

DEFENCE OF FAMILY PROVISION CLAIMS

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An executor (and an administrator in the case of intestacy) has a duty to defend family provision claims brought against the estate. In this article we look at what this involves in New South Wales.

Family provision claims

Certain people, including a spouse and a child of a deceased person, and a person who had lived with the deceased in a close personal relationship are eligible to make a claim that provision or further provision ought to be made from the estate (or notional estate) of the deceased, for their proper maintenance, education and advancement in life.

How much provision the Court might make

If the Court is satisfied that adequate provision has not been made for the applicant in the deceased's will (or pursuant to the laws of intestacy), it will only make the orders necessary to make adequate provision for the applicant's needs. The Court's role is not to rewrite the will to achieve a "fair" disposition of the estate but to only make the orders necessary to make adequate provision for the applicant's proper maintenance, education and advancement in life.

In *Vigolo v Bostin* [2005] HCA 11; (2005) 221 CLR 191, Callinan and Heydon JJ said the following of the words 'maintenance', 'support' and 'advancement':

"Maintenance' may imply a continuity of a pre-existing state of affairs, or provision over and above a mere sufficiency of means upon which to live. 'Support' similarly may imply provision beyond bare need. The use of the two terms serves to amplify the powers conferred upon the court. And, furthermore, provision to secure or promote 'advancement' would ordinarily be provision beyond the necessities of life. It is not difficult to conceive of a case in which it appears that sufficient provision for support and maintenance has been made, but that in the circumstances, say, of a promise or an expectation reasonably held, further provision would be proper to enable a potential beneficiary to improve his or her prospects in life, or to undertake further education."

Similarly, in *Alexander v Jansson* [2010] NSWCA 176, Brereton J (with whom Basten JA and Handley AJA agreed) stated:

"Proper maintenance" is not limited to the bare sustenance of a claimant [cf Gorton v Parkes(sic) [1989] 17 NSWLR 1], but requires consideration of the totality of the claimant's position in life including age, status, relationship with the deceased, financial circumstances, the environs to which he or she is accustomed, and mobility."

In assessing whether inadequate provision has been made for the applicant the Court takes into account a number of factors including the needs of the applicant for maintenance, education and advancement in life (including future needs such as the need to guard against unforeseen contingencies), the needs of any competing applicants or beneficiaries, the size of the estate, the relationship between the deceased and the applicant, contributions the applicant may have made to the support and care of the deceased and to their property and the age, health and financial circumstances of the applicant and any competing persons.

The Court considers all of these factors at the date of the hearing and so it can take into account any needs or other factors that have changed since the deceased made the will and indeed since the deceased's death.

When considering whether adequate provision has been made, the Court will have regard to what is considered to be right and proper according to contemporary accepted community standards.

The Court has a great deal of flexibility when making an order for provision and may make it in the form of a lump sum or "in any other manner the court thinks fit". The Court may also make such orders concerning the abatement, or adjustment, of distributions from the estate, as between the person in whose favour the family provision order is made and the other beneficiaries of the estate as it considers just and equitable among the persons affected. Any order made takes effect, unless the court otherwise orders, as if the provision was made in a codicil to the will of the deceased, or in the case of intestacy, as in a will of the deceased.

Time limit for making a claim

The time limit for making such a claim in NSW is, as of right, 12 months from the date of death of the deceased.

The Court has power to extend that time limit, but will not do so automatically. It can be very difficult to convince the Court that it should do so, particularly if the delay is significant.

Duties of the Executor

It is the duty of the Executor to defend the claim and uphold the provisions of the Will or to negotiate a compromise, where appropriate and particularly if the estate is small.

The Executor must place before the Court all evidence which might have any bearing on the issues raised by the Applicant's evidence or which might arise at the hearing. It is the duty of the Executor to put material before the Court which any beneficiary desires should be placed before it, (unless the material is believed to be false or clearly irrelevant) and for that reason, it is not usually necessary for the beneficiaries to be separately represented.

