



# Defending a Will against a Family Provision Claim in New South Wales

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It's not uncommon for Wills to be contested, particularly when a family member feels they've been left out or treated unfairly.

In New South Wales, the *Succession Act 2006 (NSW)* (the **Succession Act**) allows certain individuals to [challenge a Will](#) if they believe they have not been adequately provided for. These challenges, known as **Family Provision Claims**, can be emotionally taxing and legally complex.

As an executor or beneficiary, understanding how to navigate and defend against a Family Provision claim is crucial to uphold the deceased's wishes and protect the estate's integrity.

## Understanding Family Provision Claims

A Family Provision Claim is initiated when an eligible person asserts that the deceased's Will does not make adequate provision for them in the Will.

### Who is an eligible person?

Under the Succession Act, certain people - such as spouses, de-facto partners, children, in some cases grandchildren, and some other dependants - can apply to the Supreme Court of NSW for provision from the estate (a share, or a greater share, of a deceased estate).

## What's required for a successful claim?

To succeed, the person bringing the claim must show that they've been left without adequate provision for their proper maintenance, education or advancement in life.

## What's considered when determining a claim?

Whether a claim is upheld depends on a number of factors, including:

- the relationship between the claimant and the deceased;
- the claimant's financial circumstances;
- the size and nature of the estate;
- any obligations the deceased had to the claimant or other beneficiaries.

## Can a Will be defended?

Yes. Just because a claim has been made, it does not mean the Court will automatically grant provision from the estate, altering the gifts under the Will.

If you are a named executor or beneficiary, it may be in your interests to defend the claim, particularly if the Will was made thoughtfully and fairly, or if there are limited estate funds to go around.

## The executor's role

As executor, your role is to uphold the Will and act in the best interests of the estate. You will need to remain neutral, especially if the dispute is between beneficiaries.

You can learn more about the executor's role in our earlier blog, ["Executor duties when dealing with property of a deceased estate"](#).

## Important tips for the executor when there is a Family Provision Claim

- You should not distribute any part of the estate until the claim is resolved;
- Legal costs may be paid from the estate, even if the claim is unsuccessful;
- You may need to seek advice regarding protection from personal liability.

## Steps for an executor to defend a Will being contested

Seek prompt legal advice

Engage a solicitor experienced in estate litigation to assess the claim's merits and advise on the best course of action. This can include assisting you to weigh up whether the claim should be resisted or negotiated. Early legal intervention can often lead to more favourable outcomes.

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## Gather relevant documentation

Compile all pertinent documents, including the Will, financial statements, correspondence, and any notes that shed light on the deceased's intentions. This evidence can be pivotal in Court proceedings.

## Evaluate the claim's merits

Assess whether the claimant is eligible and if their financial needs warrant further provision. Consider the estate's capacity to accommodate additional claims without disadvantaging other beneficiaries.

## Consider mediation

If proceedings are commenced, the Court will require that the parties attempt to mediate the dispute in the hope that the dispute may be resolved amicably. Engaging in mediation can save time, reduce costs, and (in some cases) preserve family relationships.

## Prepare for Court proceedings

If mediation fails, be prepared to defend the claim in Court. Your solicitor will help present evidence and arguments to uphold the Will's validity and the deceased's intentions.

# Other key considerations

## Time limits

Family Provision Claims must be filed within 12 months of the deceased's death. However, the Court may allow a claim being made after 12 months from the deceased's death in certain circumstances.

## Costs

Legal expenses can be substantial. The Court may order the estate to cover costs, including the costs of the claimant, especially if the claim has merit. Conversely, frivolous claims may result in the claimant bearing the costs.

# Can the testator prevent a claim being made against their estate?

While you cannot stop someone from bringing a claim against your estate, there are ways in which the testator may reduce the risk of a successful challenge or assist your executor in the event of a claim.

- [Make your Will](#) with the help of a solicitor;
- While it would not prevent a claim, discussing your estate plans with potential beneficiaries to manage expectations, especially if you are excluding someone or making unequal distributions;
- Update your Will regularly, particularly if your relationships or assets change
- Prepare written statements or a statutory declaration explaining the reasons behind the decisions you have made regarding your chosen beneficiaries.

## Conclusion

Defending a Will against a Family Provision Claim requires a strategic approach, balancing legal obligations with sensitivity to familial dynamics. Engaging experienced lawyers early can help navigate the complexities, uphold the deceased's wishes, and ensure a fair outcome for all parties involved.

## Get help from a lawyer experienced in probate

While obtaining probate is a major step for an executor, completing the estate administration properly is just as important. Executors carry serious responsibilities and can face legal consequences if the estate is not handled correctly. This is made even more complex and onerous where there is a Family Provision Claim.

Speaking with a lawyer experienced in deceased estates, including litigation, can help you navigate the legal and financial complexities when acting as an executor.

E&A Lawyers has a dedicated and experienced probate and estates team that can help you. For more information or to arrange a consultation with a lawyer, you can call or email us.

## Contacting E&A Lawyers

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