



## 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 and many other jurisdictions allows certain people a right to make a claim against a deceased estate if they are left out or do not receive adequate provision.

In NSW, different laws apply depending on whether the death occurred before, on or after 1 March 2009. If the death occurred before 1 March 2009, the *Family Provision Act* applies. If the death occurred on or after 1 March 2009, the *Succession Act* applies. The most significant difference between the laws is the time limit in which to bring a claim in Court; otherwise the laws are quite similar.

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

- a) a person who was the wife or husband of the deceased person at the time of the deceased person's death; or
- b) a person with whom the deceased person was living in a de facto relationship at the time of the deceased person's death; or
- c) 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
- d) a former wife or husband of the deceased person; or
- e) a person:
  - i) who was wholly or partly dependent upon the deceased person at any particular time, and
  - ii) 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.
  - iii) a person with whom the deceased was living in a close personal relationship at the time of the deceased's death.

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 a person does not meet the eligibility criteria, they will not be able to make a successful claim for provision.

### What factors are taken into account?

If someone is an eligible person, it does not mean they automatically 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 person.
2. The competing claims of any other eligible persons or beneficiaries.
3. The nature and duration of the relationship between the deceased and the person.
4. The financial resources and earning capacity of that person.
5. If the eligible person 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 person by the deceased during the deceased's lifetime.
8. Any relevant Aboriginal or Torres Strait Islander customary law.

9. Certain categories of eligible persons like 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 them a beneficiary under the deceased’s will (eg: if the person engaged in fraud against the deceased).
11. The size of the estate. For example, an eligible person may have a very strong claim for provision, but if there is only \$20,000.00 in the estate, then there is very little scope for a Court to order provision.

Eligibility criteria are general and we cannot provide specific advice on whether a person might have a claim until all of the factors referred to above are examined. We examine eligibility and the relevant factors by asking our clients to complete a questionnaire which asks certain questions. 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.

Once all parties' evidence is available, it is then possible to consider what provision, if any, might be made to any applicant.

### Time Limitations

Where the deceased 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 where a deceased died before 1 March 2009 has now 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 by an eligible person **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 was not aware of the time limits or the death.

Please note these time limits apply only to estate's 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 may apply. Therefore, if the estate has assets in another state or country, you should seek legal advice from a solicitor in that State or Country.

If a person intends to proceed with a claim against an estate, they will usually notify the executor or administrator of the estate of their intentions. A claim may be lodged with the Court at any time, however, and even without notice. Legislation in NSW protects an executor/administrator from personal liability if, amongst other things, they distribute the estate after 6 months from the death and where they do not have notice of any proposed claims on the estate. An eligible person may still make a claim on the estate after the estate is distributed, however, if the estate is already distributed, they may face difficulties, particularly if the beneficiaries have already spent part of their distribution. Early or premature distributions often cause more legal costs to be incurred by the estate, and are therefore best avoided.

### Notional Estate

In some circumstances an eligible person 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 estate are:

- a) Where the deceased person gave an asset away, or sold it to someone for less than its value, within three years of the death;
- b) Where a deceased person had superannuation or life insurance which does not fall into the estate;
- c) Where a deceased person held an asset (such as a house or bank account) with another person as a joint tenant.
- d) 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 estates

There are two ways to make a claim against an estate. The first is to make a claim for adequate provision 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.

Forgery and fraud are self-explanatory. Undue influence arises 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.

To contest a will on the grounds the will-maker lacked capacity requires strong medical evidence, as well as other evidence to support that allegation. The Court will ordinarily presume a 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 of themselves conclusive evidence of a lack of capacity. A claimant will only be successful if they can convince the Court that the will-maker lacked testamentary capacity.

For testamentary capacity to exist, the deceased must at the time they made their will:

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

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 someone intends to pursue a claim that the will is invalid, they 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 to bring a claim, but it is always preferable to act as quickly as possible.

If someone can successfully prove that a will is invalid, the Court will set that will aside. In these circumstances, the will made before the last one is considered, or the estate may otherwise become intestate.