If an Executor has received notice of an intended claim, then we strongly recommend that the Executor does not make any distributions from the estate, except in certain special circumstances, which we can discuss with the executor if the need arises. If a distribution is made and it transpires that there are insufficient assets in the estate to satisfy an order made by the Court in favour of a successful plaintiff, the Executor may become **personally liable** to satisfy that order, to the extent of any deficiency in the estate to meet it. Costs may also be awarded against the executor. **The executor therefore seeks legal advice before making any distributions from the estate.**

Notice to other Eligible Persons

Upon receipt of a family provision claim against the estate, the Executor is required to send notices of claim to all other persons who may be eligible to make a family provision claim against the estate. The purpose of these notices is to ensure that all relevant parties have the opportunity to join the proceedings so that all possible claims can be determined in the one set of proceedings before the Court. The definition of eligible persons includes:-

- (i) any person who was married to the deceased person at the time of their death,

- (ii) a person with whom the deceased person was living in a de facto relationship at the time of the deceased's death,
- (iii) a child of the deceased person, or if the deceased person was at the time of his or her death a party to a domestic relationship, a person who is, for the purposes of the Property (Relationships) Act 1984, a child of that relationship,
- (iv) a former wife or husband of the deceased person,
- (v) a person who was at any particular time wholly or partly dependent upon the deceased person and who is a grandchild of the deceased person or who was, at that particular time or at any other time, a member of the household of which the deceased person was a member,
- (vi) a person with whom the deceased person was living in a close personal relationship at the time of the deceased person's death.

The executor may need to make enquiries to identify all possible eligible persons.

Executors Affidavit

The Executor is required, shortly after being served with the summons commencing the Plaintiff's claim, to file and serve an affidavit which sets out the assets and liabilities of the estate, and any possible notional estate (see further below) that might be taken into consideration by the Court in assessing whether any assets of the estate or notional estate could be applied towards making additional provision to the Plaintiff. The affidavit sets out the following matters:

- (a) the nature and value of the assets and liabilities of the deceased at the date of death,
- (b) what is likely to be the nature and value of any distributed estate and the net distributable estate (having regard to expenses incurred from the date of death to the date of swearing the affidavit e.g. funeral expenses, tax liabilities, rates, water, electricity etc on the deceased's home),
- (c) what is the nature and value of any property which may be the subject of any relevant property transaction that may give rise to an order declaring property to be notional estate e.g. transfers of the deceased's property to other parties without full and valuable consideration prior to the deceased's death (see further below)
- (d) the name and address of every person who in the defendant's opinion is holding property as trustee or otherwise which is or may be the subject of any relevant property transaction,
- (e) the name and address of every person who in the defendant's opinion is or may be:-
 - (i) an eligible person
 - (ii) an eligible person under a legal incapacity
 - (iii) a person beneficially entitled to distributable estate
 - (iv) a person holding property as trustee or otherwise
- (f) the name and address of every person to whom the defendant has given notice of the plaintiff's application
- (g) whether any commission is to be charged by the executor and, if so, the amount to be charged.

Notional estate

The Court has the power to order that property which has fallen outside of the estate, either because the deceased or the executor transferred it, or because the deceased omitted to do something which would cause the property to become part of his estate (and full valuable consideration was not given for the act, transfer or omission), constitutes notional estate. It can do so if the act, transaction or omission (the “prescribed transaction”) took place within a maximum period of 3 years from the date of death, if certain other criteria are also met.

Specific examples of transactions which may be caught include failing to direct the proceeds of a life insurance policy to be paid to the estate, failing to direct superannuation or other monies payable to the deceased on death to the estate and entering into a contract providing for the transfer of property, whether before or after the person’s death, without receiving full consideration in return for this.

However, even if such a transaction has occurred, this does not necessarily mean that the Court will declare the affected asset to be notional estate. The court will only declare this asset to be notional estate, if an order for provision in favour of a plaintiff cannot be met from the actual estate and only after other factors are considered and certain other criteria are met.

Affidavit of executor responding to matters raised by the plaintiffs in their affidavits

After the plaintiff has filed his/her evidence, then the executor will have the opportunity to file evidence in defence of the claim. This may include affidavits from other family members, responding to matters raised by the plaintiff.

Court Appearances

The matter will be listed before the Court for a number of “directions hearings” when the Court will make orders setting down a timetable for each party to complete and serve their evidence. The executor is not required to personally attend any directions hearing as we will attend Court on the executor’s behalf.

Brief to counsel

It is our usual practice to brief a barrister to settle the affidavit evidence (if time allows) and to provide a written advice to the executor on the strength of the claims made by the plaintiff. This will allow the executor to consider whether to make an offer of settlement to the plaintiff and explore settlement negotiations.

