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 is not applied in

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accordance with this subsection and may, subject to such directions or conditions as the Court gives or imposes, but otherwise as the trustee 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 1 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 1 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 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 death, entitled to appoint the property to himself or herself; 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—

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- (a) a testator has power to appoint, by will, any real property in such manner as he or she thinks fit;
- (b) by will, the testator has made a general devise of his or her real property or of such 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 or she thinks fit;
- (b) by will, the testator has made a general bequest of 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 or she 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 or she has received property other than money under the order, restore the property or, at his or her option, pay an amount

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equal to the value of the property at the time he or she 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 or she has received money under the order, pay an amount equal to the amount of the money received by him or her 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 death.

**(2)** An order under section 8 in relation to property of a deceased person who died intestate operates as a modification of Part IIIA of the *Administration and Probate Act 1929* in its 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 or her 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 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.

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## NOTES

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.

2. The *Legislation (Republication) Act 1996* (No. 51, 1996) authorises the Parliamentary Counsel in preparing a law for republication, to make certain editorial and other formal amendments in accordance with current legislative drafting practice. Those amendments make no change in the law. Amendments made pursuant to that Act do not appear in the Table of Amendments but details may be obtained on request from the Parliamentary Counsel's Office.

Table 1

**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

**Self-Government day 11 May 1989**

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**NOTES—continued**

Table 2

**Table of Acts**

Act	Number and year	Date of notification in <i>Gazette</i>	Date of commencement	Application, saving or transitional provisions
<b>(Reprinted as at 31 July 1991)</b>				
<i>Family Provision (Amendment) Act 1996</i>	16, 1996	1 May 1996	1 May 1996	S. 4

**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; Act No. 16, 1996
Ss. 5, 6.....	am. No. 38, 1981; Act No. 16, 1996
S. 7 .....	am. No. 38, 1981; No. 18, 1989; Act No. 16, 1996
Ss. 8, 9.....	am. No. 38, 1981; Act No. 16, 1996
S. 9A .....	ad. No. 38, 1981 am. Act No. 16, 1996
Ss. 10, 11.....	am. No. 38, 1981
Ss. 12-14 .....	am. No. 38, 1981; Act No. 16, 1996
S. 15 .....	am. No. 38, 1981
S. 16 .....	am. No. 38, 1981; Act No. 16, 1996
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; Act No. 16, 1996