

# NORTHERN TERRITORY OF AUSTRALIA

## FAMILY PROVISION ACT

As in force at 1 January 1992

### Table of provisions

1	Short title .....	1
2	Commencement .....	1
3	Repeal .....	1
4	Definitions .....	1
5	Application of Act .....	2
6	Transitional provisions .....	2
7	Persons entitled to apply, &c. ....	3
8	Persons entitled may obtain order for proper maintenance, &c., out of the estate of the deceased person .....	5
9	Time within which application is to be made .....	5
10	Service of application .....	6
11	Form of order .....	6
12	Class fund .....	7
13	Property subject to power of appointment .....	7
14	Presumption of death .....	9
15	Exoneration of Act under this part of estate from provision .....	9
16	Operation of order for provision out of estate of deceased person .....	10
17	Discharge, variation, &c., of order .....	10
18	Certified copy of order .....	10
19	Permission of Court necessary to validity of mortgage, charge or assignment of an interest .....	11
20	Court may order provision to be made out of property distributed .....	11
21	Protection of administrator .....	11
22	The Court may have regard to the testator's reasons .....	12

### ENDNOTES



# NORTHERN TERRITORY OF AUSTRALIA

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As in force at 1 January 1992

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## FAMILY PROVISION ACT

**An Act to ensure that the family of a deceased person receives adequate provision out of his estate**

### 1 Short title

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

### 2 Commencement

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

### 3 Repeal

The *Testator's Family Maintenance Ordinance 1929* and the *Testator's Family Maintenance Ordinance 1931* are repealed.

### 4 Definitions

(1) In this Act unless the contrary intention appears:

**Aboriginal** means a person who is a member of the aboriginal race of Australia.

**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 or the Public Trustee.

**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.

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**de facto partner**, in relation to a deceased person means:

- (a) where the deceased was a man – a woman who, immediately before the man's death, was living with him as his wife on a bona fide domestic basis although not married to him; and
- (b) where the deceased was a woman – a man who, immediately before the woman's death, was living with her as her husband on a bona fide domestic basis although not married to her.

**intestate** has the same meaning as in section 61(1) of the *Administration and Probate Act*.

**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 111 of the *Administration and Probate Act*, the probate as so sealed or the administration as so sealed, as the case requires, shall be of the will, or letters of administration of the estate granted in the Territory on the date on which it was so sealed.

## **5 Application of Act**

- (1) Subject to this section, this Act applies in relation to the estates of all deceased persons, including a person who dies 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 the *Testator's Family Maintenance Ordinance* if that Ordinance had continued in force.

## **6 Transitional provisions**

- (1) An order made by the Court under the *Testator's Family Maintenance Ordinance* 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 the *Testator's Family Maintenance Ordinance* that were pending immediately before the commencement of this Act shall be deemed, on and after the date

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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 the *Testator's Family Maintenance Ordinance* and the appeal has not been finally disposed of before the commencement of this Act, the *Testator's Family Maintenance Ordinance* continues to apply to and in relation to that appeal.

## **7 Persons entitled to apply, &c.**

- (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;
  - (f) a parent of the deceased person; and
  - (g) a de facto partner of the deceased person.
- (1A) For the purpose of determining whether a person is entitled to make an application under subsection (1), an Aboriginal who has entered into a relationship with another Aboriginal that is recognized as a traditional marriage by the community or group to which either Aboriginal belongs is married to the other Aboriginal, and all relationships shall be determined accordingly.
- (2) A person, being:
- (a) a former wife or former husband of a deceased person;
  - (b) a stepchild of a deceased person; or
  - (c) a de facto partner 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.

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- (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 or were 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.

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

- (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 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.

**9                   Time within which application is to be made**

- (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.

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- (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.

## **10 Service of application**

- (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.
- (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 Form of order**

- (1) An order under section 8 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.
- (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 (1), 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



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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.

## **12 Class fund**

- (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 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 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 subsection (3) 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.

## **13 Property subject to power of appointment**

- (1) Where:
  - (a) application is made under section 8 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

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(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 section 30(1) of the *Wills Act* 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 subsection (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 section 30(2) of the *Wills Act*, that general bequest is to be construed as including the personal property over which the deceased person had that power of appointment,

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

#### **14        Presumption of death**

Where the Court makes an order under section 8 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:

- (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 received 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.

#### **15        Exoneration of Act under this part of estate from provision**

- (1) The Court may, when making an order under section 8 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 subsection (1), the Court may direct:
  - (a) the manner in which a lump sum or periodical payment is to be secured;

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- (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 has been made.

**16      Operation of order for provision out of estate of deceased person**

- (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 4 of Part III of the *Administration and Probate Act* in their application to that property.

