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# Contesting a Will:

## Understanding Your Rights and Options.

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# [01] Contesting or Challenging a Will

When people talk of challenging or contesting a Will, they generally mean one of two things:

1. A Family Provision Application (FPA); or
2. Overturning a Will because the Will is not genuine or valid.

FPA's are commonly known as "contesting a Will", while questioning a Will's validity is commonly known as "challenging a Will". This booklet provides an overview of both, including who can apply and on what grounds, the legal processes involved and what to expect from court proceedings. In law, a person who makes a Will is known as a testator and the person named in the Will to carry out the Testator's wishes is known as an Executor.

Whether you are considering contesting or challenging a Will, or defending a Will against a claimant, this guide will help you understand your rights, the elements of each action, and the potential outcomes. Please know that the information provided is limited to the law as it applies in Queensland. This guide is not legal advice and we encourage you to contact us if you have any questions about your particular situation.

## What is a Family Provision Application?

When someone passes away, their Will is intended to carry out their wishes and distribute their estate accordingly. However, certain family

members or dependents may feel that the will does not adequately provide for their needs.

In such situations Queensland law offers those people a remedy through what is known as a Family Provision Application (FPA).

FPA's provide eligible claimants with a mechanism to set aside a part of the estate for their support if they believe they have been inadequately provided for by the Will. This legal process balances the deceased's intentions with the legitimate needs of certain close family members and dependents. An FPA is made possible by the Succession Act 1981 (Qld), but the outcome is guided by previous court decisions and a sensible approach to negotiation.

## What if there is no Will?

FPA's can also be made in an estate where there is no valid Will. This situation is known legally as an 'intestacy' or an 'intestate estate'. Where someone dies without leaving a valid Will, the law provides strict rules around how the estate is to be distributed. Those rules establish a priority for family member beneficiaries to inherit set portions of the deceased's assets according to their relationship to the deceased. If those beneficiaries are not satisfied with the entitlement they are to receive, they may bring a FPA, in the same way as a dissatisfied beneficiary in a Will.

## [02] What are the Grounds for Making a FPA?

For Family Provision Application claims, the one critical element is that the Will does not make adequate provision for the proper maintenance and support of certain family members or dependents.

### Who can apply?

- Spouse and De-facto partners
- Children
- Stepchildren
- Other Dependents defined as a person whom the deceased financially supported or maintained and who is:
  - » any person younger than 18 (a minor);
  - » the deceased's parent;
  - » the other parent of the deceased's minor child.

### What is the time limit for making a FPA?

There are two critical dates to be aware of:



A potential applicant must give the estate notice of their intention to make a FPA within 6 months of the Testator's death;



The application must then be filed in court within 9 months of the Testator's death.

While the Court can extend the time limits in certain circumstances, the option to contest can be lost forever if either of these dates is missed.

## [03] What Evidence is Needed to Contest a Will?

When contesting a Will, comprehensive and relevant evidence is crucial to support a claim and present a clear basis to the application. This allows the estate to evaluate the strength of the FPA and assists the parties to negotiate a settlement with confidence.

If negotiation fails and the parties end up at trial, the Court uses the evidence to assess the merits of the claim and of any competing claims. The judge will then decide whether or not the FPA is successful and how much (if any) of the estate will be set aside to pay the claim. The strength of evidence therefore significantly impacts the outcome of every FPA, so its preparation and presentation are crucial. The types of evidence required to support an FPA include:

- Financial, being evidence of an applicant's:
  - » Income from all sources (such as wages, investment income, Centrelink payments);
  - » Expenses (such as bills, rent, fuel, loan repayment)
  - » Debts and/or liabilities (such as credit card balances, tax debt, outstanding loans);
  - » Personal assets (such as property, cash, investments, superannuation, vehicles);
  - » Other assets (such as business accounts, trusts)
  - » Information about anyone the claimant financially supports.
  
- Health, being evidence of an applicant's:
  - » Disabilities, injuries and illnesses
  - » Medical records and reports detailing any health conditions or and how these impact an applicant's work and life;
  - » Age and how this may affect the applicant's ability to continue working in his or her field;
  - » Dependent family members' health and the extent to which the applicant is responsible for them.
  
