# Contesting Estates – when they happen and who has a claim?

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If a person dies with a valid will in place, his or her estate is usually distributed according to their wishes. This is the norm, and we emphasise that most estates are largely uncontested or have minor issues based on the understanding of the underlying legal principles which are easily resolved.

There are two main types of claims, firstly where someone feels that they should have been provided for and secondly where the will maker's mental state is questioned.

## Who is eligible to make a provision claim?

Generally, these claims occur when there is a valid will, but someone has been or feels as though they have been left out of the will or not been adequately provided for. While this may seem like a broad category, the person making the claim must fall under the definition of an 'eligible person'.

'Eligible persons' are usually limited to spouses both married or de facto, at the time of death, children both minor and adult, a person who was at any particular time wholly or partly dependent on the deceased or a grandchild who at some time was a member of the household of which the deceased was a member.

While a person may fall into the category of an eligible person, this does not guarantee that their claim for provision will be successful in Court. There are many factors that the Court considers, such as the circumstances surrounding the making of the will, whether it is wise and just to award the claim and whether the will maker had a moral duty to look after the claimant.

## The will maker's mental state at the time of making the will.

This avenue of estate claims can be split further into two main categories, the capacity of the will maker at the time, and whether the will maker was under any undue influence.

## Capacity

The subject of the will maker's capacity at the time of making a will has been a source of litigation for centuries. The ruling in the case of Banks v Goodfellow provides the principles to what must be established to test whether a will maker has capacity.

The capacity test requires a testator to understand:

1. The nature of the will and its effect;

2. The extent of the property of which they are disposing under the will; and
3. The persons for whom they would usually be expected to provide.

When bringing a case to Court, the case is determined by proving a lack of capacity. To prevent such claims, when a will is being made, it is important to have an experienced Estate Lawyer who will know which steps to take to assess and record matters that may be relevant to potential capacity issues.

## Under any undue influence

Coercion is a big issue in estate disputes. These come in the form of claims such as ‘under duress’ or ‘undue influence’.

People are living longer, becoming frail in the later years, becoming dependent on family members.

The general test being whether the will maker was coerced into a decision about their will, meaning if they were able to speak their true thoughts, they would say “this is not my wish, but I must do it”.

This is often due to the perceived notion that those who care for them or those who they are dependent on will be upset or withhold the help that they have been providing for them in their time of need.

### More Information

If you wish to obtain further information, advice or assistance in updating your will or in regard to contesting estates, please contact one of our Will Lawyers in our Estate Planning team at Matthews Folbigg on 9635 7966, or simply use the contact form below.

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