**17      Discharge, variation, &c., of order**

- (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 or any other order made by it under this Act.
- (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 subsection (1) increasing a provision made by an order under this Act.
- (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      Certified copy of order**

The Court shall, where it makes an order for provision out of the estate of a deceased person, an order under section 15 or 17,

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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.

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

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.

**20      Court may order provision to be made out of property distributed**

- (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 made within 12 months after the date on which administration was granted, the Court may, subject to subsection (2), order that provision be made under this Act out of any property of the deceased person that has been so distributed.
- (2) The Court shall not make an order under sub-section (1) 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      Protection of administrator**

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 section 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 96 of the *Administration and Probate Act* and the time specified in the notices or in the last of the notices for sending in claims had expired.

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**22            The Court may have regard to the testator's reasons**

- (1) The Court shall, in determining an application for an order under section 8, 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.

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## ENDNOTES

**1****KEY**

Key to abbreviations

amd = amended  
 app = appendix  
 bl = by-law  
 ch = Chapter  
 cl = clause  
 div = Division  
 exp = expires/expired  
 f = forms  
 Gaz = Gazette  
 hdg = heading  
 ins = inserted  
 lt = long title  
 nc = not commenced

od = order  
 om = omitted  
 pt = Part  
 r = regulation/rule  
 rem = remainder  
 renum = renumbered  
 rep = repealed  
 s = section  
 sch = Schedule  
 sdiv = Subdivision  
 SL = Subordinate Legislation  
 sub = substituted

**2****LIST OF LEGISLATION*****Family Provision Ordinance 1970 (Act No. 10, 1970)***

Assent date	8 April 1970
Commenced	17 March 1971 (Gaz No. 9, 3 March 1971, p 79)

***Ordinances Revision Ordinance 1973 (Act No. 87, 1973)***

Assent date	11 December 1973
Commenced	11 December 1973 (s 12(2))

**Amending Legislation*****Ordinances Revision Ordinance 1974 (Act No. 34, 1974)***

Assent date	26 August 1974
Commenced	11 December 1973 (s 3(2))

***Ordinances Revision Ordinance (No. 2) 1974 (Act No. 69, 1974)***

Assent date	24 October 1974
Commenced	11 December 1973 (s 3)

***Ordinances Revision Ordinance 1976 (Act No. 27, 1976)***

Assent date	28 June 1976
Commenced	ss 1, 2 and 6: 28 June 1976 (s 6(2)); ss 3 and 4: 11 December 1973; s 5: 24 October 1974

***Status of Children Act 1978 (Act No. 16, 1979)***

Assent date	26 January 1979
Commenced	21 September 1979 (Gaz G38, 21 September 1979, p 1)

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**Family Provision Act 1979 (Act No. 36, 1979)**

Assent date 27 April 1979  
 Commenced 3 December 1979 (s 2, s 2 *Administration and Probate Act 1979* (Act No. 38, 1979) and Gaz S25, 28 November 1979)

**Amending Legislation**

**Statute Law Revision Act (No. 3) 1979 (Act No. 37, 1980)**

Assent date 24 April 1980  
 Commenced 24 April 1980

**Family Provision Amendment Act 1980 (Act No. 10, 1981)**

Assent date 9 January 1981  
 Commenced 20 February 1981 (Gaz G7, 20 February 1981, p 7)

**Statute Law Revision Act (No. 2) 1981 (Act No. 63, 1981)**

Assent date 20 July 1981  
 Commenced 20 July 1981

**Statute Law Revision Act (No. 4) 1981 (Act No. 4, 1982)**

Assent date 12 February 1982  
 Commenced 12 February 1982

**De Facto Relationships (Miscellaneous Amendments) Act 1991 (Act No. 82, 1991)**

Assent date 24 December 1991  
 Commenced 1 January 1992 (s 2)

### 3 GENERAL AMENDMENTS

General amendments of a formal nature (which are not referred to in the table of amendments to this reprint) are made by the *Ordinances Revision Ordinance 1973* (Act No. 87, 1973) (as amended) to the following provisions: ss 4, 5, 6, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, and 22.

### 4 LIST OF AMENDMENTS

It	amd No. 10, 1981, s 6
ss 1 – 2	amd No. 10, 1981, s 6
s 4	amd No. 36, 1979, s 3; No. 10, 1981, ss 4 and 6; No. 4, 1982, s 3; No. 82, 1991, s 11
ss 5 – 6	amd No. 10, 1981, s 6
s 7	amd No. 16, 1979, s 19; No. 36, 1979, s 4; No. 10, 1981, ss 5 and 6
s 8	amd No. 10, 1981, s 6
ss 11 – 13	amd No. 10, 1981, s 6
ss 16 – 17	amd No. 10, 1981, s 6
s 18	amd No. 4, 1982, s 3
s 19	amd No. 63, 1981, s 2
ss 20 – 22	amd No. 10, 1981, s 6