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Challenging a will

Why challenge a will

Sometimes a person is left nothing in a Will. Other times an inheritance is much less than would normally be received by a person close to the deceased.

Sometimes a disappointed beneficiary will have a legal claim against the estate of the deceased for provision from the estate.

Challenging a Will is governed by the Family Protection Act 1955

Under the Family Protection Act a will-maker has a moral duty to make adequate provision for the proper maintenance and support of the close members of their family. If a person fails to make proper provision for these family members in their will or they are not adequately provided for by the laws of intestacy then that person can make a claim in either the Family Court or the High Court for provision from the estate.

Who can challenge a Will?

The Family Protection Act provides that the following people can make a claim in a deceased person's estate:

- Their spouse or civil union partner;
- A de facto partner who was living in a de facto relationship with them at the date of their death
- The children (including children of any de facto relationships);
- The grandchildren living at the time of their death
- The stepchildren who were being maintained wholly or partly or were legally entitled to be maintained wholly or partly by him or her immediately before his or her death
- In some circumstances, the deceased's parents (for example, if the deceased person had no living spouse, civil union partner, de facto partner or children at the time they died).

Note that anyone may make a claim against a deceased person's estate under the Law Reform (Testamentary Persons) Act 1949. [Click to read the article about this on our blog.](#)

What matters will the Court take into account when deciding a claim?

To bring a successful claim, a claimant must be able to show that the deceased person breached their moral duty by not making adequate provision for the claimant in their Will; and in a broad sense the claimant must have a need of maintenance and support.

In particular a Court will have regard to such things as:

- Whether or not the claimant has been left anything at all in the Will;
- The size of the estate;
- The other moral claims;
- The deceased's opinions and wishes at the time the will was made. This will be especially important if the deceased made a written statement explaining why he or she made the provisions in the will which were made;
- Whether a claimant has a need of maintenance and support is assessed by considering a range of considerations including the age and state of health of the claimant, his or her ability to earn a living, and his or her present financial position;
- The claimants conduct particularly towards the deceased and the relationship between the claimant and the deceased will be examined;
- What moral duty the deceased had to provide for others ie their spouse and other children;
- Whether the claimant has suffered any emotional, physical, or sexual abuse from the will maker;
- Whether any other person has a legal or moral duty to maintain the claimant;
- Whether there has been any change in circumstances since the date of death.

What a Court will do

The Court will always start from the position that a person is entitled to leave their property as they choose, subject to the will maker not being in breach of moral duty owed to the dependents. If a Court finds there has been a breach of moral duty, the award it will make will be no more than is necessary to remedy the breach.

Fairness is not important

Mere unfairness will not be enough. A Court will not make provision for a claimant merely because the deceased's will appears to be unfair to the claimant or because it sees things differently from the will maker. For example, there is no presumption that an estate should be shared equally among children.

Inheritance claims by children

Children of any age can make a claim if they believe that their parent has breached their moral duty by not adequately providing for them in their Will. In some instances a child may be left out of the Will altogether.

What can a child expect from their parent's estate?

As with all claims made against an estate the amount a child may receive depends on the circumstances. Factors that are important include:

- The moral duty owed by the parent to their children;
- The nature of the other claims made against the estate;
- Whether the children can show that they have need of maintenance and support in a broad sense;
- The size of the estate; and
- The parent's wishes;
- Any disentitling behaviour on the part of the children;
- Whether the parent and child have become estranged.

In some cases, a Court will conclude that it is perfectly appropriate that one member of the family inherits a smaller share of the estate than his or her siblings because that member of the family has been treated with greater favour during the deceased's life.

Children who had little to do with their parent during their lifetime may still have a claim against the estate. It all depends on circumstances.

The Courts have decided a number of cases where children have sought greater provision from their parent's estate in circumstances where those children have had little to do with that parent in their lifetime.

In the case of *Moon v Carlin* the Family Court determined that the children's father, Mr Sommerville did not fulfil his moral duty to his four children by only leaving them \$25,000 each in his Will. The Family Court increased the amount to \$145,000 each (75% of the estate). The High Court upheld the Family Court decision.

The children's parents separated when they were aged between 4 and 15 years of age. They had little contact with their father after that time and Mr Somerville effectively adopted Mr and Mrs Moon (the principal beneficiaries of his estate). The Family Court (with which the High Court agreed) found that Mr Sommerville was responsible for the estrangement between himself and his children. The Court also took into account the effect the estrangement had on each of the children.

In the case of *The Estate of OGC* the three children were left nothing in their late father's Will. The deceased and the children's mother separated when the children were aged between 6 and 13 years of age. The father harboured a bitter view towards both the children and their mother and both before and after the time of their parents' separation their father

had little to do with the children. He also paid very little towards the children's upkeep from the date of separation.

In total the Family Court Judge awarded the three children 55 per cent of the estate. In determining that amount the Judge found that the father owed the children a moral duty at the date of his death and that he had a duty to provide for them in his Will in a way which recognised their role as his only children. It was clear to the Judge that the father had a very poor relationship with his children and that he should have provided a considerably greater degree of emotional and financial support for them than he did. It was also clear that the father would have seen that his children suffered because he did not provide such support. If he had done so he would have seen his children in a better emotional and financial position than they were in at the time they went to Court.

The Family Court also found that given the circumstances of the family relationship it was not relevant that the children had not contributed any emotional or other support to their father during his lifetime.

Time frames

The basic rules are that a claim must be filed in the Court within 12 months of the grant of Probate. In limited circumstances the Court may extend this time. In even more limited circumstances it may be possible to pursue a claim if the estate has been distributed according to the will.

Does the law require parents to treat all children equally in their wills?

The case *Paewai-Kohe v Paewai* [2014] NZHC 3137 shows wills need to be carefully prepared. Important questions need to be considered when you make a will. Family members left out of a will have legal rights. [Read more](#).

What is the procedure?

It is critical to instruct a lawyer to assist you with making a Family Protection Act claim promptly after the will maker dies.

Graeme Withers and Julie Withers of Graeme Withers Law are experienced Solicitors who can assist you with all matters concerning inheritance claims, making Wills and family matters. Please contact Graeme on (04) 478 4889 (027) 715 5421 or Julie on (04) 478 4888 (027) 478 4888 or by email info@witherslaw.co.nz

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