

Legalquotes News

PROVIDED BY RANKIN NATHAN LAWYERS

HOW DOES A WILL GET CHALLENGED?

Many people have noticed advertisements in newspapers and other forms of media by lawyers asking "Have you been left out of a Will?".

In 1982, the NSW Government introduced the Family Provision Act. The object of that Act was to ensure that people make adequate provision in their Wills for their dependants.

The Family Provision Act enables certain persons, referred to as "eligible persons", to make an application to the Court on the basis that the deceased person's Will did not provide an adequate or appropriate amount of money for them.

Not all relatives are eligible persons. To be an eligible person, a person must be:-

1. A wife or husband of the deceased or defacto wife or husband.
2. A child of the deceased.
3. A former wife or husband of the deceased.
4. A person who at any particular time was wholly or partly dependent upon the deceased person and was either a grandchild or a member of the household of the deceased person.

If a person challenging a Will is an eligible person within the meaning of the Family Provision Act, the Court

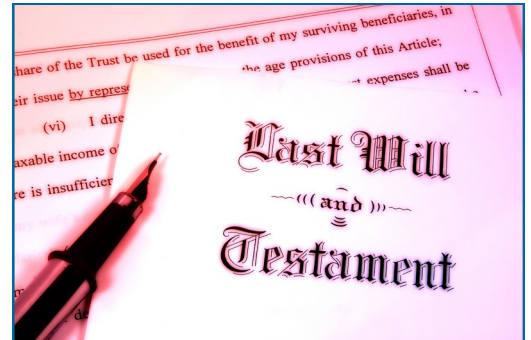
must then go on to consider whether the deceased person made adequate provision in their Will for the proper maintenance, education and advancement in life of the eligible person.

Some of the factors (this is not an exhaustive list) which the Court must take into account when making this determination are:-

1. Whether the eligible person made any contribution to the deceased (e.g. financial or provision of services to that person).
2. The character and conduct of the eligible person before and after the death of the deceased person.
3. Circumstances existing before and after the death of the deceased person.
4. Whether the deceased person promised the eligible person anything before their death.
5. Any other matter which the Court considers relevant in the circumstances.

Clearly, it is very important when a person is making a Will to consider not only the nature and extent of their estate, but also those persons or groups of people who should be provided for in that person's Will having regard to the relationship between the Willmaker and that person or group of persons.

If you are an executor of an estate you should make sure you receive sound legal advice regarding the operation of the Family Provision Act in relation to the estate in which you are an executor.



Importantly, this means that one of the main duties you will have is to consider whether there are eligible persons within the meaning of the Family Provision Act who have not been provided for in the Will.

As a prudent executor, if you believe that there are such persons, you will not distribute the assets of the estate until the situation is sorted out. Importantly, an executor who distributes the assets of an estate to beneficiaries and who is then, on behalf of the estate, met with a claim under the Family Provision Act by a person who believes they should have been left something in the Will within the first 18 months after the death of the Willmaker may be personally liable for the amount of the claim brought by the eligible person who is not included in the Will.

Costs of legal services and challenges to Wills are an important aspect of this area of the Law. Quite often the cost of a claim under the Family Provision Act against the estate and the costs of defending that claim by the executors may be paid out of the estate funds as a whole. This means that a significant proportion of the overall estate value may be consumed in legal costs in defending or prosecuting a claim under the Family Provision Act.

This area of the law can be particularly challenging and if you have concerns about possible challenges to your Will, or if you are an executor facing such a situation, you should consult Rankin Nathan Lawyers and obtain legal advice.



Rankin Nathan Lawyers

1300 727 813

NEWCASTLE • SYDNEY • PERTH • CANBERRA

