

Estrangement in family provision claims

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Under Part IV of the *Administration and Probate Act 1958* (Vic) ('*Administration and Probate Act*'), an eligible person may be able to challenge a Will if the Will-maker is considered to be under an obligation to provide for them and no such provision has been made in their Will. These are referred to as 'Part IV claims' or 'family provision claims', and often arise in circumstances where there has been estrangement between family members.

This blog explores how estrangement is treated in family provision claims, and what a Will-maker may be able to do to protect their assets from potential claims contesting a Will.

What is estrangement?

Estrangement occurs within a family when a relationship between two people breaks down, leading to the severance of communication and other social ties. Most often it is used to refer to a parent and child, but can also apply to other relationships within a family.

Even if a family member is estranged, they will still be able to make a family provision (ie, Part IV) claim provided that they fall within the definition of an 'eligible person'.

Who can make a family provision claim?

The *Administration and Probate Act* sets out the people who are 'eligible' to make a Part IV family provision claim. The most common examples include:

- A spouse or domestic partner of the deceased;
- A former spouse or domestic partner of the deceased who would have been entitled to bring proceedings under the *Family Law Act 1975* (Cth), where these proceedings had not yet commenced or were not finalised at the time of death. You can read more about time limits in family law matters here.
- A child or step-child of the deceased;
- A registered caring partner of the deceased;
- A grandchild of the deceased.

People who fall within these categories may be estranged from the Will-maker at their time of death, but will still be eligible to make a family provision claim. In these circumstances, the court may award provision in their favour if it finds they have not been adequately provided for in the Will.

In addition to being an eligible person, there are other requirements that a person must satisfy in order to make a family provision claim. These include:

- That the eligible person was partly or wholly dependent on the deceased for maintenance and support;
- That the deceased had a 'moral duty' to provide for the eligible person; and
- That the distribution of the deceased's estate under the Will does not make adequate provision for the eligible person.

Can I exclude an eligible person from my Will due to their conduct?

The character and conduct of a person making a family provision claim is a factor that courts consider when determining whether to award provision out of a deceased persons' estate for them.

Certain conduct can be sufficient to extinguish or reduce the obligations of a Will-maker to an eligible person. This is referred to as 'disentitling conduct', and may include conduct by the eligible person towards the deceased which contributed to the estrangement, such as:

- dishonesty;
- blackmail; and
- violence.

Courts, however, are reluctant to find that disentitling conduct extinguishes an eligible person's entire family provision claim. Conduct which is not extreme and directed at the Will-maker is unlikely, on its own, to disentitle an eligible person from being awarded provision out of a deceased person's estate.

'Dispositions' explaining your reasons for excluding an eligible person in a Will

You may include a ‘disposition’ in your Will or in a Statutory Declaration accompanying your Will which outlines the reasons why you wish to leave family members, who you may otherwise be regarded as having an obligation to provide for, out of your Will.

This is particularly significant where estrangement has occurred within a family or close personal relationship. A disposition may outline the conduct of the estranged family member which may be sufficient to disentitle them from making a family provision claim.

The court is required to have regard to dispositions or reasons in determining a family provision claim, however, this itself will not determine the outcome of such a claim. In contrast, a disposition which is considered to have flawed reasoning for excluding an eligible person from a Will can actually strengthen the case of a person making a family provision claim.

It is important that dispositions or reasons in your Will, or in an accompanying Statutory Declaration, are properly drafted so as to best protect your assets in the case of a potential family provision claim.

How a Wills and Estates lawyer can help

Smith Family Law are able to assist you in managing the risks associated with a potential family provision claim by an estranged family member seeking to challenge a Will.

Alternatively, if you are an estranged family member and you have been left out of a Will, we can advise you in relation to a potential family provision claim.

Contacting Smith Family Law

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