

## Contesting a Will

*When a person dies, they are free to choose who gets their house, where their savings go and how their belongings are divided up. These choices are made in their Will. But what can be done if a spouse is left out of a Will, a domestic partner is forced to leave the family home, or a child with a disability is not adequately provided for?*

### The Will

A Will is a written document which declares how a person's estate is to be distributed on their death. Provided the legal requirements for making a Will are met, or an informal Will is approved by the court, the deceased's property will usually be distributed to the beneficiaries named in the Will after probate has been obtained and all funeral, testamentary and administration expenses, debts and other liabilities of the estate have been paid.

### Can a Will be challenged?

Even though people can leave their assets by Will to anyone they wish, the law recognises that they have a moral duty to provide for certain people. This usually includes close family members such as spouses, domestic partners, children and stepchildren.

If the Will does not adequately provide for a person who the deceased had a moral duty to provide for, the court has the power under Part IV of the *Administration and Probate Act 1958 (Vic)* to order that a share, or larger share, of the estate be distributed to them (known as a 'family provision order').

### Wills & Estates areas of expertise

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## Who can bring a claim?

This will depend on whether the person died before or after 1 January 2015.

**Prior to 1 January 2015:** any person who can demonstrate that the deceased had a moral obligation to provide for them can apply to the court for provision from a deceased's estate.

**From 1 January 2015:** an application for provision from a deceased's estate can only be made by an eligible person.

The term 'eligible person' is defined in the Act and primarily includes:

- > a husband or wife
- > a domestic partner (of same or different sex)
- > a child or stepchild

There are additional classes of 'eligible persons' including (but not limited to) registered caring partners, grandchildren and a person who at the date of death is (or had been in the past and in the near future would likely to have been again) a member of the deceased's household. However, to bring a claim they must also prove that they were dependent on the deceased for their maintenance and support.

## Who can't bring a claim?

If the deceased died on or after 1 January 2015 family members including nieces, nephews, cousins, brothers, sisters and parents of the deceased are not entitled to apply to the court for a family provision order unless they fall into one of the additional classes of 'eligible persons'.

For example, a niece who was living with the deceased at the date of death and was dependent on him or her may still be entitled to bring a claim.

## Where can a claim be issued?

In Victoria, an eligible person can apply to the

Supreme Court of Victoria or the County Court of Victoria for a family provision order.

## What are the time limits?

A claim must be made to the court within six months of the date of the grant of probate of the Will or letters of administration.

The court has power to extend this period provided the estate has not been distributed. However it will only exercise this power in limited circumstances and on taking into account:

- > the reasons for the failure to apply to the court in the six month time period
- > whether a person has applied promptly for an extension of time once they became aware of their right to apply for an extension
- > the merits of the person's claim
- > whether there will be any prejudice to the beneficiaries in granting an extension

