

Challenging a Will

There are two principal ways in which a person might challenge a Will: firstly, on the basis that the Will itself is invalid, and secondly on the basis that the Will does not make proper and adequate provision for a person who has standing to apply for increased provision from an estate under section 7 of the *Family Provision Act 1972 (WA)*.

Succession Update

Invalidity of Will

A Will is invalid if the willmaker lacked testamentary capacity at the time the Will was made, or if the willmaker did not know and approve the contents of the Will. It might also be invalid if the willmaker was unduly influenced or pressured into making the Will a certain way.

If you have reasonable grounds to believe that a Will might not be valid, then you can place a caveat at the Probate Office and in effect cause the Will to be proved in solemn form. Proof in solemn form means that the Will must be proved in formal court proceedings before the Supreme Court, rather than by simply submitting a written application to the Probate Office (which is referred as proof in "common form"). A person who places a caveat at the Probate Office (called "caveator") is joined as a defendant in formal court proceedings to prove the Will in solemn form, and has the opportunity to present evidence to the Court.

If you place a caveat at the Probate Office without reasonable grounds, you may be liable for the costs of any solemn form probate proceedings, or other court proceedings, which ensue. So it is important to obtain legal advice before you place a caveat, to ensure you have proper grounds.

Family Provision Act 1972 (WA)

The second way in which a Will may be disputed is under the *Family Provision Act 1972 (WA)* ("**the Act**") on the basis that it does not make proper and adequate provision for a person who is eligible to apply. The classes of persons able to apply under the Act are:

- a spouse or defacto
- a child
- a grandchild (in limited circumstances)

Who does this affect?

- A person writing a will or holding an existing will.
- A person with a claim against a deceased estate.

Article Highlights

- A will can be disputed if it is invalid or does not make adequate provision for a family member.
- it is important to obtain legal advice before placing a caveat on a will.
- Claims must be brought within 6 months from the date on which the grant of probate is obtained.



- a parent
- a step child (limited circumstances)

A claim under the Act must be brought within 6 months from the date on which the grant of probate (or letters of administration) is obtained. If you miss this time limit, you cannot make an application without first obtaining the leave of the court.

The Court looks at a number of factors in considering a claim under the Act, but probably the most important factor is the applicant's financial position. It is incumbent on the applicant to prove that the applicant has a need which cannot be met from the applicant's own resources. "Need" in this sense doesn't mean the bare necessities; it is a relative concept. The size and nature of the estate and the competing claims of others will be taken into account.

The vast majority of inheritance claims settle at or before court-supervised mediation. Very few proceed to a formal hearing.

How Jackson McDonald can help

At Jackson McDonald we have a very experienced, dedicated estate litigation team. Our approach is a practical one, to ensure that Will disputes are resolved in the most cost effective manner possible, and with the least emotional toll on our clients.

Disclaimer: This publication is intended to provide general information only and should not be relied upon as legal advice. If you require legal advice on a matter please contact us.

Contact Us

t +61 8 9426 6611 **f** +61 8 9321 2002 **e** jacmac@jacmac.com.au
a Level 25, 140 St Georges Terrace, Perth, Western Australia 6000
GPO Box M971, Perth, Western Australia 6843

www.jacmac.com.au

Contact



Patrick Hughes
SPECIAL COUNSEL

t: +61 8 9426 6638
e: phughes@jacmac.com.au



Sally Bruce
SENIOR ASSOCIATE

t: +61 8 9426 6650
e: sbruce@jacmac.com.au