

Can I Challenge A Will?

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A question that is often asked by someone who is disappointed at having been left out of a will is whether they are entitled to challenge the will and if so what their likely entitlement might be upon a challenge.

Who can challenge a will?

The *Succession Act 1981* allows a spouse, child, or dependant to challenge a will if adequate provision has not been made for them in the eyes of the law. These three groups are defined as follows:

A **spouse** is:

- a wife or husband; or
- de-facto partner who was living with the deceased in a genuine domestic relationship for at least two years prior to death.

It is possible for someone who is not divorced and is living with a de-facto partner for at least two years to have two spouses entitled to make a claim.

A **child** includes:

- biological children and adopted children; and
- step-children where the deceased does not become divorced from the step-child's parent prior to death.

A **dependant** is someone who was being maintained wholly or substantially by the deceased at the time of death and is also a parent of the deceased, any person under the age of 18, or a parent of a child as defined above.

How much can I expect to receive if I challenge a will?

This question is a starting point for deciding whether it is worthwhile to bring a claim against an estate because frequently the costs of litigation may not make it worthwhile. The courts have gradually become more generous to disappointed family members over the years in terms of the amount they will award from the estate but seem to be becoming stricter in relation to the question of who pays the costs of the litigation.

There are two recent cases worth bringing to your attention which illustrate general principles about how much may be awarded.

In New South Wales an appeal court awarded 15% (\$390,000) to each of two adult daughters in an estate worth \$2.6 million. The daughters were found to be moderately needy of the money and there was an estrangement between them and the father for 21 years which the father had been partly responsible for.

In a Queensland case the Supreme Court considered the position of a son of a deceased father, where the son was already given a house, a car, and \$500,000 in the will. The judge made the following findings:

- the son's financial position and earning capacity was very poor, whilst the estate was 'very large';
- there was a troubled relationship between the son and the father caused by the father;
- the father's new wife and their son were well provided for in the will.

The Court ordered that the \$500,000 gift be increased to \$1,000,000. The judge commented the Court is not required to rewrite the will to make it equal to the other son's gift or to try and heal the pain of a difficult relationship or even restore 'fairness' to the will.

In regard to costs of the litigation, historically it was somewhat of a given that a claimant would have their legal costs paid from the estate even if their claim was unsuccessful but provided it was not merely fanciful. The following case suggests a stricter approach may now be taken by the courts in relation to the costs issue.

In a Queensland case the District Court awarded the claimant, the wife of the deceased, a sum of \$350,000 in place of the life tenancy in a property under the will. The entire estate was valued at about \$791,000. In addition, the wife also asked the Court for her legal costs of \$140,000 to be paid from the estate. The Court ordered that in light of the facts that it was only a two day trial and the wife's initial estimate of the costs was in the region of \$45,000 to \$60,000, her costs be capped at \$100,000.

Conclusion

The award of further provision from an estate is ultimately a matter for the discretion of the Courts. The Courts will have regard to all circumstances in deciding an outcome, and whilst there are general guidelines, a 'cookie cutter' approach is not appropriate. With the increased concerns about litigation costs eating away at smaller estates in particular, claimants need to be more mindful about whether the benefit of litigation is worth the cost to the estate. Sometimes the claimant might find themselves out of pocket if the litigation costs are capped or in some circumstances refused. Therefore care needs to be taken in assessing potential claims.

Please contact the writer should you wish to discuss a potential claim as we can assist claimants or estates in such matters.

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