

Frequently Asked Questions – Contesting Wills

We have set out below the most common questions we are asked relating to claims against Wills and Estates together with brief answers to those questions. You will see most relate to Family Provision claims pursuant to the Succession Act and do not relate to the mental capacity of the testator to make a Will.

WHAT IS A FAMILY PROVISION CLAIM?

The Succession Act is a law made by the New South Wales Parliament. It provides among other things for the most common method used to contest the Will of a deceased person, a Family Provision claim. The Act allows eligible people to apply for financial provision (money) to be paid to them out of the estate of the deceased person.

WHEN DOES A CLAIM HAVE TO BE LODGED/WHAT TIME LIMITS APPLY?

A claim must be made within 12 months of the date of death. In some limited cases the Court can extend the time period.

WHAT IF THERE IS NO WILL?

If you are eligible to claim under the Succession Act it does not matter whether the deceased made a Will or not.

WHO IS ELIGIBLE TO CLAIM UNDER THE SUCCESSION ACT?

The Act lists categories of people who are eligible to claim. They include:-

- Husbands, wives and people who were living in a de facto or domestic relationship with the deceased at the date of death. (This includes same sex couples).
- Children.
- Former spouses.
- Grandchildren;
- Other people in a close personal relationship with the deceased..

It is essential you consult us to advise on eligibility as conditions always apply.

WHAT WILL BE TAKEN INTO CONSIDERATION WHEN A CLAIM IS MADE?

A claimant must first prove that they are eligible to make a claim. You should not attempt to determine if someone is eligible merely by reading the notes in this document. You must seek the advice of a qualified solicitor.

The Court will consider whether there has been inadequate provision for the claimant's proper education, maintenance or advancement in life made by the deceased. If the provision made is inadequate, the Court must determine what provision ought to be made having regard to all of the circumstances of an applicant. These factors will include but are not limited to the relationship between the applicant and the deceased person, the amount of money and assets available to be distributed and the financial needs and circumstances of the applicant and others who will receive a benefit from the estate.

The Succession Act details many of the matters taken into consideration by the Court when a claim is being considered. Each case is judged on its merits.

CAN A CLAIM BE MADE BY A PERSON WHO IS ALREADY A BENEFICIARY?

If a person is eligible to claim they are able to apply for provision over and above the benefit which they are already entitled to pursuant to the Will. The Court will consider their circumstances and determine if they will receive a larger share. We can assist you with further advice about this type of claim.

HOW MUCH WILL A CLAIMANT RECEIVE?

The law does not provide a set amount that is to be given to each person. The Court may order that provision be made from the estate as the Court believes ought to be made for the maintenance, education or advancement in life of the applicant. This will depend upon many things including the amount of money available for distribution and the applicant's circumstances.

WHAT HAPPENS TO THE ESTATE IF A CLAIM IS LODGED?

In most cases when a claim is made the assets of the estate will be frozen. The executors or administrators of the estate may sell assets and convert them to money but should not distribute the money or any other asset until the claim is finalised. The solicitor acting for the estate will advise the executors of their responsibilities. An applicant can apply to the Court for an injunction or freezing order if appropriate. This is an Order of the Court that has the affect of freezing the assets of the estate until the claim is finalised. Such Orders can prevent money from being withdrawn from bank accounts and title to property being transferred.

HOW LONG DOES A CLAIM TAKE?

The claims are determined by the Court as soon as possible. Many claims are settled out of Court which reduces the period of time the claim will take to finalise. If a claim is urgent an application can be made to the Court for the claim to be dealt with more quickly.

WHO WILL PAY THE LEGAL EXPENSES?

If you are an executor your costs will be paid from the estate in most cases. If you are a claimant you will be obliged to pay your own solicitor's fees. If you are successful with your claim the Court will in most circumstances order that most of the costs you pay to your solicitor be reimbursed by the estate to you.

HOW CAN I FIND OUT MORE ABOUT FAMLY PROVISION CLAIMS?

Further information regarding your rights can be obtained by consulting us.

WARNING

It is important to always remember that the law changes from time to time and this information while correct at the time of publishing is intended only as a source of general information and should **NOT** be relied upon instead of or used as a substitute for legal advice provided by a properly qualified and experienced solicitor.