

# irongroup lawyers

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## Claims on estates

### • But it's my money....

As a general principle, a person is entitled to leave their estate to whomever they choose. However, governments have introduced legislation to ensure that people make adequate provision for the maintenance and support of those individuals towards whom they are deemed to have an obligation. Under State and Territory Acts, claims can be made on estates whether the deceased dies testate (with a Will) or intestate (without one). Claimants do need to meet eligibility criteria in order to make a claim, however whether they succeed or not is a matter for the Court.

### Who is eligible to make a claim?

In Victoria this is broad in that it is anyone the deceased had a 'moral duty' towards and is not restricted to relatives or partners. In WA, eligible claimants are restricted to spouses or de facto partners (either current or former), children, grandchildren or parents. In NSW, eligible claimants are spouses (current or former), de factos, children, grandchildren, anyone with whom they were in a close personal relationship and dependants who were or had been part of the deceased's household. In Qld, eligible claimants include spouse, child (includes step or adopted children) or dependants. In the ACT, eligible claimants include partners, anyone in a close domestic relationship, child, stepchild, grandchild or parent. However entitlement is not automatic - other conditions may be necessary. For example in some cases the deceased must have been supporting them prior to death.

### How far does the duty extend?

The Court takes a conservative approach to quantifying a claim as it is recognised that its role is to respect the wishes of the Willmaker as much as possible and not simply re-write a Will as if fairness were the deciding factor.

*"In the case of an adult son, who has received an education and is well able to earn his living, the father's moral obligation can probably in most cases be regarded as discharged, and a wise and just testator may well feel himself at liberty 'to do what he likes with his own'."* **In re Sinnott (1948) VLR.**

Key questions	Underlying issues
<b>Is there a duty to provide?</b>	<b>Who is eligible to make a claim?</b>
<b>What is their financial position?</b>	<b>Can the claimant look after themselves?</b>
<b>How much is adequate?</b>	<b>What is available? 'Accustomed' lifestyle?</b>
<b>And the general rule?</b>	<b>What would a "wise &amp; just testator" do?</b>

This was confirmed in **Vigolo v Bostin (2005) HCA**, on appeal from the Supreme Court of WA. The son based his case on a moral claim due to previous family dealings, in particular a promise made by his deceased father to leave him a farm in return for his dedication and hard work in building up family assets. His case failed, not because moral claims are irrelevant, but because he failed to meet the other provisions of the Act, one of which was the requirement that he had a financial need - he was an 'able-bodied adult and a man of substantial means'.

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# Claims on estates

## What is adequate provision?

There are no hard and fast rules and the court will look at all circumstances of the case including the claimant's financial position, their relationship to the deceased, and other persons who may also have a legitimate claim. The court will also look at the estate size and what the claimant's standard of living has been. For example, if it was a large estate and a child had come to expect a high standard of living, the notion of what is adequate may be very different compared to someone in more average circumstances.

## How much is enough?

In **Petrucci v Fields (2004)** a daughter-in-law and grandchildren were claimants. The deceased's son had predeceased the Willmaker who had left nothing to his son's family. The daughter-in-law was in poor financial circumstances, had had a long relationship with the deceased and had made a significant contribution to his welfare.

The Court found the deceased should have made provision for her. On the issue of the adult grandchildren, whose financial situation was also poor, the Court found that whilst he did not have to provide for their immediate needs, he did need to provide for their future needs. Consequently, out of the approximately \$900K estate, the court decided the daughter-in-law should receive income from a sum of \$60K to be invested for her lifetime and which was then to be distributed equally to her children upon her death.

## Do you need to provide for a divorced spouse?

It depends. In **Mulcahy v Weldon (2001)** in the NSW Supreme Court it was held that a former spouse who received a property settlement, and was not entitled to on-going maintenance, would not generally be regarded as being a 'natural object of testamentary disposition'. On the other hand, if the former spouse was receiving maintenance when the deceased died, he/she may be successful in making a claim.

## Are all siblings treated equally?

In short - no. In **White v Muldoon (2006)** in the Victorian Supreme Court, the mother died leaving her estate fairly evenly amongst her children. One of them however was in poor health and unable to work. The court found his need was greater than his siblings even though "none of them could be described as wealthy". The disabled brother was awarded \$100K of the total \$190K-\$195K estate.

It is worth noting that this was the net amount after deducting \$80-\$85K in legal costs (these costs are not unusual). As the judge commented, "it is tragic that the parties have been unable to reach agreement when the estate is so small. It is clear that the estate will be significantly reduced due the parties' expenditure on the legal fees of this proceeding".

If your clients are concerned about possible estate claims we would be pleased to provide advice. As in the above case, it's important to try and avoid claims in order to preserve estate values where possible.

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### 1. Irongroup Lawyers training for Advisers

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We work with Advisers around the country who, having licensed our system, are now offering in-house estate planning and business succession planning services. If you would like more information please email us on [info@irongroup.com](mailto:info@irongroup.com) or call 03 8621 9000.