

# Have you been left out of a Will?

If you discover that you have not been named as a beneficiary in a loved one's Will, or if you feel like you should be receiving a greater benefit from a loved one's estate, you may be entitled to make an Application for adequate provision (known as a "Family Provision Application").

## Am I eligible to make an Application?

You will be eligible to make a Family Provision Application if you are the deceased person's:

- ✓ Spouse;
- ✓ Child; or
- ✓ Dependant.

The term "child" means a child, step-child or adopted child of a deceased person.

### A step-child is:

- ✓ A child of the spouse of the deceased person; and
- ✓ The relationship of step-child and step-parent has not come to an end.

The relationship of step-child and step-parent does not come to an end on the death of the step-child's biological parent.

**The term "spouse" may include a deceased person's former spouse if at the time of death, the former spouse:**

- ✓ Had not remarried or entered into a civil partnership with another person before the deceased's death; and
- ✓ Was, on the deceased's death receiving or entitled to receive maintenance from the deceased.

**The term "dependant" means any person who is:**

- ✓ A parent of a deceased person; or
- ✓ The parent of a surviving child under the age of 18 years of a deceased person; or
- ✓ a person under the age of 18 years; and

received substantial maintenance and support from the deceased person at the time of their death.

## If I am eligible to make an Application, does this mean I will succeed?

Whether you are entitled to provision from a deceased person's estate will depend on a wide range of facts and circumstances.

There are 2 questions that a Court must consider:

- ✓ Has the deceased person provided 'adequate provision' for you (the Applicant) from their estate?
- ✓ If 'adequate provision' has not been made, then should any provision be made for the Applicant, and if so, how much?

## Have I been left 'adequate provision' from a deceased person's estate?

You must be able to demonstrate that inadequate provision has been made before the Court can consider making any award in your favour.

To determine whether you have been provided with 'adequate provision' from a deceased person's estate, a Court will consider what a fair and just person would have done, having regard to all of the circumstances as at the date of death of the deceased person.

**To answer this question, a whole range of factors must be examined, including:**

1. The size of the estate (what are the assets in the deceased person's estate?)
2. What are your needs and financial circumstances?
3. What are your health and personal circumstances?
4. The nature of the relationship between yourself and the deceased person;
5. Whether you made any contributions to the deceased person's estate;
6. Whether the deceased person made any provision for you during their lifetime;
7. Whether the deceased person had any obligations to you;
8. What were the terms of any previous Wills made by the deceased person?
9. Is there any evidence of the deceased person's intentions?
10. Was there any character and conduct indicating that yourself and the deceased person were estranged?
11. Are there any other persons that may have an interest or right to make a claim? What are their circumstances?
12. Any other relevant matters.

### If I have not been provided with adequate provision, how much will I receive?

It is difficult to say with absolute certainty how the Court may decide your Application. The size of the estate, any existing provision made under the deceased person's Will, your financial position and your relationship with the deceased person are all matters that are taken into account by the Court.

If you pursue an Application, an assessment of any award you may receive requires a detailed examination of your circumstances, the estate's circumstances and any other competing person's financial positions.

Litigation is an inherently uncertain process and you should carefully consider all of the circumstances before deciding whether to proceed with an Application.

### If my parent has died, wouldn't their estate automatically be distributed between me and my siblings equally?

In most circumstances, a Will maker will gift all of their estate to their spouse and in the event that their spouse has predeceased them, then the gift will be distributed to their child or children in equal shares.

However, this arrangement is not always appropriate, particularly in instances where there are vulnerable children. A Court may award a vulnerable child a greater share of the estate compared to what their siblings may receive.

#### A vulnerable child may include someone who:

1. Has any form of physical or intellectual impairment;
2. Has declared bankruptcy (or potentially committed an act of bankruptcy); and/or
3. Has separated from their spouse and their gift becomes an asset to be included in any property settlement with their spouse.

### Do I have to make an Application within a certain timeframe?

*If you intend to proceed with a Family Provision Application, you must:*

1. Give written notice to the Executor/s of the deceased person's Will of your intention to proceed with an Application within **six (6) months** from the date of death of the deceased; and
2. You must file your Application in the relevant Court and serve your Application on the Executor/s of the deceased person's Will within **nine (9) months** from the date of death of the deceased.

It is possible to commence an Application after this time. However, you must obtain the leave of the Court to do so. The Court has discretion whether to permit an Application to commence after the above time limits have expired.

In exercising that discretion, the Court considers a number of issues including the length of the delay in commencing an application, the extent to which the estate has been partially or wholly distributed and whether there would be prejudice or injustice to the beneficiaries if the application is allowed to proceed.

### Who pays the costs of my Application?

It is important to understand that your legal costs and the costs incurred by any other beneficiary may not be paid from the assets of the estate. Whether your costs will be paid from the estate assets will depend of several factors, including:

1. the value of the assets in the deceased's estate;
2. whether costs have been increased as a result of:
  - a. non-compliance with the rules of Court;
  - b. litigation of unmeritorious issues;
  - c. failure to make prompt or appropriate concessions or admissions;
  - d. giving unwarranted attention to minor peripheral issues; and
3. an offer of settlement made by a party to the proceeding.

If your costs are paid by the estate, this will reduce the size of the assets (and in some cases may even use most of the value of the estate assets).

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