
CONTESTING A WILL: INHERITANCE DISPUTES

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GMP GERARD MALOUF
AND PARTNERS





OUTLINE OF THE LAW FOR WILL DISPUTES

In Australia, people have the right to prepare a last will and testament and expect that their wishes will be respected. For the most part, the Supreme Court prioritises the wishes of a deceased and often, will do everything possible to minimise any change made to a Will.

It may come as a surprise however that there has been a significant trend in recent years where the Supreme Court and the Court of Appeal have made decisions that have changed the landscape of wills and will dispute claims.

With that in mind, it is necessary to understand that a will dispute claim is not designed to:

1. affect a "fair" disposition of the estate
2. make equal provision for children (or other persons)
3. reward for services per se
4. punish or readdress poor previous (parental) behaviour or the righting of wrongs

It is however **designed to satisfy the moral duty of a deceased person taking into consideration the backdrop of several key factors that are relevant to any claim.**

These include but are not limited to:

1. the extent of the relationship between the deceased person and the plaintiff
2. the financial needs of the plaintiff
3. the dependency of the plaintiff on the deceased person at the time of death
4. the competing financial circumstances of other parties
5. any competing claims being made on the estate

There are of course other factors that can influence how a court may alter a will and make an order for provision however the ones referred to above are some of the main considerations.

- **DO I HAVE A CLAIM?**

In order to answer the question of whether you have a claim, you need to first demonstrate that you are:

1. Eligible to make a claim.
2. You are making the claim within time limits.
3. You can demonstrate the need.
4. You can demonstrate that the deceased owed you a moral duty.

We have expanded on each of these issues below for your ease of reference.

- **FAMILY PROVISION CLAIMS IN OTHER STATES**

At Gerard Malouf and Partners (GMP) we represent clients who want to make a family provisions claim in almost all jurisdictions in Australia. For this reason, this guide will cover how the different jurisdictions deal with some of the main issues that are relevant to a family provisions claim.

AM I ELIGIBLE TO MAKE A CLAIM?

The eligibility criteria to make a claim for further provision out of an estate, varies depending on where the deceased lived and died. **Below is a brief explanation as to the groups of people that are eligible to make a claim for provision in the different jurisdictions in Australia.**

- AUSTRALIAN CAPITAL TERRITORY

You are eligible to make a claim if you are:

1. A “partner” of the deceased person.
2. A person (other than a partner of the deceased person) who was in a “domestic relationship” with the deceased person for two or more years continuously at the time.
3. A child (which includes an adopted child) of the deceased person.
4. Stepchildren, grandchildren or parents of the deceased person may also be eligible to apply for provision however there are limitations. For the most part, the applicant needs to demonstrate that the person was being maintained immediately before the deceased’s death.

- NORTHERN TERRITORY

You are eligible to make a claim if you are:

1. A spouse or de facto partner.
2. A former spouse or de facto partner of the deceased (but only if that person was maintained by the deceased immediately before his or her death).
3. A child which includes an adopted child.
4. A stepchild.
5. A grandchild.
6. A parent.

- NEW SOUTH WALES

You are eligible to make a claim if you are:

1. A person who was the wife or husband of the deceased at the time of the deceased’s death.
2. A person with whom the deceased was living in a de facto relationship at the time of the deceased death.
3. A child of the deceased.
4. A former wife or husband of the deceased.
5. A person who:
 - a. was at any particular time, wholly or partly dependent on the deceased and,
 - b. is a grandchild of the deceased or was, at that particular time or at any other time, a member of the household of which the deceased was a member.
6. A person with whom the deceased was living in a close personal relationship at the time of the deceased death.

- QUEENSLAND

You are eligible to make a claim if you are:

1. A spouse.
2. child or,
3. dependent of the deceased person you will be eligible to make a claim for provision.

- SOUTH AUSTRALIA

You are eligible to make a claim if you are:

1. The spouse of the deceased.
2. A person who has been divorced from the deceased.
3. The domestic partner of the deceased;
4. A child of the deceased;
5. A child of a spouse or domestic partner of the deceased being a child who was maintained wholly or partly or who was legally entitled to be maintained wholly or partly by the deceased immediately before his or her death;
6. A child of the child of the deceased;
7. A parent of the deceased who satisfies the that he or she cared for, or contributed to the maintenance of, the deceased during his or her lifetime;
8. A brother or sister of the deceased who satisfies the court that he or she cared for, or contributed to the maintenance of, the deceased during his or her lifetime;

