

The law recognises that a person has a fundamental, civil right to freely dispose of their assets in whatever way they see fit. This is usually effected by a Will.

However, a deceased estate can be challenged if someone feels that a deceased person has not made adequate provision for them.

In this situation that person can, under the *Administration and Probate Act 1958* (**the Act**) bring a claim for provision (or further provision) against the deceased's estate.

This is commonly known as a family provision claim.

A family provision claim can be brought either challenging the terms of a Will or the distribution of an estate under the statutory intestacy provisions.

Other Australian states and territories have similar legislation.

## Who can apply to the Court?

In Victoria, for deaths after 1 January 2015 there are essentially two categories of persons who can claim.

A person can only bring a claim for provision if they are an eligible claimant.

An eligible claimant is:

### Group one — related/immediate family member\*:

- a spouse or domestic partner;
- a child or stepchild of any age with or without a disability;
- a person who for a substantial period during the life of the deceased believed that the deceased was his/her parent and was treated by the deceased as a natural child of any age; and
- a former spouse or domestic partner (only if no property settlement reached).

### Group two — others\*:

- a grandchild;
- a registered caring partner;
- a spouse or domestic partner of a child of the deceased (including a step child or person who for a substantial period during the life of the deceased believed that the deceased was his/her parent) if the relevant child of the deceased dies within one year of the deceased's death; and
- a person who, at the deceased's death is a member of the household in which the deceased was also a member (or had been in the past and would have been likely again in near future have the deceased not died).

\***Note:** The 'group' categories is a summary of the legislation, the legislation does not contain 'groups'.

## The tests for bringing a claim

There are certain tests that must be satisfied before a court can make a family provision award in favour of a claimant, those tests are:

- is the person is an eligible person?
- did the deceased, at the time of his or her death, have a moral duty to provide for the eligible person's proper maintenance and support?
- If yes to points 1 and 2, does the distributions of the deceased's estate fail to make adequate provision for the proper maintenance and support for the eligible claimant?

If the Court answers yes to point 3, the Court will then likely make an award of provision in favour of the eligible claimant.



## Factors a Court will take into account and what is 'adequate provision'?

In determining what provision should be made for an eligible claimant, the Court will look at:

- the degree of the deceased's moral duty;
- the degree to which the deceased's estate fails to make adequate provision for the proper maintenance and support;
- the nature of the relationship and duration;
- the obligations and responsibilities of the deceased to the eligible person, any other eligible person or beneficiaries of the estate;
- the size of the estate;
- the financial resources of the eligible person, any other eligible person or beneficiaries of the estate, any physical or medical or intellectual disabilities, the age of the claimant;
- the liability of any other person to maintain the eligible person;
- character and conduct of the eligible person;
- the effects of a family provision order on the amounts received by other beneficiaries; and
- any other matter that the Court considers relevant.

If the claimant falls into Group two, that person must also prove to the Court that he or she was wholly or partly dependent on the deceased for proper maintenance and support. In addition, the Court must assess whether or not that person is capable, by reasonable means of providing adequately for their own proper maintenance and support.

## What is 'adequate provision'?

The court must decide whether the claimant has been left with adequate provision for the claimant's proper maintenance and support.

The court will consider the factors set about above, on a comparative basis to the other beneficiaries of the estate, with a particular focus on:

- financial positions and resources (including earning capacity) at the time of the court hearing and for the foreseeable future;
- medical positions;
- whether the claimant was wholly or partly supported by the deceased before his/her death; and
- whether any other person has a duty to support the claimant.

Finally, the court will consider whether the deceased actually failed in his/her duty to adequately provide for the claimant under the Will.

## Time limit for making an application

A claimant cannot bring a family provision claim until a Grant of Representation of the deceased's estate has been obtained (either a grant of probate or a grant of letters of administration).

Under the Act, the claimant can lodge a notice with the Registrar of Probates requesting the Registrar to notify the claimant when a Grant of Representation has been made regarding the deceased's estate.

This notice can only be lodged after the deceased has died.

Once the Grant of Representation has been made, the claimant has six months to challenge the Will.

## Who acts on behalf of the deceased?

Once a Grant of Representation is made, the person authorised to deal with the estate, commonly called the 'legal personal representative', will be the defendant if a claim for family provision is made.

The legal personal representative has the responsibility of dealing with the estate and this will include defending the claim and/or negotiating a resolution the claim.



## Mediation

The costs of running a family provision claim (for both parties) are usually paid out of the estate.

As a result, the value of the deceased's estate is often substantially reduced by a family provision claim.

All family provision claims will be ordered to attend mediation.

Most family provision claims settle at mediation.

The purpose of mediation is to explore options for settlement. The aim is not only to reach a monetary settlement of the claim, but also provide the parties with an opportunity to resolve other issues (if present) such as the distribution of chattels.

## Consequences of court orders or a settlement

If the court ultimately finds that the deceased should have made provision (or further provision) for the claimant, the Court has wide powers to make any orders to change the distribution of the deceased's Estate, including any award of costs.

## More information

At KCL Law, our Estate Group has extensive experience in court and mediation proceedings for and against claimants in family provision applications

If you require more information regarding family provision applications or probate matters generally, please contact our Estate Group on 03 8600 8885.

