

What is a Wills Variation Claim?

In a Wills Variation claim, a “claimant” (see below for who qualifies) may bring a legal action to challenge, or contest, the Will, and if the Court sees fit, the Court may vary the terms of the Will.

Who May Bring a Wills Variation Claim?

There are limits on who can challenge the Will. Will challenges may only be brought by:

- spouses (married or “in a marriage-like relationship”); and
- children (biological and adopted children, but not including step-children unless adopted).

Even an adult child who is financially wealthy in his or her own right may challenge a parent’s Will.

Timeline for Bringing a Wills Variation Claim

A Wills Variation claim must be started within 180 days of the Grant of Probate.

What Kinds of Claims are Considered?

When assessing whether it will alter the Will, Courts consider two categories of claims that the claimant might have concerning the Will:

1. A legal claim - this is a claim that is recognized elsewhere in the law. For example, a spouse’s claim to spousal support or property division, arising from family law obligations, would be considered a legal claim, as would a claim that the testator’s estate has been “unjustly enriched” by the claimant’s efforts (i.e. the claimant’s work as a child or adult which helped build up the estate; and
2. A moral claim – this type of claim is not based on the law but is grounded in morals or societal expectations. For instance, it can be generally assumed that a person would have a moral obligation to give the bulk of his or her estate to his or her children, in absence of extenuating circumstances. Likewise, there could be a moral obligation to support a long-time spouse, above and beyond the family law spousal support guideline amounts, i.e. above the legal obligation.

The general rule is that legal claims have priority and must be satisfied before moral claims. For instance, a spouse’s claim based on property division would have priority over an adult independent child’s claim, so if the Estate were small, the spouse’s claim might be for the entire Estate.

What Kinds of Factors are Considered?

Once the legal claims are satisfied, the Court then has to weigh the moral claims and assess whether the Will has made “adequate, just and equitable” provision for the claimant. In assessing a moral claim, the Court will look at a number of factors, including the following:

- The importance of the will-maker’s autonomy;
- The size of the Estate;
- Contributions made by the claimant and expectations of the claimant to receive something from the Estate;
- Misconduct/poor character of the claimant;
- The strength of competing moral claims;

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- The will-maker's reasons for the disinheritance or smaller than expected gift; and
- Estrangement/neglect between the claimant and will-maker; Gifts and benefits made by the will-maker during his/her lifetime. This means that if the will-maker gives away a large portion of his or her wealth before death to one beneficiary, the others may receive a larger share of what is left.

If the Court decides that the Will fails to provide "adequately, justly, and equitably" for the claimant, then the Court then varies the Will to give a greater share to the claimant. In general, there may be a range of outcomes that properly provide for the claimant. Because of the notion that the Courts must strive to respect the autonomy of the will-maker, the Court's role is to make the smallest variation required to move the Will into the range of appropriate outcomes.

Summary

Because of the long list of factors that may be considered by the Court, and the fact that there is no agreement among judges as to which factors are more important than others, the outcomes in these cases are extremely varied and fact specific. In every case, there are reasons that suggest a large variation for the claimant, and other reasons that suggest only a small variation or no variation at all. This can make this litigation particularly challenging and, unfortunately, often inhibits settlement.

Questions? Contact a member of our experienced [Estate Team](#):



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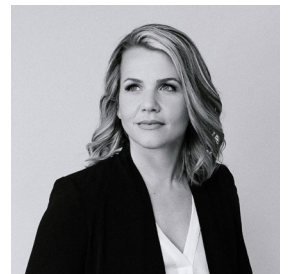
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