

Contesting a Will

Before 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, can a Will be challenged? 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 is not adequately provided for? What if the Will-maker didn't have capacity?

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?

Every Will can be challenged, without exception, if there is a legal basis to do so. Will challenges can be brought for two main reasons. Firstly, if the Will does not make adequate provision for certain classes of people. Secondly, if there is doubt about whether the Will is valid — for example, if there is doubt about whether the will-maker had the mental capacity to make it.

Family provision claim

In Australia, it is accepted that people are free to leave their assets how they wish by their Will. However, that freedom is limited by a legal duty to make 'adequate provision' for the 'proper maintenance and support' of certain people.

If a Will fails to make adequate provision for certain people, then subject to certain time limits, the Court has the ability to alter a Will to the extent necessary to distribute a greater amount to that person. This type of order is known as a 'family provision order' and is a very common type of claim in dealing with deceased estates.

Who can bring a claim?

In order to bring a claim for a family provision order, the claimant must be an 'eligible person' under the relevant legislation.

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

- > a husband or wife;
- > a domestic partner; or
- > 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.

How does a court determine a claim?

Being eligible to bring a claim does not automatically mean that the Will-maker owed a legal duty to make provision, as this will depend on the Court's assessment of a number of factors.

The court must be satisfied that:

- > at the time of death, the deceased had a duty to provide for the eligible person's proper maintenance and support;
- > the claimant has a need for added provision either because of some specific circumstances (such as a disability) or for more general factors (such as a lack of financial resources to provide for expected expenses); and
- > 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.

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.

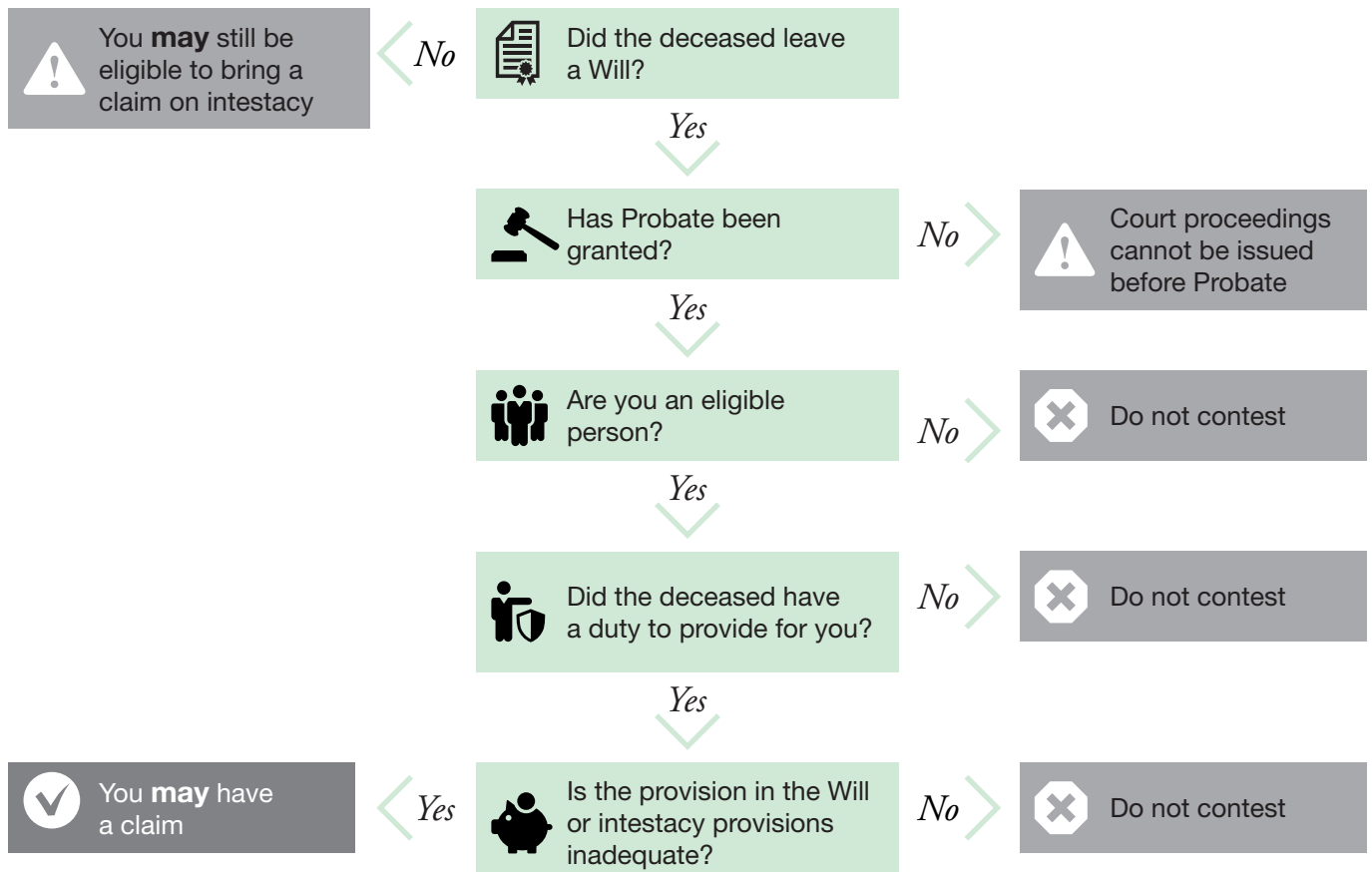
What are the time limits?

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:

- > whether the estate has been distributed;
- > whether the executor was given notice of an intended claim;
- > 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; and
- > whether there will be any prejudice to the beneficiaries in granting an extension.

Should you bring a family provision claim?



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
- > there is a later Will which applies instead.

Challenges about the validity of a Will might result in a particular Will being disregarded and an earlier Will applying (if there is one). Consider the effect of an earlier Will before bringing a challenge as to validity.

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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