

# Crilly Lawyers Information Sheet

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## Family Provision Applications

A family provision application (also known as a “testator’s family maintenance application” or “maintenance application”) is an application made by a class of people to the Court for an order that provision be made for their proper maintenance and support from the estate of a deceased person pursuant to Part 4 of the *Succession Act* 1981 (“the Act”).

The Act provides that where any person dies and adequate provision is not made from the estate for the proper maintenance and support of the deceased person’s spouse, child or dependant, the Court may, in its discretion, on the application by those persons, order that such provision as the Court thinks fit be made out of the estate for their benefit.

### Who can apply?

A deceased person’s spouse, child or dependant, who considers that adequate support has not been made for his or her proper maintenance and support, can apply to the Court for an order that provision be made out of the estate for their benefit.

The Act defines the terms spouse, child and dependant. A deceased person’s spouse includes their husband, wife, de-facto partner, and dependant former husband or wife. A deceased person’s child includes a stepchild or adopted child. A dependant includes a deceased person’s parent or any person under 18 years who was wholly or substantially maintained or supported by the deceased at the time of the deceased’s death.

### What are the time limits for making an application?

Unless the Court otherwise directs, applications for family provision must be made within nine months of the date of death of the deceased.

Notice of an intention to make an application should be given to the executors of the estate within six months of the date of death.

The Court can exercise its discretion to allow an application to proceed if such application is made more than nine months after the date of death of the deceased, but such applications are ordinarily dependant on the estate remaining intact and not having been administered.

The Act provides that no action shall lie against the executors of an estate by reason of the executors having distributed any part of the estate, if the distribution was properly made by the executors not earlier than six months after the deceased’s death and no notice of any application or intended application for family provision in relation to the estate had been received.

An application for family provision that is commenced within nine months of the date of death of the deceased may therefore be defeated if the deceased’s estate had already been distributed prior to notice being received.

### To which Court is an application made?

An application for family provision can be commenced in either the District Court or the Supreme Court, depending on the amount of provision being sought.

The monetary limit of the District Court is \$250,000.00.

If the net estate exceeds \$250,000.00, an application is generally made to the Supreme Court if there is some prospect the Court will order the entire estate (or more than \$250,000.00) be paid to the applicant.

## What is the procedure for family provision applications?

### 1. *Applicant to file and serve originating application and affidavits*

An application for family provision is commenced by filing an originating application and a supporting affidavit with the Court and serving those documents, together with a draft directions order, on the executors of the estate.

The applicant's supporting affidavit must:

- (a) set out the basis on which the applicant is entitled to apply for family provision;
- (b) set out details of the applicant's assets and liabilities and sources of income;
- (c) identify all persons who fall within the definition of spouse, child and dependant of the deceased;
- (d) identify all persons having an interest in the estate who must also be served with the material;
- (e) provide information as to the assets and liabilities of the estate from which further provision might be made for the applicant;
- (f) contain an estimate of the applicant's costs of making the application and the applicant's costs through to a final hearing;
- (g) include any other material that may be necessary to support the application.

A draft directions order, which sets out a proposed timetable for the proceeding and a dispute resolution plan, must also be served with the supporting affidavit.

The dispute resolution plan must specify a timetable of the steps to be taken towards the early and inexpensive resolution of the dispute. These steps include informal discussions between the parties, defining the issues, exchanging any relevant documents and information, meetings or conferences, as well as a proposal for mediation or case appraisal.

### 2. *Executors to serve material on any persons affected by application*

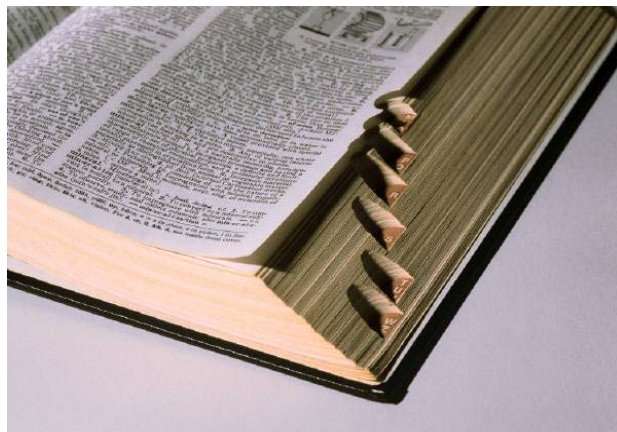
The executors are required to serve copies of the applicant's originating application and supporting affidavits on any persons who may be affected by the application. This includes any beneficiaries or potential beneficiaries under the Will who have not been named as a party to the proceeding.

### 3. *Executors to accept or reject draft directions order*

Within 14 days of service of the originating application, supporting affidavits and draft directions order, the executors are required to either:

- (a) sign and return the draft directions order to the applicant; or
- (b) advise the applicant of any matter in the draft directions order with which the executors disagree and put forward an alternative proposal.