Subpoenas and Notices to Produce

To fully explore the plaintiff’s financial position, it is our usual practice to issue a notice to produce documents to verify the information the plaintiff has provided in respect to their financial circumstances. We may also need to issue subpoenas on third parties to gain a further understanding of the financial position of the plaintiff.

Plaintiffs evidence in reply

After the executor serves his or her affidavit evidence, the plaintiff will be given the opportunity to file any affidavits in reply to the estate’s evidence.

Mediation

Mediation is usually ordered by the Court after all of the affidavit evidence has been filed. Mediations are very helpful in narrowing the areas of dispute between the parties and the majority of cases are resolved at mediation.

Mediations can be held before a Registrar of the Court (in which case the Registrar's time is offered free of charge) or before a private mediator, who will of course charge for his or her services.

Mediations before a Registrar are held in the offices of the Supreme Court and are scheduled for 3 or 4 hours duration. The executor will need to attend this mediation with legal representation, which would normally include a barrister.

Mediation is an informal process where the parties' legal representatives make short opening statements to the Mediator explaining their position. The Mediator then speaks to each of the parties to explain the purpose of the mediation, the costs involved in proceeding to a hearing before a Judge, and generally encourages the parties to try and resolve this matter at the mediation. The parties then move into different conference rooms and offers of settlement are exchanged through the Mediator until the matter is resolved or the parties decide to terminate the mediation.

If the matter does not settle at mediation, the Registrar will re-list it before the Court to allocate a hearing date before a Judge.

Offers of Compromise

In the normal course of events, where mediation had failed, the parties may file a formal offer of compromise that reflects the last offer of settlement they made at the mediation. The offer is made on a costs plus basis e.g. \$100,000 plus costs as agreed or assessed and the offer is usually open for 28 days for acceptance.

The effect of an offer of compromise for the executor is that if the plaintiff does not obtain an award in excess of the monies that are offered by the executor in the executor's offer of compromise, then the Plaintiff risks having an adverse costs order made against him or her in respect of the legal costs that were incurred by the estate after the offer of compromise was made. For example the Court may order that the plaintiff pay the legal costs of the estate incurred from the date the offer of compromise lapsed, rather than those costs being ordered to be paid from the estate.

If the plaintiff makes an offer of compromise to the estate and is awarded by the court the same or more monies than the plaintiff was willing to accept in its offer of compromise, then the estate is at risk of having an adverse costs order made against it arising from the estate's failure to accept the plaintiff's offer. The court may order the estate to pay the Plaintiff's costs on an indemnity basis from the time the offer of compromise lapsed rather than the ordinary order that costs be paid on a party/party basis. The difference between these two costs orders is that in the normal course of events parties only recover approximately 65-75% of their total legal costs on assessment if a party/party costs order is made but if an indemnity costs order is made then the party will recover anything up to approximately 90-95% of its legal costs provided that the costs are not unreasonably incurred.

The trial

If the matter is not resolved at mediation, it will be set down for a hearing usually 3 - 4 months after the date of the mediation. Prior to the hearing the parties will update their affidavit evidence and may seek to file additional evidence to more properly detail their respective positions. The parties will also be required to each pay a hearing fee to the Court.

The hearing of the proceedings before the court may take a number of days depending on the extent of the evidence and the number of witnesses. The legal costs of the hearing are usually quite substantial as the solicitor and barrister will need to allocate at least a day to prepare for the hearing and then be in attendance through each day of the hearing.

In the course of the hearing, each side will have the opportunity for their barrister to cross examine each of the witnesses and at the conclusion of their evidence each barrister will make submissions.

Legal costs of the proceedings

It is usually the case that plaintiffs who are successful in obtaining further provision from the estate are entitled to an order for their costs of the proceedings on a party/party basis. It is rare that the court would not allow the plaintiff to recover its costs.

However, in recent times the court has become very concerned about the escalation of legal costs in these proceedings and has made it clear to all of the parties to proceedings that costs are at the discretion of the court and that in some instances, costs will be capped at a particular sum and the parties will have to pay the balance of their legal costs. An order of this nature is only likely to arise where unreasonable legal costs have been incurred in the circumstances.

The costs of the executor defending the proceedings are usually ordered to be paid out of the estate on an indemnity basis as usually the executor has no choice but to incur these costs in defending the estate and these costs are paid from the estate as they are incurred.

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