Reading time .... only 10 minutes

Turnbull Hill Lawyers

CONTESTED ESTATE INFORMATION

This document is a general summary of contested estate legislation in NSW. Please read it carefully.

Who Can Claim?

Legislation in New South Wales gives certain people a right to claim against an estate if left out, or not adequately provided for.

The law that applies to your situation will depend on whether the death occurred before, on or after 1 March 2009. If the death occurred before 1 March 2009, the applicable law is the *Family Provision Act*. If the death occurred on or after 1 March 2009, the applicable law is the *Succession Act*. The most significant difference between the laws is the time limit in which to bring a claim, which we will describe later in this document. Otherwise the laws are quite similar.

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The law provides that you will only be entitled to make a claim for provision if you are an "eligible person". An "eligible person" includes the following:

1. a person who was the wife or husband of the deceased person at the time of the deceased person's death; or
2. a person with whom the deceased person was living in a de facto relationship at the time of the deceased person's death; or
3. a child of the deceased person or, if the deceased person was a party to a domestic relationship at the time of death, a person who is a child of that relationship; or
4. a former wife or husband of the deceased person; or
5. a person:
   a) who was wholly or partly dependent upon the deceased person at any particular time, and
   b) who is a grandchild of the deceased person or was at that particular time or at any other time a member of a household of which the deceased person was also a member.
   c) a person with whom the deceased was living in a close personal relationship at the time of the deceased's death.*

* Note: A "close personal relationship" is a relationship (other than a marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care.

A close personal relationship is taken not to exist between two persons where one of them provides the other with domestic support and personal care for fee and reward, or on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation).

If you are not an eligible person, then you have no entitlement and will not be able to make a successful claim.

What factors are taken into account?

If you are an eligible person, the mere fact you are an eligible person does not mean you have an entitlement to provision from the deceased's estate. In determining whether a person has an entitlement to provision from an estate, the Court will take into account the following factors:

1. Whether any provision already made from the estate was inadequate for the proper maintenance, education and advancement in life of the applicant.
2. The competing claims of any other eligible persons or beneficiaries.
3. The nature and duration of the relationship between the deceased and the applicant.
4. The financial resources and earning capacity of the applicant.
5. If the applicant is cohabiting with another person, the financial circumstances of that other person.
6. Any contribution (whether financial or otherwise) to the assets of the deceased, or the welfare of the deceased person.
7. Any provision made for the applicant by the deceased person during the deceased's lifetime.
8. Any relevant Aboriginal or Torres Strait Islander customary law.
9. Certain categories of eligible persons, grandchildren, need to be able to establish that their relationship with the deceased was such that they "ought naturally" to have been a beneficiary under the will. For example, a grandchild who gave up work to care for an ailing grandparent who subsequently died.
10. Any conduct an eligible person might have engaged in towards the deceased, against the deceased's interests, which would naturally not make you a beneficiary under the deceased's will (eg: if you engaged in fraud against the deceased).
11. The size of the estate (for example, an eligible person may have a very strong claim on the grounds of relationship and need, but if there is only $20,000.00 in

the estate, then there is very little scope for a Court to order provision).

The above criteria are general and we cannot provide specific advice on whether a person might have a claim until we can determine all of the factors referred to above. We do that by asking our clients to complete a questionnaire which asks relevant questions on these matters. Then, of course, we cannot finalise our advice until we know specific information about any other eligible persons or beneficiaries of the estate. The totality of that information is generally not obtainable until after legal proceedings have been commenced and affidavits have been filed by all of the interested parties.

However, once that information is available, we can then provide advice about what provision, if any, might be made to an applicant.

Time Limitations

Where the deceased person dies before 1 March 2009, the application/claim must be lodged with the Court **within 18 months** from the date of death. The time limit for claims wherein a deceased died before 1 March 2009 has expired – meaning all such claims are now "out of time".

Where the deceased person dies on or after 1 March 2009, then the application/claim must be lodged with the court within 12 months from the date of death.

In some special circumstances, it is possible to obtain an extension of the time limit. Special circumstances might include that a person did not realise that they had to make a claim within the time period that applies.

Please note these time limits apply only where the assets of the estate are in New South Wales. If any property of the estate is held in other states or other countries, then different laws and different time limits will apply. Therefore, if the estate has assets in another state or country, you should urgently seek legal advice from a solicitor in that State or Country. You should do so without delay because strict time limits are likely to apply.

Regardless of which time limit applies we recommend that our legal advice be sought as soon as possible after the death, in order to ensure your rights are protected.

If you intend to proceed with a claim against the estate, it is very important to notify the Executor or Administrator of the Estate of your intentions as soon as possible after the death. If your claim is under the *Succession Act,* the notification should be given within 6 months of the death. The legislation protects an executor/administrator from liability if they distribute the estate 6 months after the death. You may still make a claim on the estate after this time, however, if the estate is already distributed, you may face difficulties, particularly if the beneficiaries have already spent part of their distribution.

Notional Estate

In some circumstances an applicant may be able to claim upon assets which do not strictly fall into the deceased's estate.

