

# Who Can Claim On Your Estate?

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So you thought you could more or less give your property to whomever you wanted when you die. You thought it's yours to give away and you had freedom of disposition. Well, this is only partly true.

Freedom of disposition is a common principle of estate law. Many people believe that they should have freedom to dispose of their property when they die in any way they want. Some people even regard this as a natural right that should not be restricted in any way. Others say that there must be some constraints on freedom of disposition. So far as the law is concerned, the issues are what limitations should apply and how far should they go.

## Succession Act

In New South Wales, as in the other States and Territories in Australia, the government tries to strike a balance in Wills and estates between making proper provision for the maintenance and support of people who should have such provision made for them on the one hand, and reasonable freedom of disposition on the other. From a policy point of view, family provision legislation seeks to rectify injustices which can be caused by some Wills, but only in limited cases. Changes to the *Succession Act 2006* (NSW) (the "Act") which came into force on 1 March 2009, significantly extend the range of people who may make a claim against a Will if provision for them in the Will is inadequate and the person who made the Will died or dies after 1 March 2009.<sup>1</sup>

## Eligible Persons

Under the previous legislation<sup>2</sup> there were four categories of "eligible persons" who could make a family provision claim. The 2009 amendments have increased this to six categories. They are:

1. a wife or husband;
2. a person who was living in a de-facto relationship with the deceased person;
3. children, regardless of age;
4. a former husband or wife;
5. a person who was:
  - 5.1. wholly or partly dependent on the deceased person; and
  - 5.2. a member of the deceased person's household at any time; and
6. a person who was living in a "close personal relationship" with the deceased person.

## Children

Children who may bring a family provision claim are not just the deceased's natural or legitimate children. They also include:

1. children of a marriage (e.g. children of the other spouse in blended families in many circumstances). These may even be children of a former spouse in a previous marriage;

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<sup>1</sup> Although this article only deals with Wills, the same considerations and rights also apply to intestate estates, where people die without a Will or with a Will that only partly disposes of their estates.

<sup>2</sup> Family Provision Act 1982 (NSW).

2. children of a domestic relationship but only if the deceased was in the relationship at the time of death;
3. adopted children; and
4. children born out of wedlock.

Step-children and foster children can only be “eligible persons” to make a claim if they can establish they were wholly or partly dependent on the deceased and were a member of the deceased’s household. Similarly, grandchildren can only be “eligible persons” if they can also establish that they were wholly or partly dependent on the deceased and a member of their household.

### **Domestic Relationship**

The category of children of a domestic relationship is also a wide one. It includes:

1. children of a de facto relationship; and
2. children of a close personal relationship (other than a marriage or a de facto relationship).

### **Close Personal Relationship**

A close personal relationship for the purposes of making a claim against a Will is a relationship between two adults living together where one of them provides the other with domestic support and personal care (unless such services are provided for a fee or reward or on behalf of another person or organisation).

### **Range of Eligible Persons Significantly Extended**

The range of people who are eligible to make a claim against a Will is much wider than most people would have imagined. For example, in the case of a former husband or wife, it is irrelevant whether the former spouse has remarried. In that case, what is relevant is whether the deceased and the former spouse had made an enforceable agreement for the former spouse to release their rights against the estate. If they have not done so then the question becomes whether the Will fails to make adequate provision for the former spouse. Moreover, former spouses do not have to establish dependency.

As mentioned above, certain categories of people have to be able to establish dependency in order to make a claim. However, although dependency for the purpose of making a family provision claim normally requires some form of financial support, in certain circumstances the court considers a purely emotional dependency as sufficient. As a result, the extended concept of dependency also widens the category of eligible persons.

### **Time for Commencing Proceedings**

Under the previous legislation, a person had eighteen (18) months from the date of death to bring a family provision claim. The 2009 amendments reduce this period to twelve (12) months. This time limit cannot be extended by consent between the parties although the court can extend the period “on sufficient cause being shown”. This is likely to be a hard obstacle to overcome in most situations.

### **Family Provision Claims**

A family provision claim will only be successful if the court considers that the deceased made inadequate provision for the applicant's proper maintenance, education and advancement in life. In considering this matter, the court generally looks at:

1. the applicant's needs;
2. the deceased's duty, if any, to make provisions in favour of the applicant in their Will; and
3. all the circumstances of the case.

### Matters to be considered by the Court

The Act specifically directs the court to take certain factors into account when deciding whether adequate or inadequate provision has been made, and whether a family provision order should be made out of the estate. These factors include:

1. any family or other relationship between the applicant and the deceased. This allows the court to give effect to what would generally be regarded as moral obligations to provide for surviving spouses, children and other members of the deceased's household;
2. the nature and extent of any obligations or responsibilities owed by the deceased to the applicant as well as to any other person who has made an application or to any beneficiary of the estate;
3. the financial resources and financial needs of the applicant. This is the most significant issue that the court takes into consideration. Financial resources includes earning capacity. Financial needs cover both present as well as future needs of the applicant. In addition, the court considers the financial resources and financial needs of any other person who has made an application for a family provision order as well as those of the beneficiaries of the estate;
4. if the applicant is co-habiting with another person then the financial circumstances of the other person; and
5. the applicant's age. Young children clearly have greater need for education and maintenance in life than older people, and their claims will be considered more favourably.

The court must also take a number of other specific matters into consideration in so far as they apply to the case. The question of whether the deceased was justified in not making provision for an applicant (e.g. on the basis of previous behaviour or the claims of other people) is irrelevant for the court's decision. At least in this regard, the court recognises that a testator is free to make provisions concerning all or some of their assets.

### **Conclusion**

Whilst there are no compulsory shares to an estate under Australian law, courts do have substantial power to make orders for provision out of an estate in favour of a relatively wide group of people. The court's powers place significant restrictions on an individual's freedom to dispose of their assets just as they want to. Indeed, courts can make orders substantially different to a deceased person's Will, even in favour of people to whom the deceased thought they had no obligation or people whom they specifically wished to exclude. As a result, careful consideration must be given to the potential claims of all "eligible persons" when preparing a Will.

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