

Mediation in family provision claims when contesting a Will

Author: Kerry-Ann Smith
Email: kerryann@smithfamilylaw.com.au
Date: Sunday October 30, 2022

Under Part IV of the *Administration and Probate Act 1958* (Vic), an eligible person may be able to challenge or contest a Will if the court finds that the deceased did not make adequate provision for the eligible person in their Will and they had a moral obligation to do so. This is referred to as a 'family provision claim'. As part of a family provision claim, you will be required to participate in a mediation to try to resolve the dispute outside of court.

This blog explores the role of mediation in family provision claims and things to consider if you are required to participate in mediation.

Parties to a family provision claim

An eligible person who makes a claim for family provision is known as the 'applicant'.

Generally, the defendant in a family provision claim will be the executor of the Will or the major beneficiary of the deceased's estate. They are expected to act in the best interests of the beneficiaries of the estate and seek to uphold the deceased's Will.

What happens at mediation when contesting a Will?

Mediation is an out-of-court process whereby the applicant and defendant try to reach a settlement by agreement (without the need to go to court). It is a compulsory component of a family provision claim.

Generally, both parties will have legal representation and they will appoint an accredited mediator, who is usually a solicitor or barrister, to conduct the session. The parties will also jointly decide on the location of the mediation.

If the estate is modest, then the mediation will take place at the court and a Judicial Registrar will act as mediator.

There is no obligation at mediation to reach a settlement, however, doing so can provide various benefits to both parties. These include saving time and money and reducing the stresses associated with continuing the litigation.

If a settlement is agreed at mediation, the court will be notified and some of the orders reflecting the agreement may be made. If, however, a settlement cannot be reached, the matter will be heard again before a Judge who will prepare the matter for final hearing.

Who pays for mediation in a family provision claim?

Both parties are generally equally responsible for the costs associated with mediation, including payment of the mediator's fees and the mediation venue. If the estate is modest, there are generally no costs involved as these services are provided by the court.

If the matter does not settle at mediation, the court retains discretion as to costs, as is the case for all aspects of a family provision claim. This means that they may award costs against one party and in favour of another, depending upon the circumstances.

If an applicant succeeds in their family provision claim, generally their costs will be ordered to be paid from the deceased estate.

Defendant's costs will usually also be paid out of the deceased estate unless it is found that they have acted in an unreasonable manner. This may be the case if they have used their appointment as executor, for example, to accrue unreasonable legal expenses to protect their own interests above that of the estate.

This is significant as when litigation does not involve an early settlement, such as at mediation, and continues to a final hearing, the process can diminish estate assets. This in turn means that an early settlement at mediation will often be beneficial to all parties involved.

What are the advantages of mediation for family provision claims?

There are several key advantages to mediation in family provision claims that can help make this the best avenue to resolve a contested Will or estate. This, in part, is why mediation has become a compulsory part of family provision claim proceedings.

Some of the advantages include:

- **It may save you time and money:** An agreement reached at mediation will make continuing litigation unnecessary. This will save both parties considerable time and money.

- **The normal rules of evidence and procedure do not apply:** Unlike in a courtroom, the parties to a mediation are free to conduct the matter as they see fit, and will not need to, for example, give evidence under oath. This also means that mediation is often less intimidating and stressful than court hearings. The parties are also able to be more directly involved in the process.
- **It is confidential:** Nothing that occurs during the course of mediation may be used by either party as evidence during the remainder of the family provision claim proceedings, including at a future court hearing. The parties can also elect to make any agreement that is reached at the mediation confidential. This means that both parties are further encouraged to discuss their needs and perspectives without fear of what they say being used against them so that the parties can be encouraged to achieve the best outcome for all involved.

How a Wills and Estates lawyer can help

Smith Family Law will be able to advise you about your prospects if you are considering contesting a Will and assist you in preparing for a family provision claim mediation.

Contacting Smith Family Law

03 8625 8957

info@smithfamilylaw.com.au

This blog is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.