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## 8 Things to Know About **Contesting a Will**

# 8 THINGS TO KNOW ABOUT CONTESTING A WILL

## 1. THERE IS A BIG DIFFERENCE BETWEEN 'CONTESTING' A 'CHALLENGING' A WILL

Contesting a Will is when you have been left out of a Will, or feel you have been treated unfairly in a Will – to 'right such wrongs' so to speak, you would make a Family Provision, also known as a Part IV or Testator's Family Maintenance List claim. In Melbourne, these types of claims are governed by the Administration and Probate Act 1958 (Vic) ('the Act').

To challenge a Will is to dispute a Will, or to say that the Will itself should be struck out. These types of cases usually arise when the person who made the Will was suffering from a mentally degenerating disease, or they were put under pressure to change their Will.

At Hentys, we understand that the first step is always the hardest. Contesting a will can often be a very emotional process, but we've helped so many of clients just like you. We are committed to the interests of each of our clients, applying our hard work, knowledge and experience to achieve the best possible outcome for you and your family.

**FOR AN OBLIGATION FREE DISCUSSION, CALL US ON 03 8615 4200**

Sympathy where you need it. Success where it counts.

## 2. BEFORE YOU CAN CONTEST, YOU MUST BE ELIGIBLE

Up until the legislative reforms of the Act which came into effect on the 1 January 2015, Victoria was arguably the most flexible state in Australia for people making a claim against a Will. The eligible people were not specified, so anyone who believed that the deceased person had an obligation to provide them with some maintenance could make a claim.

However, at current, the new legislation provides that the application for a family provision order may only be made by, or on behalf of an eligible person as defined as:

- The spouse or domestic partner at the time of death;
- A child of the deceased (including an adopted or step-child or someone who believed the deceased to be their parent and was treated as such) who, at the time of death, was:
  - (1) Under the age of 18;
  - (2) A full-time student under the age of 25;
  - (3) Suffering from a disability

- A former spouse or former domestic partner of the deceased if the person, at the time of the deceased's death would have been able to make proceedings under the Family Law Act 1975 of the Commonwealth; and has either
  - (1) Not taken those proceedings; or
  - (2) Commenced but not finalised those proceedings because of the death of the deceased
- A child or stepchild of the deceased not referred to above (ie adult children)
- A registered caring partner;
- A grandchild;
- The spouse or domestic partner of a child (ie son or daughter in law) of the deceased where that child has died within one year of the deceased's death;
- A person who was or had been (and was likely to be in the near future) a member of the deceased's household.

### **3. YOU CAN'T CONTEST A WILL UNTIL PROBATE HAS BEEN GRANTED**

In most circumstances when an individual dies, the executor named in the Will has a duty to file for a Grant of Probate. Probate is basically bundle of documents which substantiates the deceased's death. Amongst other things the Probate documents will include the death certificate, Will and Inventory of Assets. It is a matter of public record and anybody can request to view the documents from the Supreme Court of Victoria, currently for a fee of \$24.20.

### **4. THERE IS A LIMITATION PERIOD**

Pursuant to s 99 of the Act you have strictly 6 months from the date that a grant of Probate is successfully made to contest a Will. The law can be harsh in the sense that often 'out of time' is synonymous with being 'out of luck' – although in some exceptional circumstances an extension of time will be granted. However, the application for extension cannot be made after the final distribution of the Estate, as no distribution of any part of the Estate made prior to the application can be disturbed by reason of the applicant or of any order made thereon.

The safest bet is just to contest before  
the 6 month period is up!

## 5. WHAT THE COURT TAKES INTO CONSIDERATION

In making a family provision order, the Court considers:[2]

- The deceased's Will;
- Evidence of the deceased's reasons for making the Will in the terms he/she did;
- Any other evidence about the deceased's intentions with respect to the claimant including:
  - (1) Family relationship between deceased and the applicant;
  - (2) obligations/responsibilities the deceased had to the applicant in the past;
  - (3) any physical, mental or intellectual disability of any applicant or beneficiary;
  - (4) the character/conduct of the applicant

Also, in determining the amount of provision to be made by a family provision order, the Court considers:[3]

- The degree to which, at the time of death, the deceased had a moral duty to provide for the eligible person:
  - (1) So whether the applicant was being maintained by the deceased person before that person's death, and whether the deceased had assumed that responsibility;
  - (2) the financial resources and financial needs of the applicant;
  - (3) the age of the applicant
- The degree to which the distribution of the deceased's estate fails to make adequate provision for the proper maintenance and support including:
  - (1) the size of the Estate and liabilities;
  - (2) any contribution of the applicant to building up the estate or the welfare of the deceased/deceased's family

## **6. ADEQUATE PROVISION' IS VERY SUBJECTIVE**

In *Pontifical Society for the Propagation of the Faith v Scales*[4] Dixon CJ noted the relative nature of the words. Thus there is no set criteria for what is considered adequate and what is not.

