

What You Must Know About **CONTESTING A WILL**

PART ONE: FAMILY PROVISION APPLICATION



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WHAT IS A FAMILY PROVISION APPLICATION?

Have you been left out of a family member or loved one's Will? Perhaps you didn't get the size of inheritance you were hoping for. If you have been excluded from a Will or have received an inheritance that does not meet your proper maintenance and support, then you may have standing to bring a Family Provision Application.

Can I claim against an estate? What is a Family Provision Application?

Each state and territory in Australia has legislation that gives the Court discretion to make an order for further provision from an estate if the testator (the deceased) did not make adequate provision for the claimant's proper maintenance and support. A claim for further provision from an estate is known as a "Family Provision Application".

There are limited people who have standing to bring a Family Provision Application against an estate. The only eligible claimants are:

1. **spouse** of the deceased: this may be a husband, wife, de facto spouse, registered partner, or a dependant former husband, wife or registered partner;
2. **child** of the deceased: this includes a biological child, stepchild, child of a de facto spouse, or adopted child of the deceased;
3. **dependant** of the deceased: any person who was being wholly or substantially maintained or supported by the deceased at the time of the deceased's death. The dependant must be a parent of the deceased, or a parent of a surviving minor child of the deceased, or a person under the age of 18 years.



2 Am I a de facto spouse?

AM I A DE FACTO SPOUSE?

You may feel it is obvious that you and your partner were de facto spouses. However, this may be contested by the executor or a beneficiary, and then the Court must decide whether you are a de facto spouse as defined by that state or territory's legislation.

What does the legislation say?

You will be considered a de facto spouse of the deceased if, at the time of death, you and the deceased had been living together on a genuine domestic basis for the two years prior to the deceased's death. When considering whether you and the deceased were living together on a 'genuine domestic basis' the relevant factors the Court will have regard to are:

- a) the nature and extent of your common residence;
- b) the length of your relationship;
- c) whether or not a sexual relationship existed;
- d) the degree of financial dependence or interdependence, and any arrangement for financial support;
- e) your joint ownership, use and acquisition of property;
- f) the degree of mutual commitment to a shared life, including the care and support of each other;
- g) the care and support of children (if any);
- h) the performance of household tasks; and
- i) the reputation and public aspects of your relationship.

2 Am I a de facto spouse?

It is not necessary for each factor or a specific combination of the relevant factors to be present. The Court has held that simply sharing a common residence is not enough to prove a de facto spouse relationship. There must be other indicators present that you and the deceased were living together on a 'genuine domestic basis'.


Your gender and the gender of the deceased are not a relevant consideration. That means that de facto spouses include same sex couples.

How do I prove that I am a de facto spouse?

You bear the onus to prove to the Court that you were a de facto spouse of the deceased at the time of their death. This means that it is your responsibility to prove to the Court that you and the deceased had been living together on a genuine domestic basis for the two years prior to the deceased's death.

There is a lot of case law around the Court deciding whether or not someone is classed as a de facto spouse of the deceased. We need to have a discussion with you and find out the particular circumstances of your matter before we can give advice on whether the Court is likely to find that you are a de facto spouse of the deceased.





3 Am I a child of the Deceased?

AM I A CHILD OF THE DECEASED?

A child of the deceased includes a biological child, stepchild, child of a de facto spouse, and adopted child. To be a biological child of the deceased, the deceased must be either your biological mother or father.

Stepchild

A person will continue to be a stepchild of the deceased if their parent (the spouse of the deceased) dies before the deceased, provided that the marriage had not been terminated by divorce. The stepchild/step-parent relationship will continue even if the deceased had remarried after the death of their former spouse.

De facto child

A person is also considered a stepchild of the deceased if they are the child of a de facto spouse of the deceased person. The de facto stepchild relationship will end on the termination of the civil partnership or the ending of the de facto relationship between the deceased person and the child's parent. A person will continue to be a de facto stepchild of the deceased if their parent dies before the deceased, provided that the relationship subsisted at the time of the deceased's death.