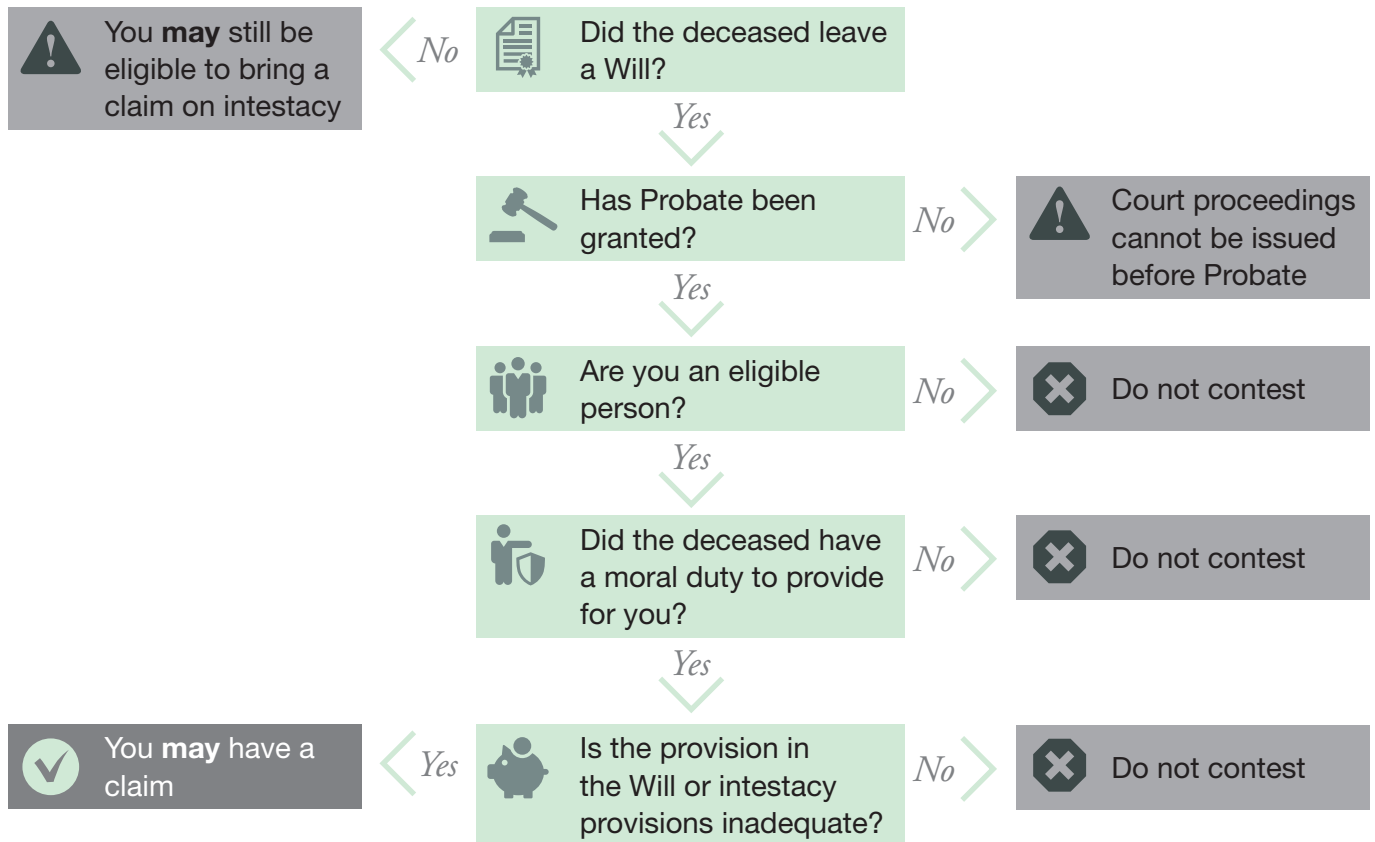
## How does a court determine a claim?

The court must be satisfied that:

- > at the time of death, the deceased had a moral duty to provide for the eligible person's proper maintenance and support
- > the distribution of the deceased's estate fails to make adequate provision for their proper maintenance and support

If satisfied, the court will then decide what provision is adequate having regard to a number of factors including evidence of the deceased's reasons for distributing the estate under the Will, the nature of the relationship between the eligible person and the deceased, the financial need of the eligible person and the effect a family provision order will have on the amounts received from the estate by other beneficiaries.

## Should you contest a Will?



## When will a claim be successful?

Each case is determined on its own facts and no two cases are the same, meaning that the success of a case at trial is hard to predict.

In order to avoid the costs and uncertainty of trial, most cases are settled at mediation or informally before court proceedings are issued.

## What if the deceased did not leave a valid Will?

If a person dies without making a valid Will, that person has died intestate and their assets will be distributed in accordance with the provisions for distribution of assets upon intestacy, established under the Act.

An eligible person who has not been adequately provided for under the intestacy provisions may still be entitled to make an application for a family provision order.

## Are there other means of contesting a Will?

It is not uncommon for family members to raise concerns that a Will is invalid because:

- > the deceased lacked testamentary capacity at the time of making the Will
- > the deceased did not know and approve of the Will
- > the deceased was subjected to undue influence when making the Will

If a Will is challenged on the basis of validity, it is important to note that action needs to be taken prior to a grant of probate of the Will or letters of administration being obtained.

## Jennifer's story

Jennifer is 46 years old. She has little in the way of savings and owns a unit that she lives in with her teenage sons. Her mother, Anna, died ten years ago and her father, John, recently passed away from cancer. Up until his death, Jennifer had a close and loving relationship with her dad and visited him regularly.

Three years before he died, John started an online relationship with a woman named Susie. A year later they were married and Susie relocated to Australia to live with John. Prior to his death, John made a new Will leaving the family home and the bulk of his savings to Susie. Under the Will, Jennifer was to receive a legacy of \$50,000.

Jennifer was upset. The family home had been jointly owned by Jennifer's mum and both her parents had told her 'the house will be yours one day'. Jennifer was also concerned that Susie would not return her calls, and was telling people that the house and money were hers now. She did not know what to do.

Jennifer's situation is not uncommon. The death of a loved one is a difficult time and the thought of contesting a Will can be overwhelming. By obtaining prompt legal advice, Jennifer was able to secure her rights and ultimately receive a fairer share of her father's estate.



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