

PROVISION FOR FAMILY AND DEPENDANTS

General

There is no automatic right under English law for spouses, children or dependents to a share of a deceased person's assets where the deceased has made a Will and left the assets to others. However, certain relatives and dependants, including spouses and children have a right to apply to Court to have the Court alter the terms of the Will in their favour.

The Inheritance (Provision for Family and Dependents) Act enables certain classes of persons to apply for provision from the deceased's estate on the basis that the deceased failed to make adequate financial provision for them. The Act applies where the deceased dies domiciled in England and Wales. "Domiciled" is a legal term which, broadly speaking, means the person's permanent long term home. Irish domiciled individuals with English assets are subject to the Irish rules mentioned below.

An Application may be made to Court, within certain specified time limits by certain categories of applicants. The application must normally be made within six months of the date of "grant of representation". The grant of representation is the document giving the personal representative authority to act in administering the deceased's estate (i.e. the grant of probate or letters of administration). If no claim is made within six months, the personal representative (i.e. the executor) may distribute the estate and will not be liable even if the Court allows a late application. Potential applicants can find out if a grant has issued by making a search in the Court offices.

Persons Entitled

The persons entitled to make an application or provision are as follows:

1. deceased's spouse or civil partner
2. former spouse or civil partner of the deceased who has not remarried

3. a co-habitant with the deceased
4. a child of deceased
5. a person who has been treated as a child by the deceased
6. other dependants of the deceased.

“Co-habitants” are persons who live in the same household as deceased as husband and wife throughout a 2 year period immediately before death. A “dependant” is any person who immediately before the date of death of the deceased was being maintained either wholly or partly by the deceased.

Criteria for Award

In order to succeed in an application, the Court must be satisfied that the deceased failed to make reasonable provision for the applicant. If the Court decides that this is the case it must consider what will amount to “reasonable financial provision”.

This will depend on who the applicant is. In the case of the surviving spouse, the standard is such provision as would be “reasonable in the circumstances” whether that is required for maintenance or not. This is more generous than the maintenance standard below. The intention is that a spouse can claim on the family assets an amount at least equivalent to those which a divorced spouse could claim.

The “maintenance standard” is such as provision is reasonable in the circumstances for the applicant to receive as maintenance. Reasonable maintenance is such as enables the applicant to live decently and comfortably according to his/her situation.

The question for the Court is whether the will or intestacy makes reasonable provision, objectively speaking. There are certain guidelines for the Court in determining whether reasonable financial provision has been made. This includes the financial resources and needs of the applicants. Any moral obligation, the size and nature of the estate, physical or mental disability of the applicant and other relevant circumstances are also taken into account.

In the case of spouse, the age of the applicant, duration of the marriage, the applicant's contribution to the welfare of the deceased's family and the provision which might reasonably have been expected on a divorce must be considered.

Where the applicant is a co-habitant, his or her age and how long they have lived in the same household as the deceased is relevant. So also is the applicant's contribution to the welfare of the deceased's family including looking after the home and caring for family.

Where the applicant is a child the Court is to consider the manner in which the applicant has been or might be expected to be educated or trained.

Where the Court makes an Order the Will is effectively varied. The deceased's net estate is affected by the Order and this will include deceased's assets but also shares in a joint tenancy and certain other property disposed of before death.

Irish Domiciled Individuals

The above rules will not affect Irish domiciled individuals. The Irish rules set out below will effectively apply to include any Irish assets. Although the Irish Courts can't make orders affecting assets situated outside Ireland, they can take account of non-Irish assets in calculating the rights below and can make orders which are personally binding on executors and others which may have the effect of bringing foreign assets into account.

This position is quite different to that in Ireland where there is a legal right share for a spouse of either one third of the deceased's assets, if there are children or one half if no children. Children do not have an automatic share in Ireland but are entitled to make a similar type of Court application in Ireland. The spouse's right is automatic, if claimed. There are no equivalent rules in Ireland benefitting co-habitants and dependants.

This Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances.

This Guide should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances.

While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in this Guide. The reader should rely only on specific legal or taxation advice.

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