

How to contest a Will

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Anyone who has a Will, or is considering writing a Will, needs to be aware of the potential that their Will can be contested (or challenged) after they die. There are certain people who are eligible to contest a Will in Victoria. In this blog, we will look at who can contest a Will, how to contest a Will, what the courts consider when determining a claim and what time limits apply.

Who is eligible to contest a Will in Victoria?

In Victoria, only certain people can bring a Family Provision Claim. A Family Provision Claim is the process an eligible person undertakes to challenge the content of the Will. Those people are:

- A husband, wife or a domestic partner of the deceased at the time of the deceased's death. A domestic partner is a person who was living with the deceased for at least two years as a couple on a ‘genuine domestic basis’ prior to their death or who has a child with the deceased who is under the age of 18.
- A child or step-child of the deceased;
- A person who, for a substantial period during the life of the deceased, believed that the deceased was their parent and was treated by the deceased as their child;
- A former spouse or former domestic partner of the deceased if the person, at the time of the deceased's death, would have been able to bring property proceedings in the family court;
- A registered caring partner of the deceased;
- A grandchild of the deceased;

- A husband, wife or domestic partner of a child of the deceased if that child dies within one year of the deceased's death; and
- A person who, at the time of the deceased's death, was a member of the same household of the deceased.

What must the eligible person satisfy before a Family Provision Order can be made by the court?

The matters that must be satisfied before a Family Provision Order can be made by a court are:

- The person bringing the claim must be eligible to contest the Will or estate;
- At the time of death, the deceased must have had a ‘moral duty’ to provide for the eligible person’s ‘proper maintenance and support’; and
- The distribution under the Will or Intestacy Rules does not make ‘adequate provision’ for the ‘proper maintenance and support’ of the eligible person.

In the case of a registered caring partner, grandchild, spouse or domestic partner of a child of the deceased and member of the same household, the eligible person must satisfy the court that they were wholly or partly dependent on the deceased for their proper maintenance and support.

The amount of provision awarded must not provide for an amount greater than is necessary for the eligible person’s proper maintenance and support. It is the court’s role to only award just enough provision to meet the ‘moral duty’ of the deceased. It is not the court’s role to be generous or fair or treat all children of the deceased person equally.

For adult children, when making a Family Provision Order, the court must take into account the degree to which the adult child is not reasonably capable of adequately providing for their own ‘proper maintenance and support’. This is intended to limit claims made by adult children who are capable of providing for themselves.

What factors does the court consider in making a Family Provision Order?

When making a Family Provision Order, the court may take into account any of the following factors:

- The nature of the relationship between the eligible person and the deceased, including the length of the relationship;
- Any obligations or responsibilities of the deceased to the eligible person, any other eligible person and the beneficiaries of the Will or estate;
- The size and nature of the estate;
- The current and future financial resources, earning capacity and financial needs of the eligible person and any beneficiary of the Will or estate;
- Any physical or mental disability of any eligible person or beneficiary;

- Any contributions of the eligible person to building up the estate or to the welfare of the deceased or the deceased's family;
- Any benefits which the deceased previously gave to the eligible person or any beneficiary;
- Whether the eligible person was being 'wholly or partly maintained' by the deceased;
- The liability of any other person to maintain the eligible person;
- The character and conduct of the eligible person;
- The effects a Family Provision Order would have on the amounts received from the deceased estate by other beneficiaries; and
- Any other matter the court considers relevant.

Time limits for contesting a Will

Time limits to contest a Will apply. In Victoria, generally, claims against an estate must be commenced within six months of the date of the Grant of Probate or Letters of Administration.

Mediation

Many Family Provision Claims are settled at mediation. Mediations can either be privately arranged between the parties and their legal representatives prior to bringing a claim in court or mandated by the court after proceedings are issued and prior to setting the matter down for trial.

Mediation is an opportunity that allows the parties to have some control over the outcome of the claim and certainty in relation to the outcome of the claim.

How to stop someone contesting a Will in Victoria

It is not possible for someone to 'contract out' of their right to make a Family Provision Claim in Victoria.

This means that a Will-maker or executor of a Will cannot provide a family member with a document to sign that would prevent them from bringing a claim to contest the Will in Victoria because an eligible person has an inherent right to do so under the law.

How to minimise the possibility of someone contesting a Will

A Will-maker can however take certain steps to minimise the possibility of a challenge to their Will after their death.

It is possible to structure your assets in such a way that when you die, those assets do not form part of your estate and therefore are not available to an eligible person to make a Family Provision claim to. An eligible applicant can only make claim to assets and property which form part of your 'estate' after you die.

For instance, if you own property or bank accounts with another person jointly, when you die, that asset or those assets automatically transfer to the surviving person, as opposed to your estate. Further, you can make a binding nomination of your superannuation and/or life insurance to a specific person, so that those assets are paid directly to that person after you die, and not to your estate. Generally, binding death benefit nominations need to be updated regularly so that they do not lapse and, in many circumstances, joint ownership of assets is not a realistic possibility, such as in the case of a parent whose husband or wife has already passed away.

It is also possible to transfer assets out of your sole name (i.e. assets that are not jointly owned) prior to your death in order to prevent those assets forming part of your estate when you die. However, there is no guarantee that such a transfer would not be scrutinised by a court after your death, and the court may find, for example, that there was undue influence or 'unconscionable conduct' exerted upon you by some other person when you transferred the assets. Such transfers could also attract stamp duty and have other taxation and Centrelink implications for you or your family members.

It could also be possible to prevent a family member from contesting your Will if you make some provision for them in your Will. The amount that you provide for them, whilst it may not quite be what a court would consider being 'adequate' in the circumstances, could be just enough to prevent them from taking the step of bringing a claim; making them think twice about the risks, time, stress and costs involved in doing so. Assessing how much provision to make, however, is not easy and making provision for a child or family member whom you otherwise would not normally provide for, goes against the freedom you have in Australia of leaving your assets in the manner and to whom you please.

How a Wills and Estates lawyer can help

Smith Family Law can assist you if, after a family member dies and where you are an eligible person, you have been left out of a Will or the amount you receive in the Will is not adequate.

We can also assist if you are the executor or administrator of an estate and a family member has indicated they intend to contest the Will or estate.

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