

# Challenging an unfair will or distribution under the *Administration Act*

If you have been a dependant of someone who has died and you do not receive a fair share of their property, this infosheet may help you.

This infosheet outlines your rights and the procedures involved in challenging an unfair will. You will need help from a lawyer to make an application or to oppose an application made by someone else.

## I think I have not received a fair share of a close relative's property after their death. What can I do?

If you are a dependant of someone who has died and have not received a fair share of the deceased's property under the will or under the *Administration Act 1903* (WA) ("the Act"), you may be able to challenge it. You should get legal advice before starting a challenge at court.

### What if there is no will?

If there is no will then the property may be distributed according to the Act.

## When will the court interfere with the way a person leaves their property in a will or with the distribution under the Act?

The Supreme Court will not usually interfere with the way a person leaves property in a will or with the distribution under the Act. However, it can interfere if it thinks the will, or the distribution,

does not properly look after the needs of a person the deceased had a duty to provide for.

## Do I need a lawyer to apply to redistribute a deceased estate?

You will need a lawyer to apply – it is a difficult process.

You will have to prove:

- your relationship to the deceased
- why you believe you are entitled to a share or a larger share of the property, and
- why you believe the will (or if there is no will, the law) does not provide well enough for you.

If the application is for a child, this information must relate to the child.

## Who may apply?

To apply to the Supreme Court of WA to alter a will or the distribution under the Act you must be one of the following:

- a person who was married to the deceased immediately before their death
- a person living as the de facto partner of the deceased immediately before their death

- a former married partner or de facto partner who was receiving, or entitled to receive, maintenance payments at the time the person died
- a child of the person living at the time of the deceased's death, or a child born within 10 months after the deceased's death
- a grandchild of the deceased:
  - who at the time of death of the deceased was being wholly or partly maintained by the deceased, or
  - who was living at the time of the deceased's death and one of whose parents was a child of the deceased who died before the deceased, or
  - who was born within 10 months after the deceased's death and who had a parent of the deceased who died before the deceased
- a stepchild of the deceased where the deceased died on or after 16 January 2013:
  - who was being maintained wholly or partly or was entitled to be maintained wholly or partly by the deceased immediately before the deceased's death, or
  - where the deceased received or was entitled to receive (other than as a creditor) property from the estate of a parent of the stepchild valued at the time of the parent's death at more than the amount specified in the *Family Provision Regulations 2013* (WA)
- a parent of the deceased.

Western Australian law recognises:

- same sex de facto relationships, and
- de facto relationships where either of the parties are married to someone else or in another de facto relationship.

The definition of "parent" under West Australian law also includes the following:

- a person who is a parent within the meaning of the *Artificial Conception Act 1985* (WA),
- a person who is an adoptive parent under the *Adoption Act 1994* (WA), and
- a person who is a parent in a relationship of parent and child that arises because of a

parentage order under the *Surrogacy Act 2008* (WA).

Get legal advice if you are not sure if you are eligible to make an application.

## When can I apply?

You must apply within 6 months of the grant of probate of the will.

If there is no will, you must apply within 6 months of the grant of "Letters of Administration".

The 6-month time limit may be extended in some circumstances. Extensions are quite rare. You should make every effort to apply within the time limit.

If you are outside the time limit get legal advice as soon as possible.

## What happens after an application is lodged?

These cases are often settled at, or as a result of, a mediation conference. The cases are initially case managed so that they are ready for mediation. If mediation does not resolve the case, then directions will be made to make sure that the case is ready to be heard and determined by a judge or master. A master is a legal person with the power to make some decisions at court.

The court will fix a time to hear the application.

## What will the court consider?

If the case goes to a hearing, the court will look at a number of factors including:

- how any change to the will may affect other people in the will
- the sort of property involved and its value
- the ages of the surviving dependants
- the relationship of other dependants to the deceased
- the needs of other dependants and your needs, and
- the way you acted towards the deceased and your relationship in general.

If you are a former married partner or former de facto partner who made no attempt to get maintenance from the deceased before their death, the court is unlikely to change the way the deceased's property is distributed.

The court will decide whether or not it will interfere. Applications are not always granted. Sometimes they may be refused.

### **What if I am affected by a court application?**

If the court orders that someone should receive a share or a larger share of the deceased's property then someone else will have to receive less.

If an application is made to the court, each person whose rights under the will or the Act will be affected should be joined as a defendant.

If you receive a summons you should get legal advice about your rights.

If you receive a summons and do not wish the court to interfere with the distribution of the property, you will need to file a document called

an "Appearance" at the court. The time limit for filing an appearance will be on the summons.

Get legal advice before filing an appearance, or where that is not possible as soon as you can afterwards. You will need a lawyer to help you oppose the application in the Supreme Court.

If you do not file an appearance the court may make a decision in your absence. You will not have a chance to present evidence opposing the application. If this happens and it is a problem for you, seek legal advice as soon as possible.

### **Where can I get more information?**

- Legal Aid WA does not give legal advice in this area.
- Contact the Law Society of WA on (08) 9324 8600 for a referral to a lawyer who specialises in this area.

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