

Who is eligible to make a family provision claim in Victoria?

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A person can make a will leaving their assets to whomever they please. However, there are laws in Victoria which allow a court to make an order that provision be made out of a deceased person's estate for a person whom they had a moral obligation to provide for after their death, known as a family provision order.

In order for a person to bring a claim requesting that a family provision order be made, known as a family provision claim, they need to be an 'eligible person' under the Administration and Probate Act (Vic) 1958. This article explains who qualifies as an eligible person and can bring a family provision claim in Victoria - and what the court considers when assessing each category.

Do you qualify to make a family provision claim in Victoria?

In Victoria, a Claim must be brought in the Supreme Court of Victoria or the County Court of Victoria ('the Court'). The Court cannot make a family provision order out of a deceased person's estate if the Court is not satisfied that the person is an 'eligible person'. Whether a person is eligible is generally to be determined at the time of the deceased person's death.

Children, Step-Children, Spouses and Former Spouses

In Victoria, the following persons are eligible under the Act to make a Claim:

- a child or step-child under 18 years of age;
- a child or step-child who is a full-time student aged between 18 and 25 years;

- a child or step-child with a disability;
- a person who for a substantial period during the deceased's lifetime, believed that the deceased was their parent and was treated as a child of the deceased (who is under 18 years or under 25 years and in full-time study or is disabled);
- a spouse or domestic partner of the deceased.
- a former spouse or former domestic partner of the deceased if, at the time of the deceased's death, the person would have been able to bring proceedings under the Family Law Act 1975 and has either not taken those proceedings, or commenced but not finalised those proceedings, and is now prevented from taking those proceedings as a result of the death of the deceased.

For the above claimants, the Court must take into account the degree to which, at the time of the deceased's death, the deceased had a moral duty to provide for them and the degree to which the distribution of the deceased's estate fails to make adequate provision for the proper maintenance and support of the eligible person.

Adult and non-disabled children and step-children

Claims can also be made by children and step-children, or persons who believed they were children of the deceased person, who do not fall into the above categories. These persons can include:

- adult children and stepchildren;
- non-disabled children and step-children; and
- persons who are adults at the time of the deceased's death and who believed the deceased was their parent for a substantial period during the deceased's lifetime and was treated as a child of the deceased.

However, for these claimants the court must also consider the degree to which the applicant is not capable, by reasonable means, of providing adequately for their own 'proper maintenance and support'.

Other Eligible Relationships: Grandchildren, Household Members and Caring Partners

The following persons are also eligible to make a Claim:

- grandchildren;
- registered caring partners;
- members of the household; and
- a spouse or 'domestic partner' of a child of the deceased who dies within 12 months of the deceased;

In addition to taking into account the degree to which the deceased had a moral duty to provide for these claimants and the degree to which the distribution of the estate fails to make adequate provision for them, these persons must also show they were 'dependant' on the deceased for their 'proper maintenance and support'.

Further, the amount of the provision made by the Court must be proportionate to the eligible person's degree of dependency on the deceased for their 'proper maintenance and support' at the time of the deceased's death.

Who is a member of the deceased's household?

For a person to be eligible to make a Claim as a member of the deceased's household, the person must have been a member of the household of which the deceased person was also a member, or had been in the past and would likely have again become a member of the household, had the deceased not died.

Who is a registered caring partner?

Further, a registered caring partner is defined in the Act as a person who, at the time of the deceased's death, was in a registered caring relationship with the deceased person within the meaning of the Relationships Act (Vic) 2008.

Who is a domestic partner?

A domestic partner of the deceased is a person who is not married to the deceased person but was living with that person at the time of the deceased person's death as a couple on a genuine domestic basis, whether or not that relationship is a heterosexual or same-sex relationship, and either:

- had lived with the person in that manner continuously for a period of at least 2 years immediately before the person's death; or
- is the parent of a child of the person, being a child who was under 18 years of age at the time of the person's death.

Not sure if you're eligible? Speak with a family provision lawyer in Melbourne

Understanding whether you qualify to make a family provision claim can be complex - and the time limits for bringing a claim in Victoria are strict. The experienced wills and estates team at Smith Family Law can assess your eligibility and help you understand your options.

We have offices in Melbourne, Sunshine and Williamstown, and we're ready to help. Contact us today for a confidential discussion.

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