

Family Provision Claims Under The Succession Act 2006



Have You Been Left Out of a Will?

The law recognises that on occasions persons who would ordinarily be a beneficiary under a will or recipient and recipients of the property of the deceased testator may either not be provided for or may be inadequately provided for.

Eligible Person

Section 57 of the Succession Act defines the eligible persons who may make an application to the Court for a family provision order adjusting the

interests that are created by a will. There are six categories, each limited to a family member or to a person with a particular status or relationship to the deceased:

- The wife or husband of the deceased when the deceased died;
- In a de facto relationship with the deceased when he/she died;
- A child of the deceased;
- Former wives and husbands of the deceased;
- A person:

- (i) Who was, at any particular time, wholly or partly dependent on the deceased, and
 - (ii) Who is a grandchild of the deceased person or was, at that particular time or at any other time, a member of the household of which the deceased person was a member;
- A person who was living with the deceased in a close personal relationship at the time of death.

advancement in life by the will of the deceased or in the event that there is no will, by the operation of the rules of intestacy in relation to the Estate.

When the Court is satisfied of these matters it may make such order for provision out of the estate of the deceased person as it thinks ought to be made for the maintenance, education and advancement in life of the eligible person, having regard to the facts known at the time the order is made.

Time Limits on Making a Claim

Section 58 of the Succession Act provides that a claim must be brought within 12 months of the death of the deceased person. The Court may permit a claim to be brought after that time in cases where 'sufficient cause' is shown.

The matters the Court may have regard to when considering whether the applicant is an eligible person and whether to make a Family Provision Order and, if so, the nature of the Order, include:

Making of a Family Provision Order

A Family Provision Order may be made if the Court is satisfied that the person seeking the order is an eligible person and has not received provision for the proper maintenance, education or

- a) Any family or other relationship between the applicant and the deceased person, including the nature and duration of the relationship;
- b) The nature and extent of any obligations or responsibilities owed by the deceased person to the applicant, to any other person in respect of whom an application has been made for a

- family provision order or to any beneficiary of the deceased person's estate;
- c) The nature and extent of the deceased person's estate and of any liabilities or charges to which the estate is subject, as in existence when the application is being considered;
- d) The financial resources and financial needs, both present and future, of the applicant, of any other person in respect of whom an application has been made for a family provision order or of any beneficiary of the deceased person's estate;
- e) If the applicant is cohabitating with another person - the financial circumstances of the other person;
- f) Any physical, intellectual or mental disability of the applicant, any other person in respect of whom an application has been made for a family provision order or any beneficiary of the deceased person's estate that is in existence when the application is being considered or that may reasonably be anticipated;
- g) The age of the applicant when the application is being considered;
- h) Any contribution by the applicant to the acquisition, conservation and improvement of the estate of the deceased person or to the welfare of the deceased person or the deceased person's family, whether made before or after the deceased person's death, for which adequate consideration was not received, by the applicant;
- i) Any provision made for the applicant by the deceased person, either during the deceased person's lifetime or made from the deceased person's estate;
- j) Any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person;
- k) Whether the applicant was being maintained, either wholly or partly, by the deceased person before the deceased person's death and, if the Court considers if relevant, the extent

to which and the basis on which the deceased person did so;

- l) Whether any other person is liable to support the applicant;
- m) The character and conduct of the applicant before and after the date of the death of the deceased person;
- n) The conduct of any other person before and after the date of the death of the deceased person;
- o) Any relevant Aboriginal or Torres Strait Islander customary law;
- p) Any other matter the Court considers relevant.

Disentitling Conduct

The character and conduct of the applicant before and after the deceased died may warrant refusal to make any order provision or to reduce the amount of provision. Such conduct is generally referred to as 'disqualifying conduct' or 'disentitling conduct'. Examples include:

- Adultery
- Desertion
- Violence or threats
- Ill treatment
- Estrangement

Making the Application for the Family Provision Order

The application is made by the filing of an application in the relevant Court form together with a detailed affidavit.

Later evidence is filed in support, including the affidavits from relevant witnesses on both sides and then the matter is listed for a compulsory mediation.

The application is filed by the person making the claim against the executor of the deceased's estate.

Matters not resolved at a mediation are then listed for a hearing before a judge. Most matters are settled within one and two years of the application being made.

Executors

Executors who are the subject of a Family Provision Act application are entitled to an indemnity in respect of the costs of defending the application, from the assets of the estate.

In the event that there is a Family Provision application, the estate cannot

ordinarily be distributed until the application has been completed.

Legal Advice

It is important to obtain advice from a lawyer early whether one is considering making a Family Provision application or an executor who is subject of a Family Provision application.

This article is meant for general information only and should not be relied upon as legal advice.

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