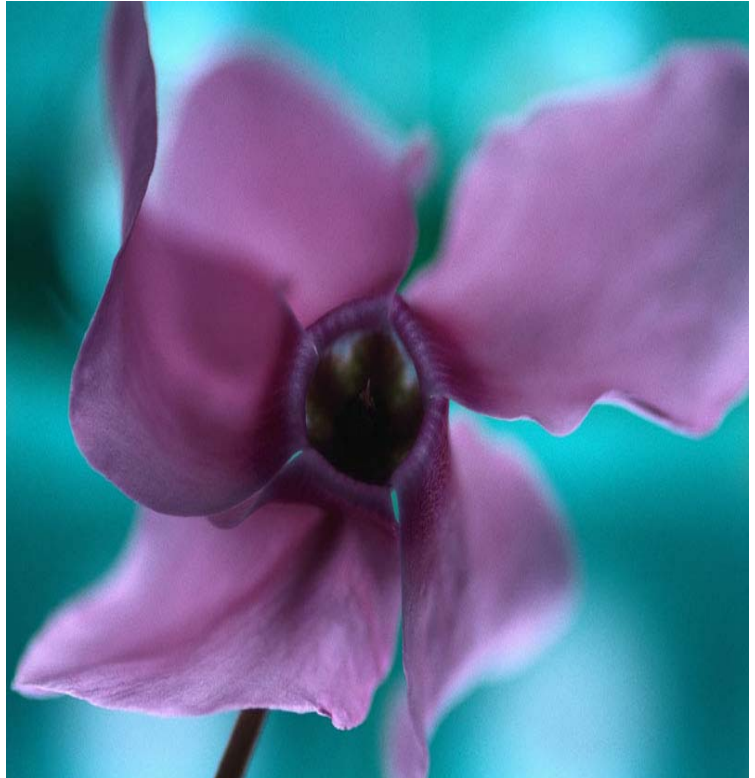
Within 7 days of receipt of a directions order signed by both the applicant and the executors, the applicant is required to file the document with the appropriate Court registry and the directions order becomes operative from that date.



4. *Executors (and any other parties) to file affidavits in response to applicant's material*

The executors and any other persons likely to be affected by the application are then required to file affidavits in response to the matters alleged by the applicant in accordance with the timetable specified in the directions order. The affidavits are to include:

- (a) a list of the assets and liabilities of the estate;
- (b) the executors' estimate of costs of administering the estate and the costs of opposing the application through to trial;
- (c) any information the executors have about the assets, liabilities and sources of income of beneficiaries of the estate who have a competing claim on the estate;
- (d) any other material relevant to matters raised by the applicant in the application.



If the parties are unable to resolve the dispute as set out in the dispute resolution plan, and they have exchanged affidavits, the matter can be set down for hearing.

***What are the relevant principles for determining a family provision application?***

Determining a family provision application involves a two stage process.

The first question is whether the applicant has shown, as at the date of the deceased's death, that adequate provision was not made from the estate for the applicant's proper maintenance and support.

If the applicant can show adequate provision was not made from the estate for their proper maintenance and support, then the Court will exercise its discretion to consider whether any order should be made and, if so, in what amount.

In determining whether the applicant has been left without adequate provision for their proper maintenance and support, the Court will consider all of the relevant surrounding circumstances. These may include:

- (a) the size and nature of the estate;
- (b) the distribution effected under the Will or intestacy;
- (c) the applicant's financial position;
- (d) the relationship between the applicant and the deceased;
- (e) the needs and claims of those who have taken a benefit under the Will or intestacy and those who have applied.

The Act provides that the Court may refuse to make an order if a person's character or conduct is such as to, in the Court's opinion, disentitle that person to an order.

Even if character or conduct is not disintitling, the Court may take that character or conduct into account and reduce the amount which otherwise might have been awarded to the applicant.

**Who pays for the costs of an application for family provision?**

Where an application is unsuccessful, there is usually no order as to costs. This means that the applicant is not awarded their costs out of the estate (i.e. the applicant's costs are not paid by the estate) and the applicant does not have to pay any other parties' costs.

If the Court takes a view that the application ought not to have been brought, the applicant may be ordered to pay the executor's costs. This usually occurs where the applicant has no right to apply because of a technicality or where the applicant gives misleading evidence about his or her assets.

Where the application is successful, the usual order is that the applicant's costs be paid out of the estate.

The executors are normally entitled to have their costs paid out of the estate, regardless of the outcome of the application.



**At Crilly Lawyers we are committed to achieving the best outcomes for you, taking into account your present circumstances and specified wishes. Call us today on 07 3839 7555 for more information on family provision applications and for all your estate planning needs.**