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NEW SUCCESSION LEGISLATION IN NSW

Legislation is expected to come into effect within the next few months which overhauls the current laws in NSW enabling claims to be made against the estates of deceased persons. While it has been the case for many years that certain 'eligible people' have been entitled to make a claim for an entitlement to, or a greater share of, a deceased person's estate, amendments to the *Succession Act 2006* seek to clarify the system and limit the legal costs incurred by those prosecuting and defending claims. It is hoped that this legislation will be put into effect throughout Australia but this has not yet occurred.

If a deceased person has made a Will, that document will not be ignored if a claim is made against the estate. A Will can be overturned in very limited circumstances, such as if the Will was signed incorrectly, was made by a person who did not have the capacity to understand what they were signing or the person making their Will was subjected to "undue influence" when making their Will. However, where a Will has been properly made, a claim can still be made, irrespective of what the Will says, in certain strict circumstances.

Under the new legislation you may be an "eligible person" and therefore entitled to make a claim against the

estate of a deceased person if you were:

- a. Married to the deceased person at the time of their death.
- b. Living in a de facto relationship with the deceased person at the time of their death.
- c. A child of the deceased person. This does not include a step child, but this may change with the passing of new family laws, expected to take place in 2009.
- d. Previously married to the deceased person.
- e. Wholly or partly dependant on the deceased **and** either a grandchild of the deceased or a member of the deceased's persons household.
- f. Living in a close personal relationship with the deceased person at the time of their death.

If you fall into one of the above categories you are not automatically entitled to part of the deceased's estate, or an additional benefit if you have been left something. Being an "eligible person" simply gives you the ability to make a claim. If a person has made a Will, the way they have asked for their assets to be divided is given serious consideration. However, if a person has been married to or lived in a de facto relationship with,



or is the child of a person who has died, and they have not been adequately provided for by the deceased by their Will or during their lifetime, the ability to make a claim is somewhat more straightforward.

The test for entitlement is particularly strict for people who fall into the categories (d), (e) and (f) of the above list, that is former spouses of the deceased person, people who were financially dependant on the deceased and who lived in their household or were their grandchild, or people who lived in a close personal relationship with the deceased person at the time of their death. For these people to make a successful claim they must fall squarely into one of these categories **and** convince the Court that there are factors that warrant the success of their claim and that they have not already been adequately provided for by the deceased person during their lifetime or under their Will.

The category of "close personal relationship" is to be introduced under the



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new legislation. If a person falls into this category they must produce evidence that this kind of relationship existed before the claim can proceed. A "close personal relationship" is not a de facto relationship, but one where the deceased and the claimant (or one of them) has provided the other with domestic support and personal care without fee or reward and not on behalf of another person or organisation. For example, a brother living with and caring for his ill sister without fee may be entitled to make a claim for provision against the estate of his sister at her death. After deciding whether a claimant is an "eligible person", the new legislation has created a list of matters that the Court can formally consider when deciding whether to grant a claim. The list includes matters such as:

1. The nature and duration of any family relationship between the applicant and the deceased person.
2. The nature and extent of any obligation owed by the deceased person to the applicant.
3. The size of the deceased's estate.
4. The financial resources of the applicant and any person that they are living with.
5. Any physical, intellectual or mental disability of the applicant or other beneficiary of the deceased person.
6. The age of the applicant.
7. Any contribution, whether financial or otherwise, the applicant has made to the assets of the deceased person, or to their welfare or the welfare of the deceased

person's family.

8. Any provision already made for the applicant either during the deceased person's lifetime or in their Will.
9. Any evidence of the actual intention of the deceased person about how their estate was to be distributed.
10. Whether the applicant was being maintained in any manner by the deceased person before their death or whether they were liable to support the person making the claim.
11. The character and conduct of the applicant before and after the death of the deceased person.
12. Any relevant Aboriginal or Torres Strait Islander customary law.
13. Any other matter that the Court considers relevant when deciding the claim.

On the basis of the above, a claimant may fail in their claim even if they are an eligible person, if the estate is a small one, they or their partner have assets or financial resources of their own adequate to support themselves and the Will of the deceased has provided them with something. If a claimant has been estranged from the deceased person or the claimant has behaved in a manner contrary to the wellbeing of the deceased, this may also have a negative impact on the prospects of successfully making a claim.

Very importantly the time limit for making a claim against a deceased person's estate under the new law will be reduced to 12 months from



the date of death, rather than 18 months under the current legislation. This means that unless the Court gives special permission for a late claim to be made, no claims can be made once 12 months have passed from the death of the deceased. After this time the Executor should be able to safely distribute the estate in accordance with the deceased's Will without fear of a claim being made. If the deceased did not have a Will, the Estate can be distributed after 12 months under the government intestacy regime.

The new legislation also aims to prevent very large legal fees from being incurred in estate disputes, particularly when an estate is considered to be small, that is, worth less than \$750,000.00. Mediation will be required before a case can proceed to a decision by a Court, which is often a less harrowing and expensive way of resolving disputes concerning estates. The new legislation is also aimed at allowing less formal evidence to be accepted at Court, where obtaining that evidence, for example a Valuation Report for the property owned by the deceased or a Medical Report about the health of the claimant, would lead to higher costs being incurred or substantial delay. The new legislation may also prohibit the advertising of legal services which promote claims against estates.



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