

A Simple Approach to Contesting a Will - Part 2

Can a Step Child make a Family Provisions Claim?

Step Children do not have an automatic right to approach the Court for provision from the estate of a deceased parent; they are not automatically 'eligible persons'.

Step Children are not prohibited from making a Family Provisions Claim, however they must establish that they are an 'eligible person', namely that they are:

A person

(i) Who was, at any particular time, wholly or partly dependent upon the deceased person, and

(ii) Who was at that particular time or at any other time, a member of a household of which the deceased person was a member

What must be established here is that such a person was dependant on the deceased.

If it can be shown that you are dependent on the deceased, and you were at some point in time, part of the deceased's household, you may be able to succeed in a Family Provisions Claim.

My Grandparent passed away, can I claim on their estate?

Grandchildren do not have an automatic right to approach the Court for provision from the estate of a deceased grandparent; they are not an automatic 'eligible persons'.

Grandchildren are not prohibited from making a Family Provisions Claim, however they must establish that they are an 'eligible person', namely that they are:

A person

(i) Who was, at any particular time, wholly or partly dependent upon the deceased person, and

(ii) Who is a grandchild of the deceased person

What must be established here is that such a person was dependant on the deceased. This means both a financial and emotional dependency, however generally an award will only be made when the role of the grandparent is more akin to a parental role. Occasional financial gifts do not qualify.

If it can be shown that you are dependent on the deceased, and you were a grandchild of the deceased, you may be able to succeed in a Family Provisions Claim.

What elements are needed to establish dependency?

Generally the Court will look at the financial dependency of an applicant on the deceased. This ranges from paying for education to regular purchase of clothing or some other form of monetary assistance.

The Courts have determined that financial assistance is the most common form of dependency however recent decisions have identified that emotional dependence will be taken into consideration.

In *Ball v Newey* (1988) 13 NSWLR 489, Samuels JA said:

"While it is true that here we are concerned with financial dependency and not emotional dependence, the whole relationship between the appellant and the deceased must be examined"

In *Petrohilos v Hunter* (1991) 23 NSWLR 559, Hope A-JA said:

"The word "dependent" is an ordinary English word, and whether a person is or has been wholly or partly dependent upon another is a question of fact. No doubt one of the commonest forms of dependence is a financial one, in the sense that the dependence flows from the fact that accommodation, food, clothing and other necessities or amenities of life are provided by the person who owns or is otherwise entitled to the accommodation and pays for the other things. But I do not think that the word, as used in the statute or otherwise, has this very limited meaning. In ordinary parlance, young children are properly and commonly said to be dependent on their mother as well as their father, regardless of where the money comes from. A contrary view, that young children are not dependent on their mother if she has no independent means, seems to me to be a misuse of language. This accords with what Samuels JA said in *Ball v Newey* (1988) 13 NSWLR 489 at 491, that "'Dependent' in the ordinary sense of the word, means the condition of depending on something or on someone for what is needed".

"Surely a mother's services to a young child satisfy the test. The child could not survive without the provision of those services; he or she needs them. To suggest that, in a money sense, they are valueless, is simply wrong."

"The same considerations apply to a step-child or his or her step-mother, when the child lives with the step-mother and is looked after by her. I appreciate that a different view has been taken by others, as for example, by Powell J in *Dunn v Public Trustee* (Powell J, 1 June 1989, unreported), but I would respectfully disagree with that view. In my opinion the plaintiff was partly dependent upon the deceased, certainly for many years of her childhood and probably until her marriage, although no doubt her dependence diminished in the latter years of this period"

If it can be shown that you are dependent on the deceased you may be able to succeed in a Family Provisions Claim. There are many forms of dependency and each case is determined on its own facts the applicant must establish that they have a particular dependency warranting the Court to make provision for them from the estate

My Uncle passed away, can I claim on his estate?

Nieces and nephews do not have an automatic right to approach the Court for provision from the estate of a deceased uncle or aunty; they are not automatic 'eligible persons'. They must establish that they are an "eligible person", namely that they are:

A person

(i) Who was, at any particular time, wholly or partly dependent upon the deceased person, and

(ii) Who was at that particular time or at any other time, a member of a household of which the deceased person was a member

What must be established here is that such a person was dependant on the deceased and part of their house hold. If it can be shown that you are dependent on the deceased, and were at some point in time part of their household, you may be able to succeed in a Family Provisions Claim.

My Friend passed away, can I claim on their estate?

Friends do not have an automatic right to approach the Court for provision from the estate of a deceased parent; they are not an automatic 'eligible persons'. They must establish that they are an 'eligible person', namely that they are:

A person

(i) Who was, at any particular time, wholly or partly dependent upon the deceased person, and

(ii) Who was at that particular time or at any other time, a member of a household of which the deceased person was a member

What must be established here is that such a person was dependant on the deceased and part of their house hold.

I was promised something before they passed away, but I was not included, or sufficiently cared for in their Will.

There may be times when a deceased person, prior to death, made a promise to you, that in return for a service (generally care in old age or some

other form of maintenance), a particular item or monetary sum would be left to you in their Will. This situation forms a Constructive Trust, and where you have suffered detriment in upholding your side of the bargain, such as time and labour, and the detriment is proven, the Courts have determined that the bargain is valid and you will be entitled to the variation of the Will.

My Step Mother and Father had similar Wills, she has now changed hers.

There may be situations where in anticipation of death a parent and a step parent make Mutual Wills. Their Wills are made in contemplation of each other and have identical terms and paragraphs. This is done in protection of the step children. The Courts have recognised that this is a contractual agreement between the deceased and the step parent, an agreement that cannot be altered as the subjects of the agreement, namely the children, are still alive.

In this situation, the new Will of the step parent will be challenged in its entirety and generally the previous Will is enacted.

About the Author

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