

## Managing Contested Bequests

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### Introduction

It is not uncommon for patients and community members to leave bequests to health services, community health organisations and research institutes. In many cases, the family of the deceased will be supportive of their relative's wishes to leave money to the service. However, in some instances, family members will object to the bequest being made and will make a claim against the executor, or even against the beneficiary health service.

In broad terms, there are 2 ways in which a will may be legally challenged by disappointed beneficiaries (generally relatives of the deceased):

- **By claiming that the will was not validly made:** The will may be challenged on the basis that it was not validly made because the deceased person did not have testamentary capacity. 'Testamentary capacity' requires (amongst other matters) that the deceased understood the nature and the effect of the will. There are also formal requirements which must be satisfied for the will to be valid. If the will is found to be invalid, the laws of intestacy, which govern the distribution of the estate where there is no will or no valid will, will apply and the family will receive the proceeds of the estate.
- **By making a claim for further provision from the estate:** If the will is valid, certain 'eligible persons' are able to make an application for a family provision order from the estate under Part IV of the *Administration and Probate Act 1958* (Vic) within 6 months of the grant of probate.

### Family provision claim

In order to make a family provision order, the Court must be satisfied that:

- the applicant is an *eligible person*
- there was a relationship of dependency as specified in the Act
- at the time of death, the deceased had a moral duty to ensure the provision of proper

maintenance and support of the applicant, and the dispositions in the will fail to fulfil this duty adequately.

### Eligible persons

In Victoria, only 'eligible persons' may make a claim for further provision from the estate. This follows a recent amendment to the Act so that only persons who, at the time of the deceased's death, were in a defined relationship with the deceased (i.e. spouse or domestic partner or a child) are able to make a claim. This requirement prevents claims being made by, for example, distant relatives with no meaningful connection with the deceased.

### Issues considered the Court

Before the claim is heard by the Court, the parties will be required to attend a mediation to attempt to settle the claim. Generally, the executor (who is responsible for carrying out the wishes of the deceased) and the person making the claim will attend the mediation. However, if the health service has been named as a party in the proceedings, it will also be required to attend the mediation and should be legally represented.

If the claim is not resolved by mediation and proceeds to trial, the Court must take into account the deceased's will, any evidence regarding the deceased's reasons for making the dispositions in the will, and any evidence relating to the deceased's intentions regarding the provision of maintenance and support for the applicant. Furthermore, there is a non-exhaustive list of matters the Court may take

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into account such as any mental, physical or intellectual disability of an applicant or any other beneficiary of the estate.

### *Costs of the proceedings*

The general rule in family provision proceedings (as in any civil litigation) is that the losing party is ordered to pay the costs of the winning party. However, where a trustee or beneficiary is forced to defend proceedings, their reasonable legal costs will generally be borne by the estate. It is important to consider the costs implications involved in resisting a claim by a disappointed beneficiary.

### Conclusion

There are legal and reputational risks in opposing a valid claim made by a family member and in our experience, health services left a bequest do not wish to stand in the way of such claims. Therefore, if a bequest is challenged, it is helpful to seek early advice about the legitimacy of the claim. It is often the case that claims on the estate can be resolved even before legal proceedings are issued.

*If you have any questions arising out of this article, please contact [Alon Januszewicz](#) on (03) 9865 1312 or email [alon.januszewicz@healthlegal.com.au](mailto:alon.januszewicz@healthlegal.com.au).*