

Estate Challenges

General Advice Disclaimer

Information provided in this document is general in nature and does not constitute financial or legal advice.

Every effort has been made to ensure that the information provided is accurate, but information may become outdated as legislation and new government announcements are made. Individuals must not rely on this information to make a financial, investment or legal decision as it does not take into account their personal circumstance.

Before making any decision, we recommend you consult a licensed adviser or legal practitioner to take into account your particular objectives, circumstances and individual needs.



What is an estate challenge?

While you are allowed to draft your will any way you like, the law allows certain parties to apply for further provision from your estate. Essentially, these individuals are trying to receive benefit from your estate that they were not left, or, wanting more than they were entitled to under your estate plan.

Who can challenge my estate?

The parties that can apply to the court for further provision from your estate ('estate challenge') vary from State to State, but generally include:

- your spouse (including former spouses and de-facto spouses)
- your children (including step-children)
- any person that can otherwise prove they were dependent on you

Adequate provision

Provided the person challenging the estate is eligible to apply to the court for further provision, they must then go about proving to the court that they should receive further provision.

There are a series of different factors the court looks at in determining whether an eligible person has been adequately provided for under the estate.

These include (but are in no way limited to):

- the size of the estate
- the intentions of the deceased in relation to their estate
- the needs of the other beneficiaries of the estate, including their physical and financial needs the physical and financial status and needs of the eligible party challenging the estate;
- the nature and duration of the relationship between the deceased, the other beneficiaries and the eligible party, including any evidence of 'disentitling conduct';
- any provision made by the deceased to the eligible party during the deceased's lifetime;
- whether there were any circumstances showing any contribution of the eligible party to building up the estate or the welfare of the deceased or their family; and
- any other matters the court thinks relevant.

What happens if my estate is challenged?

The effect of an estate challenge varies depending on the circumstances. However, the following issues often arise when your estate is challenged:

- your estate planning objectives may not be fulfilled, including adverse effects or reduced provision for the intended beneficiaries of your estate

- in defending any litigation, legal fees (fees often of significant sums may be incurred) can often be incurred by the estate, potentially including the legal fees of the person challenging the estate
- significant delays in time can occur where litigation issues arise as an estate cannot be administered (and the assets distributed) until all litigation has ceased

What part of my assets can be challenged?

In most States in Australia, only those assets that belong to you personally can be challenged in an estate challenge.

Depending on the circumstances, this can generally mean that the following assets may not be affected:

- Superannuation benefits
- Assets held inside trusts or structures
- Assets held as joint tenants

For those that live or have assets in or connected with New South Wales, separate rules apply ('notional estate rules'). The notional estate rules allow a court to consider assets that do not generally form part of your personal estate (such as those listed above).

The notional estate rules also allow a court to order estate assets to be 'clawed back' in certain circumstances.

What can I do?

The 'bad news' is that due to the imposition of legislation in each State regarding estate challenges, there is nothing you can do to prevent a person that is eligible from challenging your estate.

There are steps that may be available to minimise the likelihood of a successful estate challenge. Please contact us if you would like to talk to one of our estate planning lawyers regarding the options available to you.

Where appropriate, couples should also consider seeking advice from a family law specialist about whether they should put in place a financial agreement to confirm many agreement that they have reached regarding the division of assets on separation and death. If you would like us to provide you with contact details of family lawyers, please let us know.

