

CONCURRENCE COPY

FAMILY PROVISION BILL, 1982

EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The object of this Bill is to allow provision to be made by the Supreme Court out of property in the estates of deceased persons and certain other property for members of the immediate family of deceased persons and certain other persons (described in the Bill as "eligible persons").

The proposed Act will, as regards the estates of persons who die after its commencement and certain persons whose time of death is uncertain, supplant the provisions of the Testator's Family Maintenance and Guardianship of Infants Act, 1916, that enable provision to be made out of the estates of deceased persons in favour of surviving spouses and children.

The Bill contains the following provisions:—

PART I.—PRELIMINARY.

Clause 1. Short title.

Clause 2 provides that the proposed Act will commence on a day to be proclaimed (being not earlier than 6 months after the date of assent).

Clause 3. Arrangement.

Clause 4 provides that the proposed Act applies only to persons who die on or after the commencement of the Act.

Clause 5 provides that the proposed Act will bind the Crown.

Clause 6. Interpretation. Included in this clause are definitions of "eligible person" and "notional estate".

An "eligible person", in relation to a deceased person, is a person who was—

- (a) the spouse or de facto spouse of the deceased person;
- (b) a child of the deceased person;
- (c) a former spouse of the deceased person; or
- (d) a person who—
 - (i) was, at any time, wholly or partly dependent on the deceased person; and
 - (ii) was a grandchild of the deceased person or was, at any time, a member of the household of the deceased person;

The "notional estate" of a deceased person is property so designated by the Court under clause 23, 24 or 25.

PART II.—FAMILY PROVISION.

DIVISION 1.—*Orders for provision.*

Clause 7 empowers the Court to make provision for the maintenance, education or advancement in life of a person who is, in relation to a deceased person, an eligible person out of the estate or notional estate of the deceased person.

Clause 8 empowers the Court to make a further order for provision in favour of an eligible person who has suffered a substantial detrimental change in his circumstances since the previous order for provision was made.

Clause 9 sets out the matters which the Court is to take into account in relation to making an order for provision.

Clause 10 allows the Court to make consequential orders for provision to adjust the various interests which may have been affected by an order for provision in favour of an eligible person.

Clause 11 specifies the manner in which provision may be required to be made under an order for provision, including provision by way of a lump sum, a periodic payment or an interest in property.

Clause 12 provides for provision by way of a class fund.

Clause 13 allows the Court, where it makes an order for provision out of property in the estate of a deceased person, to specify the beneficial entitlements in the estate which shall bear the burden of that provision.

Clause 14 relates to the way in which an order for provision out of an estate of a deceased person will take effect.

Clause 15 empowers the Court to make consequential and ancillary orders to facilitate the making of provision including orders for the transfer of property or the appointment of a trustee of property.

Clause 16 specifies the time within which an application for provision under the proposed Act must be made.

Clause 17 allows the Court to require applications for provision in relation to a deceased person to be made within a shorter period than that applicable under clause 16.

Clause 18 allows the Court to require an undertaking to be given to restore property if a deceased person is later found to have been alive at the time provision was made.

Clause 19 specifies the circumstances in which the Court may revoke or alter an order for provision.

Clause 20 permits the Court to disregard the interests of persons who have not made application for provision.

DIVISION 2.—*Notional estate.*

Clause 21 defines the “disponee” and the “disponer”, in relation to a prescribed transaction, as being, respectively, the person who receives property as a result of the prescribed transaction and the person who entered into the prescribed transaction.

Clause 22 provides that a person shall be deemed to enter into a prescribed transaction if—

- (a) he does, directly or indirectly, or omits to do, any act, as a result of which property becomes held by another person; and
- (b) full valuable consideration in money or money’s worth for the first-mentioned person’s doing, or omitting to do, that act is not given.

Clause 23 allows the Court to make an order designating property of a disponee as notional estate of a deceased person where the deceased person entered into a prescribed transaction which took effect—

- (a) within 3 years before his death (if the transaction was entered into with the intention of defeating a claim under the proposed Act);
- (b) within 1 year before his death (if at that time he had a moral obligation to make adequate provision for an eligible person); or
- (c) on or after his death.

Clause 24 allows the Court to make an order designating as notional estate of a deceased person property of a person who has received property distributed from the estate of the deceased person.

Clause 25 allows the Court to make an order designating as notional estate of a deceased person property of a person who, by means of another prescribed transaction to which he was a party, benefited indirectly from a prescribed transaction entered into by the deceased person or a distribution from the estate of a deceased person.

Clause 26 restricts the power of the Court to make an order designating property as notional estate of a deceased person by reason of a prescribed transaction to cases where the prescribed transaction can be said to have enriched another person at the expense of the estate of the deceased person or an eligible person.

Clause 27 specifies the matters which the Court is required to take into consideration in relation to making an order designating property as notional estate.

Clause 28 sets out certain powers and restrictions of a Court in relation to the designation of property as notional estate.

Clause 29 provides that an order designating property as notional estate shall prevail over any other rights or interests in that property.

DIVISION 3.—*General.*

Clause 30 allows the Court to substitute certain property for property designated or proposed to be designated as notional estate of a deceased person.

Clause 31 provides for the Court’s approval of any release by a person of his rights to make an application under the proposed Act. A release which has not been approved by the Court has no effect.

PART III.—MISCELLANEOUS.

Clause 32 makes provision with respect to the admission in evidence of statements made by a deceased person during his lifetime in proceedings under the proposed Act.

Clause 33 relates to orders for the payment of the costs, charges and expenses of or incidental to proceedings under the proposed Act.

Clause 34 exempts from stamp duty certain instruments executed pursuant to an order under the proposed Act.

Clause 35 protects the administrator of the estate of a deceased person from liability where he has distributed the estate after publishing notice of his intention to distribute.

Clause 36 provides for rules of court to be made under the Supreme Court Act, 1970.

FAMILY PROVISION BILL, 1982

No. , 1982.

A BILL FOR

An Act to amend the law relating to the assurance to the family of a deceased person and certain other persons of adequate provision from the estate of the deceased person and certain other property.

[MR WALKER—23 *November*, 1982.]

See also Testator's Family Maintenance and Guardianship of Infants (Family Provision) Amendment Bill, 1982; Wills, Probate and Administration (Family Provision) Amendment Bill, 1982.

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BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

5

PART I.**PRELIMINARY.****Short title.**

1. This Act may be cited as the "Family Provision Act, 1982".

Commencement.

- 10 2. (1) Sections 1 and 2 shall commence on the date of assent to this Act.

(2) Except as provided in subsection (1), this Act shall commence on such day, being a day not earlier than 6 months after the date of assent to this Act, as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

15 Arrangement.

3. This Act is divided as follows:—

PART I.—PRELIMINARY—*ss.* 1–6.

PART II.—FAMILY PROVISION—*ss.* 7–31.

DIVISION 1.—*Orders for provision—ss.* 7–20.

20 DIVISION 2.—*Notional estate—ss.* 21–29.

DIVISION 3.—*General—ss.* 30, 31.

PART III.—MISCELLANEOUS—*ss.* 32–36.

Application.

4. This Act applies—

25 (a) in relation to a deceased person who has died on or after the appointed day; and

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(b) in relation to a deceased person where it is uncertain when he died except—

- 5 (i) where it is certain that he died before the appointed day; or
(ii) where the Court is satisfied that, on the balance of probabilities, he died before the appointed day.

Act binds Crown.

5. This Act binds the Crown not only in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

10 Interpretation.

6. (1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires—

“administration”, in respect of a deceased person, means—

- 15 (a) probate of the will of the deceased person granted in New South Wales or granted outside New South Wales but sealed in pursuance of section 107 (1) of the Wills, Probate and Administration Act, 1898; or
20 (b) letters of administration of the estate of the deceased person or in respect of the deceased person granted in New South Wales or granted outside New South Wales but so sealed, whether the letters of administration were granted with or without a will annexed and whether for general, special or limited purposes,

25 and includes an order under section 18 (2) or 23 (1) of the Public Trustee Act, 1913, in respect of the estate of the deceased person and an election by the Public Trustee under section 18A of that Act in respect of the estate of the deceased person;

“administrator”, in relation to the estate of a deceased person, means—

- 30 (a) a person to whom administration (not being an order under section 18 (2) or 23 (1), or an election under section 18A, of the Public Trustee Act, 1913) has been granted in respect of that estate or any part of that estate;

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(b) where an order under section 18 (2) or 23 (1), or an election under section 18A, of the Public Trustee Act, 1913, has been made or filed in respect of that estate or any part of that estate, the Public Trustee;

5 (c) a person who holds that estate or any part of that estate upon a trust which arises out of the will or on the intestacy of the deceased person; or

(d) a person who is otherwise entitled or required to administer that estate or any part of that estate;

10 “appointed day” means the day appointed and notified under section 2 (2);

“Court” means the Supreme Court of New South Wales;

“deceased person” includes any person in respect of whom administration has been granted;

15 “eligible person”, in relation to a deceased person, means—

(a) a person who—

(i) was the wife or husband of the deceased person at the time of the deceased person’s death;

20 (ii) where the deceased person was a man, was a woman who, at the time of his death, was living with the deceased person as his wife on a bona fide domestic basis; or

25 (iii) where the deceased person was a woman, was a man who, at the time of her death, was living with the deceased person as her husband on a bona fide domestic basis;

(b) a child of the deceased person;

(c) a former wife or husband of the deceased person; or

(d) a person—

30 (i) who was, at any particular time, wholly or partly dependent upon the deceased person; and

35 (ii) who is a grandchild of the deceased person or was, at that particular time or at any other time, a member of a household of which the deceased person was a member;

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“estate”, in relation to a person dying leaving a will, includes property which would, on a grant of probate of the will, vest in the executor of the will or, on a grant of administration with the will annexed, vest in the administrator appointed under that grant;

5 “notional estate”, in relation to a deceased person, means property designated by the Court under section 23, 24 or 25 as notional estate of the deceased person;

10 “property” includes real and personal property and any estate or interest (whether a present, future or contingent estate or interest) in real or personal property, and money, and any debt, and any cause of action for damages (including damages for personal injury), and any other chose in action, and any right with respect to property, and any valuable benefit;

“will” includes a codicil.

15 (2) A reference in this Act to an application in relation to a deceased person is a reference to an application to the Court for an order for provision in favour of an eligible person out of the estate or notional estate, or both, of the deceased person.

20 (3) A reference in this Act to an order for provision in favour of an eligible person is a reference to an order under section 7 or 8 in favour of the eligible person.

(4) A reference in this Act to the estate of a deceased person is, where any property which was in the estate of the deceased person at the time of his death has been distributed, a reference to so much of the property in the 25 estate as has not been distributed.

(5) Where property in the estate of a deceased person is held by the administrator of that estate as trustee for a person or for a charitable or other purpose, the property shall be treated, for the purposes of this Act, as not having been distributed unless it is vested in interest in that person or for 30 that purpose.

(6) Except in so far as the context or subject-matter otherwise indicates or requires, a reference in this Act to property held by a person includes a reference to property in relation to which the person is entitled to exercise a power of appointment or disposition in favour of himself.

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(7) A reference in this Act to a person entitled to exercise a power is a reference to a person entitled to exercise the power whether the power is absolute or conditional and whether or not the power arises under a trust, and includes a reference to a person entitled to exercise the power together
5 with one or more other persons, whether jointly or severally.

