

A Conversation About Estate Disputes: Part 4 – Can I Make a Family Provision Claim if I am Estranged From the Deceased?

Following on from our third article in this series about Family Provision Claims, this article focuses on whether you can make a family provision claim should you be estranged from the deceased.

In order to make a Family Provision Claim to the Court, you must fall within a category of "eligible persons" entitled to claim.

The following categories of people are eligible to make a Family Provision Claim:

- A surviving spouse of the deceased;
- A person who was living in a de-facto relationship with the deceased;
- A biological or adopted child of the deceased;
- A former spouse of the deceased;
- A person who was a member of the deceased's household, is a grandchild of the deceased, or was wholly or partly dependent on the deceased; and
- A person with whom the deceased with in a close personal relationship.

Although the nature of the relationship between the applicant and the deceased is taken into consideration by a Court, estrangement will not automatically preclude an applicant from succeeding in a Claim. The Court recognises that there are many reasons why estrangement can occur, therefore will look at all the evidence as a collective, including the behaviour of the deceased. If the estranged child demonstrates need, the estranged child may receive provision from an estate, despite the estrangement.

Various cases can be viewed as encapsulating a variety of relevant principles for estrangement in relation to family provision claims, such as the following:

Ford v Simes [2009] NSWCA 351:

- Within this case, the deceased spent the last 14 years of his life without any assistance or communication from the child and "without the benefit of the love from a child whom he had nurtured and financially assisted during his formative years."
- Bergin CJ stated that "there will be cases in which the estrangement is such that a testator is entitled to make no provision for an estranged child. This is one of them."

Lambeff v Farmers Co-operative Executors & Trustees Ltd (1991) 56 SASR 323:

- An estranged daughter made a claim for provision out of her deceased father's estate, which was valued at approximately $200,000, and had been left equally to two sons by a second marriage who possessed few assets.
- The daughter had been abandoned by her father at the age of 10 and was in well-paid employment with a reasonable equity in a flat.
- As she was abandoned at a young age and had no support from her father afterwards, she had done nothing wrong and could have done better with proper support for her advancement in life.
- The daughter was successful in her claim, being awarded $20,000 out of the $200,000 estate.

Keep v Bourke [2012] NSWCA 64:

- Within this case, the deceased was the initiator of the separation.

- The fact that the deceased's daughter (Marion), who had married against her parents' wishes, did not attempt reconciliation was treated by the primary judge as not barring a claim for provision although it did reduce her claim on the deceased's bounty.
- This was even though the deceased's last Will expressly stated that she had made no provision for Marion "because of her complete lack of concern or contact" with her and other members of her family "over a long period of time."
- The deceased's Will had originally given the whole of her estate to her two other children in equal shares, both who are not married, have no children, and have lived in the deceased's house for their entire lives.
- Marion and the deceased had been estranged for a period of 38 years, which continued at the deceased's death.
- The Judge presiding over the appeal considered that his Honour's original decision should be upheld, on the basis that his Honour had addressed all relevant matters going to jurisdiction and an assessment was made by way of appropriate "multi-faceted evaluative judgment", taking all of the above matters into account.
- Marion's originally-ordered entitlement of $200,000 in the primary judgment, being almost one-third of the deceased's estate, was therefore upheld.

Wall v Crane [2009] SASC 382:

- The deceased died in October 2002 and proceedings were commenced by the deceased's daughter, Jennifer.
- Jennifer had a severe argument with her mother which led to a prolonged period of estrangement between them and little contact afterwards; the mother later died. Jennifer had periodic contact with her father.
- Although the deceased had provided a little financial assistance to Jennifer throughout her lifetime, this was no greater than the assistance given to one of his sons, and much less than that provided to his other son.
- Unlike the sons, Jennifer was left nothing under the Will.
- The court ordered that a reasonable and fair-minded testator, reflecting free from prejudice from the estrangement, would have made some provision for Jennifer and she was awarded $160,000 out of the residuary estate (borne equally by the two sons).

What does this mean?

What these and other cases convey is that, within a family provision claim relating to estrangement, it is up to the Judge to evaluate all of the relevant circumstances, including the following, which will be given sufficient weight:

- where there has been a period of estrangement;
- the circumstances of that estrangement;
- and whether there has been any attempt at reconciliation; and

- that there may be no one right answer: reasonable minds may differ.

Ultimately, any claim will be judged on a case-by-case basis, whereby a range of relevant circumstances will be considered, leading to a holistic determination being handed down.

How can Andersons help?

If you are needing advice on a claim against an estate, whether as a claimant or a beneficiary, contact our **specialist Estates team.**

This article was researched and written by Law Clerk **Anthony Luppino** and settled by **Senior Associate Lynn Pham**.

The information in this article is general in nature and was accurate at the time of publication. Laws and circumstances can change. For advice specific to your situation, please seek professional legal advice.