Adopted child

In respect of an adopted child, if the adoption occurred in Australia then the adoption must have been formalised in accordance with the laws of the state or territory in which the adoption took place. If the adoption occurred overseas, then the adoption must have been formalised in accordance with the laws of that particular jurisdiction.



4 Am I a Dependant of the Deceased?

AM I A DEPENDANT OF THE DECEASED?

A 'dependant' is defined as any person who was being wholly or substantially maintained or supported (otherwise than for full valuable consideration) by the deceased at the time of the person's death being—

- (a) a parent of that deceased person; or
- (b) the parent of a surviving child under the age of 18 years of that deceased person; or
- (c) a person under the age of 18 years.

The phrase "otherwise than for full valuable consideration" precludes employees or paid carers of a deceased making a claim against the estate, even though they may have been dependent on the deceased for earning an income.

Paragraph (c) widens the scope of children who may have standing to bring a Family Provision Application to include foster children and former step-children, provided that they are under 18 years of age and were being wholly or substantially maintained or supported by the deceased at the time of the deceased's death.

The Court will not make an order for a dependant to receive further provision from the estate unless the Court is satisfied that it is proper that some provision should be made for the dependant. When determining if it is proper that provision should be made for the dependant, the Court will have regard to the extent to which the dependant was being maintained or supported by the deceased before the deceased's death, the need of the dependant for the continuance of that maintenance or support, and the circumstances particular to the case.



5 how do I show I need more from the estate?

HOW DO I SHOW I NEED MORE FROM THE ESTATE?

You must be able to prove to the Court that you need further provision from the estate to meet the costs of your proper maintenance and support. So what is 'proper maintenance and support'? And what material do you need to gather to prove your claim?

Is your entitlement reasonable?

The Court will have regard to a range of factors when considering whether the entitlement you are to receive from the estate (if any) is reasonable in the circumstances, including:

- Size and extent of estate;
- Your need for support/financial situation;
- The nature of your relationship with the deceased; and
- Any other competing claims against the estate by other beneficiaries.



What does 'proper maintenance and support' mean?

The Court will consider your individual circumstances when assessing whether you have received adequate provision for your proper maintenance and support. The Court has established what it considers relevant to the 'proper maintenance and support' of a person over many years of case law. These factors include:

- The value of any entitlement you are to receive from the estate (if any).
- Your financial circumstances, including the value of your assets, liabilities and financial resources.
- Your needs having regard to:
 - o Your income and income earning capacity;
 - o Whether or not you are being supported by a spouse;
 - o Any circumstances likely to affect the support from your spouse. For example, age, health and employment of your spouse;
 - o Whether you have dependants, including minor children, and whether those dependants have any special care needs;
 - o State of your health, including any mental health or incapacity issues.
- Support, maintenance and/or assistance provided to you by the deceased during their lifetime. For example, gifts or loans, rent-free accommodation, care of your children, domestic assistance.
- Any contributions you have made to increasing or preserving the estate, for example work performed in a family business for low or no remuneration, or if you maintained the family home to allow the deceased to focus on earning income.
- The lifestyle which you have historically enjoyed, and whether the deceased had any influence on your lifestyle.



WHAT DOCUMENTS DO I NEED TO GATHER?

In order to prepare your claim, you need to:

- Summarise your assets, liabilities and financial resources into a table. We have provided an example below.
- If your claim progresses, you may need evidence of the value of your assets, liabilities and financial resources. Make sure you keep your latest bank account statements, credit card statements, superannuation statements etc, and store them in an easy to access place.
- If you and/or your spouse (if you are being supported by a spouse) have health issues, then gather any medical or social worker reports (if you have them) and the contact details for your treating practitioners and specialists;
- If your dependants have health issues or special needs then gather any medical or social worker reports (if you have them) and the contact details for their treating practitioners and specialists.