(8) The Court may, for the purpose of giving effect to any provision of this Act, determine in relation to the provision that the date or time of death of a person the date or time of whose death is uncertain shall be treated as being such date or time, as the case may be, as the Court thinks reasonable
10 for the purposes of the provision.

PART II.

FAMILY PROVISION.

DIVISION 1.—*Orders for provision.*

Provision out of estate or notional estate of deceased person.

15 7. Subject to section 9, on an application in relation to a deceased person in respect of whom administration has been granted, being an application made by or on behalf of a person in whose favour an order for provision out of the estate or notional estate of the deceased person has not previously been made, if the Court is satisfied that the person is an eligible person, it
20 may order that such provision be made out of the estate or notional estate, or both, of the deceased person as, in the opinion of the Court, ought, having regard to the circumstances at the time the order is made, to be made for the maintenance, education or advancement in life of the eligible person.

Additional provision.

25 8. Subject to section 9, on an application in relation to a deceased person made by or on behalf of an eligible person in whose favour an order for provision out of the estate or notional estate, or both, of the deceased person has previously been made, if the Court is satisfied that there has been, since

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an order for provision was last made by the Court in favour of the eligible person out of the estate or notional estate, or both, of the deceased person, a substantial detrimental change in the circumstances of the eligible person, it may order that such additional provision be made out of the estate or notional estate, or both, of the deceased person as, in the opinion of the Court, ought, having regard to the circumstances at the time the order is made, to be made for the maintenance, education or advancement in life of the eligible person.

Provisions affecting Court's powers under sections 7 and 8.

9. (1) Where an application is made for an order under section 7 by an eligible person who is such a person by reason only of paragraph (c) or (d) of the definition of "eligible person" in section 6 (1), the Court shall first determine whether, in its opinion, having regard to all of the circumstances of the case (whether past or present), there are factors which warrant the making of the application and shall refuse to proceed with the determination of the application and to make the order unless it is satisfied that there are those factors.

(2) The Court shall not make an order under section 7 or 8 in favour of an eligible person out of the estate or notional estate of a deceased person unless it is satisfied that—

- 20 (a) the provision (if any) made in favour of the eligible person by the deceased person either during his lifetime or out of his estate; or
- (b) in the case of an order under section 8—
- 25 (i) if no provision was made in favour of the eligible person by the deceased person, the provision made in favour of the eligible person under this Act out of the estate or notional estate, or both, of the deceased person; or
- 30 (ii) the provision made in favour of the eligible person by the deceased person either during his lifetime or out of his estate as well as the provision made in favour of the eligible person under this Act out of the estate or notional estate, or both, of the deceased person,

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is, at the time the Court is determining whether or not to make such an order, inadequate for the proper maintenance, education and advancement in life of the eligible person.

5 **(3)** In determining what provision (if any) ought to be made in favour of an eligible person out of the estate or notional estate of a deceased person, the Court may take into consideration—

10 (a) any contribution made by the eligible person, whether of a financial nature or not and whether by way of providing services of any kind or in any other manner, being a contribution directly or indirectly to—

 (i) the acquisition, conservation or improvement of property of the deceased person; or

 (ii) the welfare of the deceased person, including a contribution as a homemaker;

15 (b) the character and conduct of the eligible person before and after the death of the deceased person;

 (c) circumstances existing before and after the death of the deceased person; and

 (d) any other matter which it considers relevant in the circumstances.

20 **(4)** Nothing in subsection (3) (a) limits the generality of subsection (3) (b), (c) and (d) and the Court may consider a contribution of the same nature as that referred to in subsection (3) (a) or of a different nature in so far as it considers it relevant under subsection (3) (b), (c) or (d).

25 **(5)** Subject to the foregoing provisions of this section, the Court may make an interim order for provision under section 7 in favour of an eligible person before it has fully considered the application for that provision where it is of the opinion that no less provision than that proposed to be made by the interim order would be made in favour of the eligible person after full consideration of the application.

30 **(6)** Where, on an application made in relation to a deceased person, the Court has made an interim order as referred to in subsection (5), it shall, in due course, proceed to make a final determination of the application, which determination shall confirm, revoke or alter the order so made.

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Consequential provision.

10. Where, on an application in relation to a deceased person, the Court makes an order for provision in favour of an eligible person out of the estate or notional estate of the deceased person, the Court may make an order
5 in favour of any other eligible person or any other person by whom, or any purpose for which, property in the estate or notional estate of the deceased person is held or would, but for the order for provision in favour of the eligible person, be held that provision be made in such manner and to such extent as the Court thinks necessary to adjust all the interests concerned and
10 to do justice in all the circumstances.

Orders for provision.

11. (1) An order for provision out of the estate or notional estate of a deceased person (whether or not an order made in favour of an eligible person) may—

- 15 (a) require the provision to be made in any 1 or more of the following manners:—
- (i) by way of a lump sum;
 - (ii) by way of a periodic sum;
 - (iii) by way of specified existing or future property;
 - 20 (iv) by way of an absolute interest, or a limited interest only, in property;
 - (v) by way of property set aside as a class fund for the benefit of 2 or more persons;
 - (vi) in any other manner which the Court thinks fit;
- 25 (b) be in respect of property which is situated in New South Wales at the time of, or at any time after, the making of the order, whether or not the deceased person was, at the time of his death, domiciled in New South Wales;

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- (c) specify the manner in which a sum of money or other property is to be paid or made available to the person in whose favour the order is made;
- 5 (d) where provision is required to be made by way of a sum of money, specify that the whole or any part of the sum shall bear interest at such rate as the Court thinks fit for such period as the Court thinks fit; and
- (e) be made subject to such conditions as the Court thinks fit.

(2) Subsection (1) (b) does not limit any power of the Court in relation to any part of the estate or notional estate of a deceased person which is situated outside New South Wales.

Class fund.

12. (1) Where the Court makes an order for provision requiring the provision to be made by way of property set aside as a class fund, it shall
15 specify a trustee of the property so set aside.

(2) The trustee of property set aside as a class fund may, subject to such directions and conditions as the Court gives or imposes, but otherwise as he thinks fit, apply from time to time the whole or any part of the income and capital of the fund for or towards the maintenance, education or
20 advancement in life of the persons for whose benefit the 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.

Burden of provision out of estate.

13. Where the Court makes an order for provision out of the estate of
25 a deceased person it may specify the beneficial entitlements in that estate which shall bear the burden of that provision and, in relation to each of those entitlements, the part of the burden which it shall bear.

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Effect of order for provision out of estate of deceased person.

14. (1) An order made by the Court for provision out of the estate of a deceased person (whether or not an order made in favour of an eligible person) shall, except in so far as the Court otherwise directs, take effect
5 as if the provision had been made—

- (a) where the deceased person died leaving a will—in a codicil to the will; or
- (b) where the deceased person died intestate—in a will of the deceased person.

10 (2) The Court shall not direct that an order for provision out of the estate of a deceased person shall take effect otherwise than in the manner referred to in subsection (1) unless it is satisfied that compliance with the order will not adversely affect any creditor of the deceased person.

Consequential and ancillary orders.

15 15. (1) To enable effect to be given to an order for provision out of the estate or notional estate of a deceased person (whether or not an order made in favour of an eligible person), the Court may—

- (a) make orders for or with respect to all or any of the following matters:—
 - 20 (i) the transferring of property in the estate or notional estate directly to the person in whose favour the order for provision is made or to any other person as trustee for that person;
 - 25 (ii) the constituting of a person by whom property in the estate or notional estate is held as a trustee of that property;
 - (iii) the appointing of a trustee of property in the estate or notional estate;
 - (iv) the powers and duties of any trustee of property in the estate or notional estate;
 - 30 (v) the vesting in any person of property in the estate or notional estate;

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- (vi) the exercising of a right or power to obtain property for the estate or notional estate;
 - (vii) the selling of, or other dealing with, property in the estate or notional estate;
 - 5 (viii) the disposing of the proceeds of any sale or other realising of property in the estate or notional estate;
 - (ix) the securing, either wholly or partially, of the due performance of an order under this section;
 - (x) the managing of property in the estate or notional estate;
 - 10 (xi) the executing of any necessary conveyance, document or instrument, the producing of such documents of title or the doing of such other things as the Court thinks necessary in relation to the performance of an order; and
- (b) make such other orders with respect to such other matters as the
15 Court thinks necessary.

(2) The provisions of sections 78 (except subsection (1)) and 79 of the Trustee Act, 1925, apply to and in relation to an order under subsection (1) for the vesting of property in a person in the same way as they apply to and in relation to a vesting order referred to in those provisions and, 20 in the case of section 78 (2) of that Act, as if the provisions of subsection (1) and the other provisions of this Act relating to the making of orders under this Act were contained in Part III of that Act.

(3) Where an order under subsection (1) provides for the payment of money, interest is not payable unless the Court specifically provides 25 that the money shall bear interest.

Time for application for provision.

16. (1) In this section, “prescribed period”, in respect of an application in relation to a deceased person, means—

- 30 (a) where the Court has, in an order made under section 17, specified a period in relation to the application—that period; or

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(b) in any other case—the period of 18 months after the death of the deceased person.

(2) An order under section 7 shall not be made unless the application for the order is made within the prescribed period in respect of that application or within such further period as the Court may, having regard
5 to all the circumstances of the case but subject to subsection (3), by order, allow.

(3) The Court shall not make an order under subsection (2) allowing an application in relation to a deceased person to be made after the
10 expiration of the prescribed period unless sufficient cause is shown for the application not having been made within that period.

(4) The Court may make an order under subsection (2) with respect to an application in relation to a deceased person whether or not—

- 15 (a) the prescribed period in respect of the application in relation to the deceased person has expired;
- (b) the application for the order under that subsection was made before that period expired; or
- (c) the application in relation to the deceased person has been made.

(5) Notwithstanding subsections (2) and (3), where administration has been granted in respect of a person whose date of death is so uncertain as to make it impossible to apply subsections (2) and (3) with respect to an application in relation to the person, the Court may, whether or not the application in relation to the person has been made, by order,
20 allow the application in relation to the person to be made within such period as it thinks reasonable and such an order has effect according to its tenor.
25

Shortening of time for applications for provision.

17. (1) On an application made to the Court by the administrator of the estate of a deceased person or by any other person who, in the opinion of the Court, has a sufficient interest in proceedings in respect of the
30 estate or notional estate of a deceased person, the Court may, if it is satisfied that, having regard to all the circumstances of the case, it is reasonable to

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make an order under this section, order that, in respect of an application in relation to the deceased person by a specified person, the period within which the application shall be made shall be such period (being a period expiring before the expiration of the period of 18 months after the death of the deceased person) as the Court specifies.

(2) An application by a person under this section shall not be deemed to be an admission by the person of any matter for any purpose.

(3) An administrator shall not be regarded as being under any duty to make an application under this section.

10 Court may require undertakings to restore property if deceased found to have been alive.

18. Where the Court makes an order for provision in favour of a person out of the estate or notional estate of a person, the Court may, if it thinks fit, make the order subject to an undertaking being entered into or security being given by the person in whose favour the order is made that, in the event of the revocation of the order by reason of the person out of whose estate or notional estate the provision was made having been alive at the time the order was made, he will, in accordance with any order made by the Court as a result of the revocation, restore any property received by him pursuant to the order or otherwise make restitution.

