

Are you the executor of a Will facing a family provision claim?

An executor is the legal personal representative appointed under a Will to oversee administration of the estate of a deceased person. An administrator has a similar role however is appointed by the Court when a person dies without leaving a Will or if the executors appointed in a Will are unable to act.

If you have been appointed executor or administrator then you will deal with the lawyers for the estate and other parties such as accountants, financial advisors, creditors, property valuers and estate agents. You will also oversee distribution of the estate to the beneficiaries.

Generally, the administration of an estate where a valid Will has been left runs reasonably smoothly, often under the guidance of a lawyer. However, sometimes the terms of the Will may be challenged and an executor or administrator will need to deal with this.

A claim on a deceased estate can be quite daunting in already difficult circumstances. An executor or administrator who is also a beneficiary (which is often the case) will be faced with additional conflict in these circumstances. The person claiming under the estate is often known by the executor and may even be a close relative. With obligations to the deceased and the estate, such a claim is likely to play on the conscience of an executor or administrator.

The following is a summary of how a family provision claim is made, how such claims are assessed, the obligations of the executor or administrator and how a lawyer can assist an estate facing a claim.

Claims for family provision

The terms of a Will are contested under family provision legislation. Some claims will proceed to Court whilst others may settle through mediation between the parties' representatives.

There is an expectation within most communities that a person should provide for certain family members from their estate. This is reflected in the *Administration and Probate Act 1958* (Vic) (the 'Act') which allows the Court to make orders to provide for a claimant from the estate of a deceased person. In other words, despite the terms of a valid Will, the Court may change those terms to vary the distribution of a deceased person's estate to compensate a worthy person who has missed out.

Because a deceased person can no longer clarify his or her intentions, such claims are often fraught with conflict and tension.

How is a family provision claim made?

A family provision claim is made by an 'eligible person'. The Act details the categories of eligible persons however these can be summarised as a current or former spouse or de facto partner, a biological, adopted or step-child of any age, a registered caring parent of the deceased, a grandchild, a person of any age who considered the deceased to be his or her parent and was treated accordingly, a partner of a deceased's child who dies within twelve months of the deceased and certain members of the deceased's household.

Claims must be made within six months from the grant of probate or letters of administration however this timeframe may be extended in limited circumstances.

An eligible person must show that the deceased owed a moral obligation to provide for him or her and failed to do so. The Court must be satisfied that the claimant was left without adequate provision for his or her proper maintenance, education and advancement in life.

A number of factors are considered - the actual Will and any evidence of the deceased's intentions with respect to the claimant, the nature and length of the relationship between the claimant and deceased, the size of the estate and the competing financial needs between the claimant, other eligible persons and the beneficiaries. Different thresholds apply for the different categories of eligible persons and needier claimants are more likely to be successful.

A claim that is not settled through mediation proceeds through the Supreme Court.

What are the obligations of the executor?

An executor primarily has a duty to uphold the terms of the Will once probate is granted and to preserve the assets of the estate. The executor must also consider the consequences of a successful claim. A decision needs to be made as to whether to admit the claim and try to settle it (preferably through mediation to avoid the costs of litigation) or to defend the claim.

Indeed, some claims are morally justified by deserving applicants who may not have been adequately provided for, and the Will of the testator may not reflect what he or she really intended had all of the circumstances been known. For example, claims by a needy widow or minor children with genuine medical or financial needs, in the absence of evidence showing otherwise, will generally receive attention.

An executor is likely to have personal knowledge of the deceased and his or her family and personal circumstances. An informed decision regarding the likely success of a claim should be made with the guidance of a lawyer. Each case is assessed on its own merit and a lawyer will be able to look at the relevant facts and advise on the options of compromising or defending a claim.

Depleting estate assets through expensive litigation should be avoided. Traditionally, legal costs were frequently awarded to claimants. However recent decisions of the Victorian Supreme Court have shown that this may no longer be so. There is no guarantee that a claimant's costs will be awarded and those with no real prospect of success or where the cost of making a claim is not reasonably proportionate to the value of the estate, should think carefully before proceeding. This should assist in deterring frivolous or unworthy claims.

Conclusion

Family provision claims are complex and executors or administrators must weigh up the advantages and disadvantages of defending or attempting to settle a claim. This can be done with the assistance of a lawyer experienced in this area of law.

If you are an executor or administrator of an estate you should seek legal advice immediately if you think that a claim may be brought against the estate. Your lawyer can advise you on the likely success of such a claim and will guide you through the appropriate steps in dealing with it.

Your lawyer can also assist with your own estate planning to reduce the risk of a family provision claim against your estate. If you require any additional information or would like a confidential discussion, please call us on (03) 9459 5764 or email admin@rtlegal.com.au.