- TASMANIA

You are eligible to make a claim if you are:

1. The spouse of the deceased;
2. The child of the deceased;
3. The parent of the deceased, if the latter dies without leaving a spouse or any children;
4. A person whose marriage to the deceased has been dissolved or annulled but who at the date of the deceased's death was receiving or entitled to receive maintenance from the deceased whether pursuant to an order of the court, or to an agreement or otherwise;
5. A person who significant relationship with the deceased had ceased before the date of the latter's death but who was receiving or entitled to receive maintenance from the deceased whether pursuant to an order of a court, or to an agreement or otherwise;

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- VICTORIA

You are eligible to make a claim if you are:

1. The spouse or domestic partner of the deceased at the time of the deceased's death.
2. A child including an adopted child of the deceased who at the time of the deceased's death, was under the age of 18 years, a full-time student aged between 18 years and 25 years, or suffered a disability;
3. A stepchild of the deceased who at the time of the deceased death, was under the age of 18 years, a full-time student aged between 18 years and 25 years, or suffered a disability
4. A person who:
 - a. for a substantial period during the lifetime of the deceased, believe that the deceased was his or her parent and was treated that way by the deceased and
 - b. at the time of the deceased death, was under the age of 18 years, a full-time student aged between 18 years and 25 years, or suffered a disability.
5. A former spouse or former domestic partner of the deceased if the person, at the time of the deceased death:
 - a. would have been able to take proceedings under the Family Law Act;
 - b. has either not taken those proceedings or commenced but not finalised those proceedings;
 - c. is now prevented from taking or finalising those proceedings because of the death of the deceased.
6. A child or stepchild of the deceased not referred to in the second or third dot points;
7. A person, not referred to in the fourth dot point above, who for substantial period during the life of the deceased believe that the deceased was his or her parent and was treated that way by the deceased;
8. A registered caring partner of the deceased;
9. A grandchild of the deceased;
10. A spouse or domestic partner of a child of the deceased if the child of the deceased dies within one year of the deceased's death;
11. A person who, at the time of the deceased's death, is a member of the household of which the deceased was also a member.

- WESTERN AUSTRALIA

You are eligible to make a claim if you are:

1. A person who was married to, or living as the defector partner of, the deceased immediately before the deceased death;
2. A person who, at the date of the deceased's death, was receiving or entitled to receive maintenance from the deceased as a former spouse or de facto partner of the deceased, whether pursuant to an order of the court, or to an agreement or otherwise;
3. A child of the deceased who was alive at, or born within 10 months of, the date of the deceased's death;
4. A grandchild of the deceased who was being maintained wholly or partly by the deceased immediately before the deceased death;
5. A grandchild of the deceased who was alive at, or born within 10 months of, the date of the deceased's death, and one of whose parents was a child of the deceased who had predeceased deceased;
6. A stepchild of the deceased who was being, or entitled to be, maintained wholly or partly by the deceased immediately before the deceased's death;

TIME LIMITS IN MAKING A CLAIM

If you intend to make a claim for provision, you need to take immediate steps so as to ensure you do so within time. The time limits in making a claim very depending on the State in which the deceased lived and died. If you are unsure as to what the time limits are, you should contact GMP as a matter of urgency.

Claims can be made outside of these time limits however in doing so, you need to ensure that a valid explanation is provided to the Court. A claim can proceed if the Court grants an extension of time. **When considering whether an extension of time ought to be granted, the Court will consider some of the following issues. This is not an exhaustive list:**

1. Time since death;
2. Whether or not you were provided with any legal advice;
3. Whether you reasonably knew or should have known of the time limits;
4. Any prejudice to the estate and beneficiaries; and
5. Whether or not the estate has been distributed.

The time limits in making a claim are:

1. Australian Capital Territory – within a period of 6 months after the date when administration in respect of the estate of the deceased person has been granted;
2. Northern Territory - within a period of 12 months after the date on which administration in respect of the estate of the deceased person has been granted;
3. New South Wales – within 12 months from the date of death;
4. Queensland – within 9 months from the date of death;
5. South Australia – within 6 months from the grant of probate;
6. Tasmania – within 3 months from the grant of probate;
7. Victoria – within 6 months from the date of which a Grant of Probate or Letters of Administration has been issued; and
8. Western Australia – within 6 months from the date a Grant of Probate is issued.