Revocation or alteration of orders for provision.

19. (1) An order for provision made under this Act may not be revoked or altered except in accordance with this Act.

(2) Subject to section 20 (4), the Court may, by order, revoke or alter an order for provision in favour of a person made in respect of property in the estate or notional estate of a deceased person so as to allow an order for provision to be made under this Act in favour of another person wholly or partly in respect of all or any of that property.

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(3) Where, following the making of an order for provision under this Act, the grant of administration made in respect of the person out of whose estate or notional estate the provision was made is revoked or rescinded, the order for provision is revoked, unless the Court otherwise provides upon the revocation or rescission of the grant.

(4) Where an order for provision is revoked or altered pursuant to section 9 (6) or subsection (2) or (3) or is altered pursuant to section 30, the Court may—

- (a) revoke or alter any other orders made by it as a consequence of, or in relation to, the order to such extent as may be necessary as a result of the revocation or alteration; and
- (b) make such additional orders (other than an order for provision) as may be so necessary.

Court may disregard persons who have not applied for provision.

20. (1) On an application in relation to a deceased person, the Court may disregard the interests of any eligible persons who have not made an application in relation to the deceased person.

(2) Except as provided in subsection (3), the Court shall not disregard the interests of an eligible person unless it has caused notice of an application before it and its intention to disregard the interests of the eligible person to be given or served upon the eligible person in such manner as may be determined by the Court.

(3) The Court is not obliged to cause a notice to be given or served as referred to in subsection (2) where, in its opinion, it would be unreasonable or impracticable to do so.

(4) The Court shall not revoke or alter an order for provision in favour of an eligible person to allow the making of a further order for provision in favour of another eligible person unless the other eligible person shows sufficient cause for not having applied for an order for provision in his favour before the firstmentioned order was made.

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DIVISION 2.—*Notional estate.*

Interpretation: Pt. II, Div. 2.

21. In this Division, except in so far as the context or subject-matter otherwise indicates or requires—

5 “disponee”, in relation to a prescribed transaction, means—

(a) where, as a result of the prescribed transaction, property becomes held by a person (whether or not as trustee)—the person; or

10 (b) where, as a result of the prescribed transaction, property becomes held subject to a trust—the object of the trust;

“disponer”, in relation to a prescribed transaction, means the person deemed by section 22 to have entered into the prescribed transaction.

Prescribed transactions.

15 **22. (1)** A person shall be deemed to enter into a prescribed transaction if—

(a) on or after the appointed day he does, directly or indirectly, or omits to do, any act, as a result of which—

20 (i) property becomes held by another person (whether or not as trustee); or

(ii) property becomes subject to a trust,

whether or not the property becomes in either case so held immediately; and

25 (b) full valuable consideration in money or money’s worth for the firstmentioned person’s doing, or omitting to do, that act is not given.

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(2) Except as provided in subsections (5) and (6), a prescribed transaction referred to in subsection (1) shall, for the purposes of this Act, be deemed to take effect at the time property becomes held by a person or subject to a trust as referred to in subsection (1) (a).

5 (3) The fact that a person has done, or omitted to do, an act as a result of which property became held by another person or subject to a trust shall not prevent a later act or omission by the firstmentioned person (as a result of which the same property becomes held by another person or subject to a trust) constituting a prescribed transaction.

10 (4) In particular and without limiting the generality of subsection (1), a person shall, for the purposes of subsection (1) (a), be deemed to do, or omit to do, an act, as a result of which property becomes held by another person or subject to a trust if—

15 (a) he is entitled, on or after the appointed day, to exercise a power to appoint, or dispose of, property which is not in his estate but the power is not exercised before he ceases (by reason of death or the occurrence of any other event) to be so entitled and, as a result of the omission to exercise the power and of his death or the occurrence of the other event—

20 (i) the property becomes held by another person (whether or not as trustee) or subject to a trust (whether or not the property becomes in either case so held immediately); or

25 (ii) another person becomes (whether or not immediately) or, if he was previously entitled, continues to be, entitled to exercise the power;

30 (b) holding an interest in property which would, on his death, become, by survivorship, held by another person (whether or not as trustee) or subject to a trust, he is entitled, on or after the appointed day, to exercise a power to prevent his interest in the property becoming, on his death, so held or subject to that trust but the power is not exercised before he ceases (by reason of death or the occurrence of any other event) to be so entitled;

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- 5 (c) holding an interest in property in which another interest is held by another person (whether or not as trustee) or is subject to a trust, he is entitled, on or after the appointed day, to exercise a power to extinguish the other interest in the property but the power is not exercised before he ceases (by reason of death or the occurrence of any other event) to be so entitled and, as a result of the omission to exercise the power and of his death or the occurrence of the other event, the other interest in the property continues to be so held or subject to that trust;
- 10 (d) he is entitled, on or after the appointed day, in relation to a policy of assurance on his life under which money is payable in consequence of his death or, as the case may require, in consequence of the occurrence of any other event to a person other than the executor or administrator of his estate, to exercise a power—
- 15 (i) to substitute a person or a trust for the person to whom or trust subject to which money is payable under the policy of assurance; or
- (ii) to surrender or otherwise deal with such a policy of assurance on his life,
- 20 but the power is not exercised before he ceases (by reason of death or the occurrence of any other event) to be so entitled;
- (e) being, on or after the appointed day, a member of, or participant in, a body (corporate or unincorporate), association, scheme, fund or plan, he dies and, as a result of his being such a member or participant and of his death or the occurrence of any other event, property becomes held by another person (whether or not as trustee) or subject to a trust (whether or not the property becomes in either case so held immediately); or
- 25 (f) on or after the appointed day, he enters into a contract providing for a disposition of property out of his estate (whether the disposition is to take effect before, on or after his death and whether in pursuance of his will or otherwise).
- 30 (5) Except as provided in subsection (6), a prescribed transaction involving the doing of, or omitting to do, an act as referred to in subsection (4) (paragraph (f) excepted) shall be deemed to be entered into immediately before, and to take effect on, the death or the occurrence of the other event referred to in that subsection in relation to that act or omission.

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(6) Where—

- (a) a prescribed transaction involves any kind of contract; and
- (b) valuable consideration, although not full valuable consideration, in money or money's worth is given for the disponent's becoming a party to the contract,

5

the transaction shall, for the purposes of this Act, be deemed to be entered into and to take effect at the time the contract is entered into.

- (7)** Notwithstanding subsections (1) and (4), the making by a person of, or the omitting by a person to make, a will is not an act or omission referred to in subsection (1) (a) except in so far as it constitutes a failure to exercise a power of appointment or disposition in relation to property which is not in his estate.

10

Notional estate—prescribed transactions.

23. On an application in relation to a deceased person made by or on behalf of an eligible person, if the Court is satisfied—

15

- (a) that an order for provision ought to be made on the application; and
- (b) that, at any time before his death, the deceased person entered into a prescribed transaction—

20

- (i) which took effect within the period of 3 years before his death and was entered into with the intention, wholly or in part, of denying or limiting, wholly or in part, provision for the maintenance, education or advancement in life of that or any other eligible person out of his estate or otherwise;

25

- (ii) which took effect within the period of 1 year before his death, and was entered into at a time when the deceased person had a moral obligation to make adequate provision, by will or otherwise, for the proper maintenance, education and advancement in life of that or any other eligible person which was substantially greater than any moral obligation of the deceased person to enter into the prescribed transaction; or

30

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(iii) which took effect or is to take effect on or after the death of the deceased person,

the Court may, subject to sections 26, 27 and 28, make an order designating as notional estate of the deceased person such property as it may specify, being property which is held by, or on trust for, the donee or, where there is more than one donee, any of the donees, whether or not that property was the subject of the prescribed transaction.

Notional estate—distributed estate.

24. On an application in relation to a deceased person, if the Court—

- 10 (a) is satisfied that an order for provision ought to be made on the application; and
- (b) finds that, as a result of a distribution from the estate of the deceased person, property became held by a person (whether or not as trustee) or subject to a trust,

15 the Court may, subject to sections 27 and 28, make an order designating as notional estate of the deceased person such property as it may specify, being property which is held by, or on trust for, the person or the object of the trust, whether or not that property is the property distributed.

Notional estate—subsequent prescribed transactions.

20 25. (1) On an application in relation to a deceased person, if the Court—

- (a) is satisfied that an order for provision ought to be made on the application;
- (b) has power, under this or any other provision of this Act, to make an order designating as notional estate of the deceased person property which is held by, or on trust for, a person; and
- 25

Family Provision.

- (c) is satisfied that, since the prescribed transaction or distribution in respect of which that power arises was entered into or made, the person referred to in paragraph (b) entered into a prescribed transaction,
- 5 the Court may, subject to sections 26, 27 and 28, make, instead of or in addition to the order referred to in paragraph (b), an order designating as notional estate of the deceased person such property as it may specify, being property which is held by, or on trust for, the donee in relation to the prescribed transaction entered into by the person referred to in paragraph
- 10 (b), or where there is more than one such donee, any of those donees, whether or not that property was the subject of the prescribed transaction.

(2) The Court shall not make an order under subsection (1) unless it is of the opinion that there are special circumstances which warrant the making of the order.

15 Property not to be designated as notional estate by reason of certain prescribed transactions.

26. On an application in relation to a deceased person, the Court shall not, by reason of a prescribed transaction having been entered into, make an order under section 23 or 25 designating property as notional estate unless

20 the prescribed transaction or the holding of property as a result of the prescribed transaction—

- (a) directly or indirectly disadvantaged the estate of the donor, an eligible person or, where the donor was not the deceased person, the deceased person (whether before, on or after his death);
- 25 (b) involved the exercise by the donor or any other person (whether alone or jointly or severally with any other person) of a right, a discretion or a power of appointment, disposition, nomination or direction which—
- (i) if not exercised, could have resulted in a benefit to the
- 30 estate of the donor, an eligible person or, where the donor was not the deceased person, the deceased person (whether before, on or after his death); or

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- 5 (ii) could, at the time the prescribed transaction was entered into or at a later time, have been exercised so as to result in a benefit to the estate of the disponent, an eligible person or, where the disponent was not the deceased person, the deceased person (whether before, on or after his death); or
- 10 (c) involved an omission to exercise a right, a discretion or a power of appointment, disposition, nomination or direction which could, at the time the prescribed transaction was entered into or at a later time, have been exercised by the disponent or any other person (whether alone or jointly or severally with any other person) so as to result in a benefit to the estate of the disponent, an eligible person or, where the disponent was not the deceased person, the deceased person (whether before, on or after his death).

Designation of property as notional estate—matters to be considered.

15 **27. (1)** On an application in relation to a deceased person, the Court shall not make an order designating property as notional estate of the deceased person unless it has considered—

- (a) the importance of not interfering with reasonable expectations in relation to property;
- 20 (b) the substantial justice and merits involved in making or refusing to make the order; and
- (c) any other matter which it considers relevant in the circumstances.

