



Etheringtons
Solicitors

YOUR GUIDE TO FAMILY PROVISION CLAIMS - CHALLENGING A WILL

2026 Edition

Your Guide to Challenging a Will

The loss of a family member is a distressing event, but it can become even more difficult to learn that you have not been included in the family member's Will. Etheringtons Solicitors can assist you with Family Provision Claims issues - whether you are the applicant (the party left out of the Will) or the executor of the Will.

This booklet answers frequently asked questions in relation to Family Provision Claims. These claims are often complex and it is important that you are guided by a solicitor well-experienced in this area of the law.



What is a Family Provision Claim?

A Family Provision Claim is an application made to the court seeking adequate provision from the Estate of a deceased person for an eligible person. You can make this claim if you are an eligible person and have been left out of a Will or did not receive adequate provision under a Will or from an Intestate Estate, where there is no Will.

Can you put anything you like in your Will?

When it comes to writing your own Will, you may think that you should be able to divide your assets as you wish. This includes dividing assets based on emotions at the time of writing the Will. For example, favouring one child over another because you have a closer relationship.

Whilst it is not unlawful to leave a part of your Estate to someone, it may be 'unfair'. The law takes into account the moral responsibilities owed to family members. Although they are your assets to divide, these laws protect your family from being unfairly disadvantaged.



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Eligibility

A Family Provision Claim can only be made by an 'eligible person'.



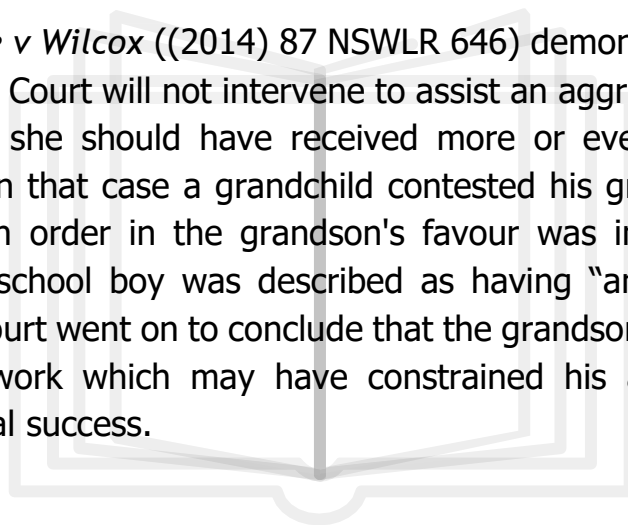
An '*eligible person*' includes:

- the wife or husband of the deceased;
- a person who was living in a de facto relationship with the deceased (including same sex couples);
- a child of the deceased (including an adopted child);
- a former wife or husband of the deceased;
- a person who was, at any particular time, wholly (entirely) or partly dependent on the deceased, and who is a grandchild of the deceased or was at that particular time a member of the same household as the deceased;
- a person with whom the deceased was living in a close personal relationship at the time of the deceased person's death such as a stepchild or a parent.

To show that you are eligible to receive some benefit from the Estate you must show that the deceased had an obligation to provide for you and that you have been left without adequate provision for your proper maintenance, education or advancement in life.

Eligibility does not always guarantee success of a Family Provision Claim.

The case of *Chapple v Wilcox* ((2014) 87 NSWLR 646) demonstrates that there are situations where the Court will not intervene to assist an aggrieved beneficiary who thought that he or she should have received more or even should have been included in a Will. In that case a grandchild contested his grandfather's Will. The Court ruled that an order in the grandson's favour was inappropriate because the former private school boy was described as having "an unhealthy sense of entitlement". The Court went on to conclude that the grandson was not "sufficiently motivated to find work which may have constrained his ambition" to achieve independent financial success.



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How can I challenge a Will?

You may seek to contest a Will if you feel the assets have been unfairly allocated. The law recognises that sometimes you might need to make a claim against a deceased person's Estate. A Family Provision Claim is made in the Supreme Court of NSW after unsuccessful private negotiation. The court can make orders allowing you to receive more than what is specified in the Will or, if you have been completely left out, allocate you a sum from the Estate.

The court considers the merits of a claim by taking into account a broad range of factors primarily set out in the Succession Act 2006 (NSW) such as:

- whether the person making a claim is an eligible person (as defined by the law);
- the size and character of the estate;
- whether there are circumstances such as financial circumstances which justify the making of orders allowing a claim; and
- whether there has been adequate provision made in the Will for the proper maintenance, education or advancement in life of that person.

A Family Provision Claim is made after the testator (the person who made the Will) is deceased. There are instances where actions against an Estate are brought whilst a party is alive, but these matters relate to the *Family Law Act 1975* (Cth) and the Federal Circuit and Family Court of Australia. This is a very complex area of law and it is important to seek professional legal advice.



Time Limit

It is important to note that inheritance claims are subject to a strict time limit, which is 12 months after the date of death. You may be able to bring a claim after this period if you have a special reason to do so; but it remains at the court's discretion whether to allow the application to proceed after the deadline.

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However, you may not need to go to a court hearing as mediation is encouraged to avoid unnecessary legal costs or any lengthy delays. Mediation involves the two parties coming together with a trained unbiased mediator. It offers greater flexibility and the opportunity for the parties to reach a settlement.

Many family provision claims are resolved at mediation. Each party files a position paper and the mediator is trained to bridge the differences between the parties so that they can come to an agreement which both sides accept and willingly implement.



