



Attacks Against Your Estate Plan

Your wealth and assets may be attacked on your death by certain eligible claimants. This means that your assets may not pass to the people who you intend to benefit from your estate, but may instead go 'L-shaped' (meaning they may pass to certain people who you may not have intended to benefit, such as an estranged child or your short-term de facto partner, for example).

If your estate is attacked after your death, expensive and time-consuming litigation will often ensue. It is not uncommon for the litigation to cost over \$300,000. This can have the effect of drastically diminishing the value of your estate and can cause significant pain and heartache for your intended beneficiaries. The good news is that these impacts can be avoided or minimized if adequate estate planning measures are implemented at the outset.

In this factsheet we consider Queensland, New South Wales and Victoria specifically, so you should seek our specific advice if you live or hold assets elsewhere.

FAMILY PROVISION CLAIMS

Certain eligible persons may bring an application to the Court after your death for a share of your estate (or for a greater share than that left to them under the Will) on the basis that 'adequate provision' has not been made for them.

In most States in Australia, this type of application is called a Family Provision Application ('FPA').

Who is eligible to bring an FPA?

Who can bring an FPA depends on two things: firstly, where you are living at your date of death (specifically, where you are 'domiciled') and secondly, where you hold your assets. Each State in Australia has a list of potential eligible applicants under the legislation applicable to that State.

In all States, your **spouse** (married, registered relationship and certain de facto partners) and **your own children** are eligible. Depending on where you live and where you hold assets, other eligible claimants may include¹:

- + Your short-term de facto partner;
- + Your former spouse;
- + Your step-children²;
- + Certain categories of financial dependents (some examples include your parent, your registered caring partner, your grandchild, a member of your household³;
- + Others, such as someone living in a close personal relationship with you⁴, someone who believed for a portion of their life that they were your child⁵, someone who was at any time in your life (not necessarily at the date of your death) financially dependent upon you and also a member of your household⁶.

In terms of what constitutes 'adequate provision', the provision should be adequate with reference to the value of the estate, the applicant's estate, and the effect that any order would have on the other beneficiaries. The Court has a very wide discretion when applying this principle, and will look at all the facts at the date of death and the financial and moral entitlements and needs of the applicant, balanced against those of the other beneficiaries. The Court may also consider any disentitling conduct of the applicant. For example, in the case of an estranged child making a claim against their deceased parent's estate, the circumstances surrounding the estrangement may be taken into account in determining whether any provision (or further provision) should be made to that child from the estate.

What can be attacked?

In all Australian States, the assets that form part of your estate are available for a Court to make an order for further provision of a successful applicant. The assets forming part of your estate include any assets that you own in your sole name (such as bank accounts, shares and real property held by you solely) or your interest in any property that you hold as tenants-in-common with another person. This would include your superannuation, if it is paid into your estate on your death (see our Factsheet on '[Estate Planning for your Superannuation](#)' for more information).

If you live in New South Wales, or hold assets in New South Wales, then the Court may also make an order (called a 'notional estate order') which can result in assets within your power and/or control that do not form part of your estate being called upon to make provision for a successful applicant. This may include your superannuation where paid to a beneficiary directly outside of your estate, assets held in a family trust which you control and assets held jointly with another person (such as a property that you own as joint tenants with another person or the proceeds of a jointly held bank account). There is a chance, because of a push for uniform succession laws throughout Australia, that the New South Wales model of notional estates will be introduced into other States in time.

¹ Please note these categories are generalised and there are differences between Qld, NSW and Vic. E.g. de factos are only eligible in Qld if they have been cohabiting for 2 or more years OR they are financially dependent and share a child under 18 years; in Vic only if they have cohabited for more than 2 years OR share a child together; while in NSW there are no such stipulations of time or dependence. Refer to our advice to you regarding who specifically is eligible to bring an FPA against your estate, based on your instructions to us.

² In Qld & Vic, but only in NSW if they fulfil other criteria, such as having been financially dependent upon you and a member of your household at some point in your lifetime.

³ The category of 'financial dependents' differs significantly between States. Refer to our advice to you for your eligible claimants.

⁴ In NSW.

⁵ In VIC.

⁶ In NSW.

Options to minimise the risk of attack

Some options available to you to reduce the risk of attack against your estate (and possible notional estate) assets are set out below. Any number of combinations of the below strategies may be suitable for your needs, and care should be taken when formulating an appropriate strategy.

- + Gift assets to your intended beneficiaries during your lifetime
- + Adequately provide for all eligible applicants
- + Statutory declarations
- + Mutual Wills deed
- + Hold assets jointly
- + Family trusts
- + Direct planning for your superannuation and/or life insurance

It is also important to point out that some of these strategies may be less effective in New South Wales (due to the potential for a Notional Estate order as set out above).

In Summary

As you can see, all of the risks of attack against your wealth need to be weighed up in order to determine what most concerns you and an estate planning strategy needs to be implemented that protects your intended beneficiaries while also being mindful to maximise the taxation opportunities. Estate planning advice is essential and Estate First Lawyers can provide you with comprehensive advice regarding your options. Please contact us on 1300 132 567 or email us at info@estatefirst.com.au.