Such assets are known as "notional estate". Some examples of situations where a claimant may be able to make a claim on an asset even though it does not form part of the deceased's assets are:

1. Where the deceased person gave an asset away, or sold it to someone for less than its value, within three years of the death;
2. Where a deceased person had superannuation or life insurance which does not fall into the estate;
3. Where a deceased person held an asset (such as a house or bank account) with another person as a joint tenant.
4. Where a deceased person made a loan to someone and forgave the loan on their death, or within three years of their death.

Other types of claims upon estate

There are two ways to make a claim against an estate. The first is to make a claim under the *Succession Act,* or alternatively the *Family Provision Act*. This is where the will is valid but its provisions are unfair. The second way is to challenge the validity of a will. This type of action may occur in the following circumstances:

1. Where it is alleged that the will is a forgery.
2. Where fraud is alleged.
3. Where undue influence is alleged.
4. Where it is alleged that the will-maker lacked the mental capacity to make a will.

Numbers 1 and 2 are self-explanatory. Number 3 is where the will-maker is forced to change their will because someone is pressuring or threatening to do something harmful to the will-maker if they do not change their will.

Number 4 is where the will-maker lacks capacity. To contest a will on this ground requires strong medical evidence, as well as other evidence to prove that the will-maker lacked capacity. The court will normally assume that the will is valid no matter how unreasonable or impulsive that will may appear to be. Generally, extreme age or illness of the will-maker are not in themselves conclusive evidence of incapacity. You will only be successful if you can convince the Court that the will-maker lacked capacity.

For testamentary capacity to exist, the deceased must:

1. understand the notion of a will;
2. have an understanding of his/her assets; and
3. be able to appreciate the various claims upon his bounty.

With regard to the latter point, the court will consider whether the deceased was suffering from a disorder of the mind or insane delusions, which affected his or her decision making.

If you intend to pursue a claim that the will is invalid, you should place a caveat on probate with the Supreme Court of NSW (assuming the assets of the estate are within NSW) as soon as possible to prevent a grant of probate of the last will being made. If probate has already been granted, it may not be too late for you to bring a claim, but it is always preferable to do so before probate is granted.

If you can successfully prove that a will is invalid, all the court will do is set that will aside. Therefore, you would only bring such a claim if you were to receive a benefit under the second last will or under intestacy laws if there is no will.

Before we could advise you whether a claim for invalidity would be likely to succeed, we would need to obtain clinical notes from doctors and hospitals that treated the deceased for their illness, and obtain a report from the deceased's treating doctor. If necessary an expert's opinion would be obtained to interpret the clinical notes and the advice of the treating doctor.

We would be guided by the treating doctor and the specialist's opinion in advising you whether you should proceed further with contesting the will-maker's capacity at the time of making their will.

With a lot of these claims it is necessary to commence legal proceedings. This is because the claims tend to involve a lot of emotion between the interested parties. The good thing about commencing legal proceedings is usually, as part of preparing legal proceedings for a hearing, all the parties are required to engage in mediation. Most claims will settle at mediation. However, if a claim does not settle at mediation, then more likely than not, it will proceed to a Court hearing. Most matters will progress through various stages as depicted below:

What happens if I proceed with a claim?

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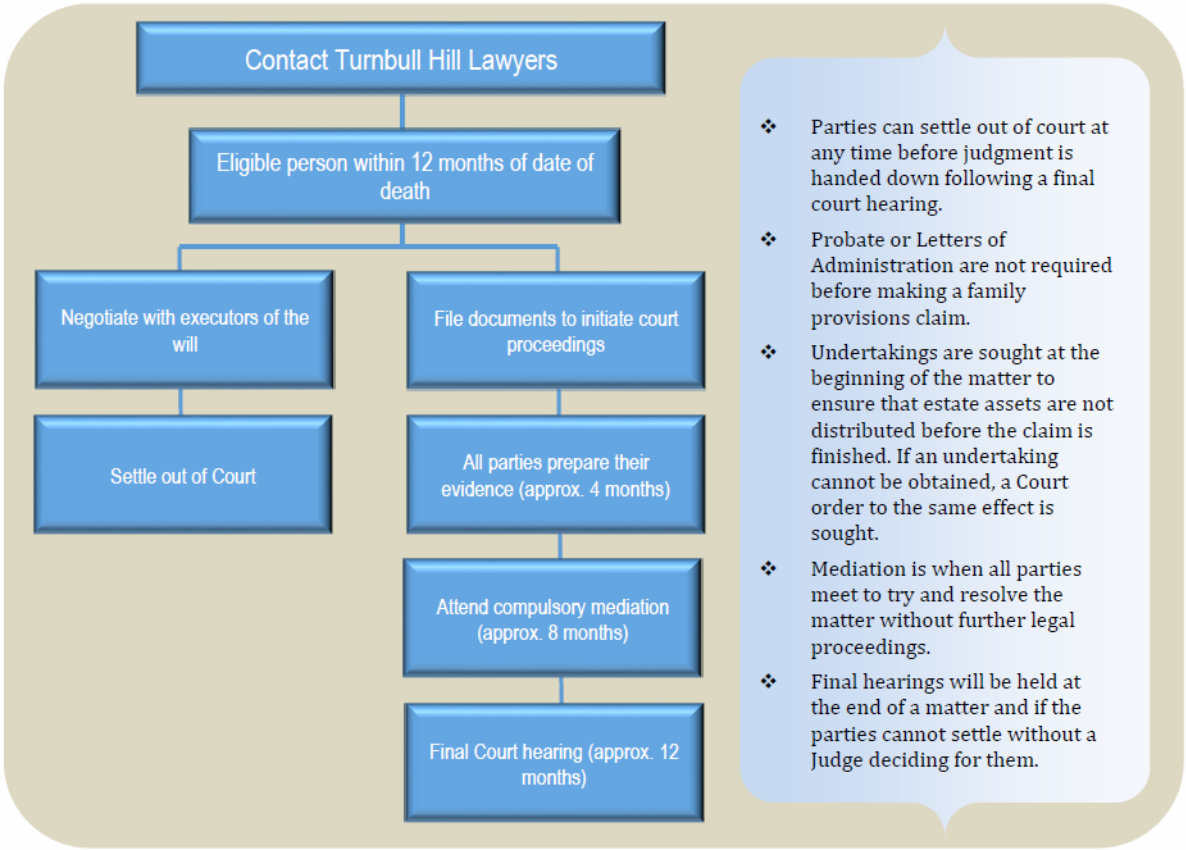

