



Fact Sheet 5 – What further criteria, if any, should apply?

What other criteria apply to eligible family members seeking to make a family provision claim in South Australia

As noted in Fact Sheet 2, laws like the *Inheritance (Family Provision) Act 1972 (SA)* were originally designed to ensure that deceased persons did not leave dependant family members inadequately provided for and totally dependent on the State. For this reason, the idea of ‘dependence’ is the premise of these laws and is reflected in section 7 of that Act. This section requires a claimant (that falls within one of the section 6 categories) to show that he or she was **left without adequate provision for his or her proper maintenance, education or advancement in life**.

If this threshold is met, then the court *may* (but does not have to) make an order that the claimant receive a proportion of the deceased person’s estate to provide for the claimant’s maintenance, education or advancement.

The High Court has described this as a ‘two stage’ process (for example see *Singer v Berghouse* (1994) 181 CLR 201, 209-210).

The first step is work out whether the claimant has been left with ‘adequate provision’ for his or her ‘proper maintenance, education or advancement in life’. These terms are not defined in the Act, and therefore their meaning has to be understood by looking at the cases in which the courts have applied this provision.

If the answer is no, the second step is for the court to decide what ‘adequate provision’ would be.

This involves having regard to all relevant circumstances in the individual case, which could include the relationship between the deceased person and the claimant, and the deceased person and his or her other family members who may be provided for in the will. It could also involve looking at the property and income of the claimant, and/or the size of the deceased’s estate.

Because the court is given the discretion to make orders under this provision, a range of different judicial decisions have been made, sometimes with startling results. For example, there have been instances of relatively wealthy adult children receiving small portions of a deceased person’s rather modest estate (such as in *Hellwig v Carr* [2009] SASC 117).

This has led some lawyers and members of the public to take the view that, in practice, these laws have given way to a culture of entitlement (even greed) among family members, rather than a need to demonstrate genuine dependency. Others have suggested that ‘dependency’ tests for family provision claims can encourage a culture of ‘bludging’ off wealthy parents or grandparents in order to satisfy a dependency test upon their death.

What about in other States and Territories?

Efforts have been made by law reform bodies around Australia to develop standard eligibility criteria to apply to family provision claims, and to set out in detail the factors to which the court should have regard when exercising its discretion to make an order.

For example, under the Victorian *Administration of Probate Act 1958*, in order to be eligible for a family provision order, an eligible family member must satisfy the court that (a) he or she was wholly or partly dependent on the deceased for his or her proper maintenance and support and (b) that at the time of death, the deceased had a moral duty to provide for his or her proper maintenance and support.

When considering whether to make an order under the Victorian Act, the court must take into account the following factors (set out in section 91A):

- > the degree to which, at the time of death, the deceased had a moral duty to provide for the claimant; and
- > the degree to which the distribution of the deceased's estate fails to make adequate provision for the proper maintenance and support of the claimant; and
- > in the case of certain categories of family members, such as adult children and step children, the degree to which the claimant is not capable, by reasonable means, of providing for his or herself.

In addition, the Victorian law provides that the court may have regard to a range of factors (set out in sections 91 and 91A) including:

- > the deceased person's reasons for making the dispositions he or she did in the will;
- > any other evidence of the deceased's intentions in relation to providing (or not providing) for certain family members;
- > any family or other relationship between the deceased and the claimant, including the nature of the relationship, and if relevant, the length of the relationship;
- > any physical, mental or intellectual disability of any eligible family member or any beneficiary of the estate;
- > the financial resources, including earning capacity, and the financial needs at the time of the hearing and for the foreseeable future of any eligible family members or any beneficiary of the estate;
- > any contribution of the claimant in building up the estate or taking care of the deceased or his or her family;
- > the character and conduct of the claimant or any other person.

SALRI is interested in your thoughts on the appropriate criteria which should apply in determining claims to family provision in South Australia under the *Inheritance (Family Provision) Act 1972 (SA)*, keeping in mind the categories of family members discussed in Fact Sheet 4.

Discussion Questions

1. Is the current South Australian test for eligibility for potential family provision orders (that asks whether the claimant has been left without adequate provision for proper maintenance, education or advancement in life) still appropriate?
2. Should more detailed criteria be applied to those seeking to make family provision claims in South Australia?
3. Is the current South Australian approach, which provides the court with a broad discretion to make an order in favour of an eligible person, appropriate or should the law set out the factors to which the court must and may have regard?

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4. Should South Australia require claimants to show dependence on the deceased person? If so, how should 'dependence' be defined?
 5. Do you think including a dependence requirement risks encouraging dependence on the deceased person during their lifetime, in order to benefit after their death?

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