

## *Your last Will may not necessarily be your last word*

When you make your Will there is usually a lot of preparation done in the lead up to signing it. You have given thought to the nomination of your executor and trustee and the distribution of which assets go to particular beneficiaries. You may have been estranged from a family member and left explicit explanations as to why this certain family member may have been omitted from your Will. You believe you have taken care of everything and your Will is DEFINITELY your last word.

It may be extremely difficult to make your Will '**challenge-proof**' if particular family members are eligible to make a claim and can show their needs were not taken into account when the testator made the Will. The Supreme Court will not set out to re-write a testator's Will. However if adequate provision for maintenance, education or advancement has not been made by the testator, claims against the estate may be successful. The Court will then re-adjust the estate distribution to give effect to its orders under the terms of the **Family Provision Act 1982**. This Act, which will be referred to as the 'FPA' came into force on 1 September 1983. It applies to the estates of anyone dying on or after that date.

### **What does this law do?**

Where the Court is satisfied certain relations or dependants of the deceased have been unjustly or unfairly treated by being omitted from a Will or not adequately provide for in the Will, it can make orders allowing for adequate provision to be made. The Court can direct an adequate amount to be paid out of the estate for your proper maintenance, education or advancement in life.

It is important to realise this law cannot be used to make a claim simply because you do not agree with the willmaker's testamentary wishes. Applicants must first of all meet the legal definition of an 'eligible person' and then must be able to provide evidence that inadequate provision has been made for them. If the application is successful the Court makes an order for provision out of the estate of the deceased person. It may also specify the entitlements in the estate that have to bear the burden of the provision.

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### Who is an 'eligible person' to make a FPA application?

- The husband or wife of the deceased person at the time of the deceased's death, or
- A person with whom the deceased was living in a domestic relationship at the time of death, or
- A child of the deceased, or, if the deceased person was living in a domestic relationship at the time of death then a child of that relationship, or
- A former wife or husband of the deceased
- 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 was, at any particular time, a member of a household of which the deceased person was a member
- Parties to relationships include same sex relationships

If you meet the requirements of an 'eligible person' you can apply irrespective of whether there was a Will (and Probate granted) or no Will (and Letters of Administration granted) or you were mentioned in the Will.

### The Court also considers:

- The character and conduct of the applicant before and after the death of the deceased (this was shown in the recent 2004 case of Tower v Tower)
- Any contribution made by the eligible person towards the deceased's property or welfare
- Any other matter that the court considers important ( this may include financial means and needs of the applicant)

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*Your last Will may not necessarily be your last word***Costs:**

The costs of a successful FPA application are usually ordered to be paid out of the deceased's estate. Costs, charges and expenses of or incidental to proceedings under FPA are paid out as the Court thinks fit.

**Recent cases for your information:**

The **New South Wales Supreme Court case of Rich v Rich [2005] NSWSC 64** involved a FPA claim brought by the deceased's 3 adult sons. The applicants were all 'eligible persons' and no provision had been made by the deceased in his Will for them.

The deceased made his last Will 20 April 2002 and died 16 September 2002. The proceedings were commenced in time. The whole estate was left to the late John Rich's widow provided she survived him by 30 days. Probate was granted to his widow. The known value of the estate was small, however the deceased had an interest in his late mother's estate which included a house in Mosman.

In allowing the FPA claim the Court noted that even though the plaintiffs had reasonable incomes when these were compared to the substantial assets of the defendant, a wise and just testator may have given a little more thought to the terms of his Will than the deceased did. The Court believed the late John Rich should have taken into account the possibilities of receiving a benefit from his mother's estate.

In **Morton v Little and Price v Little [2005] NSWSC 36** two daughters challenged the minimal legacies they were to receive according to the terms of their mother's Will. The late Genevieve Little died 19 July 2002 aged 88 years. Her last Will was dated 11 March 1997. The residue of her estate went to a charity, the Foundation for the National Parks and Wildlife.

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The Family Provision Act claim was successful by both the daughters who met the requirements of 'eligible persons' under the Act. The Court decided that the deceased had available a substantial amount from which she could provide for her two daughters and also benefit the charity she favoured. Both daughters were able to show the deceased had not made adequate provision for their maintenance education and advancement in life.

Accordingly, the legacy of \$20,000 left to Janette Morton was increased to \$350,000 and the legacy of \$20,000 left to Susan Price increased to \$100,000.

This case also deals with the issue of FPA claims made outside the statutory time limit. Applications should be made within 18 months of the date of death. However there is provision under the FPA which allows an application to be made notwithstanding it is out of time. In this case the Court accepted the evidence put forward by Susan Price that she was unaware of the time limits involved. The Court allowed the extension of time which enabled her to apply for provision in addition to her sister.

**If you believe the Estate may face a claim, contact us to discuss the family and financial issues giving rise to this. Our advice may be directed to assisting you tread a less contentious path between competing beneficiaries and help avoid a litigious situation developing in the future.**

The information contained in this article is provided by way of information only and not intended to be legal advice. You should always obtain individual legal advice.