(2) In determining what property should be designated as notional estate of a deceased person, the Court shall have regard to—

- 25 (a) the value and nature of property the subject of any relevant prescribed transaction or distribution from the estate of the deceased person;
- (b) where, in relation to any such prescribed transaction, consideration was given, the value and nature of the consideration;

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- 5 (c) any changes over the time which has elapsed since any **such** prescribed transaction was entered into, any such distribution **was** made or any such consideration was given in the value of property of the same nature as the property the subject of the prescribed transaction, the distribution or the consideration, as the case **may** be;
- 10 (d) whether property of the same nature as the property the subject of any such prescribed transaction, any such distribution or **any** such consideration could, during the time which has elapsed **since** the prescribed transaction was entered into, the distribution **was** made or the consideration was given, as the case may be, have been applied so as to produce income; and
- (e) any other matter which it considers relevant in the circumstances.

Designation of property as notional estate—powers and restrictions.

- 15 **28. (1)** On an application in relation to a deceased person for an **order** for provision in favour of an eligible person, the Court shall not make an order designating property as notional estate of the deceased person **unless** the deceased person left no estate or unless it is satisfied—
- 20 (a) that the estate of the deceased person is insufficient to allow the making of provision that, in its opinion, should be made; or
- (b) that, by reason of the existence of other eligible persons or **the** existence of special circumstances, provision should not be **made** wholly out of the estate.
- (2)** On an application in relation to a deceased person, the Court **25** shall not make an order designating as notional estate of a deceased person property in excess of that necessary to allow the making of provision **that,** in its opinion, should be made.
- (3)** The exercise by the Court of its power under section 23, 24 or **25** to make an order designating as notional estate of a deceased person **30** property held by, or on trust for, a person does not limit or restrict **any** further exercise by the Court of that power.

Family Provision.

5 (4) Where, as a result of a prescribed transaction or a distribution made from the estate of a deceased person, property becomes held by a person as a trustee only, the Court shall not make an order under section 23, 24 or 25 by reason of the prescribed transaction or distribution in respect of any property (other than the trust property) held by, or on trust for, the person.

(5) On an application in relation to a deceased person, being an application—

10 (a) made pursuant to an order under section 16 allowing the application to be made; or

(b) for an order under section 8 for additional provision,

the Court shall not make an order designating property as notional estate of the deceased person by reason of a prescribed transaction or a distribution unless it is satisfied—

15 (c) that—

(i) the property was the subject of the prescribed transaction or distribution;

20 (ii) the person by whom it is held holds the property as a result of the prescribed transaction or distribution as trustee only; and

(iii) the property is not vested in interest in any beneficiary under the trust; or

25 (d) that there are other special circumstances (including, in the case of an application made as referred to in paragraph (a), the incapacity, during any relevant period, of the person by or on whose behalf the application is made) which justify the making of an order so designating the property.

Effect of order designating property as notional estate.

30 29. To the extent that a person's rights are affected by an order made under section 23, 24 or 25, those rights are extinguished.

Family Provision.

DIVISION 3.—*General.***Discharge of property from liability as estate or notional estate.**

5 **30. (1)** Where an order for provision has been, or is proposed to be, made affecting property in the estate of a deceased person, the Court may, on an application made to it by a person who offers other property in substitution and if it is satisfied that the other property can properly be substituted for the property in the estate, alter the order made or, as the case may require, make the order proposed as if, in either case, the other property were in the estate.

10 **(2)** Where an order under section 23, 24 or 25 has been, or is proposed to be, made designating as notional estate of a deceased person property held by a person (whether or not as trustee) or subject to a trust, the Court may, on an application made to it by a person who offers other property in substitution and if it is satisfied that the other property can
15 properly be substituted for the property so designated or proposed to be designated, alter the order made by substituting the other property as notional estate or, as the case may require, make an order designating the other property as notional estate.

20 **(3)** Where, pursuant to subsection (1), an order is altered or made as if property which is not in the estate of a deceased person were in that estate, the order so altered or made shall thereafter be deemed, for the purposes of this Act (except section 14), to be an order with respect to property in the estate of the deceased person.

Release of right to apply for provision.

25 **31. (1)** A reference in this section to a release by a person of his rights to make an application in relation to a deceased person is a reference to a release by a person of such rights, if any, as he may have to make such an application and includes a reference to—

30 (a) an instrument executed by the person which would be effective as a release of those rights if approved by the Court under this section; and

(b) an agreement to execute such an instrument.

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(2) A release by a person of his rights to make an application in relation to a deceased person has no effect except as provided in subsection (3).

5 (3) A release by a person of his rights to make an application in relation to a deceased person, being a release in respect of which the Court has given its approval under this section, shall have effect to the extent to which the approval has been given and not revoked and shall, for the purposes of this Act, be binding on the releasing party.

10 (4) Proceedings for the approval of a release of rights to make an application in relation to a deceased person may be commenced before or after the death of the person.

(5) In proceedings for the approval of a release, the Court shall have regard to all the circumstances of the case, including whether—

- 15 (a) it is or was, at the time any agreement to make the release was made, to the advantage, financially or otherwise, of the releasing party to make the release;
- (b) it is or was, at that time, prudent for the releasing party to make the release;
- 20 (c) the provisions of any agreement to make the release are or were, at that time, fair and reasonable; and
- (d) the releasing party has taken independent advice in relation to the release and, if so, has given due consideration to that advice.

(6) The Court may approve of a release in relation to the whole or any part of the estate or notional estate of a deceased person.

25 (7) Except as provided in subsections (8) and (9), the Court shall not revoke its approval of a release given under this section.

(8) The Court may revoke its approval of a release given under this section if it is satisfied—

- (a) that its approval was obtained by fraud; or
- 30 (b) that the release was obtained by fraud or undue influence.

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(9) The Court may revoke its approval of a release given under this section or that approval in so far as it affects the whole or part only of the estate or notional estate of a deceased person if it is satisfied that all such persons as, in the opinion of the Court would be sufficiently affected
5 by the revocation of the approval, consent to the revocation.

PART III.

MISCELLANEOUS.

Evidence.

32. (1) In this section—

10 “document” includes any record of information;

“statement” includes any representation of fact whether or not in writing.

(2) In any proceedings under this Act, evidence of a statement made by a deceased person shall, subject to this section, be admissible as evidence of any fact stated therein of which direct oral evidence by the
15 deceased person would, if he were able to give that evidence, be admissible.

(3) Subject to subsection (4) and unless the Court otherwise orders, where a statement was made by a deceased person during his lifetime otherwise than in a document, no evidence other than direct testimony (including oral evidence, evidence by affidavit and evidence taken before a
20 commissioner or other person authorised to receive evidence for the purpose of the proceedings) by a person who heard or otherwise perceived the statement being made shall be admissible for the purpose of proving it.

(4) Where a statement was made by a deceased person during his lifetime while giving oral evidence in a legal proceeding (being a civil or
25 criminal proceeding or inquiry in which evidence is or may be given, or an arbitration), the statement may be proved in any manner authorised by the Court.

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(5) Where a statement made by a deceased person during his life-time was contained in a document, the statement may be proved by the production of the document or, whether or not the document is still in existence, by leave of the Court, by the production of a copy of the document, or of the material part of the document, authenticated in such manner as the Court may approve.

(6) Where, under this section, a person proposes to tender, or tenders, evidence of a statement contained in a document, the Court may require that any other document relating to the statement be produced and, in default, may reject the evidence or, if it has been received, exclude it.

(7) For the purpose of determining questions of admissibility of a statement under this section, the Court may draw any reasonable inference from the circumstances in which the statement was made or from any other circumstances including, in the case of a statement contained in a document, the form or content of the document.

(8) In estimating the weight, if any, to be attached to evidence of a statement tendered for admission or admitted under this section, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, including the recency or otherwise, at the time when the deceased person made the statement, of any relevant matter dealt with in the statement and the presence or absence of any incentive for the deceased person to conceal or misrepresent any relevant matter in the statement.

(9) Subject to subsection (11), where evidence of a statement of a deceased person is admitted under this section, evidence is admissible for the purpose of destroying or supporting the credibility of the deceased person.

(10) Subject to subsection (11), where evidence of a statement of a deceased person is admitted under this section, evidence is admissible for the purpose of showing that the statement is inconsistent with another statement made at any time by the deceased person.

(11) No evidence of a matter is admissible under subsection (9) or (10) in relation to a statement of a deceased person where, if the deceased person had been called as a witness and had denied the matter in cross-examination, evidence would not be admissible if adduced by the cross-examining party.

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(12) This section applies notwithstanding—

- (a) the rules against hearsay; and
- (b) the rules against secondary evidence of the contents of a document, and notwithstanding that a statement is in such a form that it would not be admissible if given as oral testimony, but does not make admissible a statement of a deceased person which is otherwise inadmissible.

(13) This section does not apply to a statement to which Part IIc of the Evidence Act, 1898, applies.

Costs, charges and expenses.

10 **33. (1)** Except as provided in subsections (2) and (3), the Court may order that the costs, charges and expenses of or incidental to proceedings under this Act in relation to the estate or notional estate of a deceased person be paid out of the estate or notional estate, or both, in such manner as the Court thinks fit.

15 (2) The Court shall not order that the whole or any part of the costs, charges or expenses of or incidental to proceedings in respect of an application in relation to a deceased person made by an eligible person who is such a person by reason only of paragraph (c) or (d) of the definition of “eligible person” in section 6 (1) be paid out of the estate or notional estate
20 of the deceased person unless—

- (a) the Court has made an order for provision in favour of the eligible person on the application; or
- (b) there are special circumstances which make it just and equitable for the Court to do so.

25 (3) The Court shall not order that the whole or any part of the costs, charges and expenses of or incidental to proceedings in respect of an application in relation to a deceased person made by an eligible person be paid out of the estate or notional estate of the deceased person by reason only of the fact that the eligible person is a person described in paragraph (a) or
30 (b) of the definition of “eligible person” in section 6 (1) or the fact that the Court has made an order for provision in favour of the eligible person on the application.

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Certain documents exempt from stamp duty.

34. An instrument executed pursuant to an order made under section 15, being an instrument relating to property in the notional estate of a deceased person, is not liable to stamp duty under the Stamp Duties Act, 1920.

5 Protection of administrator.

35. (1) Where the administrator of the estate of a deceased person has given notices in the manner and form prescribed by rules of court of his intention to distribute the property in the estate after the expiration of a specified time, he may, at the expiration of the time specified in the notices
10 or, as the case may require, in the last of the notices, distribute that property having regard only to the applications in relation to the deceased person of which he has notice at the time of the distribution.

(2) An administrator who distributes property in the estate of a deceased person in accordance with subsection (1) is not liable in respect
15 of that property to any person of whose application in relation to the deceased person he did not have notice at the time of the distribution.

Rules of court.

