



FAMILY PROTECTION CLAIMS

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98% of estates either with or without wills are administered without difficulty. A very small proportion however, are the subject of dispute, often because a family member of the deceased has either received no inheritance or feels the inheritance left to them is insufficient.

The Family Protection Act provides clear guidelines as to who may or may not make a claim as a family member against the deceased's estate. Parents, children, grandchildren, great grandchildren and adopted children all have standing as of right to make a claim against the person's estate.

Our task is to determine for our clients in the first instance whether the claim has any substance. The first issue that we determine is whether the deceased by either not providing or by providing a certain amount has breached a moral duty to their family member, our client, by a lack of provision under the estate.

The concept of moral duty has been intensively litigated, but is still being defined by the courts. In essence, the courts will look to see whether the deceased, bearing in mind the relationship with the claimant, should have made provision or better provision because of a moral obligation to the family member.

If a moral breach is established, the court will then assess what the needs of the claimant are after assessing the claimant's own personal financial circumstances. The courts are increasingly making decisions on cases in this area, granting smaller awards, in particular for adult children claimants, where it has been established that the claimants are financially secure and comfortable.

A major factor in these claims is the legal cost to litigate. Most claims are brought in the High Court although they can be brought in the Family Court. The claim requires extensive proceedings to be filed with evidence being produced by way of affidavit. Because the affidavits tell the history of the family, they can be voluminous and often counter affidavits require further reply. The costs therefore are a major driver in ensuring that most claims are resolved either by out of court discussion and negotiation between the executors and trustees of the estate and the claimants or through court assisted settlement conferences. Costs as a rule are met out of the estate's assets.

We aim to make clear early assessments as to the benefits of a mediated settlement against a litigated determination. 90% of family protection claims are settled prior to the matter being set down for hearing.

Please be aware that timeframes to a claim are set by statute and generally require a claim within 12 months of the issuing of Probate or Letter of Administration.

If, as our client you believe that you are entitled to provision under a family members deceased estate, please contact us for more information.

For more information, please contact one of our offices.

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