- Relationship with the Deceased, being evidence of an applicant's:
  - » Relationship history with the deceased, and how this has led to the FPA;
  - » Family background and how this impacts the applicant's current circumstances;
  - » Any financial or non-financial contributions to the deceased's estate.



This type of evidence will strengthen a claim and the more comprehensive and relevant it is, the greater the likelihood of success. If a FPA is commenced in court, the evidence is presented in an affidavit and supported with proof such as bank statements, tax returns, doctors' letters and personal correspondence. The executor and other potential claimants then have the opportunity to file their own affidavit evidence, telling their side of the story and addressing the applicant's claim.

## [04] What Happens if the Will Contest (FPA) is Successful?

A successful applicant in a FPA will negotiate a settlement or be awarded with further provision from the estate to provide for his or her adequate support and maintenance. This effectively means that the Will is rewritten, or the rules of intestacy are changed to satisfy the claim. This is either achieved by the parties entering a deed of settlement without the court's involvement, or by the court making an order to formalise the agreement or after a trial if there is no agreement.

## Can a No-Contest Clause prevent an eligible applicant from making a FPA?

A clause in a Will or separate document explaining why the deceased Testator left a reduced gift or no gift for a person in the Will, usually has little or no effect in defending against a FPA. There are very few reasons to legally justify disinheriting a person who satisfies the eligibility criteria to make a FPA.



## [05] Challenging a Will's Validity

Anyone with a connection to the deceased's person's estate, such as a potential beneficiary or disappointed family member, may apply to set aside a Will or part of a Will on the grounds of:

<p><b>Lack of Testamentary Capacity</b> – where the Testator did not have the mental capacity to understand the nature and effect of making their Will.</p>	<p><b>Undue Influence</b> – where the Testator was unduly influenced, improperly pressured or coerced into making the Will.</p>
<p><b>Fraud or Forgery</b> - where the Will was created under fraudulent circumstances or was forged, so that the Testator did not approve or know of the Will's contents, or was deceived into making it.</p>	<p><b>Improper Execution</b> - where the Will was not made according to the legal requirements of the Succession Act 1981 (Qld). Examples include where signatures and dates are missing, or words are unreadable.</p>

Compelling evidence must be produced to justify altering or setting aside a Will. If the court decides to set aside a Will because it is invalid, the deceased's previous Will comes into force. If there is no previous Will, the deceased is deemed to have died 'intestate'.

Challenging a Will and making a FPA are possible in the same estate. A Will may be set aside for invalidity and an applicant can then bring a FPA in relation to the previous Will.

## [06] Is Mediation or Negotiated Settlement an Option?

Negotiating a settlement early on, should always be attempted, although it is not always an option. For instance, family members are sometimes not willing to negotiate because of their history, or there may be complex legal issues requiring the court to intervene and make orders.

Where negotiation fails, mediation is a mandatory component of FPAs and a valuable tool in challenging a Will. Mediation is an excellent opportunity for parties to resolve their disputes without the need for lengthy and costly litigation. This approach assists the parties to resolve the dispute and avoid the cost, distress and uncertainty of a court trial.

At Greenhalgh Pickard, we are experienced in guiding clients through mediation, leveraging our expertise to ensure that disputes are settled efficiently and cost effectively.

## [07] How Long Does the Process Take?

Matters resolved by negotiation can settle within a couple of weeks, but if a dispute ends up going to trial, it may be months or even years after the application is made before the judge makes an order to finalise the application. A focus on early resolution by negotiation or mediation is therefore always encouraged. This avoids the delay, cost and uncertainty of contested court proceedings.

## [08] Greenhalgh Pickard's No-win, No-fee Policy

Greenhalgh Pickard Solicitors & Accountants offer a No-Win, No-Fee policy when acting for applicants who have good prospects of success in a FPA or to challenge a Will's validity. This means that the client does not pay professional fees until we achieve a successful outcome for them.

### CONTACT US

Navigating the complexities of estate litigation such as FPAs and challenges, can be daunting and difficult so proper legal advice and guidance from the start are crucial.

Our experienced team is equipped with the in-depth knowledge to provide you legal advice surrounding your circumstances. If you have found yourself in the position of considering a claim on a loved one's estate, contact our team today on 07 5444 1022 for an obligation-free discussion to ensure you achieve the best possible result.







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