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Factors for Court consideration

In making a decision the court considers what allowances should be made for an eligible person in a Will based on the following factors:

- The nature and duration of the relationship between the person making the claim (applicant) and the deceased (testator);
- The extent of responsibilities and obligations owed by the testator to the applicant;
- The means and needs of the applicant compared with the size of the Estate;
- Financial resources of any partner of the applicant;
- Whether and to what extent the applicant contributed to the property and welfare of the testator;
- The character and conduct of the person making the claim before and after the death of the testator;
- Any evidence of testamentary intentions of the testator;
- The age of the applicant;
- Whether any other person is liable to support the applicant;
- Relevant Aboriginal and Torres Strait Islander customary law;
- The conduct of any other person before and after the testator's death; and
- Any other matters the court considers relevant including things which were in existence at the time of the testator's death or at the time the application is being considered.

Will the Estate be divided equally?

It is clear that the law prioritises fairness in allowing for the redistribution of an Estate in favour of the applicant. However, in taking into account the factors above, the court is not required to achieve an equal division of the deceased's Estate. It is not the role of the court to reward an applicant or correct feelings of hurt. The primary consideration of the court in making an order for Family Provision is what is adequate for the 'proper maintenance, education and advancement in life of the applicant' (noted by Bryson J in *Gorton v Parks (1989)* 17NSWLR 1).

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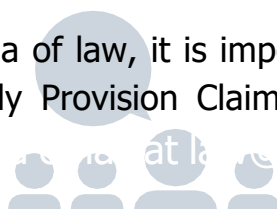
Can adult children make a Family Provision Claim?

What is considered proper provision for adult children remains undetermined under the law. The *Succession Act* does not prescribe circumstances that do not constitute adequate provision for the proper maintenance, education and advancement in life of the claimant. Whether an adult child will be successful in a Family Provision Claim depends on the court's discretion and assessment of the above factors. However, in the case of *Dugac v Dugac* [2012] NSWSC 192, the court took into account some applicable principles when considering the claims of adult children, including:

- That although the nature of a parent-child relationship changes when a child leaves home, a child does not stop being the natural recipient of parental ties and affection;
- It does not follow that community standards expect a parent, in ordinary circumstances, to leave their children an Estate or house unencumbered;
- If the child has remained dependent on their parents in adulthood, whether as a result of financial, personal or other hardship, there may be an expectation for parents to make provisions to fulfill that dependency after death;
- A claimant does not need to show some special need or special claim to the Estate;
- The claimant bears the onus of proof in establishing the justification for a claim on the balance of probabilities.

In *Dugac*, the claim failed as the Applicant could not demonstrate any dependency on her parents or that her parents had an obligation to make provision for her in their Estate, which was a small Estate. This was primarily because the Applicant demonstrated intentions to distribute any provision made for her to her own children, who were themselves adults, abled bodied and not eligible persons. However, the Court noted that the Applicant was an eligible person for the purposes of the law.

As this remains an unsettled area of law, it is important to seek legal advice if you are considering making a Family Provision Claim as an adult child against your parent's Estate.



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How do I protect my Will from a Family Provision Claim?

There is a misconception that Wills are commonly challenged and Family Provision orders are generally successfully made. However, Wills and Estates lawyers are highly qualified in assessing the risk of a successful challenge and can suggest ways to reduce the value of the assets that are vulnerable to a challenge. A lawyer can advise you on mechanisms to reduce this risk, for example through an appropriate transfer to a trust, jointly owned bank accounts and changing ownership of property to ensure your assets are dealt with securely.

It is also important to ensure that you are updating your Will regularly, and in the instance of a major life event, to ensure that your Will reflects your wishes, should something happen to you. Factors to consider when assessing the strength of your Will include:

- Have you married or separated from your partner?
- Have you had any children?
- Is the person you named as executor, to carry out the wishes in your Will, still alive and well enough to do the job?
- Have the circumstances of any beneficiaries changed to make you reconsider your wishes, or have any of them died?
- Have you nominated any specific gifts that are no longer valid or don't exist, for example, have you sold a property that you had left to someone in the Will?
- Have you acquired any new assets that you would want to make specific plans for in your Will?



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Testamentary capacity

It is important when instructing a solicitor or drafting a Will that the testator has the **legal capacity** to make a Will to ensure that the Will is valid.

Whether or not a person has the legal capacity to make a Will is a question of law rather than a medical one. Whilst the court will look to medical evidence to establish any decline in cognitive function, the assessment made by the testator/testatrix's lawyer as to capacity will be the primary consideration of the court. A lawyer must be satisfied of the following to determine capacity:

- That the testator understands the nature of their actions and that they are making a Will and its effect;
- That the testator understands the nature and extent of 'property' they are allocating in the Will;
- That the testator understands the parties for whom they should reasonably make provisions in their Will;
- That there is no disorder of the mind that would prevent an understanding of the gifts being made in the Will.

It is often the case that the issue of legal incapacity intersects with Family Provision Claims as the failure to adequately provide for a loved one can give rise to doubts surrounding a Will's validity.



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Example of a great outcome Etheringtons Solicitors have achieved

We represented a children's charity which was a beneficiary in a Will that was changed by the testator when he lacked capacity. Our principal, Mr Paul Etherington, discovered that, at the time the new Will was executed, it was evident the testator showed signs of dementia. We commenced proceedings on behalf of the charity, seeking to revoke the Grant of Probate. After a settlement conference with the charity, the executor and the new beneficiaries, we successfully persuaded the new beneficiaries to return close to one million dollars to the rightful beneficiary - the children's charity.



Contact Us



We understand the emotional toll legal proceedings can have on you and your family.

If any of the issues or situations raised in this brochure are relevant to you, please do not hesitate to contact us.

At Etheringtons Solicitors we adopt a solution-orientated approach to ensure our clients' concerns are addressed appropriately and effectively.

Please also note, that currently we are offering the first 30 minutes of the initial consultation to discuss your estate matter for \$180+GST.

We are ready to assist you, so please do not hesitate to contact us today on 02 9963 9800 or at law@etheringtons.com.au.