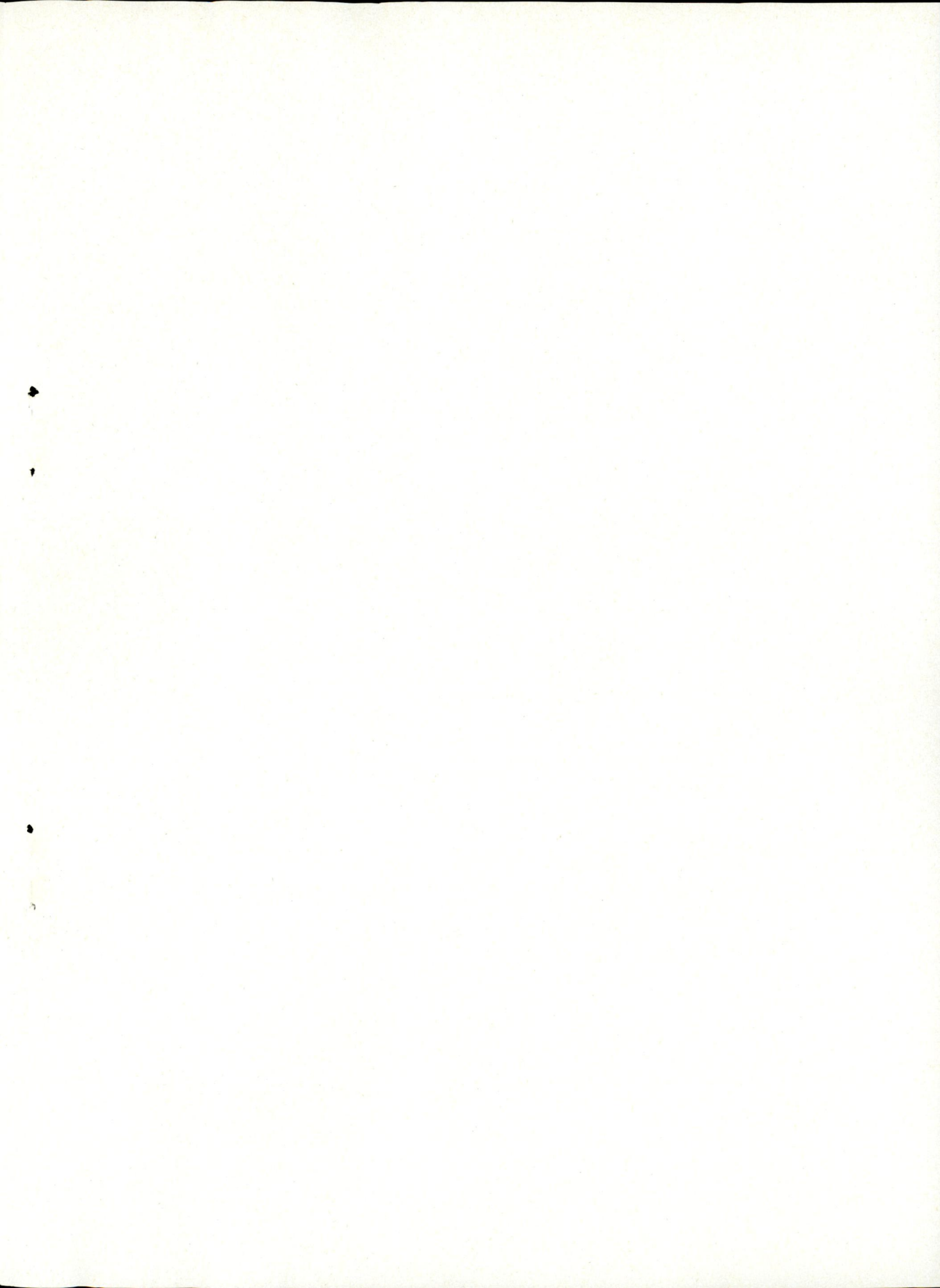
36. (1) For the purpose of regulating any proceedings under this Act in or before the Court, rules of court may be made under the Supreme Court
20 Act, 1970, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

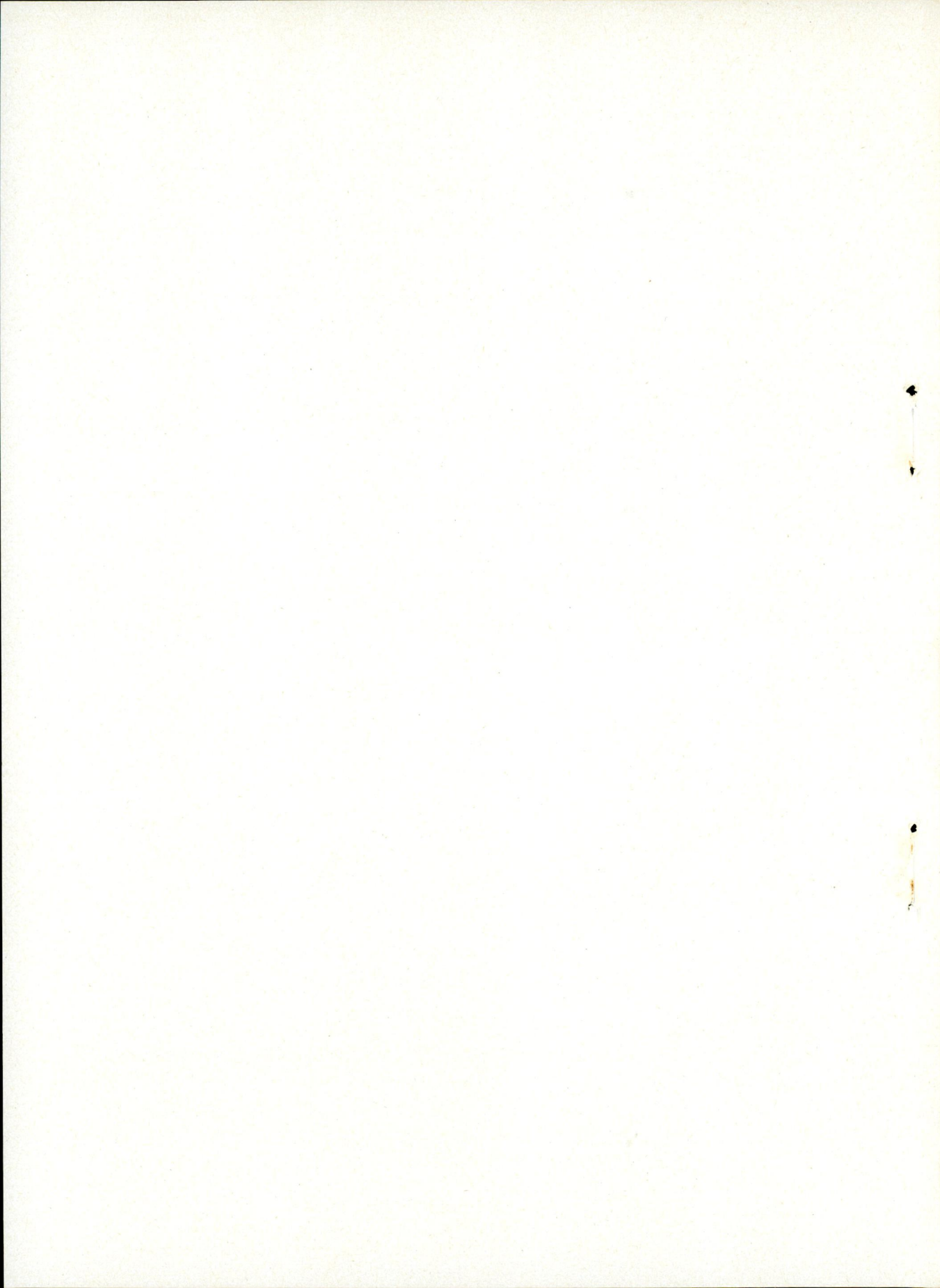
(2) Subsection (1) does not limit the rule-making powers conferred by the Supreme Court Act, 1970.

BY AUTHORITY

D. WEST, GOVERNMENT PRINTER, NEW SOUTH WALES—1982

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FAMILY PROVISION ACT, 1982, No. 160

New South Wales



ANNO TRICESIMO PRIMO

ELIZABETHÆ II REGINÆ

Act No. 160, 1982.

An Act to amend the law relating to the assurance to the family of a deceased person and certain other persons of adequate provision from the estate of the deceased person and certain other property. [Assented to, 24th December, 1982.]

See also Testator's Family Maintenance and Guardianship of Infants (Family Provision) Amendment Act, 1982; Wills, Probate and Administration (Family Provision) Amendment Act, 1982.

Family Provision.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

PART I.**PRELIMINARY.****Short title.**

1. This Act may be cited as the "Family Provision Act, 1982".

Commencement.

2. (1) Sections 1 and 2 shall commence on the date of assent to this Act.

(2) Except as provided in subsection (1), this Act shall commence on such day, being a day not earlier than 6 months after the date of assent to this Act, as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

Arrangement.

3. This Act is divided as follows:—

PART I.—PRELIMINARY—*ss.* 1–6.

PART II.—FAMILY PROVISION—*ss.* 7–31.

DIVISION 1.—*Orders for provision—ss.* 7–20.

DIVISION 2.—*Notional estate—ss.* 21–29.

DIVISION 3.—*General—ss.* 30, 31.

PART III.—MISCELLANEOUS—*ss.* 32–36.

Application.

4. This Act applies—

(a) in relation to a deceased person who has died on or after the appointed day; and

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- (b) in relation to a deceased person where it is uncertain when he died except—
- (i) where it is certain that he died before the appointed day; or
 - (ii) where the Court is satisfied that, on the balance of probabilities, he died before the appointed day.

Act binds Crown.

5. This Act binds the Crown not only in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

Interpretation.

6. (1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires—

“administration”, in respect of a deceased person, means—

- (a) probate of the will of the deceased person granted in New South Wales or granted outside New South Wales but sealed in pursuance of section 107 (1) of the Wills, Probate and Administration Act, 1898; or
- (b) letters of administration of the estate of the deceased person or in respect of the deceased person granted in New South Wales or granted outside New South Wales but so sealed, whether the letters of administration were granted with or without a will annexed and whether for general, special or limited purposes,

and includes an order under section 18 (2) or 23 (1) of the Public Trustee Act, 1913, in respect of the estate of the deceased person and an election by the Public Trustee under section 18A of that Act in respect of the estate of the deceased person;

“administrator”, in relation to the estate of a deceased person, means—

- (a) a person to whom administration (not being an order under section 18 (2) or 23 (1), or an election under section 18A, of the Public Trustee Act, 1913) has been granted in respect of that estate or any part of that estate;

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- (b) where an order under section 18 (2) or 23 (1), or an election under section 18A, of the Public Trustee Act, 1913, has been made or filed in respect of that estate or any part of that estate, the Public Trustee;
- (c) a person who holds that estate or any part of that estate upon a trust which arises out of the will or on the intestacy of the deceased person; or
- (d) a person who is otherwise entitled or required to administer that estate or any part of that estate;

“appointed day” means the day appointed and notified under section 2 (2);

“Court” means the Supreme Court of New South Wales;

“deceased person” includes any person in respect of whom administration has been granted;

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

- (a) a person who—
 - (i) was the wife or husband of the deceased person at the time of the deceased person’s death;
 - (ii) where the deceased person was a man, was a woman who, at the time of his death, was living with the deceased person as his wife on a bona fide domestic basis; or
 - (iii) where the deceased person was a woman, was a man who, at the time of her death, was living with the deceased person as her husband on a bona fide domestic basis;
- (b) a child of the deceased person;
- (c) a former wife or husband of the deceased person; or
- (d) a person—
 - (i) who was, at any particular time, wholly or partly dependent upon the deceased person; and
 - (ii) who is a grandchild of the deceased person or was, at that particular time or at any other time, a member of a household of which the deceased person was a member;

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“estate”, in relation to a person dying leaving a will, includes property which would, on a grant of probate of the will, vest in the executor of the will or, on a grant of administration with the will annexed, vest in the administrator appointed under that grant;

“notional estate”, in relation to a deceased person, means property designated by the Court under section 23, 24 or 25 as notional estate of the deceased person;

“property” includes real and personal property and any estate or interest (whether a present, future or contingent estate or interest) in real or personal property, and money, and any debt, and any cause of action for damages (including damages for personal injury), and any other chose in action, and any right with respect to property, and any valuable benefit;

“will” includes a codicil.

