

Time limits for family provision claims when contesting a Will

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There are strict time limits that apply for an eligible person to contest a Will. Time limits can however be extended to enable a family provision claim to be made outside of the prescribed time period.

This blog explores what a family provision claim is, the time limit for an applicant to bring a claim against an estate, and factors that the court will take into consideration when determining whether time should be extended to permit the applicant to issue their claim outside of the prescribed time period.

What is a family provision claim?

A family provision claim ('FPC') is a claim which can be issued by an eligible person pursuant to the *Administration and Probate Act* 1958 (Vic) ('the Act') in the Supreme or County Court of Victoria.

The eligible person would need to satisfy the court that they have not received adequate provision in a Will (or from an estate where the deceased left no Will) for their proper maintenance and support. The court can, at its discretion, order that provision, or further provision, be made to the applicant. This provision can be made out of a Will or an estate if the court is satisfied the Will does not, or the intestacy rules do not, make adequate provision for them.

You can learn more about family provision claims in our earlier blog, 'How to contest a Will".

Why is there a time limit for family provision claims?

It is in the interests of justice to impose a time limit on the ability of an eligible person to bring an FPC against a deceased estate.

The beneficiaries of a Will or an estate are entitled to receive their inheritance in a reasonable time frame. They are also entitled to arrange their affairs and have the opportunity to utilise their inheritance within a prescribed time frame.

An Executor of a Will (or Administrator where there is no Will) should therefore administer an estate promptly and distribute the assets of the deceased in accordance with the Will or the rules relating to Intestacy. An FPC will delay this process, so time limits have been imposed by law.

Time limit to bring a family provision claim

An eligible person cannot bring an FPC unless the claim is made within six months after the date of grant of representation of an estate. An application can be made at any time within this six-month period.

An FPC cannot be made before a grant of probate or letters of administration of an estate has been made as there is no right to make such an application prior to that time.

A ‘month’ means a calendar month. Therefore, if a grant of probate or letters of administration is made on 1 January, the six-month period will commence to run on 2 January and the time limit to bring an FPC would cease on 1 July. Where the time limit for issuing an FPC expires on a public holiday or a weekend, the time limit expires on the day following the holiday or weekend.

Depending on the nature of an application for a grant of probate or letters of administration, either the court or the registrar of probates will grant probate or letters of administration of the application.

Probate or letters of administration is deemed to have been granted:

- when granted by the court, when the order for the grant has been authenticated and filed in the office of the registrar of probates; or
- when granted by the registrar of probates, when the order for the grant has been signed by him or her and sealed with the seal of the court.

Extension of time claim in family provision claims

The court can order that the time limit for bringing an FPC be extended.

An eligible person can bring an application under Section 99 of the Act seeking an order that they be granted leave (i.e. permitted) to bring their FPC against the estate outside of the prescribed time period.

An application for an extension of time can be served on the legal personal representative of the estate, that is, an executor in the case of a grant of probate or administrator in the case of a grant of letters of administration.

Once the application is issued, the court may make orders directing that the application and relevant affidavit material be served on persons who have an interest in the proceedings, such as beneficiaries of the Will or the estate. This means that these persons will have an opportunity to defend and protect their own interests and submit their evidence as to reasons why the extension of time application should be rejected by the court.

Can an extension of time in a family provision claim be denied?

The Act provides two circumstances where an application for extension of time will not be permitted by the court.

1. Where the deceased's estate has been completely administered and the assets finally distributed.

If the estate has already been distributed to the beneficiaries (i.e. so long as the six-month time limit from the date of the grant of probate or letters of administration has elapsed), there is no longer an estate against which an order for provision can be made and therefore it would be pointless for the court to extend time.

1. Where part of the deceased's estate has been distributed, an extension of time application will not affect distributions made prior to the application for extension of time being made.

Therefore, in circumstances where some of the estate has been distributed once the six-month period has passed since the grant, an order cannot be made against the part of the estate which has already been distributed. This does not prevent an order being made against assets of the estate which have not been distributed.

There can be some complexity surrounding whether or not an estate has been finally distributed so you should seek legal advice promptly.

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Factors court will consider when determining whether to grant an extension of time

Leaving aside the question of whether the estate has been finally distributed, the main factors a court can take into consideration when deciding whether or not to extend the time period are:

- The length of the delay in bringing an extension of time claim;
- The explanation for the delay in bringing the family provision claim (for example, you were ignorant of your right to make an FPC);
- Whether there is any prejudice or hardship to the beneficiaries in permitting the extension of time claim;
- The overall strength and merits of the applicant's FPC; and
- Whether there has been unconscionable conduct by the applicant.

The power to extend time is discretionary. In exercising its discretion, the court will take into account all of the circumstances of the application. However, the court does not need to be satisfied of all of the above factors, and it will weigh each of the factors in determining whether extending time is in the interests of justice.

Other factors the court may take into account include:

- whether an applicant reasonably misunderstood the amount of (or lack of) their entitlement under the deceased's Will;
- whether an applicant lacked knowledge of the size and extent of the deceased's estate;
- where an executor has withheld information such that the applicant is not able to determine their legal rights within the prescribed time period;
- failure of a solicitor to advise an applicant properly; and
- whether time expired whilst the executor and/or beneficiaries were engaged in negotiations with the potential applicant about their claim.

Other considerations when considering a family provision claim

It is important that you do not let the time limit expire even if you have reached an informal agreement with the executor, administrator or the beneficiaries or are engaged in negotiations before that time.

Your solicitor can issue your FPC but not serve those proceedings on the relevant parties (i.e. formally providing the court documents to the executor or administrator) whilst negotiations are continuing in order to protect your rights. This avoids any stress, inconvenience or risk of having to later make an extension of time application.

If the time limit has expired and it is necessary to bring an extension of time claim, the extension of time claim must be brought promptly as soon as you become aware that you can make a family provision claim. Therefore, if you have a strong case for the court to extend time but you have, without good reason, delayed in bringing your extension of time application once you become aware of your right to contest a Will, the court may refuse to grant the extension.

A court may also refuse to grant an extension of time to an applicant who is aware of their right to contest a Will and the applicable time limit but chooses to delay in bringing an FPC until after the time limit has expired.

Executor or administrator refusing to provide you with a copy of the Will

If an executor of a Will is refusing to provide you with a copy of the deceased's Will and you are unsure whether you are included in the Will, your solicitor can assist you to obtain a copy to ensure that, if you do have a family provision claim, your claim is brought within the applicable time limit.

Get help from a deceased estates lawyer

It is prudent to seek legal advice from a solicitor promptly following the death of a family member or person close to you if you have been left out of or do not receive enough from their Will.

You should also seek legal advice if you are unsure about your entitlement to make a family provision claim under the intestacy rules if your family member or person close to you did not leave a Will.

Obtaining advice in a timely manner will ensure that your claim is brought within the applicable time limit. Smith Family Law will be able to assist you in navigating the complexities surrounding the time limit in family provision claims and advise you of your options, including making an extension of time application if the time limit has already expired.

Contacting Smith Family Law

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This blog is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.