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Will the proposed Succession Act 2021 Prevent People With Genuine Need From Making Estate Claims?

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Succession Law in South Australia is due to undergo its most significant change in decades. The *Succession Bill 2021 (SA)* contains sweeping changes to the legislation currently in place in South Australia and aims to incorporate current legislation dealing with estate and succession law into a single act, namely the *Succession Act 2021*.

The current pieces of legislation that would be repealed include the *Wills Act 1936*, the *Administration and Probate Act 1919* and, most importantly for the purposes of this article, the *Inheritance (Family Provision) Act SA 1972*. While most of the content of those acts is being retained, several proposed changes, including those to claims for further provision, have attracted concern from the legal profession.

What is a claim for further provision?

A claim for further provision is, in short, an application to seek part or the whole of a deceased person's estate be given to you instead of another person. Where a person has been "left without adequate provision of their proper maintenance, education or advancement" from a deceased estate (noting the deceased must have resided in South Australia and had assets in the state), the Court may make an order for that person to be provided with part of the estate.

In South Australia, a claim for further provision from a deceased estate is currently made under the *Inheritance (Family Provision) Act (SA) 1972*. Claims under this legislation are assessed by the Supreme Court of South Australia (**the Court**).

In assessing such a claim, the Court may have regard to factors such as a person's financial circumstances, their relationship with the deceased, the circumstances of other potential beneficiaries and any conduct which might prevent a person from claiming.

Claims for further provision are a complex area of succession law and as such, often run for long periods of time and incurring sizable legal fees. Normally, the costs of such applications are met by the deceased estate, which can often significantly reduce the monies left for the beneficiaries. It is those costs that have prompted the State government into introducing drastic changes to the factors being considered by the Court regarding a claim for further provision.

The Changes

The new Act introduces factors that the Court must have regard to in considering a claim for further provision. These include:

- Evidence as to why the deceased disposed of their estate in the manner set out in their will;
- A person's vulnerability and dependence on the deceased;
- A person's contribution to the deceased's persons estate; and
- The character and conduct of the applicant.

While these factors were not specifically expressed in the previous legislation, the Court would still usually consider the same when assessing a claim. However, the Court now must actively consider those factors.

The most significant (and controversial) change is that the wishes of the deceased person expressed in their will **must be the primary consideration** of the Court. This is a significant departure from the previous act where the contents of a will were one of several factors the court would consider.

The new legislation will also make it more difficult for several "classes" or groups of people to claim for further provision. The common threads are that proof of partial or entire dependency on the deceased by a claimant is required, or alternatively evidence of direct care and maintenance immediately prior to death. The definition of "dependency" is yet to be fully explained but it is safe to assume that it will include financial dependency.

For example, parents are now only able to claim from a deceased estate if they had cared for or contributed to the maintenance of the deceased person immediately before their death.

Former spouses or partners are excluded entirely if they reached an agreement of a prescribed kind with the deceased prior to the deceased's death. Although currently ambiguous, it is likely this agreement would be a formal property settlement through the Family Courts or a property adjustment order under state legislation.

Practical Effect

While the State Government has justified these changes to prevent "frivolous" claims and to limit claims to those by persons with genuine need, there is concern in the legal profession that such changes go too far and will act to prevent people with genuine

need from making claims.

While the law recognises the importance of a person's "testamentary freedom" (the right to dispose of one's estate through a will), such a freedom is also balanced around community standards regarding "the just and wise testator". For example, community standards might be that a person leaves part of their estate to a family member who has acted as their carer, or a child with a severe disability.

Unfortunately, a will can often be used as an instrument to air grievances against family members or indeed punishing a family member for an imaginary slight. A testator might exclude a family member with genuine need owing to the perception of a bad relationship (where that family member may not have done anything wrong) or a period of estrangement which the deceased imposed. Indeed, a person may be completely unaware that they have been excluded from a will and have no opportunity to address those allegations until after the deceased's death.

If a will includes a specific exclusion clause to prevent a person from receiving any benefit from an estate, the new legislation could make it difficult to overcome that exclusion. Limiting the court's ability to consider the circumstances in which the deceased made their will, including any reasonable explanations for a deceased's possibly mistaken views, could act to undermine the entire point of allowing for claims for further provision. Indeed, there seems to be a genuine risk of tossing out the proverbial baby with the bathwater if the legislation is instituted as proposed.

The Court has also begun implementing its own measures to attempt to ward off frivolous claims- cost orders. [For more information on costs in contested estates, be sure to read our previous blog here.](#)

If you are needing advice on a claim against an estate, whether as a claimant or a beneficiary, [contact our specialist Estates team.](#)

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