Challenging a Will in Victoria

Claims can be made for further provision from a deceased estate if relatives or loved ones believe that insufficient provision has been made for them however, not everyone is entitled to challenge the validity of a Will.

To be entitled to challenge you must have an “interest” in the deceased estate. That means you must have either an entitlement in a previous Will or an entitlement on Intestacy (that is, if there is no Will) and you are entitled to a share of the deceased estate by way of the laws of your State.

The most common reasons for challenging the validity of a Will relate to:

- insufficient provision made for a spouse or family member
- allegations of fraud,
- lack of mental capacity on behalf of the Will maker,
- undue influence,
- forgery,
- the Will maker having lack of knowledge and approval of what is contained in the Will;
- the Will being incorrectly executed.

What are the time limits?

A challenge to a Will must be commenced in Court within 6 months from the date the grant of probate was obtained (where the deceased person left a Will) or letters of administration (where no Will had been left).

However, the court may give an extension of time so long as the estate has not been completely administered.

What are the Will Maker’s obligations?

The Will maker must make provision for any person for whom he or she had a responsibility to provide for. In the case of de facto spouses and same-sex partners (now collectively called "domestic partners") a claim may be made if insufficient provision has been made. In addition "domestic partnership" is defined and includes relationships such as siblings who live together for a long time in a mutually supportive relationship.

How is a Will challenge made?

An application can be made in either the County Court or the Supreme Court of Victoria, but it cannot be brought in the Magistrates Court or in VCAT.

Who is entitled to claim?

To make a successful family provision claim in Victoria under the *Administration and Probate Act*, a person must have had either a blood or a close relationship with the deceased person and have received inadequate or no provision from the estate.

Currently, Victorian legislation provides that any person who *believes* that a deceased person owed a responsibility to make provisions for them in their Will can challenge the Will on the basis that it does not adequately provide for them.

However new legislation to commence on 1st July 2015 defines who is an **"eligible person"** and has the ability to challenge a deceased person's estate. The list of eligible people brings the State into line with other Australian states in providing a list and this includes:

- a spouse or domestic partner *(this includes current or former partner if no property settlement is reached)*;
- a disabled child of any age (this is subject to a definition of disabled);
- a non-disabled child of the deceased who was under 18 or under 25 and studying full-time at the time of the deceased's death; and
- a non-disabled child of the deceased who is over 25, or over 18 and not studying full-time, and who was wholly or partly dependant on the deceased for their maintenance and support at the time of the deceased's death.

Note that an adult child who is <u>not</u> disabled and who was <u>not</u> dependent on the deceased at the time of their death is not an "eligible person" and therefore cannot seek to challenge their parent's estate!

From the other perspective Will makers who have an adult child that they do not wish to make provision for will benefit from the new legislation. For them there will be no ongoing concern about the risks of not making provision for an adult child, unless the child was dependant on the deceased or is disabled.

The Courts power's and approach

The court also has power to make a maintenance order out of the estate where insufficient provision has been made in the Will for any person that the deceased had an obligation to provide for, including close family members.

A person can apply for a share or an increased share in an estate if they can show the deceased had a responsibility to make adequate provision for them in the Will for their proper maintenance and support and did not do so.

The principles considered by the Court in past cases have included:

- The net value of the estate, namely, its size *after* debts, funeral, testamentary, and other liabilities have been deducted. Therefore, if the estate is not big enough to be capable of redistribution, the action cannot succeed
- The age, sex, and health of the applicant
- If the applicant received any gift, transfer, or other provision made by the deceased during their life
- How close the relationship was between the applicant and the deceased person
- The financial resources of the applicant. An applicant will be entitled to provision only if an economic need for provision can be shown.
- The character and conduct of the applicant

Conclusion

Challenging a Will can be complicated, expensive and time consuming. Legal advice should always be sought, particularly as there are time limits and the definition of entitlement has been recently changed.

Depending on the strength of the case, we may be able to undertake the case on a no-win no-fee basis, or alternatively discuss with you the estimation of our costs. Should you require some advice and would like to have a confidential discussion with us, call us on 03 9387 2424 or email info@rrrlawyers.com.au today and see how we can help.