

CHALLENGING A WILL

By Robert Minter*

If you believe that you have been unfairly left out of a will, or that inadequate provision has been made for you, an application can be made to the Supreme Court in certain circumstances. Set out below is a summary of the law relating to what are known as Family Provisions claims.

Who can claim? - A person can make a claim if he or she is the current or former spouse of the deceased, a person living in a de facto relationship or a child of the deceased.

Others may claim in certain circumstances, such as a grandchild or stepchild if they were at any time dependent on the deceased or had at some time been a member of the deceased's household. Additionally, applications may also be made by persons living in a close personal relationship with the deceased at the time of death.

Are there any other eligibility criteria before the court can consider a claim?

In cases other than those involving a spouse or child, the court will not proceed to consider the matter unless it is satisfied that adequate provision has not been made for the claimant. In making its assessment the court will take into account issues such as the size of the estate, the relationship between the claimant and the deceased, the claimant's own needs and competing demands of other beneficiaries.

When may a Claim be made? - Applications must be made within 12 months of the date of death, or otherwise where justifiable reasons for the delay are given.

What principles are applied by the court in determining entitlement? - Whether an order will ultimately be made in favour of the claimant will involve a value judgment by the court, taking into account all the facts.

While judges are reluctant to impose fixed criteria on themselves, it is fair to say that the courts approach cases by looking at whether the deceased had a duty to provide for the claimant and whether such duty had been discharged in the will or during the deceased's lifetime.

Judges sometimes say that determining whether a "duty" exists is based on a test of whether the community would consider the claimant to be a "natural object of testamentary recognition by the deceased".

You will see that because the courts apply a duty-based test, the will-maker's own wishes can mean little because the court can disregard the will-maker's wishes if that person owed some duty to the claimant that was not recognised in the will.

It is clear therefore that a husband who fails to make provision for his old widowed wife or for a child with a disability has not met a clear duty. The extent of any duty owed to others may be less clear, such as what duty is owed to an adult child in good health and with a good job, let alone what duty might be owed to an adult stepchild.

Proper and Adequate Provision - Where some level of duty is found to exist, the courts will attempt to ensure that "proper" and "adequate" provision is made for that person when not done so in the will.

These issues were dealt with in the November 2017 case of *Lemon v Mead*, in the Western Australian Court of Appeal. The case involved the "illegitimate" daughter of a business partner of Lang Hancock, and the estate was worth over \$875,000,000. The deceased father had little contact with his daughter, and on appeal the Supreme Court's judgment of \$25,000,000 was reduced to \$6,000,000.

The Court of Appeal held that the Court may "at its discretion" make such orders as it "thinks fit" and may overturn the provisions of a person's will if it is necessary to make "adequate provision from the estate for the proper maintenance, support, education or advancement in life of the eligible claimant".

In this case, the daughter had no disabilities, was an independent adult and was not needy. The Court was therefore called upon to make its decision more on "moral grounds" even though they acknowledged that such moral criterion is not contemplated in the applicable legislation.

The Court specifically said that its role is "not for the making of what may appear to the Court to be a fair distribution of a deceased person's estate" but rather what the claimant needs for their "proper maintenance, giving due regard to all the circumstances of the case".

The Court stated that the judge at first instance had improperly exercised his discretionary power, because, in exercising that power, the Court cannot award "any more than what is adequate provision for the claimant's proper maintenance".

The Court said that the word "adequate" is more concerned with the amount that a person might actually need for their maintenance, whereas in considering what is a Court may award more than what is adequate, for example a greater amount when the estate is very large.

However, the size of the estate is not the only factor, and in this case the Court weighed up all relevant circumstances, including the daughter's lack of need or closeness with her father, and decided, despite the estate's size, that \$6,000,000 was "proper" though much more than adequate.

Section 60(2) of the Succession Act sets out fifteen matters that "may" be considered by the court and weighed up in totality to assess what might be "proper". These include the will-maker's expressed intention, the age and financial resources of the applicant, any contribution that the applicant might have

made to the deceased's assets and the applicant's state of health and financial circumstances.

Legal Fees - The basic rule remains true that if a party is successful then his or her costs will be paid out of the estate but if the party fails then such costs may have to be borne personally. But, in the case of family provisions claims, a party that is found to be eligible can have the reasonable expectation of having his or her costs paid out of the estate even if unsuccessful.

How are proceedings commenced? - An application is made to the Supreme Court, which is accompanied by a detailed affidavit setting out all relevant facts to support the claim, including the relationship to the deceased and the applicant's financial circumstances.

Once the claim is lodged, the court will, 6-8 weeks later, order that the parties attempt to settle the matter by mediation. Eighty percent of claims are settled at the mediation stage.

If the matter is not resolved by mediation, it will be set down for a hearing, generally 5-6 months after the conclusion of the unsuccessful mediation. These delays, and the substantial cost of a hearing, are important factors in encouraging parties to settle in mediation

The above represents only a brief summary of the essential legal issues. There may be other situations that arise, such as a question of the will-maker's mental capacity to make a valid will, or issues of harassment.

If you wish to obtain legal advice on your rights and entitlements in relation to a potential Family Provisions claim, or in relation to estate planning matters generally, contact Robert Minter

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