Contesting a Will - who can challenge my Will?

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Date: Monday November 4, 2019

Anyone having a Will done (and that should be everybody) should be aware of the potential consequences of leaving an eligible person, namely a spouse, child or dependent either out of the Will or with only a small share.

The notion of a 'moral obligation' to provide for dependents after death is in constant competition with deciding who you want to leave your worldly possessions to.

Leaving a spouse, child or dependent out of a Will

The process where an eligible person challenges a deceased's estate; that is, challenges a Will, is known as a Family Provision Application (FPA).

The costs for FPAs are usually taken from the estate. This provides a strong incentive for an executor and named beneficiaries to settle and not litigate and the majority of FPA claims are settled without a court hearing.

This can act as an incentive for an eligible person to 'have a go' at contesting the Will.

What does a spouse, child or dependent have to prove?

The *Succession Act* 1981 requires the person seeking to be granted further or better provision from an estate, to show that adequate provision has not been made from the estate in all the circumstances for their proper maintenance and support.

This is a question of fact and relates to both the needs of the applicant as well as all the circumstances such as:

- the applicant's financial position;
- the size and nature of the estate;
- the relationship between the applicant and the deceased; and
- the relationship between the deceased and others who have legitimate claims on the estate.

If a court determines adequate provision has not been made, it is important to understand that the applicant will not necessarily get what they have asked for.

It is a claim for adequate provisions, not a claim by a disappointed beneficiary. The court has discretion as to what provision it regards as adequate in all the circumstances of a matter.

The applicant's conduct can lead to losing a challenge to the Will

The court can refuse to make provision for an applicant whose character and conduct disentitles her or him, or whose circumstances are such as to make refusal reasonable.

The types of conduct likely to be deemed as 'disentitling' has changed with a shift in community values. Adultery by the applicant and renunciation of marital obligations are no longer deemed to be disentitling.

Disentitling conduct generally relates to the treatment of the deceased when they were alive. As a consequence, the following matters are not generally disentitling;

- if the deceased was estranged from their son or daughter but reconciled before they died;
- different religious views to their child; or
- a child marrying without the deceased's consent.

Importantly an addiction (for example illicit drugs or alcohol) suffered by the applicant or their possession of a criminal record is unlikely to be deemed disentitling.

What behaviour could disentitle an applicant to a share of the estate?

Violence towards the deceased that is not explained by reason of a mental illness or qualified by the applicant trying to reconcile the position with the deceased, will likely be considered disentitling.

Get help from a Wills &Estate lawyer

The law and procedures surrounding FPAs is complex.

Anyone who has an interest in an estate, either as executor, administrator, beneficiary or as a disappointed person who receives less than what they believe is fair or nothing at all when they believe they are entitled to something, should seek legal advice from one of our Wills and Estates lawyers.

There are time limits that must be complied with and delay could be fatal to a claim.