(2) A reference in this Act to an application in relation to a deceased person is a reference to an application to the Court for an order for provision in favour of an eligible person out of the estate or notional estate, or both, of the deceased person.

(3) A reference in this Act to an order for provision in favour of an eligible person is a reference to an order under section 7 or 8 in favour of the eligible person.

(4) A reference in this Act to the estate of a deceased person is, where any property which was in the estate of the deceased person at the time of his death has been distributed, a reference to so much of the property in the estate as has not been distributed.

(5) Where property in the estate of a deceased person is held by the administrator of that estate as trustee for a person or for a charitable or other purpose, the property shall be treated, for the purposes of this Act, as not having been distributed unless it is vested in interest in that person or for that purpose.

(6) Except in so far as the context or subject-matter otherwise indicates or requires, a reference in this Act to property held by a person includes a reference to property in relation to which the person is entitled to exercise a power of appointment or disposition in favour of himself.

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(7) A reference in this Act to a person entitled to exercise a power is a reference to a person entitled to exercise the power whether the power is absolute or conditional and whether or not the power arises under a trust, and includes a reference to a person entitled to exercise the power together with one or more other persons, whether jointly or severally.

(8) The Court may, for the purpose of giving effect to any provision of this Act, determine in relation to the provision that the date or time of death of a person the date or time of whose death is uncertain shall be treated as being such date or time, as the case may be, as the Court thinks reasonable for the purposes of the provision.

PART II.

FAMILY PROVISION.

DIVISION 1.—*Orders for provision.*

Provision out of estate or notional estate of deceased person.

7. Subject to section 9, on an application in relation to a deceased person in respect of whom administration has been granted, being an application made by or on behalf of a person in whose favour an order for provision out of the estate or notional estate of the deceased person has not previously been made, if the Court is satisfied that the person is an eligible person, it may order that such provision be made out of the estate or notional estate, or both, of the deceased person as, in the opinion of the Court, ought, having regard to the circumstances at the time the order is made, to be made for the maintenance, education or advancement in life of the eligible person.

Additional provision.

8. Subject to section 9, on an application in relation to a deceased person made by or on behalf of an eligible person in whose favour an order for provision out of the estate or notional estate, or both, of the deceased person has previously been made, if the Court is satisfied that there has been, since

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an order for provision was last made by the Court in favour of the eligible person out of the estate or notional estate, or both, of the deceased person, a substantial detrimental change in the circumstances of the eligible person, it may order that such additional provision be made out of the estate or notional estate, or both, of the deceased person as, in the opinion of the Court, ought, having regard to the circumstances at the time the order is made, to be made for the maintenance, education or advancement in life of the eligible person.

Provisions affecting Court's powers under sections 7 and 8.

9. (1) Where an application is made for an order under section 7 by an eligible person who is such a person by reason only of paragraph (c) or (d) of the definition of "eligible person" in section 6 (1), the Court shall first determine whether, in its opinion, having regard to all of the circumstances of the case (whether past or present), there are factors which warrant the making of the application and shall refuse to proceed with the determination of the application and to make the order unless it is satisfied that there are those factors.

(2) The Court shall not make an order under section 7 or 8 in favour of an eligible person out of the estate or notional estate of a deceased person unless it is satisfied that—

- (a) the provision (if any) made in favour of the eligible person by the deceased person either during his lifetime or out of his estate; or
- (b) in the case of an order under section 8—
 - (i) if no provision was made in favour of the eligible person by the deceased person, the provision made in favour of the eligible person under this Act out of the estate or notional estate, or both, of the deceased person; or
 - (ii) the provision made in favour of the eligible person by the deceased person either during his lifetime or out of his estate as well as the provision made in favour of the eligible person under this Act out of the estate or notional estate, or both, of the deceased person,

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is, at the time the Court is determining whether or not to make such an order, inadequate for the proper maintenance, education and advancement in life of the eligible person.

(3) In determining what provision (if any) ought to be made in favour of an eligible person out of the estate or notional estate of a deceased person, the Court may take into consideration—

- (a) any contribution made by the eligible person, whether of a financial nature or not and whether by way of providing services of any kind or in any other manner, being a contribution directly or indirectly to—
 - (i) the acquisition, conservation or improvement of property of the deceased person; or
 - (ii) the welfare of the deceased person, including a contribution as a homemaker;
- (b) the character and conduct of the eligible person before and after the death of the deceased person;
- (c) circumstances existing before and after the death of the deceased person; and
- (d) any other matter which it considers relevant in the circumstances.

(4) Nothing in subsection (3) (a) limits the generality of subsection (3) (b), (c) and (d) and the Court may consider a contribution of the same nature as that referred to in subsection (3) (a) or of a different nature in so far as it considers it relevant under subsection (3) (b), (c) or (d).

(5) Subject to the foregoing provisions of this section, the Court may make an interim order for provision under section 7 in favour of an eligible person before it has fully considered the application for that provision where it is of the opinion that no less provision than that proposed to be made by the interim order would be made in favour of the eligible person after full consideration of the application.

(6) Where, on an application made in relation to a deceased person, the Court has made an interim order as referred to in subsection (5), it shall, in due course, proceed to make a final determination of the application, which determination shall conform, revoke or alter the order so made.

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Consequential provision.

10. Where, on an application in relation to a deceased person, the Court makes an order for provision in favour of an eligible person out of the estate or notional estate of the deceased person, the Court may make an order in favour of any other eligible person or any other person by whom, or any purpose for which, property in the estate or notional estate of the deceased person is held or would, but for the order for provision in favour of the eligible person, be held that provision be made in such manner and to such extent as the Court thinks necessary to adjust all the interests concerned and to do justice in all the circumstances.

Orders for provision.

11. (1) An order for provision out of the estate or notional estate of a deceased person (whether or not an order made in favour of an eligible person) may—

- (a) require the provision to be made in any 1 or more of the following manners:—
 - (i) by way of a lump sum;
 - (ii) by way of a periodic sum;
 - (iii) by way of specified existing or future property;
 - (iv) by way of an absolute interest, or a limited interest only, in property;
 - (v) by way of property set aside as a class fund for the benefit of 2 or more persons;
 - (vi) in any other manner which the Court thinks fit;
- (b) be in respect of property which is situated in New South Wales at the time of, or at any time after, the making of the order, whether or not the deceased person was, at the time of his death, domiciled in New South Wales;

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- (c) specify the manner in which a sum of money or other property is to be paid or made available to the person in whose favour the order is made;
- (d) where provision is required to be made by way of a sum of money, specify that the whole or any part of the sum shall bear interest at such rate as the Court thinks fit for such period as the Court thinks fit; and
- (e) be made subject to such conditions as the Court thinks fit.

(2) Subsection (1) (b) does not limit any power of the Court in relation to any part of the estate or notional estate of a deceased person which is situated outside New South Wales.

Class fund.

12. (1) Where the Court makes an order for provision requiring the provision to be made by way of property set aside as a class fund, it shall specify a trustee of the property so set aside.

(2) The trustee of property set aside as a class fund may, subject to such directions and conditions as the Court gives or imposes, but otherwise as he thinks fit, apply from time to time 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 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.

Burden of provision out of estate.

13. Where the Court makes an order for provision out of the estate of a deceased person it may specify the beneficial entitlements in that estate which shall bear the burden of that provision and, in relation to each of those entitlements, the part of the burden which it shall bear.

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Effect of order for provision out of estate of deceased person.

14. (1) An order made by the Court for provision out of the estate of a deceased person (whether or not an order made in favour of an eligible person) shall, except in so far as the Court otherwise directs, take effect as if the provision had been made—

- (a) where the deceased person died leaving a will—in a codicil to the will; or
- (b) where the deceased person died intestate—in a will of the deceased person.

(2) The Court shall not direct that an order for provision out of the estate of a deceased person shall take effect otherwise than in the manner referred to in subsection (1) unless it is satisfied that compliance with the order will not adversely affect any creditor of the deceased person.

Consequential and ancillary orders.

15. (1) To enable effect to be given to an order for provision out of the estate or notional estate of a deceased person (whether or not an order made in favour of an eligible person), the Court may—

- (a) make orders for or with respect to all or any of the following matters:—
 - (i) the transferring of property in the estate or notional estate directly to the person in whose favour the order for provision is made or to any other person as trustee for that person;
 - (ii) the constituting of a person by whom property in the estate or notional estate is held as a trustee of that property;
 - (iii) the appointing of a trustee of property in the estate or notional estate;
 - (iv) the powers and duties of any trustee of property in the estate or notional estate;
 - (v) the vesting in any person of property in the estate or notional estate;

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- (vi) the exercising of a right or power to obtain property for the estate or notional estate;
 - (vii) the selling of, or other dealing with, property in the estate or notional estate;
 - (viii) the disposing of the proceeds of any sale or other realising of property in the estate or notional estate;
 - (ix) the securing, either wholly or partially, of the due performance of an order under this section;
 - (x) the managing of property in the estate or notional estate;
 - (xi) the executing of any necessary conveyance, document or instrument, the producing of such documents of title or the doing of such other things as the Court thinks necessary in relation to the performance of an order; and
- (b) make such other orders with respect to such other matters as the Court thinks necessary.

(2) The provisions of sections 78 (except subsection (1)) and 79 of the Trustee Act, 1925, apply to and in relation to an order under subsection (1) for the vesting of property in a person in the same way as they apply to and in relation to a vesting order referred to in those provisions and, in the case of section 78 (2) of that Act, as if the provisions of subsection (1) and the other provisions of this Act relating to the making of orders under this Act were contained in Part III of that Act.

(3) Where an order under subsection (1) provides for the payment of money, interest is not payable unless the Court specifically provides that the money shall bear interest.

Time for application for provision.

16. (1) In this section, “prescribed period”, in respect of an application in relation to a deceased person, means—

- (a) where the Court has, in an order made under section 17, specified a period in relation to the application—that period; or

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(b) in any other case—the period of 18 months after the death of the deceased person.

(2) An order under section 7 shall not be made unless the application for the order is made within the prescribed period in respect of that application or within such further period as the Court may, having regard to all the circumstances of the case but subject to subsection (3), by order, allow.

(3) The Court shall not make an order under subsection (2) allowing an application in relation to a deceased person to be made after the expiration of the prescribed period unless sufficient cause is shown for the application not having been made within that period.

(4) The Court may make an order under subsection (2) with respect to an application in relation to a deceased person whether or not—

- (a) the prescribed period in respect of the application in relation to the deceased person has expired;
- (b) the application for the order under that subsection was made before that period expired; or
- (c) the application in relation to the deceased person has been made.

(5) Notwithstanding subsections (2) and (3), where administration has been granted in respect of a person whose date of death is so uncertain as to make it impossible to apply subsections (2) and (3) with respect to an application in relation to the person, the Court may, whether or not the application in relation to the person has been made, by order, allow the application in relation to the person to be made within such period as it thinks reasonable and such an order has effect according to its tenor.

Shortening of time for applications for provision.

