

HarrisLieberman

solicitors

MAKING A CLAIM AGAINST AN ESTATE

A photograph of a person from behind, wearing a tan jacket, looking out over a forest at sunset. The sun is low on the horizon, creating a warm, golden glow that filters through the trees. The person's hair is dark and slightly messy. The jacket has a hood and a patch on the sleeve.

WILL & ESTATE LAW
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MAKING A CLAIM AGAINST AN ESTATE

Who is entitled to contest a Will?

There are limits on who is able to make a claim for further provision from an Estate. The rules are slightly different in Victoria and NSW, but generally speaking claims are restricted to close family members or others that were financially dependent on the deceased. In order to be entitled to make an application, you first need to ensure that you fit within one of the categories set out in the legislation. Simply being left out of a Will or receiving a smaller share than others is not sufficient. For example, an adult child who cannot establish any financial need may well be unsuccessful.

What will the Court take into account?

Claims made against an estate are commonly called Family Provision Claims or Testators Family Maintenance claims. As these terms suggest, the focus is on the relationship between the claimant and the deceased and whether this created a moral obligation on the deceased for provision to be made and the claimants need for financial assistance.

In both NSW and Victoria there are a number of factors that the Court will take into account when determining a claim. They include:

- » The nature and duration of the relationship between the claimant and the deceased
- » The size of the estate and how any extra provision for the claimant would impact on other beneficiaries.
- » The obligations of the deceased to the claimant and to any other beneficiaries of the Estate.
- » The age, health and financial resources of the claimant and of other beneficiaries
- » Any contribution by the claimant to the assets of the deceased or to the welfare of the deceased
- » Any previous benefits given by the deceased to the claimant
- » Whether any other person is liable to maintain the claimant.
- » The conduct of the claimant

This list is not exhaustive and the Court has a broad discretion when considering these sorts of claims.

When should a claim be made?

There are legislative time limits in place in both NSW and Victoria that specify when applications must be made. In NSW the Succession Act provides that any claims be made within 12 months of the date of death. In Victoria, the time limit is 6 months from the date Probate or Letters of Administration were granted. In both cases the Court may extend the time for making a claim if compelling reasons exist. You should not rely on getting an

extension of time as there is no guarantee such an application will be successful.

What can the court order?

The court has the ability to make a wide variety of orders that change the way the Estate is distributed. The court can order a lump sum payment, the transfer of property or periodic payments as it sees fit. The court can specify from which part of the Estate the extra provision for the claimant is to be paid.

Who pays the costs?

Traditionally the Estate was usually ordered to pay all the costs of these types of matters regardless of the outcome. The only real exception was if the claim was found to be malicious, vexatious or wholly unfounded. This was a huge drain on the Estate and may have resulted in Executors settling claims in order to contain costs. Over the last few years, however, Courts have started to take a more active interest in the costs that are being incurred and who will have to pay them.

An unsuccessful claimant can now expect that they will have to bear their own costs and depending on the way the matter has been conducted, they may also have to pay some of the Estate's costs as well.

It is therefore important to make a proper assessment of the likelihood of success at the earliest opportunity.



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