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

Your children can challenge your will. Family members who are left out of a will or who do not get a fair share from your will have legal rights

It is essential to get your will right.

As you will see when you read our article on Mrs Paewai's case the Courts will give children a greater share of your estate if they find you got it wrong.

***Paewai-Kohe v Paewai* [2014] NZHC 3137**

The will-maker - Mrs Paewai

Mrs Paewai died in October 2009. She made her last will in July 2008 when she was 82 years old. Her estate was valued at between \$2.5 and \$2.8 million.

Mrs Paewai's will

Under her will Mrs Paewai divided her property among her children and grandchildren as follows:

- The family home was left to her daughter Alma together with one half of the land at the address on which the home was built.
- The land was to be subdivided and the other half sold.
- The net proceeds of the sale of that subdivided land were to be divided between her six of her other children Ena, Kara, Noel, Huiarangi, Api and Manahi in the following portions:
 1. Ena and Manahi 10% each
 2. Noel, Huiarangi and Api 20% each
 3. Kara 20% on trust for her maintenance and welfare during her lifetime and then the balance to her three children, Kareeve, Kayla and Kamillia. Kara died in September 2013, so under the will her share went to her three children.
- The chattels were to be retained by Alma during Nitama's lifetime. Nitama was Mrs Paewai's son who had Down Syndrome and required constant care. Once Nitama died then the chattels were to be distributed according to a list prepared by Mrs Paewai.
- Any residue was to be divided equally between the children.

No direct provision was made for her son Nitama, other than leaving the home to Alma, his sister and carer. Mrs Paewai made a statement to explain the reason for the more generous provision for Alma, which was due to the help Alma had given her and Nitama and that Alma would continue to provide a home for Nitama during his lifetime.

The effect of Mrs Paewai's will was to leave 64% of her estate to Alma, 3.6% to Ena and Manahi and 7.2% to the other children. The children who received the smaller shares brought a claim under the Family Protection Act 1955 for a greater share in the estate.

The Family Court's decision

Judge McHardy decided that by making her will in the way she did, Mrs Paewai breached the moral duty she owed her children.

The Judge looked at the large difference between the amount of the estate given to Alma compared with the other children and grandchildren. The Judge considered that Mrs Paewai should have realised that if she postponed the date for the estate to be distributed until after both she and Nitama were dead then equal division would have been appropriate. Nitama died in November 2012.

The Judge also noted that Mrs Paewai had assumed some of her children were in a better financial position than they were.

Judge McHardy decided that there was nothing to justify Mrs Paewai leaving her estate to her children (and grandchildren) in "such an unequal fashion".

As a result the Judge ordered that the home be sold and that the net proceeds of sale be divided equally between the children (and Kara's children taking her share in equal amounts).

The High Court's decision

Thomas J did not agree with the Family Court Judge that there is a presumption of equal sharing among children.

The High Court confirmed that Alma was entitled to a much greater share of the estate than her brothers and sisters. Alma had done a lot for Mrs Paewai and Nitama for a long period of time before they both died.

However, Mrs Paewai did breach her moral duty to her other children. They all had financial need and were entitled to more than they were given in her will. The different share given to Ena and Manahi was also a breach of Mrs Paewai's obligation and was based on Mrs Paewai's misunderstanding of their financial positions.

Alma's award was reduced to 40% of the estate and the remaining 60% was to be divided between the other brothers and sisters with Kara's share being divided equally between her three children.

This court case 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.

- **How much should you leave your children in your will?**
- **Do I have to leave my children anything in my will even if I have nothing to do with them?**
- **How much should your parent leave you in their will?**
- **What can I do if I receive nothing under a will?**
- **What can I do if I have not received a fair share under a will?**

If you have these questions then you should obtain legal advice. When you make a will, it is important to know that family members have certain legal rights. If you are the family member who is left out of a will or does not receive a fair share under a will, then you have certain legal rights.

Graeme Withers and Julie Withers of Graeme Withers Law can help you with making a will. We can advise you about the risk of claims against your estate after you die, and how to manage this risk.

We can also advise you on what entitlement you may have to receive a share under a will, and what solutions you may have if you are missed out, or do not receive a fair share of an estate.

This note is intended for general information only. It is not intended to be relied on as a substitute for legal advice which focusses on individual circumstances.