17. (1) On an application made to the Court by the administrator of the estate of a deceased person or by any other person who, in the opinion of the Court, has a sufficient interest in proceedings in respect of the estate or notional estate of a deceased person, the Court may, if it is satisfied that, having regard to all the circumstances of the case, it is reasonable to

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make an order under this section, order that, in respect of an application in relation to the deceased person by a specified person, the period within which the application shall be made shall be such period (being a period expiring before the expiration of the period of 18 months after the death of the deceased person) as the Court specifies.

(2) An application by a person under this section shall not be deemed to be an admission by the person of any matter for any purpose.

(3) An administrator shall not be regarded as being under any duty to make an application under this section.

Court may require undertakings to restore property if deceased found to have been alive.

18. Where the Court makes an order for provision in favour of a person out of the estate or notional estate of a person, the Court may, if it thinks fit, make the order subject to an undertaking being entered into or security being given by the person in whose favour the order is made that, in the event of the revocation of the order by reason of the person out of whose estate or notional estate the provision was made having been alive at the time the order was made, he will, in accordance with any order made by the Court as a result of the revocation, restore any property received by him pursuant to the order or otherwise make restitution.

Revocation or alteration of orders for provision.

19. (1) An order for provision made under this Act may not be revoked or altered except in accordance with this Act.

(2) Subject to section 20 (4), the Court may, by order, revoke or alter an order for provision in favour of a person made in respect of property in the estate or notional estate of a deceased person so as to allow an order for provision to be made under this Act in favour of another person wholly or partly in respect of all or any of that property.

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(3) Where, following the making of an order for provision under this Act, the grant of administration made in respect of the person out of whose estate or notional estate the provision was made is revoked or rescinded, the order for provision is revoked, unless the Court otherwise provides upon the revocation or rescission of the grant.

(4) Where an order for provision is revoked or altered pursuant to section 9 (6) or subsection (2) or (3) or is altered pursuant to section 30, the Court may—

- (a) revoke or alter any other orders made by it as a consequence of, or in relation to, the order to such extent as may be necessary as a result of the revocation or alteration; and
- (b) make such additional orders (other than an order for provision) as may be so necessary.

Court may disregard persons who have not applied for provision.

20. (1) On an application in relation to a deceased person, the Court may disregard the interests of any eligible persons who have not made an application in relation to the deceased person.

(2) Except as provided in subsection (3), the Court shall not disregard the interests of an eligible person unless it has caused notice of an application before it and its intention to disregard the interests of the eligible person to be given or served upon the eligible person in such manner as may be determined by the Court.

(3) The Court is not obliged to cause a notice to be given or served as referred to in subsection (2) where, in its opinion, it would be unreasonable or impracticable to do so.

(4) The Court shall not revoke or alter an order for provision in favour of an eligible person to allow the making of a further order for provision in favour of another eligible person unless the other eligible person shows sufficient cause for not having applied for an order for provision in his favour before the firstmentioned order was made.

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DIVISION 2.—*Notional estate.***Interpretation: Pt. II, Div. 2.**

21. In this Division, except in so far as the context or subject-matter otherwise indicates or requires—

“disponee”, in relation to a prescribed transaction, means—

- (a) where, as a result of the prescribed transaction, property becomes held by a person (whether or not as trustee)—the person; or
- (b) where, as a result of the prescribed transaction, property becomes held subject to a trust—the object of the trust;

“disponer”, in relation to a prescribed transaction, means the person deemed by section 22 to have entered into the prescribed transaction.

Prescribed transactions.

22. (1) A person shall be deemed to enter into a prescribed transaction if—

- (a) on or after the appointed day he does, directly or indirectly, or omits to do, any act, as a result of which—
 - (i) property becomes held by another person (whether or not as trustee); or
 - (ii) property becomes subject to a trust,

whether or not the property becomes in either case so held immediately; and

- (b) full valuable consideration in money or money's worth for the firstmentioned person's doing, or omitting to do, that act is not given.

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(2) Except as provided in subsections (5) and (6), a prescribed transaction referred to in subsection (1) shall, for the purposes of this Act, be deemed to take effect at the time property becomes held by a person or subject to a trust as referred to in subsection (1) (a).

(3) The fact that a person has done, or omitted to do, an act as a result of which property became held by another person or subject to a trust shall not prevent a later act or omission by the firstmentioned person (as a result of which the same property becomes held by another person or subject to a trust) constituting a prescribed transaction.

(4) In particular and without limiting the generality of subsection (1), a person shall, for the purposes of subsection (1) (a), be deemed to do, or omit to do, an act, as a result of which property becomes held by another person or subject to a trust if—

- (a) he is entitled, on or after the appointed day, to exercise a power to appoint, or dispose of, property which is not in his estate but the power is not exercised before he ceases (by reason of death or the occurrence of any other event) to be so entitled and, as a result of the omission to exercise the power and of his death or the occurrence of the other event—
 - (i) the property becomes held by another person (whether or not as trustee) or subject to a trust (whether or not the property becomes in either case so held immediately); or
 - (ii) another person becomes (whether or not immediately) or, if he was previously entitled, continues to be, entitled to exercise the power;
- (b) holding an interest in property which would, on his death, become, by survivorship, held by another person (whether or not as trustee) or subject to a trust, he is entitled, on or after the appointed day, to exercise a power to prevent his interest in the property becoming, on his death, so held or subject to that trust but the power is not exercised before he ceases (by reason of death or the occurrence of any other event) to be so entitled;

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- (c) holding an interest in property in which another interest is held by another person (whether or not as trustee) or is subject to a trust, he is entitled, on or after the appointed day, to exercise a power to extinguish the other interest in the property but the power is not exercised before he ceases (by reason of death or the occurrence of any other event) to be so entitled and, as a result of the omission to exercise the power and of his death or the occurrence of the other event, the other interest in the property continues to be so held or subject to that trust;
- (d) he is entitled, on or after the appointed day, in relation to a policy of assurance on his life under which money is payable in consequence of his death or, as the case may require, in consequence of the occurrence of any other event to a person other than the executor or administrator of his estate, to exercise a power—
 - (i) to substitute a person or a trust for the person to whom or trust subject to which money is payable under the policy of assurance; or
 - (ii) to surrender or otherwise deal with such a policy of assurance on his life,

but the power is not exercised before he ceases (by reason of death or the occurrence of any other event) to be so entitled;

- (e) being, on or after the appointed day, a member of, or participant in, a body (corporate or unincorporate), association, scheme, fund or plan, he dies and, as a result of his being such a member or participant and of his death or the occurrence of any other event, property becomes held by another person (whether or not as trustee) or subject to a trust (whether or not the property becomes in either case so held immediately); or
- (f) on or after the appointed day, he enters into a contract providing for a disposition of property out of his estate (whether the disposition is to take effect before, on or after his death and whether in pursuance of his will or otherwise).

(5) Except as provided in subsection (6), a prescribed transaction involving the doing of, or omitting to do, an act as referred to in subsection (4) (paragraph (f) excepted) shall be deemed to be entered into immediately before, and to take effect on, the death or the occurrence of the other event referred to in that subsection in relation to that act or omission.

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(6) Where—

- (a) a prescribed transaction involves any kind of contract; and
- (b) valuable consideration, although not full valuable consideration, in money or money's worth is given for the disponent's becoming a party to the contract,

the transaction shall, for the purposes of this Act, be deemed to be entered into and to take effect at the time the contract is entered into.

(7) Notwithstanding subsections (1) and (4), the making by a person of, or the omitting by a person to make, a will is not an act or omission referred to in subsection (1) (a) except in so far as it constitutes a failure to exercise a power of appointment or disposition in relation to property which is not in his estate.

Notional estate—prescribed transactions.

23. On an application in relation to a deceased person made by or on behalf of an eligible person, if the Court is satisfied—

- (a) that an order for provision ought to be made on the application; and
- (b) that, at any time before his death, the deceased person entered into a prescribed transaction—
 - (i) which took effect within the period of 3 years before his death and was entered into with the intention, wholly or in part, of denying or limiting, wholly or in part, provision for the maintenance, education or advancement in life of that or any other eligible person out of his estate or otherwise;
 - (ii) which took effect within the period of 1 year before his death, and was entered into at a time when the deceased person had a moral obligation to make adequate provision, by will or otherwise, for the proper maintenance, education and advancement in life of that or any other eligible person which was substantially greater than any moral obligation of the deceased person to enter into the prescribed transaction; or

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- (iii) which took effect or is to take effect on or after the death of the deceased person,

the Court may, subject to sections 26, 27 and 28, make an order designating as notional estate of the deceased person such property as it may specify, being property which is held by, or on trust for, the donee or, where there is more than one donee, any of the donees, whether or not that property was the subject of the prescribed transaction.

Notional estate—distributed estate.

24. On an application in relation to a deceased person, if the Court—

- (a) is satisfied that an order for provision ought to be made on the application; and
- (b) finds that, as a result of a distribution from the estate of the deceased person, property became held by a person (whether or not as trustee) or subject to a trust,

the Court may, subject to sections 27 and 28, make an order designating as notional estate of the deceased person such property as it may specify, being property which is held by, or on trust for, the person or the object of the trust, whether or not that property is the property distributed.

Notional estate—subsequent prescribed transactions.

25. (1) On an application in relation to a deceased person, if the Court—

- (a) is satisfied that an order for provision ought to be made on the application;
- (b) has power, under this or any other provision of this Act, to make an order designating as notional estate of the deceased person property which is held by, or on trust for, a person; and

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- (c) is satisfied that, since the prescribed transaction or distribution in respect of which that power arises was entered into or made, the person referred to in paragraph (b) entered into a prescribed transaction,

the Court may, subject to sections 26, 27 and 28, make, instead of or in addition to the order referred to in paragraph (b), an order designating as notional estate of the deceased person such property as it may specify, being property which is held by, or on trust for, the donee in relation to the prescribed transaction entered into by the person referred to in paragraph (b), or where there is more than one such donee, any of those donees, whether or not that property was the subject of the prescribed transaction.

(2) The Court shall not make an order under subsection (1) unless it is of the opinion that there are special circumstances which warrant the making of the order.

Property not to be designated as notional estate by reason of certain prescribed transactions.

26. On an application in relation to a deceased person, the Court shall not, by reason of a prescribed transaction having been entered into, make an order under section 23 or 25 designating property as notional estate unless the prescribed transaction or the holding of property as a result of the prescribed transaction—

- (a) directly or indirectly disadvantaged the estate of the disponent, an eligible person or, where the disponent was not the deceased person, the deceased person (whether before, on or after his death);
- (b) involved the exercise by the disponent or any other person (whether alone or jointly or severally with any other person) of a right, a discretion or a power of appointment, disposition, nomination or direction which—
- (i) if not exercised, could have resulted in a benefit to the estate of the disponent, an eligible person or, where the disponent was not the deceased person, the deceased person (whether before, on or after his death); or

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- (ii) could, at the time the prescribed transaction was entered into or at a later time, have been exercised so as to result in a benefit to the estate of the disponer, an eligible person or, where the disponer was not the deceased person, the deceased person (whether before, on or after his death); or
- (c) involved an omission to exercise a right, a discretion or a power of appointment, disposition, nomination or direction which could, at the time the prescribed transaction was entered into or at a later time, have been exercised by the disponer or any other person (whether alone or jointly or severally with any other person) so as to result in a benefit to the estate of the disponer, an eligible person or, where the disponer was not the deceased person, the deceased person (whether before, on or after his death).