What is mediation?

Mediation is a process where a neutral and independent person (a mediator) assists the parties in a dispute to reach their own resolution. It is compulsory in family provision matters for the parties to attend mediation. In most cases the parties will attend a court-annexed mediation however there is also the more expensive option a private mediation.

At mediation, each party has the opportunity to voice their point of view. The mediator helps the parties to focus on the real issues of the dispute and explore options to resolve these. The mediator does not impose a solution or give tactical advice.

In mediation, the options that can be explored to resolve the dispute are often broader than those that can be considered by a Judge of the Court. If the parties resolve their dispute at mediation, they may make a written agreement and have orders made by the Court to finalise the case. Those orders have the same standing as orders made by a Judge, and can be enforced, if necessary.

It is the duty of all parties to the mediation to participate in good faith. A mediator can terminate a mediation session and make a report to the Court if this duty is breached.

There are numerous benefits that can arise from mediation, including:

- Early resolution
- Less costs to parties
- Greater flexibility in resolving the dispute
- Finality
- Privacy

The benefits in using mediation to settle a claim are that the parties work out their own resolution of the dispute and a solution is not imposed upon them. Also, the parties can resolve the dispute in broader and possibly more practical ways than those the Court can consider. These aspects can be particularly important when a dispute is within a family.

How much will it cost?

Free assessment

Assessment of your enquiry is at no charge to you. If you decide not to continue with your claim you will not be charged. You will not have any obligations at this stage.

How to determine costs

Determining how much it will cost to bring your claim is very difficult. Legal costs will vary depending on factors such as:

→ How willing the executors are to negotiate

→ Whether there are complicating factors

→ The type of claim you are bringing.

We believe that your financial position should not prevent you from achieving justice. In line with this philosophy, we perform most of our work on a “no win - no fee” basis.

Under a “no win - no fee” arrangement, all our legal fees are delayed until finalisation of your claim. In the event that you are successful our fees are almost always paid from the money you receive from the deceased’s estate, not from your pocket.

In the process of running your case we will need to incur expenses on your behalf. For example, to initiate a claim in court you need to pay a filing fee. We usually assist you to apply to the court to have your filing fee waived. Despite our best attempts we are not always able to delay all payments to third parties. You may need to make small outlays along the way. It is our practice to advise you of unavoidable disbursements before they are incurred.

Under a “no win - no fee” agreement if your claim is not successful, you do not pay any of our legal fees. However, commencing court proceedings is not completely without risk. If your case is one of the rare few that require a court hearing then you should be aware that if you are unsuccessful, courts are capable of directing you to pay the other party’s costs. To date none of our clients have ever had to pay a costs order. We have avoided such costs orders against our clients because we thoroughly examine the merits of your claim before considering initiating legal proceedings and we monitor your case closely once it has commenced.

After our initial consultation we present you with a Client Services Agreement. This is a written document which thoroughly explains exactly how legal fees are calculated.

Fear of legal costs should not discourage you from exercising your rights.

OUR TEAM

Adrian Corbould
Partner
Accredited Specialist
E: acorbould@turnbullhill.com.au

Peter Elliott
Lawyer
E: pelliott@turnbullhill.com.au

Mary Windeyer
Lawyer
E: mwindeyer@turnbullhill.com.au

Liza Stewart
Lawyer
E: lstewart@turnbullhill.com.au

Kaylyn Lyle
Paralegal
E: klyle@turnbullhill.com.au

Lauren Ridgeway
Legal Secretary
E: lridgeway@turnbullhill.com.au

Imogen Sheriff
Legal Administration Assistant
E: isheriff@turnbullhill.com.au