

**DISPUTING A WILL
“TESTATOR’S FAMILY MAINTENANCE”**

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The freedom to make a Will

It is said that it is one of the freedoms of our society that a person is free to dispose of their assets by their Will as they think fit.

Courts are loathe to disturb that freedom unless it can be established that the Will maker has abused that freedom by failing to honour their moral duty to make adequate provision for the proper maintenance for those a Court concludes the deceased had an obligation.

Who can claim?

Following amendments to the *Administration and Probate Act 1958 (Vic)* made in 1997, the potential class of applicants has been extended. In effect, anyone (spouse, de facto partner, children, non-relatives) can, and do successfully challenge a Will.

In summary, the question to be determined by a Court is whether the applicant is a person to whom the deceased had a responsibility to make provision. The question can only be answered on the facts of each case.

The Act provides guidance for the Court in listing 12 factors which a Court must take into account:

1. Any family or other relationship between the deceased and the applicant, including the nature of the relationship and, where relevant, its length.
2. Any obligations or responsibilities of the deceased to the applicant, any other applicant, and the beneficiaries of the estate.

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3. The size and nature of the estate and any charges and liabilities to which it is subject.
4. The financial resources (including earning capacity) and the financial needs of the applicant, of any other applicant, and of any beneficiary of the estate at the time of the hearing and for the foreseeable future.
5. The physical, mental and intellectual disability of any applicant or any beneficiary of the estate.
6. The age of the applicant.
7. Any contribution (not for adequate consideration) of the applicant to building up of the estate or to the welfare of the deceased or his or her family.
8. Any benefits previously given by the deceased to any applicant or to any beneficiary.
9. Whether the applicant has been maintained by the deceased before his or her death either wholly or partly and, where the Court considers it relevant, the extent to which and the basis upon which the deceased had assumed that responsibility.
10. The liability of any other person to maintain the applicant.
11. The character and conduct of the applicant or any other person.
12. Any other matters the Court considers relevant.

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Decided cases

As to be expected, there have been many challenges to Wills particularly since the amendments to the Act in 1997.

Clearly, no two cases are the same. Every case will have to be determined on its own facts.

Advising an applicant wishing to challenge an estate, or advising the estate against whom a challenge is made, will involve a detailed examination of the background and history of the deceased, the applicant and beneficiaries.

Guidance can be obtained from the many reported cases.

Legal costs

If an applicant is successful, the Court in exercising its discretion will usually order that the applicant's costs be paid out of the estate as well as ordering that the estate costs in defending the claim also be paid out of the estate.

Caution ought be exercised in determining whether to bring a claim as the Court may order that an unsuccessful applicant pay their own costs and that of the estate. Alternatively, the Court may make no order as to costs thus leaving the unsuccessful applicant and the estate each to pay their own costs.

In some cases, the Courts have found that the applicant's claim was untenable and ordered costs against the unsuccessful applicant.

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Conclusion

As mentioned above, each case will be looked at on its own circumstances and will need to be closely examined to determine whether a claim ought be made.

Whilst the 1997 amendments have permitted a wider class of potential claimant, the Courts, have made it clear that in bringing or defending a claim, the Courts will seek to avoid over reaching the potential for disturbing a Will whilst ensuring that someone unjustly excluded from the provisions in a Will are able to seek redress.

Nevett Ford Lawyers practise in this area and can offer advice and assistance in both considering a claim and also, where an estate faces a claim, defending a claim.

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Our people

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