'Adequate' and 'proper' in particular must be considered as words which must always be relative. The 'proper' maintenance and support of a [person] claiming a statutory provision must be relative to his age, sex, condition and mode of life and situation generally. What is 'adequate' must be relative not only to [their] needs but also [their] own capacity and resources for meeting them.

This is effectively why there are no 'hard or fast' rules as to how much money you will get if you contest a Will governing an Estate of a certain size. This being, what may be considered adequate and proper for your maintenance may be insufficient for a person in a different circumstance although regarding the same amount/Estate.

## 7. YOU CAN'T CONTEST THE DIVISION OF ASSETS WHICH ARE NOT PART OF A WILL

Not every asset of a deceased is considered part of a deceased's Estate. Instead, there are 'estate assets' which can be included in a Will and 'non-estate assets' which cannot.

Estate assets as a broad rule of thumb include anything the deceased has sole ownership over. This includes:

- Any type of real property, i.e. real estate, land and buildings.
- Unproductive property, i.e. valuables such as motor vehicles, jewellery, furniture.
- Cash of any kind, i.e. savings, term deposits.
- Intangible personal property – items which cannot be held but are of worth, i.e. stocks, business ownership and digital assets (Facebook, Twitter, Instagram).
- Intellectual property, i.e. patents, copyrights, royalties.

Non-estate assets on the other hand are things that the deceased does not have legal ownership over, or has joint ownership over with another party. Examples of such assets include:

- Jointly owned assets – both real and personal property
- Discretionary/Family Trusts
- Company Assets
- Life Insurance
- Superannuation

For example irrespective of the testator's Will, if the testator owns a home with their spouse as joint tenants (joint proprietors), upon death of the testator, full ownership will automatically revert to the surviving spouse. This means that the house cannot be considered part of the Estate and as it is not governed by the Will, cannot be contested. The property title trumps all.

The same applies for life insurance and superannuation. Both operate so that the testator nominates the beneficiary of their policy and the policy is then paid directly to the stipulated beneficiary or beneficiaries. Again, as this does not form part of the Estate, a contest is not within the scope of the Act.

## **8. THE COST OF CONTESTING AND 'NO WIN, NO FEE'**

Traditionally no matter the state or jurisdiction, there is a large amount of difficulty surrounding the determination of how much such a proceeding will cost. It varies greatly depending on each individual state of affairs, taking into consideration how willing the executors are to negotiate and whether there are any complicating factors which will affect the estimated cost of your case.

However, at Hentys most of the time we are prepared to act on a No Win, No Fee Basis as we believe that your financial position should not prevent you from achieving justice. This means that you won't have to pay our legal costs unless we provide you with a successful outcome.

Before we commence proceedings under that arrangement we review your claim, with just one phone call being all it takes for us to confirm whether you have a reasonable claim or not. We then assess your case – estimating the size of your claim and provide you with a detailed cost agreement which specifies the costs likely to incur conditional to a success outcome. Next we commence proceedings – being with you every step of the way, managing the entire process on your behalf. Last we settle your case, applying our knowledge and expertise to reach the settlement you are entitled to.

# Hentys | Lawyers

Hentys Lawyers has over 25 years of experience in Will Dispute cases. Our dedicated team of Will Dispute specialists are committed to providing you with outstanding legal service and emotional support during the entire dispute.

At Hentys, we care about our clients. We know that in hiring us, you are putting your trust in our hands to deliver the results that you need.

Our team also has the in-depth understanding of these situations to provide you with further emotional support.

We build a trusting relationship with our clients, that's why we are Victoria's Will Dispute Experts.

**Hentys Lawyers** ABN 88 118 869 793

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