

# Making a will or left out of a will: The importance of family provision claims in Queensland.

BY PETER LEE & SIMON WATSON



## A. A WILL IS IMPORTANT BUT IS NOT ALWAYS FINAL

1. It is important to have a will.
2. A will provides your executor with directions on how to distribute everything you have saved in life, collectively called your estate. Through years of work and prudence, your estate may well be worth over a million dollars, especially if you own land.
3. It comes as a surprise to many though that a court can overrule a person's testamentary wishes, even if recorded clearly in writing in a will.
4. This does not mean there is no respect for testamentary freedom (although some would argue this is exactly what it means). What it means indisputably, is that a will (or no will) is not necessarily definitive of how an estate will be distributed.
5. In Queensland, the making and interpretation of a will is primarily regulated by the Succession Act 1981 and decisions of judges, referred to as case law.
6. The Succession Act and case law also regulate a dispute process which allows disgruntled persons, left out of a will entirely or who think they are entitled to more, to make a claim for provision.
7. Normally (although not always according to case law) it is necessary to be a family member to be able to make a legitimate claim.
8. If successful, a family provision claim will result in a court order varying the effect of a will, or if there is no will, the ordinary rules of intestacy.
9. The table on the next page identifies who it is important for to understand the substantive principles and the regulated process which can influence the outcome of a family provision claim.

Persons	Testators	Executors	Family Members
Why it is important?	Leaving out a person without considering the possibility of a family provision claim could later result in litigation.	Executors are bound to comply with a regulated dispute process. It is important they understand the process and the prospects of claims to manage them economically.	Family members may not be aware they have rights. It is important they are comfortable with the prospects, process and potential costs of making a claim.
What the persons want	Testators want their estate to be distributed according to their will.	Executors want the estate to be protected and distributed correctly and as efficiently as possible.	Family members want as much as they are entitled to.
What the persons do not want	Testators do not want their will to be disregarded or future disputes.	Executors do not want protracted estate disputes or personal claims made against them.	Family members do not want to lose out on what they otherwise could have received.

## B. SUBSTANTIVE CONSIDERATIONS

10. A court has the power to determine whether “adequate provision” for “proper maintenance and support” has been made for a qualifying person.
11. Important factors relevant to the substance of a family provision claim are identified in the table below.

Consideration	Three things to think about
Relationship between the parties	<ul style="list-style-type: none"> <li>• How close was the claimant to the deceased?</li> <li>• Was the claimant dependant on the deceased?</li> <li>• Did the claimant look after the deceased?</li> </ul>
Size and nature of the estate	<ul style="list-style-type: none"> <li>• What is the size of the estate?</li> <li>• Where did the estate assets come from?</li> <li>• Did the claimant contribute to the estate?</li> </ul>
Financial Position of the claimant	<ul style="list-style-type: none"> <li>• Does the claimant need money and if so for what purpose?</li> <li>• Does the claimant work and if not why?</li> <li>• Has the claimant already received something from the estate?</li> </ul>
Competing Claims	<ul style="list-style-type: none"> <li>• How many competing claims are there?</li> <li>• What is the age of the competing claimants?</li> <li>• What are their personal circumstances?</li> </ul>

12. Below is a simplified table identifying factors relevant to a family provision claim and their impact on the prospects of a claim succeeding.

Relationship with deceased	Size of the estate	Degree of need of claimant	Competing claims	Prospects of family claim succeeding
Close	Large	Substantial	Weak	High
Distant	Small	Minimal	Strong	Low

13. Because each situation is different and there are other relevant considerations, the above table is not conclusive on the merits of a claim.
14. A principle worth noting, and which has been supported by the courts, is that:
15. “The more distant the family relationship between the deceased and a claimant, the greater must be the need of the claimant for maintenance and support if it is to give rise to an obligation..” (Freeman & Ors v Jacques [2005] QCA 423 at paragraph 5).
16. While other general principles can be expressed and worked around for guidance, the reality is that the case law has an element of unpredictability. General principles and criteria which can be used for guidance include:
  - a. what would a wise and just parent have done in the circumstances?
  - b. the term “adequate provision” is not a reward for services rendered,
  - c. the term “adequate provision” is not based on notions of fairness or equality,
  - d. the financial position and needs of the claimant are likely to be relevant.

## C. PROCEDURAL CONSIDERATIONS

---

17. The first step for someone who wants to make an application to court for family provision is to give formal notice to the executor of such an intention.
18. The person applying then has up until 9 months from the date of death to institute proceedings (section 41 (8) of the Succession Act). This involves making application to either the District or Supreme Court and including a detailed affidavit with supporting evidence showing that at least, on the face of it, the applicant is entitled to apply.
19. Once the application is served, the process is regulated by court practice directives which require a disclosure and settlement process to be attempted before a trial takes place.
20. Important things to consider relating to timing, costs and disclosure are identified in the table below:

Issue	To consider
Timing	The exchange of affidavits, disclosure material and negotiations leading up to a mediation can last between 3 to 6 months. If the matter is not settled further delays follow because a trial must take place. It could be over a year before a binding decision is made, during which time the assets of the estate cannot be distributed.
Costs	Unless a claim is entirely without merit, the estate is normally responsible for the costs. Even if the costs are technically recoverable from an applicant this can be of little comfort to the beneficiaries of an estate if the applicant is not able to or avoids paying them.
Disclosure	The process can become personal and uncomfortable. It requires full disclosure from all beneficiaries under a will and from all family provision applicants. This includes personal details relating to family history and personal finances, including assets owned, income and expenditure. This is not something everyone wants to go through.

21. Because of the issues and process involved, a claim for family provision can be successful for an applicant, even if the chances of it succeeding in a trial are remote. This is because an executor might make a commercial decision that it is better for the beneficiaries under a disputed will for an application for provision to be settled.
22. Navigating the process sensibly involves balancing the prospects of a claim succeeding, the extent of provision which a court might award, and the time and costs involved.

## D. ASSISTANCE WE PROVIDE

---

23. We are available to assist if you:
  - a. require assistance drafting a will and need to factor in the possibility of a family maintenance claims,
  - b. are an executor and require assistance responding to a family maintenance claim,
  - c. have been excluded from a will or through the laws of intestacy and want advice on the prospects of succeeding in a family maintenance claim.