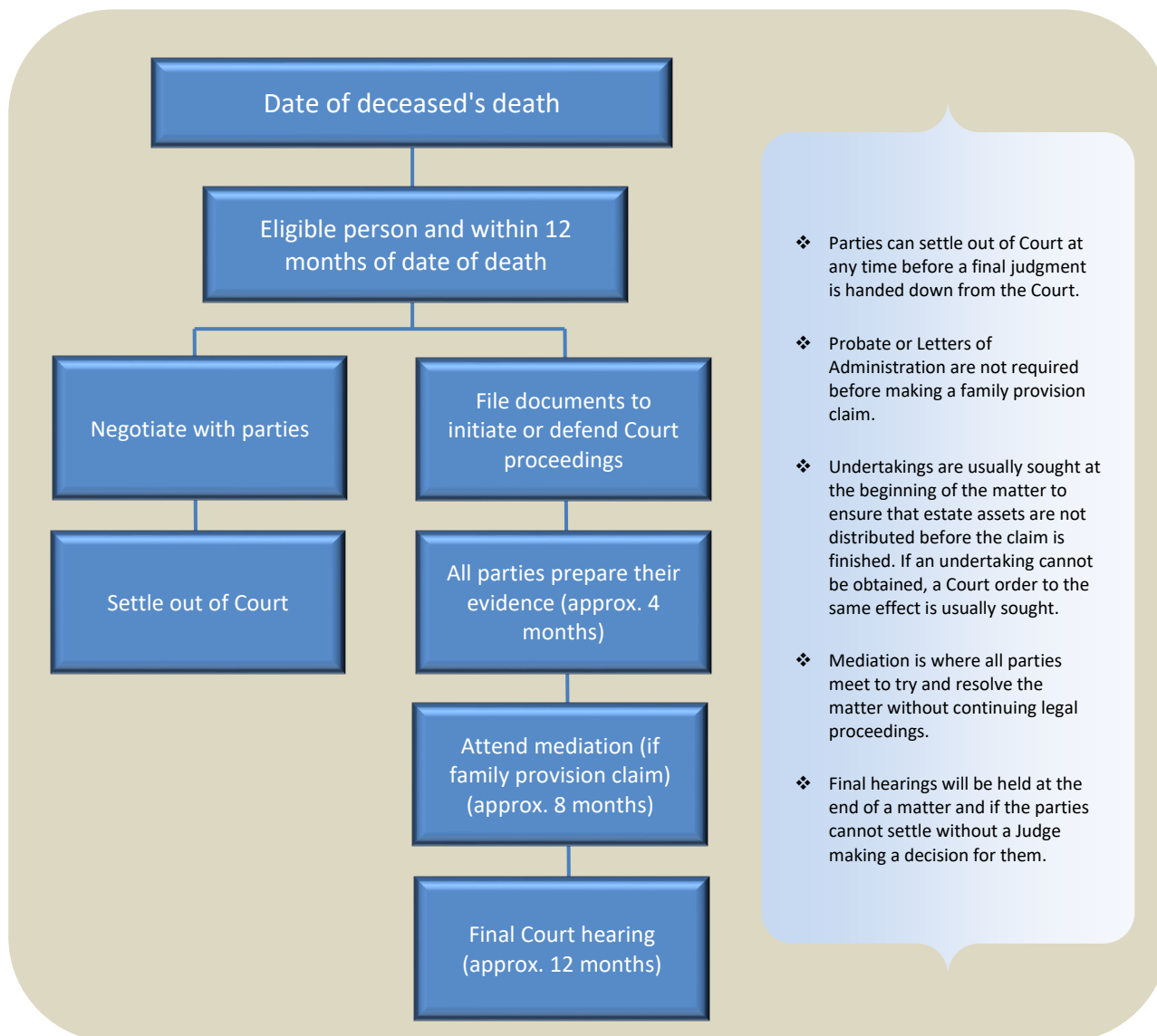
Before advices can be given regarding whether a challenge to a will has merit, clinical notes from doctors and hospitals that treated the deceased, as well as other medical evidence, needs to be reviewed. If necessary, an expert's opinion would be obtained to interpret the clinical notes and the advices of any treating doctor.

General guidance can be obtained by the deceased's treating doctor and any specialist's opinion in advising as to a will-maker's capacity at the time of making their will.

### What happens if proceedings are commenced?

A lot of will matters involve complex legal proceedings. This is because the claims tend to involve a lot of emotion between the interested parties, and often require an examination of historical events.

All claims for family provision are required to be mediated before a final hearing is granted. Most claims will settle at mediation, however, if a claim does not settle at mediation, then it will proceed to a Court hearing. Most matters will progress through the general stages shown below:



## 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 although in some cases, matters are referred to 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 the matter. 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. If the parties resolve their dispute at mediation, they may make a written agreement and can have orders made by the Court to finalise the matter.

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 of settlement at mediation allow the parties to reach a compromise and effect resolution of the dispute without a solution being imposed on them. Also, the parties can resolve the dispute in broader and possibly more practical ways than a Court can consider. These aspects can be particularly important when a dispute is within a family.

## How much will it cost?

Determining how much it will cost to defend a claim can be difficult. Legal costs will vary depending on factors such as:

- How willing the parties are to negotiate and compromise.
- Whether there are complicating factors.
- How many parties there are.
- The type of claim being brought.

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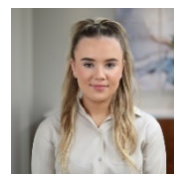
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