

FAMILY PROVISION CLAIMS:
Where the Will does not provide adequately
for all beneficiaries



The most common type of challenge to Wills is by an application to court known as a family provision claim. This arises if a person's expectations of their entitlement to receive a share pursuant to a Will have been disappointed.

Family Provision Claims

Where a person dies and the terms of the Will do not make adequate provision from the estate for the proper maintenance and support of the deceased person's spouse, child or dependant, the Court may in its discretion, order 'such provision as the Court thinks fit shall be made out of the estate of the deceased person for such spouse, child or dependant'. This is provided for in Section 41 of the *Succession Act (Queensland)* provides:

If any person (the deceased person) dies whether testate or intestate and in terms of the will or as a result of the intestacy adequate provision is not made from the estate for the proper maintenance and support of the deceased person's spouse, child or dependant, the court may, in its discretion, on application by or on behalf of the said spouse, child or dependant, order that such provision as the court thinks fit shall be made out of the estate of the deceased person for such spouse, child or dependant.

The same type of application can be made where there is no Will if the distribution in intestacy fails to provide adequate provision for a person.

Who has the ability to apply for Family Provision?

To have the standing to make an application, you must be one of the following:

- a) Deceased's person's spouse – This is defined to include a de facto partner, but only where the de facto relationship involved living together as a couple for a continuous period of at least 2 years;
- b) Children - this includes and child, step-child or adopted child of that person. A person is a step-child of the deceased if the person is a child of the spouse of the deceased, unless there has been a divorce; and
- c) Dependant - A dependant means any person who was being wholly or substantially maintained or supported by the deceased, and who is either a parent of the deceased, a parent of a surviving child under the age of 18 of the deceased, or a person under the age of 18.

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The test for Family Provision

High Court cases indicate that the Court is required to carry out a two stage process.

The first stage calls for determination of whether the Applicant has been left without adequate provision for his or her proper maintenance. In performing the assessment of the first stage of the process, consideration must be given objectively as to what, in all the circumstances is the proper level of maintenance appropriate for the Applicant.

The second stage only arises if determination of the first stage has been made in favour of the Applicant. It requires the Court to decide what provision ought to be made out of the deceased estate for the Applicant. This is clearly a value judgment in all the circumstances.

What is Proper Maintenance and Support?

The concept of what is “proper maintenance and support” is assessed by “not merely adequacy or sufficiency but whether the distribution has measured up to the obligations which the statute imposes on a testator”.

The station in life of the parties and the reasonable expectations must be considered. Therefore, in larger estates, this can be very different from smaller estates.

The character and conduct of the person who has been excluded from the Will is relevant as to what is a reasonable expectation.

Persons with an intellectual disability as a general rule are likely to be considered as having need, and to be a person who should have been in the parent’s mind when making the Will.

What if the estate has been given to charity?

If the estate has been to charity, this does not prevent a person from applying for fair provision from the estate.

However, there are cases where courts have recognised a moral duty of the person making the Will, large estates, to benefit charities. As a result, some charities may oppose an application for provision out of the Will, rather than merely adopting a “wait and see” what the court does attitude.

Time Limits

Unless the court otherwise directs, no application shall be heard by the court unless proceedings for such claim have been instituted within 9 months of the death of the deceased. Where an application has been filed on behalf of any person, it may be treated by the court as deemed to be made on behalf of all persons who might apply. Therefore, if an application has been brought by another person, other claimants can join in such application.

Conclusion

The family provision part of the *Succession Act* allows family members to make claims for a distribution from the estate where the Will fails to provide adequate provision for them.

HOW WE CAN HELP YOU

Our team can advise whether it is worthwhile for you to pursue a claim and proceed with litigation to protect your interests.