Example table to summarise your assets, liabilities and financial resources

Assets	
Eg. Home at 1 Smith Drive, Suburb	300,000.00
Eg. 2006 Ford Focus	2,000.00
Eg. Commonwealth Bank account - savings	150.00
Eg. Commonwealth Bank account - cheque	300.00
Total:	\$302,450.00

Liabilities	
Eg. Mortgage for home at 1 Smith Drive, Suburb	100,000.00
Eg. Personal loan	8,000.00
Eg. Commonwealth Bank credit card	2,000.00
Total:	\$110,000.00

Financial Resources	
Eg. Superannuation with MLC	20,000.00
Eg. Superannuation with Retail Super	35,000.00
Total:	\$55,000.00

In addition to the above documents, we need to have an in depth conversation about your relationship with the deceased, your need for greater provision from the estate, the size of the estate (if known) and any other competing claims against the estate (if known).



6 Disentitling Conduct and Estrangement

DISENTITLING CONDUCT AND ESTRANGEMENT

The Court may refuse to make an order for further provision out of the estate because the claimant's character or conduct disentitles them to the benefit of an order, or if the refusal to include the claimant in the Will was reasonable in the circumstances.

What is "disentitling conduct"? How bad does the conduct have to be?

Generally, disentitling conduct will reduce the distribution that a claimant will receive from an estate rather than exclude the claimant entirely. As a rule of thumb, the stronger the case for further provision from the estate, the more reprehensible the conduct must be to reduce the claim or exclude the claimant. The onus of evidencing the disentitling conduct rests on the person who is opposing the Family Provision Application.

It might surprise you as to what the Court has found not to be disentitling conduct. Adultery by a spouse, misappropriation of a parent's assets by a child, and children refusing to see their terminally ill parent in hospital have all been held not to be disentitling conduct by the Court. However, each case will turn on its own facts and circumstances.

Some examples of behaviour that the Courts have found to be disentitling conduct include:

- chronic drunkenness;
- dishonesty in business;
- conviction of murder; and
- continuous domestic violence against the deceased.



Haven't spoken in years? What about estrangement?

Family estrangement is an emotional distancing between two family members. Often this occurs over a number of years. Estrangement between the deceased and the claimant may impact their moral claim against the estate.

That being said, estrangement or even hostility does not necessarily bring an end to the moral duty of the deceased to make provision for an eligible claimant. Who is responsible for the estrangement is relevant to the Court's considerations and if the claimant is largely responsible for the estrangement then this will weaken their claim against the estate.

Case example of disentitling conduct and estrangement

In a recent Family Provision Application case, the last surviving child of the deceased was left out of his mother's Will. The deceased left the entirety of her estate to her granddaughter. The claimant led evidence that he was a loving son who was always desirous of having a close relationship with his mother, however, was pushed away by his mother over the course of many years.

The granddaughter named in the Will led opposing evidence that the claimant was violent and hostile towards the deceased. The granddaughter also relied on other witnesses who led evidence that there was a long history of violence and abuse by the claimant towards the deceased. One witness recounted an incident where the claimant had grabbed the deceased by the throat, pushed her against the wall with a lit cigarette lighter and threatened to set the deceased on fire. It was established that the violent conduct had occurred over a number of years, and was not merely an isolated incident.

The Court found that the claimant was abusive and physically aggressive to the deceased over a number of years, which led to the deceased excluding the claimant from her life and eventually cutting off all contact with him. The Court dismissed the claimant's Application and allowed the granddaughter to keep the entirety of her grandmother's estate.



WHAT IF I'M TRYING TO DEFEND A CLAIM?

The executor or administrator of the estate is obligated to defend the Family Provision Application on behalf of the estate. This involves considering the merits of the Family Provision Application and the best interests of all beneficiaries under the terms of the Will (if there is one) or the Rules of Intestacy (if the deceased died without leaving a valid Will).

How do I resolve a claim against the estate?

