

Legal Answers for Permanent Care Families

Fact Sheet 5: Will and Succession Rights of Carers and Children in Permanent Care

What are the inheritance rights of children in permanent care?

Children in permanent care do not have the same automatic inheritance rights in relation to the carers as their natural or adopted children.

Although the carer has custody and guardianship, there are still legal ties to the birth parents, for example, the birth certificate is not changed to the carer's surname.

Only natural children and legally adopted children of a deceased carer are recorded on the deceased carer's death certificate.

It is possible for the child to inherit from a carer, but a carer would need to ensure this happens in their Will.

If the carer has not made provision for the child in his or her Will, the child may have the right to claim for provision under the 'family provision' legislation in Victoria. In terms of this legislation, the Supreme Court may order that provision be made out of the estate of the deceased carer for the proper maintenance and support of the child, if the child can prove that the deceased had responsibility to make provision.

The Court must have regard to factors such as the relationship between the carer and the child, any obligations or responsibilities of the carer to the child, the size of the estate, the age of the child, any benefits already given to the child, whether the child was wholly being maintained by the carer before the carer's death and the basis upon which the carer had assumed responsibility of the child.

Being a member of the deceased's household and being dependent on the deceased carer usually demonstrates to the Court that the deceased carer had some responsibility to make provision for the child.

This can be a very complicated area of the law and carers should seek legal advice before drafting their Wills.

The child in permanent care does not lose the right to inherit from his or her birth parents.

What if the carer dies without a Will?

This is called dying 'intestate'. A child in permanent care has no entitlement to the Estate under the intestacy distribution rules.

The same provisions relating to 'family provision' legislation in Victoria will apply on intestacy, so the child could apply to the Supreme Court for an order that provision be made out of the estate of the deceased carer for the proper maintenance and support of the child, if the child can prove that the deceased had responsibility to make provision.

Should I change my Will when I become a Permanent Carer?

It is advisable to consult with a lawyer. You should always update your Will when a change in circumstances has occurred and taking a child into permanent care is a significant change in circumstances. The same applies when a child leaves permanent care. It is recommended that you discuss with your lawyer including additional clauses in your Will referring to the permanent care order and the carer's obligations and testamentary wishes in relation to the child.

Can I appoint a Guardian for the child in my Will?

If there is a PCO in place appointing you and your spouse or de facto partner as joint permanent carers of the child and one of you dies, the survivor will have sole guardianship and custody of the child.

If there is no survivor, you can nominate a guardian of the child in your Will.

Any adult regardless of whether they are related to you or not may be nominated, however the Court will be likely to determine whether the nominee is appropriate or not.

Naming the person that you would like to be a guardian doesn't automatically establish that person's guardianship – it simply indicates to the Court what your preference is. The person nominated by you will need to either make, or intervene in, an application to the Family Court or Federal Circuit Court exercising Family Court jurisdiction. As the PCO is extinguished upon a carer's death, either of these Courts have jurisdiction to hear the application, and confirm the nomination.

The nominated guardian should contact the Department of Human Services (DHS) to advise them of his or her nomination. DHS may be joined in the proceedings confirming the nomination or may take the matter back to the Children's Court for a new protection order or PCO if there is any concern relating to the welfare of the child.

Can I make the child a beneficiary of my Super Fund?

Under superannuation laws, if a member dies, the superannuation death benefits are usually payable to their dependants. The child under a PCO may fall in to the category of a dependant as he or she is financially dependent on the deceased fund member.

If a carer does not make a beneficiary nomination, or does not include the child in the beneficiary nomination, the fund Trustee (assuming the Trustee has discretion under the terms of your Fund) *may* on the basis of the dependent relationship, make a payment to the child, depending upon the claims and needs of your other dependants.

You may also consider nominating the child as a beneficiary of any life insurance policies.



About these fact sheets

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