- **WHAT IS MEANT BY “NEED” AND “MORAL DUTY” IN THE CONTEXT OF AN APPLICATION?**

Within the context of a family provision claim, a Court will need to consider the needs of the applicant as well as the moral obligation of the deceased person towards the plaintiff.

Need is a concept which is relative to the financial circumstances of each person. For example, the needs of a person who has millions of dollars in assets is different to the needs of a person who lives in a Department of Housing home with no savings.

What is relevant however, is **the plaintiff’s lifestyle prior to and since the deceased’s passing as well as the financial resources available to meet their respective needs.**

When taking into account the moral duty of a deceased towards a plaintiff, the Court will be considerate of the extent and duration of the relationship, how dependent the plaintiff was in the deceased and what contributions the plaintiff had made to the acquisition of the deceased’s estate, their ongoing maintenance and what support was provided to improve the deceased’s quality of life.

The Court will also consider how and what the deceased did for the plaintiff during his or her life. It is relevant to assess what the plaintiff has come to expect from the deceased and whether it is reasonable for a Court to expect that level of ongoing assistance and support.

- PROMISSORY ESTOPPEL CLAIMS

You may have had a promise made to you before the deceased passed away for some benefit. The promise must be specific and have a valuable consideration owed to you. **It is important to specify when the promise was made, exactly what was said and the circumstances surrounding the promise.**

When examining a promissory estoppel claim it is important to consider what detriment you experienced on account of the promise not being fulfilled. In many instances it can be thought of as a contract, a promise was made by the deceased in exchange for some sort of service the beneficiary would be providing to the deceased.

- MENTAL CAPACITY CLAIMS

There are many forms of mental capacity claims however the most common is the deceased making a will during a time when they had dementia. It is important to consider the date the will was made and what conditions the will was made under was there a solicitor present and what health issues was the deceased suffering from at the time?

It is important to understand your relationship with deceased and how often the you had contact with the deceased around the time the Will was created. **If the deceased was mentally impaired it is important to obtain their medical practitioner details and any documentation regarding their health condition.**



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PROCESS OF MAKING A CLAIM

Whilst the documents that need to be filed in each jurisdiction are different, GMP has adopted a streamlined method to process your claim.

It is our intention to commence proceedings as soon as practicable to avoid any unnecessary delays and to ensure a quick result with minimal costs.

In summary, the general steps to processing a claim for further provision are set out below:

1. Engage a lawyer.
2. You will be requested to provide documents in support of your claim including but not limited to:
 - a. financial records i.e. tax returns, pay slips, bank statements, superannuation statements etc
 - b. documents supporting the relationship i.e. photographs, letters and general communications
 - c. documents showing your weekly expenses
 - d. documents showing your weekly income
 - e. in the event that you are in a de-facto relationship or a marriage, the financial circumstances of your partner will become relevant and will also need to be produced.
3. Immediately, your solicitor will write to the executor of the estate and their solicitors, putting them on notice of your intention to commence proceedings seeking further provision out of the estate. 1-4 weeks
4. Requesting particulars from the estate 1-4 weeks
5. Preparing your draft affidavit to review. This is attended to once a response from the estate is received confirming the size of the estate. 3-6 months
6. commencing formal proceedings in the Supreme Court or the appropriate court in your jurisdiction 6 months
7. The matter will be listed for a directions hearing in Court 7 months
8. The defendant will serve affidavit evidence detailing the size of the estate as well as the anticipated costs 8 months
9. Mediation will be scheduled to take place. The matter may settle at the mediation or could proceed beyond a mediation if no settlement is achieved 9 months
10. In the event that the matter has not resolved each party will put on further evidence (by way of further Affidavits) in support of their claim 10 to 12 months
11. Apply to have the matter listed for a hearing 12 months
12. Hearing will take place followed by judgement.

The process can vary slightly in different jurisdictions, however as a general rule, this is how one can expect a family provision claim to progress. Various obstacles can delay the claimant from progressing and at times estates may be inclined to want to participate in early settlement discussions to resolve a claim sooner rather than later.

Engaging the correct law firm, with litigation experience is of paramount importance. Often law firms fail to adequately assess the prospects of success in a claim and will refuse to take the case on.

At GMP we have extensive litigation experience in family provision matters and will be able to assist you and obtain the results that you deserve.



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