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YOUR WILL – CAN IT BE DISPUTED?

Family relationships can be difficult during your lifetime, but they can become even more difficult for those you leave behind after your death. Most people make their Will expecting that their wishes, as set out in their Will, will be followed by their loved ones and put into effect by their Executor. However, serious problems can arise when a member of your family is not happy with the gift they receive under your Will, and particularly so if they have been left out of your Will.

Under the Succession Act 2006 it may be possible for your spouse or former spouse, child, grandchild or member of your household to challenge your Will. This is called an application to the Supreme Court for a "family provision order" which asks for a larger share in your estate than you have given under your Will. Before a Court will make a family provision order it has to consider many factors, including whether you have already made "adequate provision" for the "proper maintenance, education or advancement in life" of the person challenging your Will.

The Succession Act sets out a very detailed list of the factors that can be considered before a family provision order will be made. These include:

1. Any family or other relationship between the applicant and the deceased person, including the type of relationship and the length of the relationship,

2. The nature and extent of the responsibilities owed by the deceased person to the applicant and any beneficiary of the deceased person's estate,
3. The size of the deceased person's estate,
4. The financial resources, including earning capacity and financial needs of the applicant and any beneficiary of the deceased person's estate,
5. The financial circumstances of the spouse of an applicant,
6. Any physical, intellectual or mental disability of the applicant and any beneficiary of the deceased person's estate,
7. The age of the applicant,
8. Any financial or other contribution the applicant made to the assets of the estate of the deceased person or to the welfare of the deceased person or their family, whether before or after the deceased person's death,
9. Any provision made for the applicant by the deceased person, either during the deceased person's lifetime or made from the deceased person's estate,
10. Any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person,
11. Whether the applicant was being wholly or partly supported by the deceased person before their death and why they provided that support,



12. Whether any other person is liable to support the applicant,
13. The character and conduct of the applicant before and after the date of the death of the deceased person,
14. The conduct of any other person before and after the date of the death of the deceased person,
15. Any relevant Aboriginal or Torres Strait Islander customary law,
16. Any other matter the Court considers relevant.

Looking at the above list, the Court can take into account many and varied circumstances when it decides whether to alter your Will. Evidence of money or other provision you have provided to a family member during your lifetime, poor conduct by the applicant or their bad treatment of you during your lifetime, as well as the size of your estate, are all factors the Court will consider very seriously before it decides whether to override the terms of your Will.

There may be measures that you can take during your lifetime that can limit the ability of your family members and other dependants to challenge your Will after your death. For advice on these issues, contact our estates team on 1300 727 813.



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