If a Family Provision Application has been made against the estate then there are plenty of opportunities to resolve the claim without proceeding to Court. In fact, we encourage all clients to resolve Family Provision Applications by negotiation, rather than Court proceedings. Resolving a claim by negotiation saves the estate the expense of responding to the Application, and also saves the executor/administrator and the beneficiaries a lot of time and stress.

That being said, if the estate and claimant are unable to resolve the Application by negotiation, then the claimant may choose to proceed with bringing their Application in the Court. This provides the claimant and the estate with a certainty that the Application will be resolved, whether that be in favour of the claimant or the estate.

Once the estate has received notice of the claim, then the estate and the claimant can start negotiating a resolution. If the claim has not resolved by negotiation, then the claimant must bring Court proceedings within nine (9) months of the date of death. Once proceedings have been filed there is still further opportunity to resolve the matter by negotiation, and usually the Court will order that the parties participate in mediation if they have not already done so. If the matter still does not resolve, then the Court will decide the matter after a trial.



8 how does the Application process work?

HOW DOES THE APPLICATION PROCESS WORK? DO I HAVE TO GO TO COURT?

If you are intending on bringing a Family Provision Application, or are on the other side of the estate responding to one, then don't fear – there are plenty of opportunities to resolve the claim without having to proceed through the Court system.

The initial stage of the Claim

A claimant has up to six (6) months from the date of death to provide the estate with notice of their intention to bring a Family Provision Application against the estate.

During the six month period from the date of death, the Personal Representative may continue to perform their duties as Personal Representative. This includes applying for a Grant of Probate or Letters of Administration, calling in the assets and liabilities of the estate, and otherwise progressing the administration.

We recommend that no distributions be made from the estate until at least six months after the date of death. This is because the Personal Representative may be personally liable for any loss suffered by the claimant if the estate is distributed within that six month period and a Family Provision Application is then made against the estate.



The negotiation stage

The estate and the claimant begin negotiating a resolution of the claim once the estate has received notice of the claim. The Personal Representative of the estate must consider the merits of the claim, and weigh up the best interests of all beneficiaries under either the terms of the Will (if there is one), or the *Rules of Intestacy* (if there is no valid Will).

The Personal Representative may also consider the benefits of resolving the claim by negotiation, and the likely costs the estate will incur if the matter proceeds to a Court Application.

Proceeding to Court

If the claim has not resolved by negotiation, then the claimant must file Court proceedings within nine (9) months of the date of death. Filing proceedings protects the claimant's interest in the estate. Once proceedings have been filed there is still further opportunity to resolve the matter by negotiation, and usually the Court will order that the parties participate in mediation if they have not already done so. If the matter still does not resolve, then the Court will decide the matter after a trial.

Common Terms

Administration of the estate:	the process of calling in the estate assets and payment of estate liabilities, and finalising a distribution of the estate to the beneficiaries. Administration of the estate is managed by the Personal Representative. Only the Personal Representative has the authority and power to deal with estate assets and liabilities, and to authorise a distribution from the estate.
Beneficiary:	a person taking a benefit or gift from the estate.
Grant of Letters of Administration:	issued by the Supreme Court when the deceased did not leave a valid Will. The Grant of Letters of Administration is issued in favour of an administrator/s of the estate who are responsible for the administration of the estate.
Personal Representative:	the Personal Representative of the estate is responsible for managing the administration of the estate. The Personal Representative may also be called the executor of the estate where a Grant of Probate has been issued, or the administrator of the estate where a Grant of Letters of Administration has been issued
Probate:	issued by the Supreme Court which annexes the last valid Will of the deceased. The Probate is proof that the Will annexed to the Grant is the last valid Will of the deceased. The Grant of Probate is issued in favour of an executor/s who are responsible for the administration of the estate.
Testator:	the person who has made the Will.
Will:	the document containing the testator's intentions for how their property is to be distributed and dealt with upon their death.

Now where to from here?

For assistance with Estate Administration, please
contact Christine Matsinger at
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