*Insights*

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# Will challenges

## *What's involved in challenging an estate*

### Introduction

As a general principle, a person is entitled to leave their estate to whomever they choose. However, governments have legislation to ensure that people make adequate provision for the maintenance and support of those individuals towards whom they are deemed to have an obligation. Under State and Territory Acts, claims can be made on estates whether the deceased dies with a Will or without one. Claimants do need to meet eligibility criteria in order to make a claim, however, whether they succeed or not is a matter for the Court.

### Who is eligible to make a claim?

ACT: Eligible claimants include partners, anyone in a close domestic relationship, child, stepchild, grandchild or parent. However, entitlement is not automatic - other conditions may be necessary. For example, in some cases the deceased must have been supporting them prior to death.

NSW: Eligible claimants include spouses (current or former), de factos, children, grandchildren, anyone with whom they were in a close personal relationship and dependants who were or, who had been, part of the deceased's household.

QLD: Eligible claimants include spouse, children (includes step or adopted children) and dependants including any child, the parent of a surviving child of the deceased under 18 or parents.

SA: Eligible claimants include a spouse (including a domestic partner), a divorced spouse, a child or step-child being maintained by the deceased, or a parent or sibling who helped care for the deceased during their lifetime.

TAS: Eligible claimants include a spouse, children (or parents if there is neither a spouse nor children). In addition, someone in a significant relationship (as defined in the Relationship Act 2003) or an ex-spouse, both of whom were receiving maintenance from the deceased can also make a claim.

VIC: Eligible claimants include spouse (including domestic partner and former spouse or domestic partner if family law settlement has not occurred), children, stepchildren, grandchildren, registered carer and household members.

WA: Eligible claimants are restricted to spouses or de facto partners (either current or former), children, grandchildren or parents.

### How far does the duty extend?

The court takes a conservative approach to quantifying a claim as it is recognised that its role is to respect the wishes of the Willmaker as much as possible. "In the case of an adult son, who has received an education and is well able to earn his living, the father's moral obligation can probably in most cases be regarded as discharged, and a

wise and just testator may well feel himself at liberty 'to do what he likes with his own." In re Sinnott [1948] VLR.

This was confirmed in Vigolo v Bostin [2005] HCA, on appeal from the Supreme Court of WA. The son based his case on a moral claim due to previous family dealings, in particular a promise made by his deceased father to leave him a farm in return for his dedication and hard work in building up family assets. His case failed, not because moral claims are irrelevant, but because he failed to meet the other provisions of the Act, one of which was the requirement that he had a financial need – the Court decided that he was an

'able-bodied adult and a man of substantial means'.

### What is adequate provision?

There are no hard and fast rules and the court will look at all circumstances of the case including the claimant's financial position, their relationship to the deceased, and other persons who may also have a legitimate claim. The court will also look at the estate size and what the claimant's standard of living has been. For example, if it was a large estate and a child had come to expect a high standard of living, the notion of what is adequate may be very different compared to someone in more average circumstances.

### A daughter-in-law?

In Petrucci v Fields [2004] VSC a daughter-in-law and grandchildren were claimants. The deceased's son had predeceased the Willmaker who had left nothing to his son's family.

The daughter- in-law was in poor financial circumstances, had had a long relationship with the deceased and had made a significant contribution to his welfare.

The court found the deceased should have made provision for her. On the issue of the adult grandchildren, whose financial situation was also poor, the Court found that whilst he did not have to provide for their immediate needs, he did need to provide for their future needs.

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# Will challenges…

Consequently, out of the approximately $900K estate, the court decided the daughter-in-law should receive income from a sum of $60K to be invested for her lifetime and which was then to be distributed equally to her children upon her death.

### Do you need to provide for a divorced spouse?

It depends. In Mulcahy v Weldon [2001] in the NSW Supreme Court it was held that a former spouse who received a property settlement, and was not entitled to on-going maintenance, would not generally be regarded as being a 'natural object of testamentary disposition'.

On the other hand, if the former spouse was receiving maintenance when the deceased died, he/she may be successful in making a claim.

### Are all siblings treated equally?

In short - no. In White v Muldoon [2006] VSC, the mother died leaving her estate fairly evenly amongst her children. One of them however, was in poor health and unable to work. The court found his need was greater than his siblings even though "none of them could be described as wealthy". The disabled brother was awarded $100K of the total

$190K-$195K estate.

It is worth noting that this was the net amount after deducting $80-$85K in legal costs (these costs are not unusual).As the judge commented, "it is tragic that the parties have been unable to reach agreement when the estate is so small. It is clear that the estate will be significantly reduced due the parties' expenditure on the legal fees of this proceeding".

### Stepchildren...

In McKenzie v Topp, [2004] VSC a 67 year old stepson was successful in making a claim against his stepmother's estate, worth approximately $700K. The court decided he should share in the estate with her nephew and awarded him enough to purchase a modest house plus costs. In this instance it was $275K.

"the plaintiff established ... not only that he gave to the (deceased) assistance worthy of recognition (thus constituting a "special claim"), but also a "special need for maintenance or support", in that his financial resources are meagre and he is about to be evicted from his home. I am to some extent confirmed in my view as to the (deceased's) responsibility towards him by the size of the estate which his father left to her." This decision took into account the nature of the relationship (he had been her primary carer for a number of years), the amount his father had left her when he died, the size of the estate and the needs of the competing beneficiaries.

### Second wife

In Gigliotti v Gigliotti [2002] VSC a life interest had been left in the matrimonial home to the widow. It was a second marriage and they had been married 10 years. For a number of reasons, she could not continue to live in the home so the court was asked to consider whether she should be provided for from the estate.

"The relevant considerations ... are the following: the age of Mrs Gigliotti; the fact that she has been a devoted wife for some 10 years and is now a widow with few assets and has as income only an age pension of $427 per fortnight; she is in good health for a woman of her age; the competing beneficiaries have not demonstrated any particular want of financial resources; their moral claim upon the bounty of the deceased is minimal compared with that of the widow."

The judge decided the house could be sold (estimated $225K net) and another bought for $150K with $50K provided as a "nest egg". The widow could then live in the house until her death when it would pass back to the deceased's children.

"...wisdom ... has dictated that a widow requires not only a roof over her head, but also what is called a "nest egg" to give her some comfort in facing the unforeseeable vicissitudes which lie ahead."

### Trying to avoid a challenge?

NSW goes a step further than the other states in that 'claw-back' provisions apply. If a deceased person has transferred property to someone within the last 3 years of their life, with the intention of avoiding a claim, the court can order that property be transferred back to the estate and be available for a claim. Even if there was no intention to avoid providing for someone, any transfers done within 12 months prior to the death can also be 'undone'.

### Summary

If you believe you may have a right to make a claim or are concerned about possible claims on your estate we would be pleased to provide advice. As in some of the above cases, it's important to try and avoid claims in order to preserve estate values where possible.

Alternatively, if you believe you may have a right to challenge a Will we will provide initial advice obligation free.

### Contact us

Please call us for an obligation free chat on **03 8621 9000** or send us an email **info@irongrouplawyers.com**

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