



Law changes for challenging a Will

Laws came into effect in NSW on 1 March 2009 in which the former Family Provisions Act was repealed and replaced by new provisions inserted into the Succession Act 2006 ("Succession Act").

This enactment is part of the current push to create uniform Succession laws throughout Australia.

The current legislation applies to all estates where the deceased died after 1st March, 2009.

Some of the significant changes made in the Succession Act are as follows:-

Eligible Persons

In order to make a Family Provision claim to the supreme Court of News South Wales ('the Court') (if you have not been adequately provided for in a will or left out altogether) you must first qualify as an eligible person under the Succession Act. The legislation has tightened the scope for making a claim and provides the following are eligible persons:-

1. A spouse of the deceased person at the time of death;
2. A person who was living in a de-facto relationship with the deceased person at the time of death;
3. A child of the deceased person;
4. A former spouse of the deceased person;
5. A person who was at any time wholly or partly dependent on the deceased person and, is a grandchild of the deceased person or was, at any time, a member of the household of the deceased person;
6. A person with whom the deceased was living in a close personal relationship at the time of death.

Categories (1) – (3) are entitled to make an application for provision as of right. However categories (4) – (6) must be able to demonstrate to the Court the existence of factors warranting their making an application. These may include the character and conduct of the applicant, financial circumstances and needs of the applicant, and any contribution by the applicant to the deceased's welfare and maintenance.

Time Limits

The time for making an application for a Family Provisions order by an eligible person has been reduced from 18 months to 12 months from the date of death of the deceased person. There is still provision to apply for an extension of time however the applicant must establish sufficient cause to the satisfaction of the Court.



Further provision

The Court now has broader powers to make a second Family Provision order to an eligible person. This may arise if there has been a substantial detrimental change to the personal circumstances of the applicant or there is later found to be undisclosed property in the deceased's estate.

Legal personal representative

The Succession Act provides additional protection for the legal personal representative or Executor if they distribute in accordance with the provisions of that Act. The Court now also has the power to order that final or partial distribution of the estate be restrained pending determination of a Family Provision application.

Costs

There has been discussion recently in relation to costs associated with Family Provision applications. The Court does have extensive powers which allow the making of costs orders, in particular in relation to smaller estates, which are those valued at less than \$750,000.00.

Following on from these changes the Court has issued a new practice note which applies to all applications under the former Family Provision Act or the current Succession Act. This practice note aims to resolve the Family Provision disputes faster, more easily and with less expense. The Court has, in essence determined the form of the application, the relevant issues which should be addressed in the Affidavits to be submitted by both parties and a timetable for the conduct of the proceedings.

The Succession Act also now provides that all Family Provision application matters must be referred to mediation before they go to a Court hearing.

At Bateman Battersby we have a number of experienced Lawyers who specialise in Probate and Estate related matters. If you need help or advice about your entitlements and rights under the current legislation or if you wish to discuss any of the matters addressed above, please feel free to contact John Bateman or Scott Johnson on (02) 4731 5899 or email us at willsstates@batemanbattersby.com.au.