Designation of property as notional estate—matters to be considered.

27. (1) On an application in relation to a deceased person, the Court shall not make an order designating property as notional estate of the deceased person unless it has considered—

- (a) the importance of not interfering with reasonable expectations in relation to property;
- (b) the substantial justice and merits involved in making or refusing to make the order; and
- (c) any other matter which it considers relevant in the circumstances.

(2) In determining what property should be designated as notional estate of a deceased person, the Court shall have regard to—

- (a) the value and nature of property the subject of any relevant prescribed transaction or distribution from the estate of the deceased person;
- (b) where, in relation to any such prescribed transaction, consideration was given, the value and nature of the consideration;

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- (c) any changes over the time which has elapsed since any such prescribed transaction was entered into, any such distribution was made or any such consideration was given in the value of property of the same nature as the property the subject of the prescribed transaction, the distribution or the consideration, as the case may be;
- (d) whether property of the same nature as the property the subject of any such prescribed transaction, any such distribution or any such consideration could, during the time which has elapsed since the prescribed transaction was entered into, the distribution was made or the consideration was given, as the case may be, have been applied so as to produce income; and
- (e) any other matter which it considers relevant in the circumstances.

Designation of property as notional estate—powers and restrictions.

28. (1) On an application in relation to a deceased person for an order for provision in favour of an eligible person, the Court shall not make an order designating property as notional estate of the deceased person unless the deceased person left no estate or unless it is satisfied—

- (a) that the estate of the deceased person is insufficient to allow the making of provision that, in its opinion, should be made; or
- (b) that, by reason of the existence of other eligible persons or the existence of special circumstances, provision should not be made wholly out of the estate.

(2) On an application in relation to a deceased person, the Court shall not make an order designating as notional estate of a deceased person property in excess of that necessary to allow the making of provision that, in its opinion, should be made.

(3) The exercise by the Court of its power under section 23, 24 or 25 to make an order designating as notional estate of a deceased person property held by, or on trust for, a person does not limit or restrict any further exercise by the Court of that power.

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(4) Where, as a result of a prescribed transaction or a distribution made from the estate of a deceased person, property becomes held by a person as a trustee only, the Court shall not make an order under section 23, 24 or 25 by reason of the prescribed transaction or distribution in respect of any property (other than the trust property) held by, or on trust for, the person.

(5) On an application in relation to a deceased person, being an application—

(a) made pursuant to an order under section 16 allowing the application to be made; or

(b) for an order under section 8 for additional provision,

the Court shall not make an order designating property as notional estate of the deceased person by reason of a prescribed transaction or a distribution unless it is satisfied—

(c) that—

(i) the property was the subject of the prescribed transaction or distribution;

(ii) the person by whom it is held holds the property as a result of the prescribed transaction or distribution as trustee only; and

(iii) the property is not vested in interest in any beneficiary under the trust; or

(d) that there are other special circumstances (including, in the case of an application made as referred to in paragraph (a), the incapacity, during any relevant period, of the person by or on whose behalf the application is made) which justify the making of an order so designating the property.

Effect of order designating property as notional estate.

29. To the extent that a person's rights are affected by an order made under section 23, 24 or 25, those rights are extinguished.

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DIVISION 3.—*General.***Discharge of property from liability as estate or notional estate.**

30. (1) Where an order for provision has been, or is proposed to be, made affecting property in the estate of a deceased person, the Court may, on an application made to it by a person who offers other property in substitution and if it is satisfied that the other property can properly be substituted for the property in the estate, alter the order made or, as the case may require, make the order proposed as if, in either case, the other property were in the estate.

(2) Where an order under section 23, 24 or 25 has been, or is proposed to be, made designating as notional estate of a deceased person property held by a person (whether or not as trustee) or subject to a trust, the Court may, on an application made to it by a person who offers other property in substitution and if it is satisfied that the other property can properly be substituted for the property so designated or proposed to be designated, alter the order made by substituting the other property as notional estate or, as the case may require, make an order designating the other property as notional estate.

(3) Where, pursuant to subsection (1), an order is altered or made as if property which is not in the estate of a deceased person were in that estate, the order so altered or made shall thereafter be deemed, for the purposes of this Act (except section 14), to be an order with respect to property in the estate of the deceased person.

Release of right to apply for provision.

31. (1) A reference in this section to a release by a person of his rights to make an application in relation to a deceased person is a reference to a release by a person of such rights, if any, as he may have to make such an application and includes a reference to—

- (a) an instrument executed by the person which would be effective as a release of those rights if approved by the Court under this section; and
- (b) an agreement to execute such an instrument.

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(2) A release by a person of his rights to make an application in relation to a deceased person has no effect except as provided in subsection (3).

(3) A release by a person of his rights to make an application in relation to a deceased person, being a release in respect of which the Court has given its approval under this section, shall have effect to the extent to which the approval has been given and not revoked and shall, for the purposes of this Act, be binding on the releasing party.

(4) Proceedings for the approval of a release of rights to make an application in relation to a deceased person may be commenced before or after the death of the person.

(5) In proceedings for the approval of a release, the Court shall have regard to all the circumstances of the case, including whether—

- (a) it is or was, at the time any agreement to make the release was made, to the advantage, financially or otherwise, of the releasing party to make the release;
- (b) it is or was, at that time, prudent for the releasing party to make the release;
- (c) the provisions of any agreement to make the release are or were, at that time, fair and reasonable; and
- (d) the releasing party has taken independent advice in relation to the release and, if so, has given due consideration to that advice.

(6) The Court may approve of a release in relation to the whole or any part of the estate or notional estate of a deceased person.

(7) Except as provided in subsections (8) and (9), the Court shall not revoke its approval of a release given under this section.

(8) The Court may revoke its approval of a release given under this section if it is satisfied—

- (a) that its approval was obtained by fraud; or
- (b) that the release was obtained by fraud or undue influence.

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(9) The Court may revoke its approval of a release given under this section or that approval in so far as it affects the whole or part only of the estate or notional estate of a deceased person if it is satisfied that all such persons as, in the opinion of the Court would be sufficiently affected by the revocation of the approval, consent to the revocation.

PART III.

MISCELLANEOUS.

Evidence.

32. (1) In this section—

“document” includes any record of information;

“statement” includes any representation of fact whether or not in writing.

(2) In any proceedings under this Act, evidence of a statement made by a deceased person shall, subject to this section, be admissible as evidence of any fact stated therein of which direct oral evidence by the deceased person would, if he were able to give that evidence, be admissible.

(3) Subject to subsection (4) and unless the Court otherwise orders, where a statement was made by a deceased person during his lifetime otherwise than in a document, no evidence other than direct testimony (including oral evidence, evidence by affidavit and evidence taken before a commissioner or other person authorised to receive evidence for the purpose of the proceedings) by a person who heard or otherwise perceived the statement being made shall be admissible for the purpose of proving it.

(4) Where a statement was made by a deceased person during his lifetime while giving oral evidence in a legal proceeding (being a civil or criminal proceeding or inquiry in which evidence is or may be given, or an arbitration), the statement may be proved in any manner authorised by the Court.

Family Provision.

(5) Where a statement made by a deceased person during his life-time was contained in a document, the statement may be proved by the production of the document or, whether or not the document is still in existence, by leave of the Court, by the production of a copy of the document, or of the material part of the document, authenticated in such manner as the Court may approve.

(6) Where, under this section, a person proposes to tender, or tenders, evidence of a statement contained in a document, the Court may require that any other document relating to the statement be produced and, in default, may reject the evidence or, if it has been received, exclude it.

(7) For the purpose of determining questions of admissibility of a statement under this section, the Court may draw any reasonable inference from the circumstances in which the statement was made or from any other circumstances including, in the case of a statement contained in a document, the form or content of the document.

(8) In estimating the weight, if any, to be attached to evidence of a statement tendered for admission or admitted under this section, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, including the recency or otherwise, at the time when the deceased person made the statement, of any relevant matter dealt with in the statement and the presence or absence of any incentive for the deceased person to conceal or misrepresent any relevant matter in the statement.

(9) Subject to subsection (11), where evidence of a statement of a deceased person is admitted under this section, evidence is admissible for the purpose of destroying or supporting the credibility of the deceased person.

(10) Subject to subsection (11), where evidence of a statement of a deceased person is admitted under this section, evidence is admissible for the purpose of showing that the statement is inconsistent with another statement made at any time by the deceased person.

(11) No evidence of a matter is admissible under subsection (9) or (10) in relation to a statement of a deceased person where, if the deceased person had been called as a witness and had denied the matter in cross-examination, evidence would not be admissible if adduced by the cross-examining party.

Family Provision.

(12) This section applies notwithstanding—

(a) the rules against hearsay; and

(b) the rules against secondary evidence of the contents of a document, and notwithstanding that a statement is in such a form that it would not be admissible if given as oral testimony, but does not make admissible a statement of a deceased person which is otherwise inadmissible.

(13) This section does not apply to a statement to which Part IIc of the Evidence Act, 1898, applies.

Costs, charges and expenses.

33. (1) Except as provided in subsections (2) and (3), the Court may order that the costs, charges and expenses of or incidental to proceedings under this Act in relation to the estate or notional estate of a deceased person be paid out of the estate or notional estate, or both, in such manner as the Court thinks fit.

(2) The Court shall not order that the whole or any part of the costs, charges or expenses of or incidental to proceedings in respect of an application in relation to a deceased person made by an eligible person who is such a person by reason only of paragraph (c) or (d) of the definition of “eligible person” in section 6 (1) be paid out of the estate or notional estate of the deceased person unless—

(a) the Court has made an order for provision in favour of the eligible person on the application; or

(b) there are special circumstances which make it just and equitable for the Court to do so.

(3) The Court shall not order that the whole or any part of the costs, charges and expenses of or incidental to proceedings in respect of an application in relation to a deceased person made by an eligible person be paid out of the estate or notional estate of the deceased person by reason only of the fact that the eligible person is a person described in paragraph (a) or (b) of the definition of “eligible person” in section 6 (1) or the fact that the Court has made an order for provision in favour of the eligible person on the application.

Family Provision.

Certain documents exempt from stamp duty.

34. An instrument executed pursuant to an order made under section 15, being an instrument relating to property in the notional estate of a deceased person, is not liable to stamp duty under the Stamp Duties Act, 1920.

Protection of administrator.

35. (1) Where the administrator of the estate of a deceased person has given notices in the manner and form prescribed by rules of court of his intention to distribute the property in the estate after the expiration of a specified time, he may, at the expiration of the time specified in the notices or, as the case may require, in the last of the notices, distribute that property having regard only to the applications in relation to the deceased person of which he has notice at the time of the distribution.

(2) An administrator who distributes property in the estate of a deceased person in accordance with subsection (1) is not liable in respect of that property to any person of whose application in relation to the deceased person he did not have notice at the time of the distribution.

Rules of court.

36. (1) For the purpose of regulating any proceedings under this Act in or before the Court, rules of court may be made under the Supreme Court Act, 1970, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) Subsection (1) does not limit the rule-making powers conferred by the Supreme Court Act, 1970.

In the name and on behalf of Her Majesty I assent to this Act.

J. A. ROWLAND,
Governor.

*Government House,
Sydney, 24th December, 1982.*



