



FAMILY PROVISION CLAIMS – WHAT ARE THEY?

Whilst many people may consider that once a Will is made it is “bullet proof”. This may not be the case.

Section 41 of the *Succession Act* (Qld) provides that if a person dies with or without a Will and “adequate provision is not made from the Estate for the proper maintenance and support of the Deceased person’s spouse, child or dependent” the Court may order “such provision as the court thinks fit shall be made out of the estate”.

Whilst the Court has no general power to rewrite a Will, if a Claim is made the Court may alter the disposition made by a Testator (person making the Will) to the extent that it is necessary to “make proper provision for the Applicant”. Whilst the Court does not have the power to re-write the Will, the effect of a successful Claim is that the terms of the Will are altered.

The Court is not interested in equality or fairness between Beneficiaries and the mere fact that Beneficiaries are treated differently does not, of itself, mean that a Will can be challenged. The Court will, however, make a provision in circumstances where it is of the view that “adequate provision” has not been made.

The Court, through case law, has determined that Claims involve a 2 stage process namely:

1. Deciding whether the Applicant has been left without adequate provision for his or her “proper maintenance and support”. This is sometimes referred to as the jurisdictional question;
2. If the answer to question 1 is “yes”, deciding what provision ought to be made.

In considering a potential Claim, the Court considers many issues including but not limited to:

1. The size and nature of the Estate;
2. The financial resources and needs of the nominated Beneficiaries of the Estate and the Claimant;
3. The age of the Beneficiaries and the Claimant;
4. The relationship between the Deceased, the other Beneficiaries and the Claimant;
5. Any contributions made by the Beneficiaries and the Claimant to the creation and “building up” of the Estate;
6. Any physical, mental or intellectual disability of the Beneficiaries and the Claimant;
7. The length and quality of the relationship between the Claimant and the Deceased. For instance, the Court may take into account any issues of estrangement.

Some strategies by which the risk of a Claim could be minimised include:

1. Intervivos (between the living) transfer of assets;
2. Different tenancies for property (ie. joint tenancy arrangements);
3. Structuring of asset ownership (ie. use of trusts/companies to hold assets or holding assets jointly);
4. Binding Death Benefit Nominations for superannuation funds;
5. Structuring the Beneficiary entitlements of any life insurance policies.

This is not an exhaustive list and there are risks and expenses associated with each of them including stamp duty implications, taxation implications (capital gains tax in particular) and potential issues with Centrelink.

Disclaimer – The comments contained in this document are general comments and are not advice in relation to a specific Will or specific Claim. Each and every Will and Estate administration must be prepared and conducted in accordance with its own set of facts and circumstances.