

What is a family provision application?

A family provision application is a claim made against a deceased's estate seeking provision on the basis that the estate does not provide "proper and adequate provision".

Who can claim?

Persons who are eligible to claim include:

- The deceased person's husband or wife;
- A person who is living in a de facto relationship at the date of death (a two-year relationship is not required);
- A deceased person's child;
- A deceased person's former husband or wife;
- A person who was dependent upon the deceased and was a member of the same household (or was a grandchild); and
- A person who was living with the deceased and was in a close personal relationship with the deceased at the time of death.

Although former husbands and wives are eligible to claim, if there was a family law property settlement during the deceased's life, they would generally have poor prospects of success.

Brothers and sisters, stepchildren and grandchildren cannot automatically claim. They need to establish dependency.

Whether or not a de facto relationship existed, can often be an issue. An applicant needs to establish that they were a "couple living together". However, it is not essential that they resided in a single common residence.

What are the principles that apply?

The merits of a claim depend on many factors which include:

- The relationship with the deceased and the duration of the relationship;
- The obligations and responsibilities owed by the deceased person to the applicant;
- The size of the deceased's estate;
- The financial needs of the applicant (and anyone with whom they are cohabitating);
- Any disabilities suffered by the applicant;
- The contributions made by the applicant to the deceased's estate or the welfare of the deceased;
- Provision made by the deceased for the applicant during the deceased's lifetime;
- Whether the applicant was being maintained by the deceased before the deceased's death;
- The character and conduct of the applicant; and
- Any other matter the court considers relevant.

An applicant's affidavit will normally be a lengthy document addressing the various relevant factors.

Overall, the various factors are considered in the light of a deceased's "moral obligation" and "community standards".

What is the process?

Many potential family provision applications are settled amongst the parties without the involvement of the court. If this is the case, the agreement can be recorded in a Deed of Family Arrangement.

If court action is commenced, most family provision cases, are settled at some form of mediation. Only around 3% of applications filed in court proceed to a hearing.

Claw-back provisions?

A family provision application can result in a successful applicant receiving assets of the estate.

In NSW, a successful applicant can also receive “notional estate” which can include the deceased’s superannuation and property held by the deceased jointly with another person. These assets do not automatically form part of a deceased estate.

Notional estate can also include property that has been transferred by the deceased to another person within three years of the date of death.

The deceased’s assets can also include equitable interests. For example, a deceased person may have contributed towards the purchase price of a property but may not be registered on title.

Making a claim

If you have been left out of a will or treated unfairly, we can advise you of your prospects of success in making a family provision claim.

The limitation period that applies to a family provision application is 12 months from the date of death. Only in exceptional circumstances can the limitation period be extended.

If you are eligible to make a claim, it is important that you seek legal advice as early as possible.

Defending a claim

If you are an executor or administrator of an estate, that is the subject of a claim, the situation that you face can be a daunting, confusing and stressful experience.

We have the experience and expertise to help you deal with these claims. We can explain to you what your duties and obligations include and what the best approach may be to resolve a claim in a cost-effective and timely fashion.

We will ensure that you obtain the proper personal protections when finalising a claim and we can represent you in court if necessary.

Contact our Accredited Specialist in Wills and Estates, **Manny Wood**, if you have any questions.