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Challenges to Wills: Part 1

Introduction

Challenges to Wills is a complex but topical area. Naturally it's top of mind for our lawyers when preparing Wills as it's important for clients to understand not only the consequences of including a beneficiary in a Will but of also excluding someone.

Anyone can now make a claim - but will they succeed?

In Victoria, legislative amendments came into effect in 1998 that extended those who can make a claim on an estate beyond widows, widowers and children to include anyone.

For that claim to be successful however, the court considers a number of issues to determine whether the deceased had a responsibility to make a provision for someone and if so, whether it was adequate.

To help provide an understanding of the impact of these changes, we will consider those issues and look at how they have been applied in some recent Victorian cases.

So what are the issues the court must consider?

- The nature and length of the relationship between the deceased and the applicant and the obligations or responsibilities of the deceased to them and other estate beneficiaries
- The size and nature of the estate and the financial resources of the applicant and beneficiaries
- Any physical, mental or intellectual disability of any applicant or beneficiary
- The age of the applicant
- Any contributions made by the applicant to building up the estate or to the welfare of the deceased or their family
- Any benefits given by the deceased person to any applicant or to any beneficiary
- Whether the applicant was being maintained by the deceased person and whether anyone else had a liability to maintain the applicant
- The character and conduct of the applicant or any other person and any other matter the Court considers relevant.

How have these changes been interpreted by the courts?

In the first instance, the court must consider whether a responsibility exists.

In *Schmidt v Watkins* [2002] VSC 273 these changes were considered to be "...the inclusion into a class of those

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claimants of persons who, although not numbered among the deceased's immediate family, nevertheless had a moral claim to the deceased estate."

So what is a moral claim? The "object of the legislation ...is not to ensure that generosity is adequately rewarded or reciprocated. That is a private matter... Rather, the object ... is to ensure ... that those who have a duty, not so much to reward but rather to provide maintenance and support, do so by appropriate testamentary disposition ..."

How far does this moral obligation extend?

Grandchildren...?

In *Macewan, Shaw v Shaw* [2003] VSC 318, grandchildren made a claim against the grandparent's estate. This claim was unsuccessful.

The court found "The amended legislation... does not license the court to effect a redistribution of an estate because it would satisfy notions of familial generosity, or because the claimant has few resources and the defendant taking benefits under the will is relatively well off."

This decision concluded the grandparents had not assumed the role of primary provider (the parents bore that responsibility) and that they had not unconditionally assured they would fund their future education.

The court also noted how much was left directly to the son and how that would benefit the grandchildren indirectly.

Estranged children...?

Conversely in *Penn v Richards* [2002] VSC 378 (6 September 2002) the claim was upheld.

The plaintiff had been adopted by the deceased and

her husband when she was very young. In 1969 at age 21 the plaintiff married and left home. She had since divorced, was ill and on a disability pension.

The daughter had been largely estranged from her parents since before 1986 and had no face to face contact with her mother for almost 7 years before she died in 2000. "Her mother, shortly put, did not want to know her".

The court found the mother had a responsibility to provide for the daughter. "In my opinion, for the testatrix to leave her daughter, though estranged, no more than \$20,000 out of (a \$500K) estate ... in the plaintiff's particular circumstances, which were long-standing and very likely to continue, (is) much less than adequate provision for her proper maintenance and support.

The result? The daughter received \$250,000 to purchase a home and provide a "nest egg".

More information?

We will continue this topic in the next edition of our newsletter.

Will challenges can be expensive both financially and emotionally so if you have a client who needs help with a Will please call one of our lawyers on 03 8621 9000.

With our fixed prices and convenient service we would be pleased to help.