Family Provision Claims in a Deceased Estate

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It is a common question asked by many of our clients “who can challenge my will because they feel like I should have left them something or I have not left them enough!

Whilst a willmaker has the freedom to make a will leaving their assets to whomever they like, this freedom is nowhere near absolute. It is still essential that you should have an up to date will at all times. In our experience we see that people tend to focus on ensuring they have a will when they go overseas or recently during the bushfire crisis but it is important for peace of mind to have a will at all times. The law also recognises that a willmaker has a responsibility to provide for certain categories of people in their life who are considered to have a “moral” claim to their estate. In this edition of our Private Client Newsletter we will summarise the various categories of people that are eligible to contest your will on the basis that they have not been left enough or legally referred to in New South Wales as a “family provision” claim.

Spouses

The law recognises that the willmaker has a primary responsibility to provide for their spouse and hence any spouse of the willmaker whether married or de facto is entitled to make a claim against your estate. Long gone are the times now where you observe the poor surviving spouse (usually the wife) was left destitute following her husband’s death like in a bad Charles Dickens novel. In fact more in line with today’s community expectations the surviving spouse in a family provision context would generally be expected to be left with the matrimonial home plus a contingency fund.

Children

It is recognised in law that children are eligible to claim against a willmaker’s estate in a family provision context. Eligible children applicants include biological children, adopted children, minor children and also if they are adults. Step-children are not included but may be eligible if they fit within the other category of “anybody else” which is discussed later.

Adult children do need to get a special mention as we are seeing that this is the proportionately largest category of people that are making a family provision claim on their deceased parent’s estate. It is usually in the context of their parent having re-partnered and they are the children from the first marriage.

Grandchildren

As a grandchild of the willmaker they are not automatically eligible to make a claim but in special circumstances they will be eligible such as if at any stage they were financially dependant on the willmaker. Generally if the grandchild spent some school holidays at the

grandparent's house the the usual Christmas and Birthday presents does not suffice to make then eligible to make a claim in and of itself.

Anybody else

If the applicant does not fit within any of the above categories then they may still be eligible to contest a willmaker's estate if they satisfy the two conditions of having being wholly or partly dependant on the willmaker and they were at some point in time lived in the same household as the willmaker. It is in this category where you may find some step-children of the willmaker are eligible to contest the will.

Contact Information

For further information or if you require assistance please contact our Wills & Estate Planning team or email info@matthewsfolbigg.com.au