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SUCCESS RATE IN CONTESTING A WILL

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HIGH SUCCESS RATE OF CONTESTATION

74% of family provision
claims by family (children
or partners, including ex-
partners) were successful.

See: Tilse, C., Wilson, J., White, B., Rosenman, L. & Feeney, R. (2015), "Having the Last Word? Will Making and Contestation in Australia". The University of Queensland.

Many deceased estates are contested
under family provision legislation.

Studies undertaken by the University of
Queensland in 2015 found that:

- **86%** of claims are brought by immediate family members: either children of the deceased (63%) or partners (including ex-

partners) (23%) – This means that adult children are the most common claimants in applications for provision from an estate.

- These applications are often driven by exclusion from a Will and/or significant disparity in distribution of assets between beneficiaries.
- Applications for provision from a deceased estate have a high rate of success, whether obtained through a judgment from the Court or settled in mediation.
74% of family provision claims by family (children or partners, including ex-partners) were successful.

COMMON REASONS FOR CONTESTING A DECEASED ESTATE

‘Contesting a deceased estate’ refers to claims pursuant to the family provision legislation.

The said studies also found that contestation is most commonly driven by:

- Inadequate provisions to meet the needs of a family member;
- The type and quality of a relationship with the deceased where a family member felt a sense of entitlement to a greater distribution;
- Exclusion from a Will and/or disparity in distribution of assets.

SIGNIFICANCE OF FINDINGS

The above findings are significant to:

- **The Will maker:**
Judicial statistics show that 51% of estates that were contested were family provision claims. In light of these statistics, if you are making a Will, you need to give very careful and detailed considerations to the people who may have a claim against your estate and how you should distribute your assets. The more complex the family relationships, the higher the chance your Will may be contested or otherwise disputed between your family members upon your death.

At the time of making your Will, you need to consider ways to reduce the risk of contestation by addressing underlying family dynamics and issues and obtaining strategic legal advice if you plan to exclude someone from your Will.

- **The Executor or Administrator:**
A personal representative who has obtained a grant of Probate or Letters of Administration (i.e. the executor or the administrator) will undoubtedly find themselves spending considerable time dealing with family provision proceedings where an applicant has contested the Estate. This may necessitate engaging lawyers to defend the contestation, and obtaining detailed evidence, including expert evidence where necessary, to defend against the claim. This can detract the

executor or administrator's attention from getting on with other tasks in administering the estate, such as collecting and realising assets.

□ **A family member who can be a potential claimant:**

There is a high success rate for family members who apply for family provisions from a deceased estate, insofar as they receive greater or some provision from an estate either by way of judgment or settlement. Notwithstanding the existence of a Will or the provisions of the *Administration Act 1903* (WA), in the case where someone has died without a Will, the Court has the discretion to award or increase provision to an applicant.

WHO CAN CONTEST A WILL?

Pursuant to Section 7(1) (a) of the *Family Provision Act 1972* ("Act"), the following are "eligible persons" who may apply to the Court for a family provision order in respect of the estate of a deceased person in WA:

- Former spouse or spouse, including a former or current de-facto partner, of the deceased (former spouse/de facto must be entitled to or receiving maintenance at the time of death);
- Child of the deceased living as at the date of death or born within 10 months of the deceased's death;

- A stepchild of the deceased (in limited circumstances);
- A grandchild of the deceased (in limited circumstances);
- A parent of the deceased.

ACTUAL CASES OF CONTESTED WILLS

Contested by Spouse ***Waddingham v Burke (as executor of the Will of Waddingham)*** **[2015] WASC 65**

Facts:

The deceased was married to the applicant spouse who claimed that inadequate provisions had been provided for her proper maintenance in the deceased's Will. The Spouse was 69 years old, had no income, and argued that the Will did not provide adequate provisions for her support or/and maintenance in life.

Claim by Spouse:

The Spouse applied for orders to vary the Will for greater provisions and to prevent the immediate sale of land.

Court Findings:

The Supreme Court of Western Australia held that the Will did not adequately provide for the Spouse and ordered the parties to the proceedings to confer in an attempt to reach an agreement on the details of the proposed sale of property

Contested by Former Spouse

(same sex de facto relationship)
Nelligan v Crouch
[2007] NSWSC 840

Facts:

The applicant had been in a same sex de facto relationship with the deceased for 30 years but they had been separated for a number of years prior to the deceased's death as a result of the demands of both personal and family illness. The applicant had not been provided for in the Will. The deceased had, instead, left his entire estate to the Royal Flying Doctor Service.

Claim by Former Spouse:

The applicant claimed that he shared a domestic relationship with the deceased and should be provided for under the Will.

Court Findings:

The Court awarded the applicant \$100,000 from the estate that was valued at \$180,000 after costs.

Contested by Adult Child
Mead v Lemon
[2015] WASC 71

Facts:

The applicant, the adult daughter of a billionaire, brought proceedings seeking greater provision from her father's estate. The Will established a trust for the adult daughter which provided, amongst other terms, that the capital of the trust was not to exceed \$3 million. Stringent conditions were imposed on the daughter's access to the trust fund, including her religion, and she was unable to receive distributions before the age of 30. The total value of the deceased's estate was estimated at more than \$1 billion.

Claim by the Adult Child:

The issue was whether the Will of the deceased provided adequately for the applicant, taking into account a number of factors including the size of the estate and the conditions imposed by the trust established for the adult daughter.

Court Findings:

The court exercised its discretion under section 6(1) of the **Act**, taking into consideration factors such as the size of the estate, the needs of the plaintiff and the interests of other people entitled to shares in the deceased's estate. The daughter successfully obtained orders from the Court and she was awarded a cash payment of \$25 million. This decision is being appealed by the respondents; the deceased's other adult children.

Contested by Grandchild
Devenish v Devenish
[2011] WASC 129

Facts:

The applicant, the adult grandchild of the deceased, was not provided for in the Will of his deceased grandmother.

Claim by Grandchild:

Whether there should be provision made for the proper maintenance, support, education and advancement in life of the applicant grandchild, and if so, what would be adequate provision?

Court Findings:

The Court granted the plaintiff 20% from the deceased's estate, the net value of which was valued at \$1,290,000 at the date of death.

TIME LIMIT

Claims made under the *Family Provision Act 1972* must be made within 6 months of the personal representative becoming entitled to administer the estate, or in other words, within 6 months from the grant of Probate or Letters of Administration.

See **section 7(2) (a)** of the *Family Provision Act 1972*.

Whilst the Court can make orders tracing and recovering estate assets which have been distributed, there is always a risk that the estate may be dissipated. If you want to make a claim for provision from an estate, you should act without delay.