

# Legalquotes *News*

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## CHANGES TO CHALLENGING A WILL

In New South Wales from 1 March 2009 the Family Provision Act 1982 ceased to apply to Estates for persons who passed away on or after 1 March 2009. The "old" Family Provision Act still applies to those who died before that date. For the Estates of people who passed away after 1 March 2009 there are important changes to both the Law of challenging a Will and the procedure involved in making a challenge. Overall, it could be said that many of the changes are aimed at giving parties an opportunity to settle disputes before taking the matter to a full Hearing and incurring the significant costs involved in a contested Court Hearing. Generally speaking a Will cannot be challenged by anyone and everyone. Under the old Law to challenge a Will the person making the challenge must prove that they are an "eligible person". Eligible persons are a spouse or defacto spouse of the person at the time of the deceased person's death, a child of the deceased person, a former wife or husband, a grandchild or person who was wholly or partly dependent on the deceased person and a member of the household of the deceased person. The new Law now includes an additional category being, "a person with whom the deceased person was living in a close personal relationship at the time of the deceased person's death".

Under the Succession Act in NSW the Court now has clear powers to make regulations with respect to costs and these regulations may include the fixing of the maximum legal costs for legal services in order to limit the amount of legal costs that are incurred in relation to these types of matters. It has been contemplated that Estates with a value of \$750,000.00 or less may have the Court decide the outcome based on evidence that the parties have filed without those parties actually having to attend Court and be cross-examined. In this way significant legal costs could be avoided for small Estates.

Section 98 of the Act is aimed at encouraging the settlement of disputes before holding a Hearing. This Section states that unless the Court for special reasons, such as the threat of violence etc, ordered otherwise the Court must refer an Application to Mediation before it considers the Application.

Courts are able to regulate the procedure that must be followed by parties to Court proceedings and their Lawyers by way of publishing "Practice Notes". On 1 June 2009 a



Practice Note was published setting out the form of the Affidavit that an Applicant must file together with the summons that starts the person's Application to the Court to challenge the Will. The Affidavit must contain information which includes details as to the reasons why they are eligible to make a claim, their employment and education history, who the Applicant lives with and the summary of the assets and liabilities including superannuation and joint assets of the Applicant together with a summary of their monthly expenditure, copies of Income Tax Returns and a summary of the Applicant's spouse or partner's assets and the liabilities for the last 3 years of income. The Applicant must also provide access to the other parties to the Applicant's bank statements and credit card statements for the last 3 years. The Applicant must also list their future needs. By providing this information at the commencement of proceedings it is hoped that unmeritorious claims by Applicants who cannot demonstrate the necessary dependency on the deceased may be avoided. The Practice note also states that the Court may make orders that limit the costs that may be recovered in estates with a value of less than \$500,000.00.

The Court is "clamping down" on this jurisdiction in a positive way so as to avoid claims which do not hold merit and significant legal costs being avoided in situations where they can be avoided. It can be anticipated that other ways to challenge a Will may be explored. Under Section 27 of the Succession Act a Court may make an Order to rectify a Will to carry out the intentions of the Testator if the Court is satisfied that the Will does not carry out those intentions. It is possible that this Section will in future be utilised as a means to challenge a Will. For further information please contact our Estates Team on 1300 727 813.



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